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(2020)02ILR A1
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 17.02.2020

BEFORE

THE HON'BLE JASPREET SINGH, J.

Arbitration Application No. 44 of 2019
Alongwith
Arbitration Application No. 45 of 2019

M/s Ultra Tech Cement Ltd. (UTCL) ...Applicant
Versus
UPRVUNL, Lucknow ...Opposite Party

Counsel for the Applicant:
Rajat Gangwar, Rahul Agarwal

Counsel for the Opposite Party:
Vibhanshu Srivastava, Suyash Manjul, Vibhanshu Srivastava

A. Arbitration and Conciliation Act, 1996-Section 11(6)- challenge to-appointment of arbitrator-agreement between the parties required the respondent to provide fly ash free of cost to the petitioner-negotiation continued for some time-respondent were charging for the fly ash from others then why the charge should not be levied from the petitioner upon the objection raised by the audit team-meanwhile, respondent issued a tender seeking bids from third parties-this triggered the dispute-upon request for appointing arbitrator according to arbitration clause,objection raised by the respondent that agreement is not duly stamped-the court considered the agreement is akin to licence and is duly stamped-petitioner proposed the name of an Arbitrator, which was not acceptable to the respondent-arbitration clause invoked by a notice duly served on the respondent-since the arbitration clause between the parties is not disputed-the court has ample jurisdiction to exercise its power u/s 11(6) of the Act, to appoint an Arbitrator.(Para 61 to 81)

The application is allowed. (E-6)

List of Cases Cited:-

1. Garware Wall Ropes Ltd. Vs. Coastal Marine Constructions & Engineering Ltd.,AIR (2019)SC 2053

2. SMS Tea Estates (P) Ltd. Vs. Chandmari Tea Company (P) Ltd. (2011) 14 SCC 66

3. Errington Vs. Errington & Woods Lord Denning, (1952) 1 KB 290

4. Thomas Vs. Sorrell (1558-1774) All ER Rep 107

5. Associated Hotels of India Ltd. Vs. R.N. Kapoor, AIR (1959) SC 1262

6. Qudrat Ullah Vs. Municipal Board, Bareilly, (1974) 1 SCC 202

7. Khalil Ahmed Bashir Ahmed Vs. Tufelhussein Samasbhai Sarangpurwala, (1988) 1 SCC 155

8. Ashoka Marketing Ltd. Vs. PNB (1990) 4 SCC 406

9. Corporation of Calicut Vs. K. Sreenivasan (2002) 5 SCC 361

10. New Bus Stand Owners Association Vs. Corporation of Kozhikode & Anr.(2009) 10 SCC 455

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

1. Heard Shri Jaideep Narain Mathur learned Senior Advocate alongwith Shri Rahul Agarwal and Shri Rajat Gangwar learned counsel for the petitioner and Shri

Sandeep Dixit learned Senior Advocate alongwith Shri Suyash Manjul for the respondent.

2. The aforesaid two petitions have been preferred under Section 11 (6) of the Arbitration and Conciliation Act, 1996. Both involve similar facts and common questions of law and as such have been heard together and are being decided by this common judgment.

3. In order to appreciate the controversy involved in the above petitions, briefly the facts giving rise to the present petitions are being noted hereinafter.

4. M/s. Jai Prakash Associates Limited "hereinafter referred to as JAL" had entered an agreement for the purposes of consumption of fly ash which was to be generated as a by product at 1x250 Unit 9 MW Harduganj Thermal Extension Power Project, Kasimpur, Aligarh while the aforesaid fly ash was to be consumed by the petitioner for its Portland Pozzollona Cement "hereinafter referred to as PPC" at Sikandrabad U.P.

5. However, on account of changed circumstances, in term of the order passed by the National Company Law Tribunal at Mumbai & at Allahabad, a scheme for acquiring the identified cement plants of JAL in the States of Madhya Pradesh, Andhra Pradesh, Himachal Pradesh, Uttar Pradesh and Uttarakhand was prepared and the petitioner entered in an agreement with JAL on 31st of March, 2016 which was approved by the NCLT at Mumbai and Allahabad, by means of the order dated 15th of February 2017 and 2nd of March, 2017 respectively.

6. Subsequently the Board of Directors of the petitioner's company and JAL in their meeting held on 29th of June, 2017 declared the scheme to be made effective and all the identified assets of JAL vested with the petitioner's company with effect from 29th of June, 2017. It is in this backdrop that the petitioner's company, namely, M/s. Ultra Tech Cement Limited "hereinafter referred to as UTCL" acquired all the rights and the liabilities of JAL including the rights, obligation in terms of the agreement which was entered between JAL and the respondent dated 16th of February, 2007.

7. The respondent is a State Thermal Power Utility and is wholly owned and controlled by the State of Uttar Pradesh. The respondent corporation i.e. Uttar Pradesh Rajya Vidyut Utpadan Nigam Ltd. "hereinafter referred to as UPRVUNL" was constituted for the purposes of construction of new Thermal Power Projects in the State and is responsible for the generation, transmission and distribution of power within the State of Uttar Pradesh. It is with the aforesaid purpose that the operations of the State Sector Thermal Power Stations were handed over to it.

8. To put the controversy in a prespective, certain background facts which led the parties to enter in an agreement dated 16th of February, 2007 "hereinafter referred to as the said agreement of 2007" and which is in the eye of the storm, may be noted first:-

(i) Usually, thermal power is generated from coal which leads to generation of fly ash as its by-product. This, by-product which is generated from the thermal power is a hazardous product and causes environmental damage and accordingly the Ministry of Environment and Forest, Union of India has made strict regulations in respect thereto and necessarily all thermal power plants are

required to have a fly ash pond for stocking of fly ash generated by the said power plants;

(ii) The aforesaid by product i.e. fly ash is used in production of several products such as bricks, roads and cement amongst others;

(iii) The Ministry of Environment and Forest, Union of India had issued a notification dated 14th of September 1999, a copy of which has been annexed as Annexure no.1 with the petition. The aforesaid notification with the objective of restricting the excavation of top soil for manufacture of bricks and promoting the utilization of fly ash in the manufacture of building material and in construction activity within a specified radius of fifty kilometers from the coal or lignite based thermal power plants as well as to prevent the dumping of fly ash and regulate the disposal of fly ash discharged from coal or lignite based thermal power plants had issued the aforesaid notification.

(iv) For the present purposes, clause 2 of the aforesaid notification dated 14th of September, 1999 relating to utilization of ash by thermal power plant is being reproduced hereinafter, for ready reference:-

(1) Every coal or lignite based thermal power plant shall make available ash, for at least ten years from the date of publication of this notification, without any payment or any other consideration, for the purpose of manufacturing ash-based products such as cement, concrete blocks, bricks, panels or any other material or for construction of roads, embankments, dams dykes or for any other construction activity.

(2) Every coal or lignite based thermal power plant commissioned subject to environmental clearance conditions stipulating the submission of an action plan for full utilisation of fly ash shall, within a period of nine years from the publication of this notification, phase out the dumping and disposal of fly ash on land in accordance with the plant. Such an action plan shall provide for thirty per cent of the fly ash utilisation, within three years from the publication of this notification with further increase in utilisation by at least ten per cent points every year progressively for the next six years to enable utilisation of the entire fly ash generated in the power plant at least by the end of ninth year. Progress in this regard shall be reviewed after five years.

(v) It is in this backdrop that the respondent which is managing the operations of the State sector thermal power station and is responsible for generation of thermal power as a result of its production, fly ash was being generated, whereas in terms of the aforesaid notification of 14th of September, 1999, the respondent was required to create appropriate model for disposal of fly ash. On the other hand, the petitioner who is a Company engaged in production of cement wherein the aforesaid fly ash is used as a natural raw material accordingly had set up its cement plant at Sikandrabad.

(vi) Thus, the predecessor of the petitioner i.e. JAL and the respondent had entered in an agreement dated 16th of February, 2007.

9. It is this agreement dated 06.02.2007 which contain the arbitration clause which reads as under:-

"If any dispute or difference arises between two parties, the same shall be conducted in accordance with Arbitration and Conciliation Act, 1996. All

disputes of any nature shall be subject and the jurisdiction of Allahabad High Court, Bench of Lucknow."

10. The aforesaid agreement, a copy of which has been annexed with the Annexure no.2 with the petition, contained certain recitals which are relevant for the effective disposal of the present petition and are being quoted hereinafter:-

a. UPRVUNL is desirous to dispose off dry fly ash from their proposed 2 x 250 MW Harduaganj Thermal Power Station Kasimpur, Aligarh [referred as HTPS] in the state of U.P. which will in the process of electricity generation will produce huge quantity of fly ash which need to be disposed off in an effective manner so as to prevent environmental hazards according to quidelines issued by MOEF, Government of India vide gazette notification 763 [Aa] dated 14.09.1999.

b. UPRVUNL intends to commission the 2 x 250 MW power plant extention by August 2009 and fly ash availability thereafter 'JAL' intends to commission Grinding Unit at Sikandrabad U.P. by October 2008.

c. 'JAL' intends to use fly ash for cement manufacturing of its proposed cement manufacturing units of Sikandfabad U.P. for manufacture of fly ash based Portland Pozzollona Cemen [PPC].

d. 'JAL' in pursuance of the proposal submitted by them have agreed to use entire quantity (approximate 4.5 lac tones per annum. (MIPA) or 1350 tones per day (MTPO) of 1 x 250 MW [Unit no.9].

e. Both the parties viz UPRVUNL and 'JAL are desirous of recording the terms and conditions which have been agreed by both the parties.

various discussions were held between the representatives of UPRVUNL and JAL which have culminated in certain agreed terms and conditions and a MOU dated 29.09.2006 was signed relating to utilization of dry fly ash of 2 x 250 MW (Unit No.9) Harduaganj Thermal Power Project Kasimpur, Aligarh of UPRVUNL by JAL for their Cement Plants as detailed above.

NOW THEREFORE forth and in consideration of the discussion, mutual convenient set forth herein and MOU dated 29.09.2006 and proposal submitted dated 6th Jan.,2007 by JAL both the parties enter into an agreement as follows:-

1. That JAL shall install, maintain and operate the Dry Fly Ash Extraction System (DFAES) starting from ESP hopper's bottom to Silos and its loading system into close bulkers for 1 x 250 MW (Unit no.9) HTPS of UPRVUNL at its own cost as per the layout plant to be submitted by JAL and approved by Chief Engineer, Environment & Safety UPRVUNL.

2. UPRVUNL shall allow to collect the entire quantity (Approximate 45 lacs MTPA of Dry Fly Ash generated from ESP of Unit No.9 on as is where is basis from the date of installation and operation of the Dry Fly Ash Extraction System, free of cost. JAL shall make arrangements for carrying the same to their premises of their own cost.

3. UPRVUNL shall allow to collect the Dry Fly Ash, Free of Cost for a period of 25 years or life time of the plant of either of the said parties whichever is earlier.

4. As the DFAES is the integral part of Thermal Power Station, hence

electricity and wather used for collection of Dry Fly Ash from ESP hoppers and conveying it to the silos and loading pipes shall be treated as the auxiliary consumption of Thermal Power Station.

5. JAL shall obtain NOC/permissioin from the other related department if any as required, however, assistance if any shall be provided by UPRVUNL.

6. If any dispute or difference arises between the two parties, the same shall be conducted in accordance with the Arbitration & Conciliation Act, 1996. All disputes of any nature shall be subject and the jurisdiction of Allahabad High Court Bench of Lucknow.

7. UPRVUNL shall transfer the right to use and work at HTPS land for construction activities of DFAES System. Power and Water required for construction shall be charged as per prevailing tariff.

8. UPRVUNL shall help in securing the 9 MVA/132 KV power supply from UPPCL. However, it will no have any contractual liability on the UPRVUNL.

9. UPRVUNL will not be liable legally or financially to pay any kind of damages or compensation to JAL in the event of not being able to supply dry fly ash during the period of the agreement for reasons beyond its control and decision regarding shut down and maintenance of electricity generating units will be solely of UPRVUNL and will be on "JAL".

10. 'JAL' shall observe all the safety rules & regulations as per Indian Factory Acts and Rules and UP Factor Act and Rules and will arrange labour insurance for their employees in case of any accident or mis-happening during installation, operation & maintenance of DFAES. JAL shall be responsible for payment of compensation to their employees as per Workmen's Compensation Act and any other rules & regulations as prevalent at that point of time.

11. Any change in GOI guidelines regarding cost of fly ash shall be binding on both the parties.

11. Under the head general conditions as mentioned in the aforesaid agreement, it contained certain more clauses which are being mentioned hereinafter:-

5. 'JAL' will actually use the lifted quantity of fly ash for manufacturing of PPC/RMC plants only and trading of fly ash will not be permitted.

6. 'JAL' will develop greenbelt on the 5 hectare land of UPRVUNL by planting the 5000 nos of non exotic India species plant such as Neem, Peepal, Kadam, Jangli Jalebi, Shisham, Imli etc., however the cost of the plant and their maintenance shall be borne by the 'JAL'. The plants shall remain the properties of UPRVUNL.

9. All cost necessary for modification of the system for taking fly ash from DFAES of HTPS, if any required shall be borne by the JAL, subject to prior approval from Chief Engineer, Environment and Safety, unit UPRVUNL Lucknow.

10. All the operation and maintenance instructions for DFAES given by Chief Engineer, HTPS or his appointed nominee shall be binding on JAL.

11. In case JAL is not able to lift the fly ash for a continuous period of four weeks because of their own inability and no genuine reasons agreed by Chief Engineer (E & A). Chief Enginerr (E & S) UPRVUNL may impose a penalty as

deemed fit to a maximum of Rs.10,000/- (Rupees Ten Thousand only) per day.

12. UPRVUNL shall not be responsible for supply of any specific quality/grade of fly ash to 'JAL'. The chemical composition and physical properties of fly ash depends on grades of coal and varying firing conditions in the boiler.

15. All vehicles of 'JAL', which will carry fly ash shall be liable for checking by HTPS for ensuring of safety regulations enforced in the area from time to time. The JAL shall indemnify UPRVUNL's properly by their workmen or any member of their establishment. The JAL must ensure that the fly ash must be transported through closed vessel carriers.

16.UPRVUNL reserves the right to terminate the contract earlier and forfeit the security deposit in case of Chief Engineer [E & S] is satisfied without prejudice to any other proceedings that may be taken up by UPRVUNL that the progress of installation of Dry Fly Ash Extraction System is not up to the mark and may delay the implementation of the 2 x 250 MW Harduaganj Extension Project as a whole such termination will not entitle 'JAL' to any claim for compensation of any kind whatsoever.

17. UPRVUNL reserves the right to terminate the contract earlier for non-fulfillment of any of the conditions as stipulated in the contract without prejudice to any other proceedings that may be taken up by UPRVUNL. Such termination will not entitle "JAL to any claim for compensation of any kind whatsoever. This clause shall not be effective for day to day working minor disputes at site.

20. 'JAL' shall indemnify and save harm to the property of HTPS against all actions, claims suits, demand, costs or expenses arising in connection with injuries suffered during the Agreement period by persons employed by the JAL or his sub-contractor on the works whether under the General Law or under the Workmen's Compensation Act 1923 or any other statute in force during the currency of the agreement.

*22. **Liability for damages to works or plants:***

JAL shall during the currency of Agreement, property protect the work/plant and shall take every reasonable, proper, timely and useful precaution against the accident or injury to the same from any cause and shall remain answerable and liable for all accidents or injuries there to which until the same be or deemed to be or be occasioned by the acts or commissions of or their contractor or their workmen or their sub-contractors and all losses and damages JAL to the work/plant arising from such accidents or injuries as aforesaid shall be made good in the most complete and substantial manner by and at the cost of JAL and to the reasonable satisfaction of the Chief Engineer HTPS or any other persons designated by him.

12. The aforesaid agreement is stamped with a duty of rupees one hundred and it has been acted upon between the parties. It will be relevant to point out that as far as the parties are concerned, there is no dispute regarding the factum of signing and entering into the aforesaid agreement dated 16th of February, 2007. It is also not disputed that the parties acted upon the same and the terms and conditions contained in the aforesaid agreement was followed by the parties, until the controversy erupted.

13. The contents and recital of the agreements in between the parties in the two petitions are identical. The only difference is that in the Arbitration Application No.44 of 2019, relates to the thermal power plant 1x250 Unit 9 MW Harduganj, whereas the Arbitration Application No.45 of 2019 relates to 2x250 Unit 8 MW Harduganj. The parties are the same and the same controversy is in both the petitions hence they were consolidated and are being disposed of by this common judgment. However, for the sake of convenience the facts relating the Arbitration Case No.44 of 2019 has been noticed by this Court.

14. It would be seen from the perusal of the agreement entered between the parties that the petitioner's Company was required to lift the fly ash from the thermal power station at Harduganj which was to be used by the petitioner as raw material for its cement plant at Sikandrabad.

15. It was specifically provided in the agreement that the respondent shall allow the petitioner to collect the entire quantity of dry fly ash generated from its power plant on 'As Is Where Is Basis' from the date of installation and operation of the dry fly ash extraction system, free of cost. JAL "the predecessor in the interest of the petitioner's Company" was required to make arrangement for carrying the same to their premises at their own cost.

16. In furtherance of the aforesaid agreement dated 16th of February 2007, the respondent got the permission from the Ministry of Environment and Forest for setting up its thermal power plant at Harduganj, Kasimpur and Aligarh. The respondent commissioned its Unit 9 and the petitioners have been lifting the fly ash generated from the said Unit 9 with the effect from May 2013.

17. On 3rd of November, 2009, the Ministry of Environment and Forest issued another notification, a copy of which has been annexed as Annexure no.3 to the petition.

18. By the instant notification, the earlier notification issued on 14th of September, 1999 was amended and as a result of the aforesaid notification the thermal power station which were earlier required to provide the fly ash free of costs, now, enabled the power plant to charge for the fly ash upto 80% and 20% of the fly ash was to be made available free of charge. The relevant portion of the notification of 2009 reads as under:-

"(1) All coal or lignite based thermal power stations would be free to sell fly ash to the use agencies subject to the following conditions, namely:-

(i) the pond ash should be made available free of any charge on "as is where is basis" to manufacturers of bricks, blocks or tiles including clay fly ash product manufacturing unit(s), farmers, the Central and the State road construction agency Public Works Department, and to agencies engaged in back filling or stowing of mines.

(ii) at least 20% of dry ESP fly ash shall be made available free of charge to unit manufacturing fly ash or clay-fly ash bricks, blocks and tiles on a priority basis over other users and if the demand from such agencies falls short of 20% of quantity, the balance quantity can be sold or disposed of by the power station as may be possible;

Provided that the fly ash obtained from the thermal power station should be utilized

on for the purpose for which it was obtained from the thermal power station or plant failing which no fly ash shall be made available to the defaulting users."

19. Be that as it may, despite the aforesaid notification of 2009, the parties to the instant agreement continued to follow the earlier notification of 1999.

20. In terms of the agreement, the petitioner had invested large sum of money for the purposes of installation of Dry Fly Ash Extraction System "hereinafter referred to as DFAES" at it own cost. The aforesaid investment included the monetary involvement towards silos, compressor, vacuum pumps, panel etc. In terms of the agreement, it was the petitioner who had to bear the maintenance and operational charges of the DFAES.

21. It is only on the 4th of May, 2011 the respondent wrote a letter to JAL (predecessor in interest of the petitioner) regarding negotiating the rate for lifting of fly ash from Harduaganj thermal power station. The same was replied by the predecessor of the petitioner stating that the agreement between the parties required the respondent to provide the fly ash free of cost and it was not fair for the respondent to charge for the same. This negotiations continued for quite sometime and it was also informed that in the audit conducted of the respondent power plant, it revealed that the respondent were charging for the fly ash from others then why the charge should not be levied from the petitioner. It was in light of the objection so raised by the audit team that the respondent initiated the negotiation regarding the price of lifting of the fly ash.

22. Number of meetings took place between JAL and the respondent, however, no conclusive decision could be arrived at and as late as on 31st of January, 2018 i.e. by this time the present petitioner had acquired the assets of its predecessor and made an offer by means of its letter dated 31st January, 2018 a price of rupees fifty per metric tonne for lifting fly ash from Harduaganj Thermal Power Plant. This offer made by the petitioner was not acceptable to the respondent. In the meantime, the respondent issued a tender seeking bids from third parties for lifting of dry ash. It is this publication of tender which trigerred the dispute and the petitioner reacting to the same sent a letter dated 15th of May, 2019 objecting to the tender notice published on 29th of April, 2019.

23. The respondent replied to the said letter vide its reply dated 24th of May, 2019 and invited the petitioner to a meeting which were scheduled to be held on 29th of May, 2019 between the representative of the petitioner and the concerned officers of the UPRVUNL. The said meeting did not result in any fruitful outcome and thereafter the petitioner instituted a petition before the Commercial Court at Lucknow invoking Section 9 of the Arbitration & Conciliation Act, 1996. The said petition was registered as Arbitration Case No.619 of 2019 which, after hearing the parties, was dismissed by the Commercial Court at Lucknow by means of its judgment/order dated 10th of July, 2019. The petitioner also preferred an appeal before the High Court. However, the same was also dismissed on 14th of June, 2019, a copy of which has been annexed as Annexure No.22 with the petition.

24. The petitioner by means of its notice dated 04.06.2019, a copy of which has been annexed as Annexure No.23, invoked the arbitration clause and suggested the name of retired Judge of this Court to act as the sole arbitrator. The aforesaid notice was duly served on the respondents. However, the respondents did not take any active participation in the constitution of the arbitral tribunal, hence the aforesaid petition.

25. The respondents filed their counter-affidavit seeking rejection of the aforesaid petition. At the very outset, it may be stated that the scope of this Court while entertaining a petition under Section 11(6) of the Arbitration & Conciliation Act is limited to the extent that this Court is required only to look into the fact whether the agreement entered between the parties contained an arbitration clause or not. It is also required to look into the fact whether the proper court having jurisdiction has been approached for the aforesaid purpose and primarily all contentious issues have to be left to be decided by the Arbitrator.

26. However, in so far as this aspect of the matter is concerned, the respondent does not dispute the arbitration clause nor the signing of the agreement dated 16th of February, 2007. Though the respondent while filing its counter-affidavit have raised objection on the merit. However, suffice to state that this Court is not inclined to go into the merits of the dispute and confines itself only to the fact that the agreement dated 16th of February, 2007 is not disputed by the respondent and so also the arbitration clause.

27. Having said that, it would be relevant to mention that the respondent has raised a primarily objection regarding the maintainability of the above petition. The ground so raised by the respondent is squarely based on the decision of the Apex Court in the case of ***Garware Wall Ropes Ltd. Vs. Coastal Marine Constructions & Engineering Ltd.,*** reported in ***AIR 2019 SC page 2053.***

28. On the strength of the aforesaid case, the respondent has raised a plea that unless and until the agreement which contain the arbitration clause is duly stamped as required in law till then the agreement becomes unenforceable and the court in terms of Section 11(6) of the Arbitration & Conciliation Act is denuded of its jurisdiction to appoint an Arbitrator.

29. Thus, the gist of the preliminary objection raised by the respondent is that the agreement dated 16th of February, 2007 is under stamped and as such unless and until the same is impounded and properly stamped as required in law, no Arbitrator can be appointed.

30. It is in this backdrop that the question before this Court to be considered and decided is whether the agreement dated 16th of February, 2007 is appropriately stamped or not. In case if it is properly stamped, then the Court possesses the jurisdiction to appoint an Arbitrator and in case if the answer is in the negative, then the agreement requires to be impounded and unless appropriately stamped as per provisions contained in the Stamp Act, the Court will not appoint an Arbitrator.

31. It is in light of the aforesaid question so formulated that the Court has heard the learned Senior Counsel appearing on the two sides at length.

32. Shri Jaideep Narain Mathur learned counsel for the petitioner has plainly, but vehemently, submitted that as far as the agreement dated 16th of February, 2007 is concerned, the said instrument is governed by Article 5 (c) of Schedule 1-B of the Indian Stamp Act as duly amended and applicable in the State of Uttar Pradesh. It is the submission of Shri Mathur that the aforesaid agreement entered between the parties is appropriately stamped; inasmuch as a stamp duty of rupees one hundred is provided for an instrument which is mentioned in Article 5 entry (c) contained in Schedule 1-B.

33. To elaborate his submission Shri Mathur has taken the Court extensively through the recital of the notification dated 14th of September, 1999 and the agreement dated 16th of February, 2007. On the strength of the aforesaid, it has been argued by Shri Mathur that the agreement in question only relates to lifting of fly ash and that too free of cost. It has been submitted that though the petitioner was required to install operate and maintain the DFAES at the costs of the petitioner. In the entire agreement, there is not a single word or terminology which is used to indicate that the aforesaid DFAES has been either sold or transferred to the respondent.

34. Shri Mathur has also emphasized that as far as the lifting of the dry fly ash is concerned, the same was to be done by the petitioner at his own costs by providing its own vehicle and since the aforesaid fly ash was generated from the power plant of the respondent and in terms of notification dated 14th of September, 1999 and it was for a period of 25 years, the dry fly ash in terms of the agreement dated 16th of February, 2007 was required to be given/provided to the petitioner free of costs. Thus, for the entire transaction as mentioned and depicted in the agreement of February 2007, there is neither any transfer nor any consideration as such it cannot be treated either as a conveyance nor it can be said that it relates to any transfer of movable or immovable property, accordingly the agreement falls within Article 5(c) of Schedule 1-B of the Stamp Act as amended in the State of U.P., accordingly there is no deficiency of any stamp duty and there is no impediment for the court to appoint an Arbitrator.

35. Per contra, Shri Sandeep Dixit, learned Senior Advocate appearing for the respondent has also meticulously taken the Court to the terms of the agreement as well as the notification dated 14th of September, 1999 and 3rd of November, 2009 and has submitted that the entire transaction as indicated in the said agreement is squarely covered by Article 23 relating to a conveyance of Schedule 1-B of the Stamp Act and has submitted that apparently in terms of the aforesaid Article 23, the agreement in between the parties is under stamped accordingly the agreement requires to be impounded and only when the stamp duty is properly paid alongwith the penalty, can the Court appoint an Arbitrator.

36. Shri Dixit in order to buttress his submission has vehemently urged that in terms of the agreement which clearly provides that the DFAES which is to be installed, operated and maintained by the petitioner on the premises belonging to the respondent is embedded in earth and as such would be treated as an immovable property. It has also been submitted that since according to the petitioner, the value

of the said DFAES is in several lacs accordingly that should be taken minimum as the value and appropriate stamp duty be paid.

37. Shri Dixit has also submitted that the agreement provides that the said DFAES shall form an integral part of the power station of the respondent, thus it implies that the DFAES has been transferred to the respondent, accordingly it is squarely covered under Article 23 of Schedule 1-B of the Uttar Pradesh Stamp Act.

38. Another limb of argument of Shri Dixit is, that the petitioner was required to develop a green belt on an area of about five hectares of land belonging to the respondent by planting five thousand, non-exotic Indian species plants such as Neem, Peepal, Kadam, Jangaljalebi, Shisham, Imli etc. on the costs as well as its maintenance which was to be borne by the petitioner whereas the plants shall remain the property of the respondent. Thus in view thereof, Shri Dixit has submitted that the agreement also contemplates transfer of five thousand trees which are embedded in and as such also amounts to a transfer of immovable property attracting Article 23 of Schedule 1-B of the Stamp Act applicable in the State of U.P. Since the stamp duty applicable on conveyance is on ad- volerum basis directly connected with the valuation hence the value of the aforesaid agreement runs in several lacs and in any case stamp duty of rupees one hundred on the agreement is grossly deficient and thus in light of the decision rendered by the Apex Court in the case of ***SMS Tea Estates (P) Ltd. Vs. Chandmari Tea Company (P) Ltd.*** reported in ***2011 (14) SCC page 66*** and ***Garware Wall Ropes Ltd.*** (supra), the request of the petitioner to appoint the Arbitrator, cannot be acceded unless the stamp duty is made good.

39. In order to appreciate the submission of the respective parties, it will be essential to note the ratio of the decision rendered by the Apex Court in the case of ***Garware Wall Ropes Ltd.*** (supra) and ***SMS Tea Estates (P) Ltd.*** (supra).

40. The Apex Court in the case of ***Garware Wall Ropes Ltd.*** (supra) was confronted with the question as to what is the effect of an arbitration clause contained in a contract which requires to be stamped. The Apex Court further noticed that in the case of ***SMS Tea Estates (P) Ltd.*** (supra) the Court had held that when an arbitration clause is contained in an unstamped agreement, the provisions of the Indian Stamp Act requires the Judge hearing the petition under Section 11 to impound the agreement and ensure that the stamp duty and penalty (if any) are paid before proceeding further with the petition under Section 11.

41. The Apex Court also noticed that the legislative amendment brought in the Arbitration & Conciliation Act, 1996 by the Arbitration & Conciliation "Amendment" Act, 2015 whereby Section 11 (6-A) has been introduced and its effect on such understamped or unstamped agreement containing Arbitration Clause. In order to under stand the controversy before the Apex Court, it will be worthwhile to reproduce Section 11 (6-A) as amended by 2015 Act and which reads as under:-

[(6A) The supreme Court or, as the case may be, the High Court, while

considering any application under sub-section (4) or sub-section (5) or sub-section (6), shall, notwithstanding any judgment, decree or order of any Court, confine to the examination of the existence of an arbitration agreement.]

42. Now the question arises as to the effect of the decision of ***SMS Tea Estates (P) Ltd.*** (supra) on dispute which arises post the amendment of 2015; inasmuch as by the aforesaid Section 11 (6A), the High Court while considering an application under sub-sections (4)(5) or (6) shall confine itself only to the examination of the existence of an arbitration agreement, notwithstanding any judgment, decree or order of any court. Thus, whether in the changed circumstances the dictum of ***SMS Tea Estates (P) Ltd.*** (supra) would continue to govern the field or post 2015 even if an agreement is under stamped, the court while dealing with an application under Section 11(6) will still confine itself only to the examination of the existence of an arbitration agreement.

43. It is in this backdrop that the Apex Court considering the various provisions of both the Arbitration & Conciliation Act as well as the Stamp Act as applicable to the State of Maharashtra including the provisions of the contract Act and the earlier binding decision of the Apex Court and thereafter held as under and the relevant paragraphs reads as under:-

16. ... A close look at Section 11(6A) would show that when the Supreme Court or the High Court considers an application under Section 11(4) to 11(6), and comes across an arbitration clause in an agreement or conveyance which is unstamped, it is enjoined by the provisions of the Indian Stamp Act to first impound the agreement or conveyance and see that stamp duty and penalty (if any) is paid before the agreement, as a whole, can be acted upon. It is important to remember that the Indian Stamp Act applies to the agreement or conveyance as a whole. Therefore, it is not possible to bifurcate the arbitration clause contained in such agreement or conveyance so as to give it an independent existence, as has been contended for by the respondent. The independent existence that could be given for certain limited purposes, on a harmonious reading of the Registration Act, 1908 and the 1996 Act has been referred to by Raveendran, J. in SMS Tea Estates (supra) when it comes to an unregistered agreement or conveyance. However, the Indian Stamp Act, containing no such provision as is contained in Section 49 of the Registration Act, 1908, has been held by the said judgment to apply to the agreement or conveyance as a whole, which would include the arbitration clause contained therein. It is clear, therefore, that the introduction of Section 11(6A) does not, in any manner, deal with or get over the basis of the judgment in SMS Tea Estates (supra), which continues to apply even after the amendment of Section 11(6A).

17. Looked at from a slightly different angle, an arbitration agreement which is contained in an agreement or conveyance is dealt with in Section 7(2) of the 1996 Act. We are concerned with the first part of Section 7(2) on the facts of the present case, and therefore, the arbitration clause that is contained in the sub-contract in question is the subject matter of the present appeal. It is significant that an arbitration agreement may be in the form of an arbitration clause "in a contract".

18. Sections 2(a), 2(b), 2(g) and 2(h) of the Indian Contract Act, 1872 ["Contract Act"] read as under:

"2. Interpretation clause.--In this Act the following words and expressions are used in the following senses, unless a contrary intention appears from the context:--

(a) When one person signifies to another his willingness to do or to abstain from doing anything, with a view to obtaining the assent of that other to such act or abstinence, he is said to make a proposal;

(b) When the person to whom the proposal is made signifies his assent thereto, the proposal is said to be accepted. A proposal, when accepted, becomes a promise;

xxx xxx xxx

(g) An agreement not enforceable by law is said to be void;

(h) An agreement enforceable by law is a contract;

xxx xxx xxx"

19. When an arbitration clause is contained "in a contract", it is significant that the agreement only becomes a contract if it is enforceable by law. We have seen how, under the Indian Stamp Act, an agreement does not become a contract, namely, that it is not enforceable in law, unless it is duly stamped. Therefore, even a plain reading of Section 11(6A), when read with Section 7(2) of the 1996 Act and Section 2(h) of the Contract Act, would make it clear that an arbitration clause in an agreement would not exist when it is not enforceable by law. This is also an indicator that SMS Tea Estates (supra) has, in no manner, been touched by the amendment of Section 11(6A).

27. ... One reasonable way of harmonising the provisions contained in Sections 33 and 34 of the Maharashtra Stamp Act, which is a general statute insofar as it relates to safeguarding revenue, and Section 11(13) of the 1996 Act, which applies specifically to speedy resolution of disputes by appointment of an arbitrator expeditiously, is by declaring that while proceeding with the Section 11 application, the High Court must impound the instrument which has not borne stamp duty and hand it over to the authority under the Maharashtra Stamp Act, who will then decide issues qua payment of stamp duty and penalty (if any) as expeditiously as possible, and preferably within a period of 45 days from the date on which the authority receives the instrument. As soon as stamp duty and penalty (if any) are paid on the instrument, any of the parties can bring the instrument to the notice of the High Court, which will then proceed to expeditiously hear and dispose of the Section 11 application. This will also ensure that once a Section 11 application is allowed and an arbitrator is appointed, the arbitrator can then proceed to decide the dispute within the time frame provided by Section 29A of the 1996 Act.

44. In light of the pronouncement of the Apex Court in the case of ***Garware Wall Ropes Ltd.*** (supra), it cannot be doubted that while dealing with an application under Section 11(6) even post 2015 amendment, this Court is required to prima facie consider whether the agreement, the subject matter of these petitions, dated 16th of February 2007 is properly stamped or not.

45. In the quest to ascertain whether the aforesaid agreement is properly stamped or not, it will be apposite for this Court to notice the settled legal principles which are applicable on the authority

including a court while determining the manner in which the Stamp Act and the instrument in question is to be examined.

46. It will be gainful to state, at the very out set, that the Stamp Act is a fiscal statute which has been enacted with an object to secure revenue for the State on certain classes of instrument as mentioned therein. It must be equally remembered that the Act does not arm a litigant with a weapon of technicality to meet the case of his opponent. The stringent provision of the Act are conceived only for the purposes of securing interest of the revenue.

47. Since the Stamp Act is a fiscal legislation accordingly its provisions have to be strictly construed and it does not permit liberal interpretation as is applicable as far as remedial statutes are concerned. It is equally well settled that while interpreting a fiscal law there is no scope for equity or judiciousness if the letter of law is clear and unambiguous.

48. It is in the backdrop of the above noted principles that the agreement dated 16th of February, 2007 is to be examined by this Court for the purposes of ascertaining the applicability of stamp duty. For ready reference, Article 5 as contained in Schedule 1 B of the Stamp Act as amended an applicable in the State of U.P. is being reproduced hereinafter for ready reference:-

Agreement or memorandum of an agreement		
(a)	if relating to the sale of a bill of exchange	[Ten Rupees]
(b)	if relating to the sale of a Government security or share in an incorporated company or other body corporate	Subject to a maximum of 46[One thousand rupees; ten rupees for every Rs. 20,000"] or part thereof the value of the security or share.
[(b-1)	if relating to the sale of an immovable property where possession is not admitted to have been delivered nor is agreed to be delivered without executing the conveyance.	The same duty as on conveyance [no. 23 clause (a)] on one half of the amount of consideration as set forth in the agreement.
Provided	that when conveyance in pursuance of such agreement is executed, the duty paid under this clause in excess of the duty payable under clause(c) shall be adjusted towards the total duty payable on the conveyance.	
[(b-2)]	If relating to the construction of a building on a land by a person other than the owner or lessee of such land and having a stipulation that after construction, such building shall be held jointly or severally by that other person and the owner or the lessee, as the case may be, of such land, or that it shall be sold jointly or severally by them or that a part of it shall be held jointly or severally by them and the remaining part thereof shall be sold jointly or	The same duty as a conveyance [(No. 23 Clause(a)] for a consideration equal to the amount or value of the land.

	severally by them.	
(1)	Explanations For the purpose of this clause the expression "land" shall include things attached to the earth, or permanently fastened to anything attached to the earth.	
(2)	the expression "lessee" shall mean a holder of a lease in perpetuity or for a period of thirty years or more.	
(3)	the expression "building" shall mean a building having more than one flat or office accommodation or both and the expression "flat" shall have the meaning assigned to it in the Uttar Pradesh Ownership of Flats Act, 1975.]	
(c)	**if not otherwise provided for**	**"[One hundred rupees].**
	Exemption	
	Agreement or memorandum of agreement--	
(a)	[***]	
(b)	made in the form of tenders to the Central Government for, or relating to, any loan.	
	Agreement to lease- See "Lease" (No. 35)	

49. As the submission of the learned Senior Counsel for the respondent hinges on the premise that the agreement amounts to a conveyance which has been defined under Section 2 (10) of the Stamp Act and the duty is indicated in Article 23 of Schedule 1 B. Thus, Section 2(10) of the Stamp Act as well as Article 23 are being reproduced hereinafter for ready reference:-

"Section 2(10) *"Conveyance" includes a conveyance on sale and every instrument by which property, whether movable or immovable, is transferred inter vivos and which is not otherwise specifically provided for by [by Schedule I, Schedule I-A or Schedule 1-B], [as the case may be];*

23. **Conveyance** [as defined by Section 2 (10)] not being a Transfer charged or exempted under No.62-	
(a) if relating to immovable property where the amount or value of the consideration of such conveyance as set forth therein or the market value of the immovable property which is the subject of such conveyance, whichever is greater does not exceed Rs.500.	Sixty rupees.
Where it exceeds Rs.500 but does not exceed Rs.1,000.	One hundred and twenty-five rupees.
and for every Rs.1,000 or part thereof in excess of Rs.1,000.	One hundred and twenty-five rupees: Provided that the duty payable shall be rounded off to the next multiple of ten rupees.
(b) if relating to movable property where the amount or value of the consideration of such conveyance as set forth therein does not exceed Rs.1,000.	Twenty rupees.
and for every Rs.1,000 or part thereof in excess of Rs.1,000.	Twenty rupees.
Exemption	
Assignment of copyright in musical, works by resident of, or first published in India.	
Explanation	

For the purposes of this Article, in the case of an agreement to sell an immovable property, where possession is delivered before the execution or at the time of execution, or is agree to be delivered without executing the conveyance, the agreement shall be deemed to be a conveyance and stamp duty thereon shall be payable accordingly: Provided that the provisions of Section 47-A shall mutatis mutandis apply to such agreement: Provided further that when conveyance in pursuance of such agreement is executed, the stamp duty paid on the agreement shall be adjusted towards the total duty payable on the conveyance]	

50. Section 2(10) of the Stamp Act defines a conveyance including a conveyance on sale and every instrument by which property whether movable or immovable property is transferred inter vivos and which is not otherwise specifically provided. An explanation is also appended to the aforesaid Section which for the present case is not relevant.

51. Upon reading of the terminology which has been used to define conveyance as well as on the reading of Article 23 contained in Schedule 1-B of the Indian Stamp Act. What needs to be established before an instrument can be covered as a conveyance covered by Article 23 is that such an instrument must affect a transfer which may relate to movable or immovable property. The important word in Section 2(10) as well as in Article 23 is the word 'transfer'.

52. The aforesaid word 'conveyance' and 'transfer' as defined in the **Black's Law Dictionary** (Eighth Edition) is marked as "(a)" hereinafter and in **Osborn's Law Dictionary** (Seventh Edition) is marked as "(b)" hereinafter for perusal:-

*(a) "**Conveyance** 1. The voluntary transfer of a right or of property.*

***Absolute conveyance:-** A conveyance in which a right or property is transferred to another free of conditions or qualifications (i.e., not as a security). CF conditional conveyance.*

***Conditional conveyance:-** A conveyance that is based on the happening of an event, usu. payment for the property; a mortgage. CF. absolute conveyance, **derivative conveyance.** See secondary conveyance."*

*"**Transfer 1.** To convey or remove from one place or one person to another; to pass or hand over from one to another, esp. to change over the possession or control of. 2. To sell or give."*

*(b) "**Conveyance:-** A mode of transfer of property; the deed or instrument other than a will whereby an interest in property is assured by one person to another. It includes a mortgage, charge, lease, assent, vesting declaration, vesting instrument, disclaimer, release and every other assurance of property, except a will."*

*"**Transfer:-** The passage of a right from one person to another (i) by virtue of an act done by the transferor with that intention, as in the case of a conveyance or assignment by way of sale or gift, etc.; or (ii) by operation of law, as in the case of forfeiture, bankruptcy, descent, or intestacy. A transfer may be absolute or conditional, by way of security, etc."*

53. From the above, it would indicate that transfer in so far as any movable or immovable property is concerned, relates to transfer of rights from one party to another. It necessarily includes consideration for such a transfer whereas Article 5 relates to an agreement or memorandum of an agreement which have been mentioned in the aforesaid Article including of sale of both movable and immovable property and the residuary Article 5(c) states that if an agreement which is not otherwise provided for which stamp duty of rupees one hundred has been prescribed.

54. The agreement dated 16th of February, 2007 clearly emphasis the intention between the parties to the effect that as far as the thermal power plant at Harduaganj is concerned, the same is in the undisputed ownership of the respondent. The cement plant undisputedly belongs to the petitioner.

55. The agreement has been necessitated on account of the notification dated 14th of September, 1999. In terms thereof, certain obligations have been conferred upon the parties that is to say that the petitioner was required to install, operate and maintain DFAES at his own cost. The respondent permitted the petitioner to lift the fly ash generated from its thermal power plant without consideration. The petitioner was required to plant five thousand trees on the land belonging to the respondent free of costs and maintain the said greenbelt.

56. However, the entire agreement is completely silent to the consequences regarding the status of DFAES at the end of the term of the agreement or its prior termination as the case may be. As far as the maintenance of greenbelt is concerned, it is clearly provided that the trees so planted by the petitioner at his costs shall always be treated as that of the respondent. Apparently the agreement in between the parties is to be construed in the way it intended to be and it is not permissible for the court to add or infer something and read something in the agreement which does not exist or is not provided for by the parties.

57. In the above backdrop where the agreement does not indicate any exchange of consideration nor it uses any terminology by which it can be inferred that the parties intended to transfer DFAES nor the agreement spells out the consequence and any contrary status regarding the aforesaid DFAES at the time of termination or expiry of the aforesaid agreement. Thus, it is difficult to stretch the language of the agreement to give a meaning and create a transaction which from the agreement in question was not intended by the parties themselves.

58. At this juncture, it will be gainful to ascertain that if the agreement falls short of a conveyance in the sense that it does not contemplate transfer of rights then what would be the nature of such an agreement, dated 16.02.2007.

59. In the aforesaid background it will be imperative to notice the definition of the word 'licence' as defined in the Indian Easements Act, 1882. Section 52 of the Indian Easements Act reads as under:-

"52. "License" defined- Where one person grants to another, or to a definite number of other persons, a right to do, or continue to do, in or upon the immovable property of the grantor,

something which would, in the absence of such right, be unlawful, and such right does not amount to an easement or an interest in the property, the right is called a license."

60. From the perusal of the aforesaid definition, it would indicate that the license is a privilege given by the grantor to the grantee to do something on the premises of the grantor which otherwise without such permission would be unlawful.

61. In the instant case, it is not disputed that the land and the entire power plant subsisting thereon belongs to the respondent Power Corporation. It is in furtherance of the agreement entered between the parties dated 16.02.2007 that a privilege was conferred upon the petitioner to do an act on the premises belonging to the Power Corporation and without such permission the act of the petitioner would otherwise be unlawful. It would be seen that the agreement dated 16.02.2007 which takes note of the notification dated 14th of September, 1999 culminated in grant of permission to the petitioner to enter in the premises of the respondent to install, maintain and operate the DFAES at its own costs for the purposes of Extraction of Fly Ash. This agreement read simplicitor and in light of the clauses, terms and conditions which have been noted and reproduced herein above first, unambiguously prods this Court to take a view that the agreement dated 16.02.2007 was actually more akin to grant of a license and not so much of a conveyance.

62. It will also be relevant to mention that the payment of license fee though is not an essential condition for the subsistence of a license. As noted above, the notification dated 14th of September, 1999 clearly envisaged that there would be no consideration between the parties and in absence of any consideration and knowing-fully well that the consideration could not be charged and yet the respondent had permitted the petitioner to use its premises for the purposes of installation, maintenance and operating, at his own costs, the DFAES and that too agreed for a shelf life of 25 years for the agreement unless it was terminated earlier. In absence of any clause indicating that at the end of the aforesaid period of 25 years or in its termination the DFAES would stand transferred to the respondent, indicates the intention which also is manifested in the conduct of the parties that the respondent had merely granted a license to the petitioner for the purposes of Extraction of Fly Ash and the obligations were duly set forth in the agreement dated 16.02.2007.

63. Significantly the agreement dated 16.02.2007 does not in any manner create an interest in the immovable property or a right to possess the same since the terminology of the agreement does not indicate creation of any such right. Nor the agreement results or envisages the transfer of exclusive possession specially when the right conferred under the agreement was specific and was more of a privilege granted to the petitioner, alone.

64. At this juncture, it is the relevant to notice the distinction between a lease or a license. The idea is to extract the ingredients of the license and to juxtapose the same with a lease, which generally is a conveyance. This Court is conscious that in the Stamp Act a separate entry has been dedicated to a lease which is different

from the conveyance but the fact remains that generally all leases are conveyances but all conveyances may not be a lease.

65. To, lucidly comprehend the nature of a license and how it has been understood in legal parlance this Court gainfully refers to the decision of the Court of Appeal in ***Errington Vs. Errington and Woods Lord Denning reported in 1952 (1) KB 290*** in deciding the issue whether an agreement is a lease or licence referres to the decision given by Vaughan, C.J. in the seventeenth century in ***Thomas Vs. Sorrell*** reported in ***(1558-1774) All ER Rep 107.*** In the said judgment (Sorrell case), Vaughan, C.J. outlined certain features of lease which are as follows:-

"....'A dispensation or licence properly passeth no interest nor alters or transfers property in any thing, but only makes an action lawful, which without it had been unlawful.' The difference between a tenancy and a licence is, therefore, that, in a tenancy, an interest passes in the land, whereas, in a licence, it does not. In distinguishing between them, a crucial test has sometimes been supposed to be whether the occupier has exclusive possession or not. If he was let into exclusive possession, he was said to be a tenant, albeit only a tenant at will (see Doed Tomes Vs. Chamberlaine and Lynes Vs. Snaith), whereas if he had not exclusive possession he was only a licensee.

66. Relying on the aforesaid principle Lord Denning explained that the difference between a tenancy and a licence is that, in a tenancy, an interest passes in the land, whereas, in a licence, it does not. The exposition has further been elucidated and it is to be ascertained whether the occupier has exclusive possession or not. However, this test of exclusive possession has been held to be not a decisive test. In order to distinguish between the two the intentions of the parties, their conduct also have to be considered.

67. This aspect of the matter was considered by the Apex Court in the case of ***Associated Hotels of India Ltd. Vs. R. N. Kapoor reported in AIR 1959 SC page 1262*** and it discussed the issue as under:-

21. this issue in very lucid terms. K. Subba Rao, J. who was in minority, discussed this question with a clarity which is often associated with His Lordship's opinion. The learned Judge referred to Section 105 of the Transfer of Property Act and then compared it with Section 52 of the Easements Act, 1882. After referring to those two sections and also after referring to the decision in Errington [(1952) 1 KB 290 : (1952) 1 All ER 149 (CA)] the learned Judge pointed out the distinction between the lease and the licence by expressly approving the tests laid down by Lord Denning and which may better be quoted: (Kapoor case [AIR 1959 SC 1262 : (1960) 1 SCR 368] , AIR pp. 1269-70, para 27)

"27. ... The following propositions may, therefore, be taken as well established: (1) to ascertain whether a document creates a licence or lease, the substance of the document must be preferred to the form; (2) the real test is the intention of the parties--whether they intended to create a lease or a licence; (3) if the document creates an interest in the property, it is a lease; but, if it only permits another to make use of the property, of which the legal possession continues with the owner, it is a licence;

and (4) if under the document a party gets exclusive possession of the property, "prima facie', he is considered to be a tenant; but circumstances may be established which negative the intention to create a lease." (SCR pp. 384-85 of the Report)

23. Subsequently, in M.N. Clubwala v. Fida Hussain Saheb [AIR 1965 SC 610] the same propositions have been reiterated by Mudholkar, J. in para 12 of the Report after relying on the decisions in Errington [(1952) 1 KB 290 : (1952) 1 All ER 149 (CA)] and also Cobb [(1952) 1 All ER 1199 (CA)] and also the decision of this Court in Associated Hotels of India Ltd. [AIR 1959 SC 1262 : (1960) 1 SCR 368] The principle laid down by the learned Judge is as follows: (Clubwala case [AIR 1965 SC 610] , AIR p. 614, para 12)

"12. ... We must, therefore, look at the surrounding circumstances. One of those circumstances is whether actual possession of the stalls can be said to have continued with the landlords or whether it had passed on to the stall holders. Even if it had passed to a person, his right to exclusive possession would not be conclusive evidence of the existence of a tenancy though that would be a consideration of first importance. That is what was held in Errington v. Errington and Woods [(1952) 1 KB 290 : (1952) 1 All ER 149 (CA)] and Cobb v. Lane [(1952) 1 All ER 1199 (CA)] ."

25. Reference in this connection can also be made to a later judgment of the Court of Appeal in Marchant v. Charters [(1977) 1 WLR 1181 : (1977) 3 All ER 918 (CA)] where again Lord Denning reiterated these principles in a slightly different form by holding that the true test is the nature and quality of the occupation and not always whether the person has exclusive possession or not. The true test in the language of the learned Judge is as follows: (WLR p. 1185 F-H)

"... It does not depend on whether he or she has exclusive possession or not. It does not depend on whether the room is furnished or not. It does not depend on whether the occupation is permanent or temporary. It does not depend on the label which the parties put upon it. All these are factors which may influence the decision but none of them is conclusive. All the circumstances have to be worked out. Eventually the answer depends on the nature and quality of the occupancy. Was it intended that the occupier should have a stake in the room or did he have only permission for himself personally to occupy the room, whether under a contract or not? In which case he is a licensee."

27. In a rather recent judgment of this Court in C.M. Beena v. P.N. Ramachandra Rao [(2004) 3 SCC 595] the learned Judges relied on the ratio in Associated Hotels of India Ltd. [AIR 1959 SC 1262 : (1960) 1 SCR 368] in deciding the difference between lease and licence. In para 8 of the said judgment, learned Judges held that the difference between lease and the licence is to be determined by finding the real intention of the parties from a total reading of the document, if any, between the parties and also considering the surrounding circumstances. The learned Judges made it clear that use of terms "lease" or "licence", "lessor" or "licensor", "rent" or "licence fee" by themselves are not decisive. The conduct and intention of the parties before and after the creation of relationship is relevant to find out the intention. The learned Judges quoted from the treaties of Evans and Smith on The Laws of Landlord and Tenant and of Hill

& Redman on Law of Landlord and Tenant in support of their proposition.

68. The Apex Court in the case of ***Qudrat Ullah Vs. Municipal Board, Bareilly reported in 1974 (1) SCC page 202*** has held as under:-

".... If an interest in immovable property, entitling the transferors to enjoyment is created, it is a lease; if permission to use land without right to exclusive possession is alone granted, a license is the legal result."

69. Also in the case of ***Khalil Ahmed Bashir Ahmed Vs. Tufelhussein Samasbhai Sarangpurwala, reported in 1988 (1) SCC page 155.*** The Apex Court held as under:-

*"To put it precisely... if permission to **use land** without exclusive possession was alone granted, a licence was the legal result. We are of the opinion that this was a licence."*

70. The Constitution Bench of the Apex Court in the case of ***Ashoka Marketing Ltd. Vs. Punjab National Bank reported in 1990 (4) SCC page 406*** as held as under:-

"It implies occupation by a person who has entered into occupation of any public premises without lawful authority as well as occupation which was permissive at the inception but has ceased to be so.... This part covers a case where a person had entered into occupation legally under valid authority but who continues in occupation after the authority under which he was put in occupation has expired or has been determined. The words 'whether by way of grant or any other mode of transfer' in this part of the definition are wide in amplitude...."

71. It is also to be noted from the perusal of the aforesaid mentioned decisions that a licensee does not acquire any interest in the property by virtue of grant of licence in his favour in relation to any immovable property. Once the authority to occupy and use the same is granted in his favour by way of licence, he continues to exercise that right so long the authority has not expired or has not been determined for any reason whatsoever, meaning thereby so long the period of licence has not expired or the same has not been determined on the ground permissible under the contract or law, occupation of the licensee is permissive by virtue of the grant of licence in his favour, though he does not acquire any right in the property and the property remains in possession and control of the grantor, but by virtue of such a grant, he acquires a right to remain in occupation so long the licence is not revoked or he is not evicted from its occupation either in accordance with law or otherwise.

72. This Court is also fortified in its view in light of the decision rendered by the Apex Court in the case of ***Corporation of Calicut Vs. K. Sreenivasan reported in 2002 (5) SCC page 361 and New Bus-Stand Shop Owners Association Vs. Corporation of Kozhikode and another reported in 2009 (10) SCC page 455.***

73. In light of the principles as extracted from the various decisions of the Apex Court on the aforesaid point as noticed as, this Court has no hesitation to hold that the agreement dated 16.02.2007 merely conferred a right to the petitioner to enter on the land of the respondent for

the purposes of installing, operating and maintaining the DFAES and this arrangement cannot be mirrored as a conveyance rather it replicates a license, within the meaning of Section 52 of the Indian Easement Act, 1882.

74. In the Stamp Act as applicable in the State of Uttar Pradesh, there is an entry for a licence which is contained in Articles 38 and 38-A appended in Schedule 1-B which mentiones the stamp duty of rupees thirty. However,the aforesaid articles 38 relate only to an agreement between a debtor and his creditor while Article 38-A relates to document evidencing the licence or renewal relating to arms and ammunition under the provisions of Arms Act 1959.

75. Thus it would be seem that Article 38 and 38-A does not in any manner govern the licence as envisaged under Section 52 of the Indian Evidence Act. Moreover, the agreement as mentioned in Article 5 (c) appended in Schedule 1-B clearly covers the field and as such in light of the aforesaid discussion, this Court finds it difficult to accept the contention of the learned counsel for the respondent to submit that the agreement dated 16.02.2007 amounts to a conveyance.

76. It will also be pertinent to notice that merely by giving a right to the petitioner to plant five thousand trees on the greenbelt also it does not amount to transfer; inasmuch as that was also a right granted by the respondent allowing the petitioner to plant the trees and as already noticed above the licence fee is not an essential condition.

77. Thus, for the said purpose as well, the rights conferred by the agreement were obligation which did not create any right either of transfer or interest in the land nor exclusive possession was granted to the petitioner nor by installing, maintaining and operating the DFAES the petitioner relinquished its right or created any interest in favour of the respondent, hence for all the aforesaid reasons as discussed above, this Court is of the firm opinion that the agreement dated 16.02.2007 is akin to a licence and is duly and appropriately stamped. In light of the discussions aforesaid, the objections raised by the respondent regarding the stamp duty are accordingly overruled.

78. Before parting with the issue, this Court deems necessary to state that any observation contained in this order may not be construed as an expression of any view on the merits of the controversy as this Court has considered the agreement only for the limited purpose of assessing the chargeability of stamp duty only.

79. Now the stage is set for this count to examine the petition for the purposes of appointment of an Arbitrator. Since the agreement is found by the Court to be duly stamped and the arbitration clause in between the parties is not disputed nor there is any dispute to the factum of the petitioner having invoked the arbitration clause by sending the notice dated 4th of June, 2019 by which it had proposed the name of an Arbitrator, which was not acceptable to the respondent, who did not respond.

80. However, from the counter-affidavit it is evident that disputes have occurred, arbitration clause subsists and the arbitration clause has been invoked by a notice duly served on the respondent and the Arbitral Tribunal comprising of a sole Arbitrator has not been constituted, thus all these facts confer this Court with ample jurisdiction to exercise its powers under Section 11(6) of the Arbitration &

Conciliation Act, 1996, to appoint an Arbitrator.

81. In view of the above, it is a fit case for the Court to appoint an Arbitrator. This Court further finds that in both the petitions, the parties are also similar, the controversy and points of fact and law are the same hence it will be expedient to appoint the same Arbitrator in both the cases. Accordingly, this Court proposes the name of Justice D.B Bhosle (Retd. Chief Justice) of this Court 6, Bhagyoday behind Kandil Restaurant, Near State Exchange, Fort, Mumbai-400001, Mob. Nos.9494940122, 9833300555, Land Line Nos.22675858, 22675959 to act as an Arbitrator in both the cases. The learned counsel for the petitioner shall provide a complete set of the paper book, in both of cases, to the office to be forwarded to the proposed Arbitrator to seek his consent in terms of Section 12(1) of the Arbitration & Conciliation Act, 1996 to conduct the arbitration proceedings at Lucknow.

82. Put up this matter in the week commencing 23rd of March, 2020.

(2020)02ILR A23
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 10.02.2020

BEFORE

THE HON'BLE ABDUL MOIN, J.

Contempt Appeal No. 89 of 2019

Mili Nigam ...Applicant
Versus
Kalanaidhi Naithani, S.S.P. Lko & Ors. ...Opposite Parties

Counsel for the Applicant:
Shiv Raj Mohan Nigam

Counsel for the Opposite Parties:

A. Contempt of Courts Act, 1971 - Sections 10, 11 and 12 - alleging - non-compliance of the orders issued by the learned Chief Judicial Magistrate - exercise of power by the High Court under Section 10 of the Act of 1971 - where there is no provision under the Criminal Procedure Code or the Code of Civil Procedure for execution of the orders or for compliance of such orders - Where there is an effective remedy for enforcing the order then the High Court would be justified in declining to entertain the contempt petition - contempt petition not maintainable under Section 10 read with Sections 11 and 12 of the Act of 1971.(Para-4,10,15)

An order issued by the learned Chief Judicial Magistrate requiring the officials concerned to send a report and thus Section 10 of the Act of 1971 has been invoked for punishing the officials for not responding to the orders passed by the learned Chief Judicial Magistrate for sending a report. (Para-6)

HELD:- Learned Chief Judicial Magistrate has got the power under the Criminal Procedure Code to have his own orders complied with.(Para- 10)

Contempt petition dismissed. (E-7)

List of cases cited:-
1. E. Bapanaiah vs. K.S. Raju , (2015) 1 SCC 451

(Delivered by Hon'ble Abdul Moin, J.)

1. Heard. At the very outset, Sri Shiv Raj Mohan Nigam, learned counsel for the petitioner, made a request that he is unable to see clearly as such his friend,colleague and Advocate Sri H.M. Mathur be permitted to argue the matter on his behalf.

2. Accordingly, seeing the personal difficulty of Sri Nigam, this Court permitted Sri H.M. Mathur, Advocate, to argue the matter.

3. Heard Sri Shiv Raj Mohan Nigam, learned counsel for the petitioner, and Sri H.M. Mathur, Advocate, who has assisted the learned counsel for the petitioner.

4. Present contempt petition has been filed under Sections 10, 11 and 12 of the Contempt of Courts Act, 1971 (hereinafter referred to as the Act of 1971) alleging non-compliance of the orders issued by the learned Chief Judicial Magistrate, Lucknow, as per the order sheet, a copy of which has been filed as Annexure-1 to the contempt petition.

5. It is contended by learned counsel for the petitioner that learned Chief Judicial Magistrate, Lucknow, through various orders had required the officials concerned to submit a report but despite sending various letters, as would be apparent from perusal of the order sheet, on 20.07.2018, 24.09.2018, 29.10.2018, 27.11.2018 and 11.12.2018 the said report has not been sent and consequently the respondents run in contempt of the orders passed by the learned Chief Judicial Magistrate, Lucknow.

6. From perusal of the record, it is clearly apparent that it is not the order of a writ Court against which contempt is alleged but an order which has been issued by the learned Chief Judicial Magistrate, Lucknow requiring the officials concerned to send a report and thus Section 10 of the Act of 1971 has been invoked for punishing the officials for not responding to the orders passed by the learned Chief Judicial Magistrate, Lucknow for sending a report.

7. Heard learned counsel for the petitioner and perused the records. From the pleadings on record, it is apparent that the petitioner seeks initiation of contempt proceedings of non-compliance of the orders issued by the learned Chief Judicial Magistrate, Lucknow to the officials concerned for sending a report which has not been sent by them.

8. Whether this Court while exercising power under Section 10 of Act of 1971 would have jurisdiction to entertain the present contempt petition alleging contempt of orders passed by a subordinate court is an issue which has to be considered by this Court.

9. This aspect of the matter has been considered by the Apex Court in the case of **E. Bapanaiah vs. K.S. Raju** reported in **(2015) 1 SCC 451** wherein it has been held as under:-

"25. Powers of the High Courts to punish for contempt including the powers to punish for contempt of itself flow from Article 215 of the Constitution of India. Section 10 of the Contempt of Courts Act, 1971 empowers the High Courts to punish contempts of its subordinate courts which reads as under: -

"10. Power of High Court to punish contempts of subordinate courts. - Every High Court shall have and exercise the same jurisdiction, powers and authority, in accordance with the same procedure and practice, in respect of contempts of courts subordinate to it as it has and exercises in respect of contempts of itself:

Provided that no High Court shall take cognizance of a contempt alleged to have been committed in respect of a court subordinate to it where such contempt is an offence punishable under the Indian Penal Code (45 of 1860).

27. The present case relates to a civil contempt wherein an undertaking given to Company Law Board is breached. Normally, the general provisions made under the Contempt of Courts Act are not invoked by the High Courts for forcing a party to obey orders passed by its subordinate courts for the simple reason that there are provisions contained in Code of Civil Procedure, 1908 to get executed its orders and decrees. It is settled principle of law that where there are special law and general law, the provisions of special law would prevail over general law. As such, in normal circumstances a decree holder cannot take recourse of Contempt of Courts Act else it is sure to throw open a floodgate of litigation under contempt jurisdiction. It is not the object of the Contempt of Courts Act to make decree holders rush to the High Courts simply for the reason that the decree passed by the subordinate court is not obeyed."

10. From perusal of the aforesaid judgment in the case of **K.S. Raju (supra),** it is apparent that the power exercised by the High Court under Section 10 of the Act of 1971 can be exercised where there is no provision under the Criminal Procedure Code or the Code of Civil Procedure for execution of the orders or for compliance of such orders meaning thereby that where there is an effective remedy for enforcing the order then the High Court would be justified in declining to entertain the contempt petition.

11. Being armed with the aforesaid proposition of law the Court now sets out to see whether there is a remedy available to the petitioner of having the orders passed by the learned Magistrate complied with?

12. For the aforesaid purpose, Section 345 of the Code of Criminal Procedure, 1973 (for short, 'Cr.P.C.') would be relevant. Section 345 of the Cr.P.C. provides as under:-

"345. Procedure in certain cases of contempt.

(1) When any such offence as is described in section 175, section 178, section 179, section 180 or section 228 of the Indian Penal Code (45 of 1860), is committed in the view or presence of any Civil, Criminal or Revenue Court, the Court may cause the offender to be detained in custody and may, at any time before the rising of the Court on the same day, take cognizance of the offence and, after giving the offender a reasonable opportunity of showing cause why he should not be punished under this section, sentence the offender to fine not exceeding two hundred rupees, and, in default of payment of fine, to simple imprisonment for a term which may extend to one month, unless such fine be sooner paid.

(2) In every such case the Court shall record the facts constituting the offence, with the statement (if any) made by the offender, as well as the finding and sentence.

(3) If the offence is under section 228 of the Indian Penal Code (45 of 1860), the record shall show the nature and stage of the judicial proceeding in which the Court interrupted or insulted was sitting, and the nature of the interruption or insult."

13. From perusal of Section 345 of the Cr.P.C., it is apparent that where any offence as is described in section 175, section 178, section 179, section 180 or section 228 of the Indian Penal Code is committed, the Court may cause the offender to be detained in custody and may take cognizance of the offence and, after giving an opportunity may also impose penalty upon him.

14. Section 175 of the Indian Penal Code (for short, 'IPC') reads as follows:-

"175. Omission to produce [document or electronic record] to public servant by person legally bound to produce it.--Whoever, being legally bound to produce or deliver up any [document or electronic record] of any public servant, as such, intentionally omits so to produce or deliver up the same, shall be punished with simple imprisonment for a term which may extend to one month, or with fine which may extend to five hundred rupees, or with both, or, if the [document or electronic record] is to be produced or delivered up to a Court of Justice, with simple imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both."

15. From perusal of Section 175 of IPC, it is apparent that omission to produce document or electronic record by person legally bound to produce up to a Court of justice is an offence punishable with simple imprisonment for a term which may extend to one month or with fine which may extend to five hundred rupees or with both. Thus, in case learned Magistrate is of the view that the officials concerned have not produced the document/report deliberately as were directed by him to be produced it is always open for the learned Magistrate to proceed against the officials concerned under the powers vested with him under the aforesaid provisions of law. However, this Court records that it has not gone into the merits of the orders passed by the learned Magistrate but has only considered as to whether learned Magistrate has got the power to have his own orders complied with whereby not requiring this Court to interfere and invoke its jurisdiction under the Act of 1971.

16. Taking into consideration the aforesaid, no case for entertaining of the present contempt petition under Section 10 read with Sections 11 and 12 of the Act of 1971 is made out. The contempt petition is accordingly **dismissed**. However, it would be open to the petitioner to pursue other remedies that are available to her.

(2020)02ILR A26
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 26.02.2020

BEFORE

THE HON'BLE ANANT KUMAR, J.

Criminal Appeal No. 783 of 2019

Hari Bhajan & Ors. ...Appellants
Versus
State of U.P. ...Respondent

Counsel for the Appellants:
Devendra Pratap

Counsel for the Respondent:
Govt. Advocate

A. Criminal Law-Indian Penal Code-Section 304 (Part 2)/34, 323/34 — Appeal against conviction.

Appellant has been granted bail by a coordinate bench. Now a prayer has been made that the sentence awarded by the trial court may be suspended during pendency of the appeal because of the fact that the applicant is an old aged person aged about 71 years and is a Loktantra Senani and getting Loktantra Senani pension from the State Government and in case the sentence is not suspended he will not get the Loktantra Senani pension and his survival will be jeopardized. (Para 3)

Criminal Appeal allowed. (E-2)

List of cases cited :-

1. AIR 2001 Supreme Court 3320; K.C.Sareen V. C.B.I. Chandigarh;

2. AIR 2008 Supreme Court 35; State of Punjab v. Deepak Mattu;

3. 2013 (2) ACR 1701; State of Mah. through CBI, Anti Corruption Branch, Mummbai vs. Balakrishna Dattatrya Kumbhar;

4. (2003)12 SCC 434:

5. N. Ramamurthy v. State by Central Bureau of Investigation, A.C.B., Bengaluru in Criminal Appeal Nos.751- 752/2019 decided on 26th April, 2019.

(Delivered by Hon'ble Anant Kumar, J.)

(Crl. Misc. Application No.4812 of 2020)

1. Rejoinder affidavit filed today is taken on record.

2. Appellant No.1/applicant has been convicted in S.T. No. 258 of 2011, Crime No. 339 of 2011, under Section 304 (Part 2)/34, 323/34 IPC, P.S. Sursa, District Hardoi and has been sentenced to undergo Five Years' R.I. with a fine of Rs.10,000/- for the offence under Section 304 (Part 2)/34 IPC and Six Months' S.I. with a fine of Rs.500/- for the offence under Section 323/34 IPC.

3. Appeal of the appellant No.1/applicant is pending before this Court. Appellant No.1/applicant has been granted bail by a co-ordinate bench of this Court vide order dated 06.09.2019. Now a prayer has been made that the sentence awarded by the trial court may be suspended during pendency of the appeal because of the fact that the appellant No.1/applicant is an old aged person aged about 71 years and is a Loktantra Senani and getting Loktantra Senani pension from the State Government and in case the sentence is not suspended he will not get the Loktantra Senani pension and his survival will be jeopardized.

4. The prayer has been made in reference to Section 389(1) Cr.P.C., which reads as under:

"Section 389(1) in The Code Of Criminal Procedure, 1973

(1) Pending any appeal by a convicted person, the Appellate Court may, for reasons to be recorded by it in writing, order that the execution of the sentence or order appealed against be suspended and, also, if he is in confinement, that he be released on bail, or on his own bond."

5. It is stated by learned counsel for the appellant No.1/applicant that since the appellant No.1/applicant has been granted bail, so as a natural corollary of the order, sentence of the appellant No.1/applicant has also been suspended. This prayer has been opposed by learned A.G.A.

6. Learned counsel for the appellant No.1/applicant has cited the following case laws:

1. AIR 2001 Supreme Court 3320; K.C.Sareen V. C.B.I. Chandigarh;

2. AIR 2008 Supreme Court 35; State of Punjab v. Deepak Mattu;

3. 2013 (2) ACR 1701; State of Maharashtra through CBI, Anti Corruption Branch, Mummbai vs. Balakrishna Dattatrya Kumbhar;

4. (2003)12 SCC 434:

7. Learned counsel for the appellant No.1/applicant has also referred a case law ***N. Ramamurthy v. State by Central Bureau of Investigation, A.C.B., Bengaluru in Criminal Appeal Nos.751-752/2019 decided on 26th April, 2019.*** In Para 8 of the said judgement Hon'ble Apex Court held as under :

"8. In both the orders impugned, the High Court, apart from the aforesaid error about the length of imprisonment to be served by the appellant, has also proceeded on entirely irrelevant consideration with reference to the principles related with the prayer for suspension of the operation of the order of conviction that such a suspension could be granted only in rare and exceptional cases and for special reason. With respect, the High Court appears to have missed out the fact that the prayer on behalf of the appellant had only been for suspension of execution of sentence and not for stay or suspension of the operation of the order of conviction. Hence, reference to the decision in Navjot Singh Siddhu (supra) had been obviously inapt on the facts and in the circumstances of the present case. In fact, in the other cited decision in K.C. Sareen v. CBI, Chandigarh: (2001) 6 SCC 584, this Court has indicated that ordinarily, the superior Court should suspend the sentence of imprisonment in the matters relating to the offence under the PC Act, unless the appeal could be heard soon after filing. This Court pointed out the subtle distinction in the proposition for suspension of an order of conviction on one hand and that for suspension of sentence on the other. This Court explained and laid down as under:

"11. The legal position, therefore, is this: though the power to suspend an order of conviction, apart from the order of sentence, is not alien to Section 389(1) of the Code, its exercise should be limited to very exceptional cases. Merely because the convicted person files an appeal in challenge of the conviction the court should not suspend the operation of the order of conviction. The court has a duty to look at all aspects including the ramifications of keeping such conviction in abeyance. It is in the light of the above legal position that we have to examine the question as to what should be the position when a public servant is convicted of an offence under the PC Act. No doubt when the appellate court admits the appeal filed in challenge of the conviction and sentence for the offence under the PC Act, the superior court should normally suspend the sentence of imprisonment until disposal of the appeal, because refusal thereof would render the very appeal otiose unless such appeal could be heard soon after the filing of the appeal. But suspension of conviction of the offence under the PC Act, dehors the sentence of imprisonment as a sequel thereto, is a different matter." 8.1. What we find

from the impugned order dated 29.01.2019 is that, even after taking note of the principles aforesaid, the High Court has apparently missed out the substratum and has not applied the applicable legal principles to the case at hand."

8. In view of the above circumstances, the application is allowed. Sentence awarded by the trial court against the appellant No.1/applicant shall remain suspended during pendency of the appeal.

(2020)02ILR A29
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 19.02.2020

BEFORE

THE HON'BLE ANANT KUMAR, J.

Criminal Appeal No. 1422 of 2019

Ajay Rastogi & Anr. ...Appellants
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Appellants:
Syed Raza Mehdi, Syed Husain Mehdi [S.H.Me

Counsel for the Respondents:
G.A., Mohd. Mateen

A. Criminal Law-Indian Penal Code-Sections 323, 504 and Section 3 (1) (dha) of SC/ST Act,— Appeal against conviction.

It is submitted by learned counsel for the appellants that in the F.I.R. it was mentioned that the complainant was addressed with his caste but when the statement of complainant was recorded during course of investigation, it is stated that abuses were given but it is not mentioned that he was addressed by caste by the appellants. Even the eye witnesses also not stated that the appellants had addressed the complainant by his caste. Other witnesses also not confirmed this fact that the complainant was addressed by caste. (Para 4)

The trial court has not properly appreciated the material on record while passing the summoning order against the appellants. (Para 9)

Criminal Appeal allowed. (E-2)

List of cases cited:-

(2009) 1 SCC (Cri) : Gorige Pentaiahi Vs. St. of A.P. & others

(Delivered by Hon'ble Anant Kumar, J.)

1. Counter affidavit filed on behalf of the State is taken on record.

2. This criminal appeal under Section 14-A (1) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 has been filed for setting aside the entire proceedings of Special Sessions Trial No.115 of 2019, under Sections 323, 504 IPC and Section 3 (1) (dha) of SC/ST Act, pending before the Special Judge, SC/ST Act/Additional Sessions Judge, District Balrampur as well as the summoning order dated 05.07.2019, passed by Special Judge, SC/ST Act/Additional Sessions Judge, Balrampur.

3. It is submitted by learned counsel for the appellant that in this case F.I.R. was lodged by the complainant Shiv Lal to the effect that on 19.02.2019, he had gone in the market. At about 6.30 P.M. he was talking with Om Prakashji. In the meantime, present appellants started giving filthy abuses by addressing caste and started beating. Then anyhow the complainant could be saved by

intervention of several people of the locality.

4. It is submitted by learned counsel for the appellants that in the F.I.R. it was mentioned that the complainant was addressed with his caste but when the statement of complainant was recorded during course of investigation, it is stated that abuses were given but it is not mentioned that he was addressed by caste by the appellants. Even the eye witnesses Om Prakash Mishra also not stated that the appellants had addressed the complainant by his caste. Other witnesses Ashish Kumar Soni, Nitesh Kumar Soni, Sahid, Dhiraj Kumar also not confirmed this fact that the complainant was addressed by caste.

5. It is further stated that as per provisions of Section 3 (1) (dha) of SC/ST Act, it is necessary that *"whoever, not being a member of a Scheduled Caste or a Scheduled Tribe, intentionally insults or intimidates with intent to humiliate a member of a Scheduled Caste or a Scheduled Tribe in any place within public view."* But in the present case during investigation when the statement of eye witnesses and complainant was recorded, he have not stated that the appellants addressed him by caste.

6. It is also stated by learned counsel for the appellant that in the light of the above assertion no case under Section 3 (1) (dha) of SC/ST Act is made out. In support of the contention learned counsel for the appellants have placed reliance upon a case law ***(2009) 1 SCC (Cri) : Gorige Pentaiahi Vs. State of Andhra Pradesh & others*** wherein in paragraph 6 of the Hon'ble Apex Court has held as under :-

"6. In the instant case, the allegation of Respondent 3 in the entire complaint is that on 27-5-2004, the appellant abused them with the name of their caste. According to the basic ingredients of Section 3 (1) (x) of the Act, the complainant ought to have alleged that the appellant-accused was not a member of the Scheduled Caste or a Scheduled Tribe and he (Respondent 3) was intentionally insulted or intimidated by the accused with intent to humiliate in a place within public view. In the entire complaint, nowhere it is mentioned that the appellant-accused was not a member of the Scheduled Caste or a Scheduled Tribe and he intentionally insulted or intimidated with intent to humiliate Respondent 3 in a place within public view. When the basic ingredients of the offence are missing in the complaint, then permitting such a complaint to continue and to compel the appellant to face the rigmarole of the criminal trial would be totally unjustified leading to abuse of process of law."

7. Opposing the appeal, learned A.G.A. has submitted that complainant was addressed by caste in the public view, which was a market place, so, the case under Section 3 (1) (dha) of SC/ST Act is very well made out.

8. However, from the rival contention, this Court finds that though in the F.I.R. it is mentioned that complainant was addressed by caste, as stipulated under Section 3 (1) (dha) of SC/ST Act but in the statements recorded during the investigation, no such assertion has been made by any of the witnesses. Only this much has been stated that complainant was abused but it is not confirm that the complainant was addressed by his caste or

not, which is a mandatory requirement of Section 3 (1) (dha) of SC/ST Act.

9. In view of the above circumstances, to my view the trial court has not properly appreciated the material on record while passing the summoning order against the appellants.

10. Accordingly, the appeal is allowed. The summoning order dated 05.07.2019, passed by the trial court, so far it relates to summoning of the appellants under Section 3 (1) (dha) of SC/ST Act is set aside. However, it is made clear that the trial court shall proceed with the trial relating to other sections in accordance with law.

(2020)02ILR A31
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 18.02.2020

BEFORE

THE HON'BLE ANANT KUMAR, J.

Criminal Revision No. 1423 of 2019

Manish Kanaujia ...Revisionist
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Revisionist:
Indrajeet Shukla, Manoj Kumar

Counsel for the Opposite Parties:
Govt. Advocate

A. Criminal Law-Code of Criminal Procedure,1973-Section 397/401 & Indian Penal Code,1860-Section- 363,366,376 & Protection of Children From Sexual Offence(POCSO) Act,2012 & Juvenile Justice(Care and Protection of Children)Act,2015-Section 102-grant of bail to juvenile-rejection of bail by lower court-However, Section 12(1) provides for bail to a child in conflict with law-juvenile justice Act is meant for minors who are innocent law breakers-accused-juvenile granted bail on his father furnishing a personal bond with two sureties.(Para 3 to 8)

B. Section 12(1) of juvenile justice act provides for If release is likely to bring that person into association with any known criminal or be exposed to any moral, physical or psychological danger or the person's release would defeat the ends of justice. Board shall record the reasons for denying bail.(Para 3)

Criminal Revision allowed.(E-6)

List of Cases Cited:

1. Rahul Patel Vs. St. Of U.P. & Anr.{2018(1) JIC 357 (All)}

2. Gurjeet Singh Vs. St. Of U.P. & Anr.{2018(3) JIC 48 (All)}

3. Om Prakash Vs. St. Of Rajasthan and Anr,(2012) 5 SCC 201

(Delivered by Hon'ble Anant Kumar, J.)

1. This Criminal revision under Section 102 of Juvenile Justice (Care and Protection of Children) Act, 2015 has been filed against the judgment and order dated 20.09.2019, passed by the learned Additional Sessions Judge/Special Judge, POCSO Act, Ambedkar Nagar in Criminal Appeal No.37 of 2019, by which the order dated 30.07.2019, passed by the Juvenile Justice Board, Ambedkar Nagar in Bail Application No.22 of 2019 relating to Case Crime No. 65 of 2019, under Section 363, 366, 376 IPC and Section 3/4 POCSO Act, Police Station Bhiti, District Ambedkar Nagar hsa been confirmed.

2. In this case an F.I.R. was lodged on 20.04.2019 to the effect that on

15.04.2019 prosecutrix had gone to attend her school but when she did not return from the School, a search was made and it was found that she had not gone to her school. Thereafter, from the reliable sources it was informed that named accused persons had managed her to elope with the revisionist. In this case initially F.I.R. was lodged under Section 363, 366 IPC and Section 7/8 of POCSO Act. It is submitted that when the prosecutrix was recovered after 3-4 days her statement under Section 161 Cr.P.C. and 164 Cr.P.C. was recorded wherein no such element was stated that revisionist had taken her forcibly, rather she stated that she had gone to school and on the way co-accused met her and advised her that if she wants to do some job, she might get a good job and she could earn her livelihood.

3. The submission of learned counsel for the revisionist is that the impugned orders passed by the courts below are contrary to the parameters envisaged under the proviso to Section 12(1) of Juvenile Justice (Care and Protection of Children) Act, 2015 in the matter of grant of bail to a juvenile. In short, the submission of learned counsel for the revisionist is to the effect that there is nothing in the social investigation report or in any other evidence on record that may lead to the conclusion that the case of the revisionist falls within any of the three exceptions to the rule in favour of bail to a juvenile under the proviso to Section 12 (1) of Juvenile Justice (Care and Protection of Children) Act, 2015. Section 12 (1) of the Juvenile Justice (Care and Protection of Children) Act, 2015, is quoted as under :-

*"**12. Bail to a person who is apparently a child alleged to be in conflict with law. -** (1) When any person, who is apparently a child and is alleged to have committed a bailable or non-bailable offence, is apprehended or detained by the police or appears or brought before a Board, such person shall, notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974) or in any other law for the time being in force, be released on bail with or without surety or placed under the supervision of a probation officer or under the care of any fit person:*

Provided that such person shall not be so released if there appears reasonable grounds for believing that the release is likely to bring that person into association with any known criminal or expose the said person to moral, physical or psychological danger or the person's release would defeat the ends of justice and the Board shall record the reasons for denying the bail and circumstances that led to such a decision."

4. It is further submitted by learned counsel for the revisionist that the Juvenile Justice Board as well as learned Sessions Judge have not taken into account the report of District Probation Officer. In the report, no adverse remark has been made pertaining to revisionist. It is also not mentioned in the report of District Probation Officer that in case revisionist is released on bail his release is likely to bring him into association with any known criminal or expose him to moral, physical or psychological danger or his release would defeat the ends of justice. Learned counsel for the revisionist has submitted that the finding recorded by the Probation Officer is baseless and without any reason. Revisionist has no criminal history to his credit. Learned counsel for the revisionist has placed reliance upon a case law reported in ***[2018 (1) JIC 357 (All)] :***

Rahul Patel Vs. State of U.P. & another, in which this Court in paragraph 8 has held as under:-

"8. The Apex Court in a catena of judgements has constantly held that gravity of the offence is not a ground to deny bail to a juvenile accused. Unless the conduct of the accused is such to indicate that in all likelihood, after being released on bail, the juvenile-accused will indulge into more crimes. If there are no imminent chances of his repeating the crime, bail to a juvenile should not be ordinarily refused."

5. Learned counsel for the revisionist has further relied upon the case law reported in ***[2018 (3) JIC 48 (All)] : Gurjeet Singh Vs. State of U.P. & another,*** wherein in paragraphs 17 & 18 the Hon'ble Court has held as under :-

"17. A perusal of that evidence would show that it cannot be said that the offence, in fact, has been committed so daringly and outwardly that enlarging the revisionist on bail would defeat the ends of justice. In this connection the guidance of the Hon'ble Supreme Court in the case of ***Om Prakash vs. State of Rajasthan and another,*** *(2012) 5 SCC 201 may be quoted:*

"3. Juvenile Justice Act was enacted with a laudable object of providing a separate forum or a special court for holding trial of children/juvenile by the juvenile court as it was felt that children become delinquent by force of circumstance and not by choice and hence they need to be treated with care and sensitivity while dealing and trying cases involving criminal offence. But when an accused is alleged to have committed a heinous offence like rape and murder or any other grave offence when he ceased to be a child on attaining the age of 18 years, but seeks protection of the Juvenile Justice Act under the ostensible plea of being a minor, should such an accused be allowed to be tried by a juvenile court or should he be referred to a competent court of criminal jurisdiction where the trial of other adult persons are held.

23. ..... Similarly, if the conduct of an accused or the method and manner of commission of the offence indicates an evil and a well planned design of the accused committing the offence which indicates more towards the matured skill of an accused than that of an innocent child, then in the absence of reliable documentary evidence in support of the age of the accused, medical evidence indicating that the accused was a major cannot be allowed to be ignored taking shelter of the principle of benevolent legislation like the Juvenile Justice Act, subverting the course of justice as statutory protection of the Juvenile Justice Act is meant for minors who are innocent law breakers and not accused of matured mind who uses the plea of minority as a ploy or shield to protect himself from the sentence of the offence committed by him."

18. There is no such finding or otherwise any material on record that the revisionist has committed the offence that indicates more towards the matured skill of an accused than an act of the child as held by their Lordships in Om Prakash (supra). There is nothing about the manner and method of the commission of the offence that indicates a well planned design. In fact, not much about the circumstances under which the alleged offence took place, where it was committed and by whom, has been dwelt upon. This matter is to be determined in the pending case before the Juvenile Justice Board.

There is, however, in the opinion of the Court no such ground disentitling the juvenile to bail under the proviso to Section 12(1) of the Act so as to keep him deprived of the company of his family which is the best school for any child. It is also not the case that it is a family of criminals and delinquents. The revisionist's family is a normal, average and happy family as the social investigation report would show, though they may not be an affluent family."

6. It is also submitted that the revisionist is in custody since 24.04.2019 and the trial may take some more time.

7. In view of the above circumstances, the revision is allowed. Impugned orders dated 20.09.2019, passed by the learned Additional Sessions Judge, Court No.1/Special Judge, POCSO Act, Ambedkar Nagar in Criminal Appeal No.37 of 2019 (Manish Kanaujia Vs. State of U.P. & another) and order dated 30.07.2019, passed by the Juvenile Justice Board, Ambedkar Nagar in Bail Application No. 22 of 2019, relating to Crime No. 65 of 2019, under Sections 363, 366, 376 IPC and Section 3/4 POCSO Act, Police Station Bhiti, District Ambedkar Nagar are hereby set aside. The bail application of the revisionist is allowed.

8. Let the revisionist (Manish Kanaujia) through his natural guardian/father Ram Bakash be released on bail in Crime No. 65 of 2019, under Sections 363, 366, 376 IPC & Section 3/4 POCSO Act, Police Station Bhiti, District Ambedkar Nagar on his father furnishing a personal bond with two sureties in the like amount to the satisfaction of the Juvenile Justice Board, Ambedkar Nagar, subject to the following conditions:

(i) that the natural guardian/father will furnish an undertaking that upon release on bail the juvenile will not be permitted to come into contact or association with any known criminal or be exposed to any moral, physical or psychological danger and further that the father will ensure that the juvenile will not repeat the offence.

(ii) that the father will further furnish an undertaking to the effect that the juvenile will be placed in a school and encouraged to his studies and not allow to waste his time in unproductive and mere recreational pursuits.

(iii) The revisionist and his father will report to the District Probation Officer on the first Monday of every month with effect from the first Monday of the month next after release from custody, and, if during any calendar month the first Monday falls on a holiday then on the following working day.

(iv) The District Probation Officer will keep strict vigil on the activities of the revisionist and regularly draw up his social investigation report that would be submitted to the Juvenile Justice Board, Ambedkar Nagar on such periodical basis as the Juvenile Justice Board determines.

(2020)02ILR A34
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 14.11.2019

BEFORE
THE HON'BLE NAHEED ARA MOONIS, J.
THE HON'BLE ANIL KUMAR-IX, J.

Crl. Misc. Writ Petition No. 23385 of 2019

Sher Singh & Anr. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Ajay Sengar

Counsel for the Respondents:
A.G.A., Sri Vijay Singh Sengar

A. Criminal Law-Indian Penal Code,1860-Sections 363, 366, 506, 328,342, 354-Quashing of FIR-issuance of non-bailable warrant and proceedings u/s 82 Cr.P.C. can be exercised even in the investigation when the accused were absconding after lodging FIR-investigating officers raided successively for the arrest of accused-under compelling circumstances, investigating officer moved application to issue non-bailable warrant as the accused were trying to prolong the investigation-Magistrate is fully competent to issue warrant to apprehend the culprit even in aid of investigation-Hence, dismissed.(Para 7 to 12)

B. Criminal Law-section 73 Cr.P.C. gives power to Magistrate to direct a warrant for the person who is accused of a non-bailable warrant and is evading arrest.(Para 14)

In the instant case accused were not paying heed to summons, Magistrate resorted to issuance of non-bailable warrant of arrest after being satisfied that the accused/petitioners are avoiding to appear before the investigating officer intentionally.(Para 16)

Crl. Misc. writ petition dismissed. (E-6)

List of Cases Cited:-

1. State thru CBI Vs. Dawood Ibrahim Kaskar & Ors.,(2000) 10 SCC 438

(Delivered by Hon'ble Naheed Ara Moonis, J. & Hon'ble Anil Kumar-IX, J.)

1. Heard Shri Ajay Sengar, learned counsel for the petitioners, Shri Vijay Singh Sengar, learned counsel appearing on behalf of respondent No. 3 and learned Additional Government Advocate for the State.

2. By means of the instant writ petition, the petitioners have prayed for quashing of the impugned order dated 17.09.2019 passed by the learned Chief Judicial Magistrate, Jalaun at Orai in Case Crime No. 00141 of 2019, under Sections 366, 506, 328, 354 IPC, Police Station Nadigaon, district Jalaun. It is further prayed that FIR in the aforesaid case may also be quashed.

3. The brief facts of the case are that on 30.5.2019, an FIR was lodged under Sections 363/366 IPC by respondent No. 3 in respect of the occurrence dated 29.5.2019 against the petitioners that they came on motorcycle and taken away his niece. The persons who had witnessed the occurrence, chased the accused persons and ultimately petitioner No. 1, Sher Singh was nabbed, who confessed that he along with Vivek have taken away the victim. He further disclosed that he had left both Vivek and victim at the railway station on his motorcycle.

4. The victim was recovered and her statement was recorded under Section 164 Cr.P.C. on 13.6.2019 before the concerned Magistrate wherein she has disclosed that accused Vivek and Sher Singh had taken her away on motorcycle at pistol point and threatened to kill her and her brother in case she makes hue and cry. They took her to Auraiya on motorcycle and therefrom she was taken to Delhi on roadways bus by Vivek Kumar. On the way to Delhi the prosecutrix was given cold drink and after consuming it, she became unconscious. She further disclosed that at Delhi Ranu, Gullu and Govind Singh also joined accused Vivek and they were planning to

sell her. At Delhi accused Vivek Singh had molested her. She also stated that as to how she reached the police is not known to her as at Delhi accused-Vivek has given some intoxicant to her and thereafter she became unconscious.

5. On the basis of the aforesaid statement of the victim, the investigating officer added sections, 366, 506, 328, 342, 354 IPC in the aforesaid case.

6. Learned counsel for the petitioners submits that the first information report lodged against the petitioners is absolutely false and concocted. There is no credible evidence with respect to the abduction of the niece of the first informant.

7. Learned counsel for the petitioners further submits that learned Magistrate has passed the impugned order on the basis of the application moved by the investigating officer that petitioners are not cooperating with the investigation. It is also submitted that investigation is still continuing and no report has been submitted under Section 173(2) Cr.P.C. and hence issuance of non-bailable warrant against the petitioner during the pendency of investigation is liable to be quashed. In support of his submission, learned counsel for the petitioner has relied upon the decision of the Hon'ble Apex Court in **State through CBI Vs. Dawood Ibrahim Kaskar and others,** (2000) 10 SCC 438, wherein Hon'ble Supreme Court has held that power of issuance of non-bailable warrant can be exercised by the learned Magistrate for appearance of accused before the Court and not before the police in aid of investigation.

8. Learned counsel for the petitioners also submitted that on the strength of aforesaid order of Hon'ble Supreme Court, in similar matter, the coordinate Bench of this Court vide order dated 30.3.2018 has granted interim order in favour of the accused in Criminal Misc. Writ Petition No. 7833 of 2018.

9. Per contra, learned Additional Government Advocate has contended that impugned order has been passed by the learned Magistrate issuing non-bailable warrant after taking into account the fact that petitioners were absconding after lodging of the FIR since 16.8.2019 and the investigating officer has raided the house of the petitioners on ten dates for the arrest of the petitioners as indicated in the application moved by the investigating officer before the court concerned. Hence, under compelling circumstances the investigating officer has moved the application on 16.9.2019 requesting the court to issue non-bailable warrant and for proceedings under Section 82 Cr.P.C.

10. Learned Additional Government Advocate further submits that from the perusal of FIR, prima facie cognizable offence is made out against the petitioner. Hence, the FIR does not deserve to be quashed.

11. Perusal of the impugned order indicates that there was no interim order in favour of the petitioners and they were trying to prolong the investigation, who were involved in serious offence of kidnapping and hence learned Magistrate has rightly exercise his power issuing non-bailable warrant against them.

12. In **Dawood Ibrahim Kaskar (Supra) Dawood Ibrahim Kaskar (Supra),** police, after completing investigation, submitted composite charge

sheet on 04.11.1993 before the designated Court against 198 persons showing 45 of them as absconders for commission of offence. However, on 11.11.1993, Government of India directed further investigation by the CBI. During the course of investigation, on 24.7.1995 CBI arrested one Mohd. Salim Mira Moiuddin Shaikh alias Salim Kutta, one of the absconders nominated in the charge sheet. In his confessional statement, he disclosed that respondent Nos. 2 to 7 therein had also taken active part in commission of conspiracy. On the basis of the confessional statement of Salim Kutta, police raided their hideouts to arrest them, but in vain. Thereafter CBI moved an application before the Designated Court for issuance of non-bailable warrant for their arrest, which was rejected by the Designated Court. In appeal Hon'ble Supreme Court held that warrant can be issued only for the production of the accused for appearance before the Court and not in aid of investigation.

13. In **Dawood Ibrahim Kaskar (Supra)** the investigation was completed and charge sheet submitted, whereas in the instant case, the investigation is still continuing and accused is avoiding arrest and not appearing before the police for getting his statement recorded and not cooperating with the investigation.

14. For better appreciation of the case of the petitioners it would be apposite to quote Section 73 Cr.P.C., which reads as under"

Warrant may be directed to any person:- (1) The Chief Judicial Magistrate or a Magistrate of the first class may direct a warrant to any person within his local jurisdiction for the arrest of any escaped convict, proclaimed offender or of any person who is accused of a non-bailable offence and is evading arrest.

(2) Such person shall acknowledge in writing the receipt of the warrant and shall execute it if the person for whose arrest it was issued, is in, or enters on, any land or other property under his charge.

(3) When the person against whom such warrant is issued is arrested, he shall be made over with the warrant to the nearest police officer, who shall cause him to be taken before a Magistrate having jurisdiction in the case, unless security is taken under Section 71."

15. From the perusal of the aforesaid provisions, it is apparent that if during investigation the investigating officer intends to arrest the person accused of the offence, he has to seek for and obtain a warrant of arrest from the Magistrate. The Magistrate is fully competent to issue non-bailable warrant to apprehend recalcitrant person who is accused of non-bailable offence and is evading arrest. In this case, the learned Magistrate has exercised his judicial discretion considering the gravity of the offence as well as taking into account the fact that petitioners are not cooperating with the investigation as successively the police had raided their premises so that they may be questioned in details regarding various facet of commission of crime. Hence, it was necessary to curtail their freedom in order to enable the investigating officer to proceed without any hindrance. Ordinarily the arrest is a part of process of investigation. As statement of the victim has been recorded showing the involvement of the petitioners in the commission of the crime, in the opinion of the investigating officer it was necessary

to effectuate their arrest and in doing so he has committed no fault in moving before the Court to obtain non-bailable warrant or initiate proceedings under Section 82 Cr.P.C.

16. No doubt, personal liberty of a person is paramount and the Courts are not expected to issue warrant in casual manner without proper application of mind. In the instant case when the petitioners were not paying any heed to the summons, learned Magistrate has resorted to issuance of non-bailable warrant of arrest after being fully satisfied that the petitioners are avoiding to appear before the investigating officer intentionally. Instead of appearing before the investigating officer, it is the audacity of the petitioners to have approached before this court to quash the order of non-bailable warrant which is highly contemptible also.

17. Thus, we see no ground to quash the order dated 17.09.2019 passed by the learned Chief Judicial Magistrate, Jalaun at Orai or to quash the impugned FIR in Case Crime No. 00141 of 2019, under Sections 366, 506, 328, 354 IPC, Police Station Nadigaon, district Jalaun. The writ petition sans any merit is accordingly dismissed.

18. However, it is provided that in case the petitioners appear before the court concerned within four weeks from today and apply for bail in the aforesaid case, their prayer for bail shall be considered and disposed of in accordance with law.

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(2020)02ILR A38
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 08.01.2020
BEFORE
THE HON'BLE RAMESH SINHA, J.
THE HON'BLE AJIT KUMAR, J.

Crl. Misc. Writ Petition No. 24908 of 2018

Silpa Devi Patel ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Mamta Sen, Sri Kailash Pati Singh Yadav, Sri Rakesh Prasad

Counsel for the Respondents:
A.G.A., Swati Agrawal

A. Criminal Law-Indian Penal Code, 1860-Sections 323,376,504,506,452 & Prevention of Children from Sexual Offence Act, 2012-Sections 3/4 –challenge to- quashing of order passed by Secretary,U.P. Government for transferring the investigation to the C.B.C.I.D.-while police already submitted chargesheet-cognizance taken of –trial is pending-accused availed various remedy available from high court to Apex court-when he failed, he applied for transfer the investigation agency just to avoid the trial-it is the trite law that accused persons can not choose as to which investigation agency must investigate the alleged offence-accused has no right with reference to the matter of investigatin or mode of prosecution-Hence,dismissed.(Para 8 to 12)

Crl. Misc. writ petition dismissed. (E-6)

List of Cases Cited:-

1. Narmada Bai Vs. St. Of Guj. & Ors.,(2011) 5 SCC 79

2. Sajiv Rajendra Bhatt Vs. UOI & Ors, (2016) 1 SCC 1

3. Romila Thapar & Ors. Vs. UOI & Ors.,W.P.No, 260 of 2018

(Delivered by Hon'ble Ramesh Sinha, J. & Hon'ble Ajit Kumar, J.)

1. Sri Rakesh Prasad has filed vakalatnama on behalf of the petitioner

which is taken on record. He states that he has taken no objection from Ms. Mamta Sen earlier counsel for the petitioner.

2. Heard Sri Rakesh Prasad, learned counsel for the petitioner, Ms. Swati Agrawal, learned counsel appearing for respondent no. 6, Sri Gaurav Pratap Singh, learned A.G.A. for the State and perused the record.

3. By means of present writ petition, the petitioner has prayed for quashing the order dated 20.7.2018 passed by respondent no. 2 transferring the investigation to the C.B.C.I.D. in case crime no. 217 of 2016 under sections 323, 376, 506 I.P.C. and 3/4 POCSO Act, police station Utraon, District Allahabad and case crime no. 255 of 2016 under sections 323, 504, 506, 452 I.P.C., police station Utraon, District Allahabad.

4. Brief facts of the case are that a First Information Report has been lodged by the petitioner against accused-respondent no. 6 Lal Chand Patel which was registered as case crime no. 217 of 2016 under sections 323, 376, 506 I.P.C. and 3/4 POCSO Act at police station Utraon, District Allahabad and after investigation, the police submitted charge-sheet against accused-respondent no. 6 on 13.10.2016 and the Additional District Judge-V has taken cognizance of the offence on 14.11.2016 and the trial is pending against him.

5. The argument advanced by learned counsel for the petitioner is that at the behest of accused-respondent no. 6 further investigation of the case crime no. 217 of 2016 under sections 323, 376, 506 I.P.C. and 3/4 POCSO Act, police station Utraon, District Allahabad as well as case crime no. 255 of 2016 under sections 323, 504, 506 I.P.C. and 3/4 POCSO Act, police station Utraon, District Allahabad has been transferred to C.B.C.I.D. by respondent no. 2 Secretary U.P. Government, Lucknow by passing the impugned order dated 20.7.2018 though the civil police has already submitted charge-sheet against accused-respondent no. 6 in case crime no 217 of 2016 which was lodged by the petitioner for the aforesaid offence and the court below has taken cognizance on the same and summoned the accused-respondent no. 6 to face trial. He submits that as the accused-respondent no. 6 is avoiding the trial, a non bailable warrant has been issued against him by the trial court on 24.3.2017. He submits that the accused-respondent no. 6 had challenged the charge-sheet of case crime no. 217 of 2016 before this Court in Crl. Misc. 482 Cr.P.C. Application No. 11551 of 2017 which was disposed of by this Court directing the accused-respondent no. 6 to obtain bail. Thereafter, he preferred Crl. Misc. Writ Petition No. 8918 of 2017 which was also disposed of on 23.5.2017 in which this Court directed that the investigation of the case be carried out in a fair manner independently and police report be submitted within four months. He contended that another 482 Cr.P.C. Application No. 11551 of 2017 was filed by respondent no. 6 in which he prayed for staying of order dated 11.8.2017 issued under section 82 Cr.P.C. by the trial court in case crime no. 217 of 2016 for the aforesaid offence which too was disposed of by this Court on 24.8.2017 directing the applicant to surrender before the court concerned and apply for bail. He argued that against the order dated 18.4.2017 passed in Crl. Misc. 482 Cr.P.C. Application No. 11551 of 2017, the accused-respondent no. 6 preferred S.L.P.

(Criminal) No. 7367 of 2017 before the Apex Court which too was dismissed and accused-respondent no. 6 was given liberty to move regular bail before the trial court concerned, if so advised, but the accused-respondent no. 6 did not appear before the trial court and got the investigation of the case transferred by the State Government just to delay the trial. He urged that the impugned order which has been passed transferring the investigation of the case to C.B.C.I.D. shows that the respondent no. 6 has only alleged that he has been falsely implicated in the present case on account of some inimical relationship with S.I. Narendra Pratap. He next submitted that respondent no. 6 is named in the F.I.R. by the petitioner and further in the statement of the victim recorded under sections 164 Cr.P.C. it has been categorically stated that the respondent no. 6 has committed rape on her. The cognizance of the offence had already been taken by the trial court and the trial against the accused-respondent no. 6 is pending and the impugned order passed at the behest of the accused-respondent no. 6 is just to escape the criminal liability, hence the same be quashed.

6. *Per contra,* learned counsel for the respondent no. 6 has vehemently opposed the prayer for quashing of the impugned order and submitted that respondent no. 6 is a Journalist. He has protested against the illegal activities of S.I. Narendra Pratap as he in collusion of with the father of the victim was getting the victim married to one Pramod Patel though she was a minor girl. She further submitted that against the illegal activities, the respondent no. 6 and other villagers have demonstrated before the S.S.P. Allahabad and because of same he has been falsely implicated in the present case. She submits that respondent no. 6 had also moved an application before the court concerned under section 156 (3) Cr.P.C. for registering an F.I.R. against S.I. Narendra Pratap to which learned counsel for the petitioner submits that the said application under section 156 (3) Cr.P.C. moved by respondent no. 6 was rejected by the court concerned. She could not dispute the fact that charge-sheet has been submitted against the respondent no. 6 in case crime no. 217 of 2016 for the offence in question and the trial court had taken the cognizance on the same and trial is pending against him.

7. Considered the submissions advanced by learned counsel for the parties and perused the record.

8. It is an admitted fact that an F.I.R. was lodged against respondent no. 6 under sections 323, 376, 506 I.P.C. and 3/4 POCSO Act registered as case crime no. 217 of 2016 on 20.7.2018 and charge-sheet has been submitted on which the court had taken cognizance and the trial is pending and when he failed to appear before the trial court non bailable warrant has been issued against respondent no. 6, who in turn has challenged the charge-sheet of case crime no. 217 of 2016 before this Court by filing a 482 Cr.P.C application which was disposed of directing him to appear before the competent court and obtain bail but he did not comply with the said order and challenged the same before the Apex Court by filing S.L.P. (Criminal) which too was dismissed with a direction to the respondent no. 6 to obtain regular bail. The act and conduct of respondent no. 6 goes to show that he is avoiding the trial of the present case on one pretext or the other. Moreover, the impugned order transferring the investigation of case crime

no. 217 of the 2016 and case crime no. 255 of 2016 shows that respondent no. 2 only consider the false implication of respondent no. 6 by the petitioner in case crime no. 217 of 2016 and had transferred the investigation. There appears to be no sound reason given by respondent no. 2 for transferring the investigation of the aforesaid cases. Moreover, the respondent no. 6, who is an accused has no right to choose the investigating agency as has been laid down by the Apex Court in catena of decisions such as ***Narmada Bai vs. State of Gujrat and others*** *reported in* ***2011 (5) SCC 79.*** In para-64 of the said judgment, the Apex Court has observed as under:-

" 64..... It is trite law that accused persons do not have a say in the matter of appointment of an investigation agency. The accused persons cannot choose as to which investigation agency must investigate the alleged offence committed by them."

9. Further in the case of ***Sajiv Rajendra Bhatt vs. Union of India and others*** reported in ***2016 (1) SCC 1,*** in para-68, the Apex Court has observed as under:-

"68. The accused has no right with reference to the manner of investigation or mode of prosecution. Similar is the law laid down by this Court in Union of India vs. W.N. Chadha, Mayawati v. Union of India, Dinubhai Boghabhai Solanki v. State of Gujrat, CBI v. Rajesh Gandhi, Comptition Commission of India v. SAIL and Janta Dal v. H.S. Choudhary."

10. Recently the Apex Court in the case of ***Romila Thapar and others vs. Union of India and others*** in ***Writ Petition (Criminal) No. 260 of 2018*** decided on 28.09.2018 following its earlier judgment has observed in para-27 of the said judgment as under:-

" ..... it is clear that the consistent view of this Court is that the accused cannot ask for changing the Investigating Agency or to do investigation in a particular manner including for Court monitored investigation. .....".

11. In view of the above, the impugned order dated 20.7.2018 is hereby quashed.

12. The writ petition is dismissed.

13. The trial court is directed to proceed with the trial of the present case and conclude the same expeditiously.

(2020)02ILR A41
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 21.01.2020

BEFORE

THE HON'BLE ARVIND KUMAR MISHRA-I, J.
THE HON'BLE GAUTAM CHOWDHARY, J.

Government Appeal Defective No. 119 of 2018

State of U.P. ...Appellant
Versus
Rajbeer & Anr. ...Opposite Parties

Counsel for the Appellant:
A.G.A.

Counsel for the Opposite Parties:

A. N.D.P.S Act-Ss.21/22-Arms Act-ss. 25/27-Sections 147, 148, 149, 307 IPC-Seeking leave to appeal-challenging acquittal-of four accused-allegedly stole a jeep-to commit loot-by administering noxious powder-falsely implicated-no testimony-non-compliance of-specific provisions of NDPS Act-no evidence-proving case beyond reasonable ground-acquitted-judgement-unless-erroneous & perverse-cannot be reversed-no illegality-leave to appeal-refused-hence Dismissed.

Held, it is established criminal jurisprudence that in case of acquittal where the finding of acquittal is grounded and based on material on record the same need not be interfered by Appellate Court. May be that the other alternate view is possible, but the view that favours the accused would be preferred. For the reasons aforesaid, we don't find it reasonable and cogent to interfere with the judgement and order of acquittal dated 29.07.2017. Consequently, finding of acquittal recorded by the trial court is hereby affirmed by us.
In the final count leave to appeal is refused and this appeal loses its force and the same is dismissed.

Writ Petition dismissed. (E-8)

(Delivered by Hon'ble Arvind Kumar Mishra-I, J. &
Hon'ble Gautam Chowdhary, J.)

1. Heard learned A.G.A. for the appellant- State of U.P. and perused the record as available on the file.

2. By way of instant Government Appeal the appellant (State) is seeking leave to appeal against the judgment and order of acquittal dated 29.07.2017 passed by Additional Sessions Judge, Court No.02, Etawah in concerned Special Case No.51 of 2011 (State of U.P. Vs. Rajveer) concerning case crime no.275 of 2011, under section 21/22 N.D.P.S. Act, Sessions Trial No.21 of 2012 (State of U.P. Vs. Bhupendra Singh, Sanjeev @ Sanju and Rajveer) arising out of Case Crime No.274 of 2011, under sections 147, 148, 149, 307 I.P.C., and Sessions Trial No.22 of 2012 (State of U.P. Vs. Bhupendra Singh) arising out of Case Crime No.276 of 2011, under section 25/27 Arms Act, P.S.- Bakewar, District-Etawah.

3. In all the aforesaid sessions trials charges were framed under the relevant provisions of the 21/22 N.D.P.S. Act, under sections 147, 148, 307 r/w 149 I.P.C. and under section 25/27 of the Arms Act and all the aforesaid accused/ respondents were acquitted of all the aforesaid charges framed against them.

4. For proper adjudication of this case the facts relevant as discernible from the record appear to be that some police inquiry followed after some tip off information was received by the police on 5.8.2011 that some miscreants have looted one Bolero Jeep, red colour No. MH 14 BC 6923 and in case checking is done the miscreants will be napped. This tip off information led to the aforesaid incident allegedly committed on Phuphoond crossing within police station Auraiya. The tip-off information was also submitted to the effect that driver of the vehicle had also been abducted. The eagle-1 and eagle-2 mobile vans of the police were asked to come on the Bakewar crossing. Whereupon the police personnel and the aforesaid eagle mobile police met on the Bakewar crossing, they consulted each other and made personal search of each other in order to ascertain whether any untoward incriminating material is in possession of the police party or not. After ensuring safety that no police personnel

possesses any incriminating material all waited over there for sometime when some Bolero vehicle, red colour was seen coming towards Mahewa crossing. The police personnel asked by making signs to stop the vehicle but instead of stopping it, the driver tried to speed away when the vehicle was surrounded by the police on the spot and in the process certain miscreants got down from the vehicle and uttered words- "मारो सालों को नहीं तो पकडे जाओगे"- and several rounds of fire was opened on the spot by the accused upon the police party, however, no one was hurt in the firing and (after surrounding) the miscreants were napped by the police party around 00:20 in the night at the culvert of 'Baheda' canal. Two miscreants escaped from the scene. On inquiry being made from the apprehended accused three accused spelled their names as Bhupendra Singh s/o Arvind Singh Chauhan, Sanjeev @ Sanju s/o Bake Dayal Dohre and the third one named himself as Rajveer s/o Subedar Sengar. Rajveer also told that he is possessing some noxious powder which they used to administer upon victims and commit loot. Upon this information the accused Rajveer was offered choice to be searched by a gazetted officer but Rajveer expressed confidence in the police party itself and willing to be searched by the police. Therefore search was made whereby some noxious powder weighing approximately 110 gms was recovered from the possession of the accused Rajveer and upon search being carried out inside the vehicle one person whose hands and legs were tied was found lying in between the space the first and the second row of the seat of the vehicle. Upon being asked this person named himself Krishna Murari Gupta @ Kallu s/o Rajendra Kumar Gupta resident of district Jalaun. He claimed himself to be the driver of the vehicle and to have been administered noxious powder which was kept by the miscreants and he was abducted and loot was committed upon him. Consequently, the formalities were completed by the police party on the spot and arrest and seizure memo was prepared. The informant Rakesh Bharti, the then S.H.O. of police station Bakevar lodged a written report Ex. Ka-1 at case crime no.274/ 2011, under sections 147, 148, 149, 307 I.P.C. and as case crime no.276/ 2011, under section 25/ 27 Arms Act and as case crime no.275/ 2011, under section 21/22 N.D.P.S. Act. Consequently, the relevant entries were noted down at the relevant Check F.I.R. and relevant entry was made in the concerned G.D. Investigation of the aforesaid cases was entrusted to S.I. Jagmohan Singh who prepared the site plan and recorded the statement of various witnesses and after completing the investigation filed charge-sheet against Bhupendra Singh, Sanjeev @ Sanju and Rajveer, under sections 147, 148, 149, 307 I.P.C. and under section 25/ 27 Arms Act concerning case crime no.276/ 2011 and charge-sheet against Bhupendra Singh, under section 21/ 22 N.D.P.S. Act concerning case crime no.275/ 2011. Pursuant thereto, the matter was committed to the court of sessions where all the accused were heard on the point respective charges. Accordingly, charges were framed against the accused, the same were read over and explained to them but they denied the charges. They opted to be tried whereupon prosecution produced in all four witnesses P.W.1 is the informant Rakesh Bharti, P.W.2 is constable Sonelal Mathur, P.W.3 is constable Kamlendra Singh, P.W.4 is S.I. Jagmohan Singh- the investigating officer. Apart from above witnesses the driver of the Bolero Jeep was examined as C.W.1 (Krishna Murari Gupta). Apart from that

the prosecution also proved various documents which have been exhaustively referred in the judgement of the trial court and need not be repeated at this stage by us. After recording statement of the aforesaid witnesses, the testimony for the prosecution was closed and the statement of the accused was recorded under section 313 Cr.P.C., all the accused claimed to have been falsely implicated in this case.

5. No evidence whatsoever was led by the defence. Consequently, the matter was considered on its merit and the aforesaid judgement of acquittal was passed on 29.7.2017. Resultantly, this appeal.

6. Claim is that the judgement and order of acquittal dated 29.7.2017 is erroneous and perverse in the face of the finding of acquittal recorded by the trial court to the ambit by observing that the case of the prosecution was not proved beyond doubt, whereas the fact is that 110 gms of diazepam was recovered from the possession of the accused Rajveer and the informant P.W.1 himself has proved the fact of police encounter and the consequent arrest and recovery from the accused and the case is well proved under section 307 I.P.C. Thus the case of firing on the police party was proved beyond doubt but the trial court did not believe the same and based on conjectural analogy of evidence recorded whimsical finding on fact of police encounter and the firing done by the miscreants. It appears that the driver C.W.1, Krishna Murari Gupta has been won over by the accused and he did not come out with the truthful version of the incident though crime was committed in dare devil manner by the accused against him by abducting him.

7. We have considered the submissions so made and the entirety of the case apart from the testimony of the witnesses. No doubt the allegations are specific but insofar as the compliance of the relevant provisions of the N.D.P.S. Act regarding search and ensuring safe upkeep of the recovered material/ contraband is concerned the same was not properly done and not duly complied. Thus in view of the violation of specific provisions of the N.D.P.S. Act the case of the prosecution is not proved within the four corners of charge under section 21/ 22 of the N.D.P.S. Act. Similarly, while we scrutinize carefully the testimony of the driver of the vehicle as C.W.1 we arrive at conclusion that the very commission of the offence has been denied by him. Insofar as the act of abduction of driver of the Bolero Jeep and loot of Jeep (Bolero) is concerned, the entire incident as per the testimony of C.W.1 is placed under dark shadow of doubt and these facts become opaque. He has not supported the prosecution version regarding any loot having been committed by the accused against him. This being the central theme, the trial court was justified while it disbelieved the entire story and acquitted all the accused of all charges. No other best alternate view of the alleged occurrence is possible. It cannot be said from any angle that the finding of acquittal is not based on material on record.

8. It is established criminal jurisprudence that in case of acquittal where the finding of acquittal is grounded and based on material on record the same need not be interfered by Appellate Court. May be that the other alternate view is possible, but the view that favours the accused would be preferred. For the reasons aforesaid, we don't find it reasonable and cogent to interfere with the judgement and order of acquittal dated 29.07.2017. Consequently, finding of acquittal recorded by the trial court is hereby affirmed by us.

9. In the final count leave to appeal is refused and this appeal loses its force and the same is **dismissed**.

(2020)02ILR A45
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 27.01.2020

BEFORE

THE HON'BLE ARVIND KUMAR MISHRA-I, J.
THE HON'BLE GAUTAM CHOWDHARY, J.

Government Appeal No. 2949 of 2003

State of U.P. ...Appellant
Versus
Dharmendra Singh & Ors. ...Respondents

Counsel for the Appellant:
A.G.A.

Counsel for the Respondents:

A. Criminal Law-Indian Penal Code-Ss. 498A & 304-B-Leave to appeal-against order of acquittal-no independent corroboration found-testimony not trustworthy-no evidence found-presumption of innocence-no latent or patent infirmity-in the judgment of the Trial Court-Appeal Dismissed.

B. Held, it would be relevant to take note of fact that we after careful scrutiny of the impugned judgment discover no perversity in the judgment of trial court. We are fully conscious of fact that presumption of innocence is available to the accused even up to this appellate stage which got strengthened by order of acquittal in favour of accused by the trial court. Thus the view taken by the trial court in recording finding of acquittal is just and reasonable. Even if other view is possible it would not be proper to substitute our own view in place of finding recorded by the trial court. This approach is to be avoided and the view as taken by the trial court has got to be affirmed. Hon'ble Apex Court has observed that while dealing with an appeal against acquittal the court should keep in view the presumption of innocence in favour of the accused as the same gets fortified by his acquittal if the view taken by the trial court is well grounded and based on material on record. We are, accordingly, not inclined to interfere with the judgment and the order of acquittal recorded by the trial Judge in respect of the accused-respondents. The instant appeal is liable to be dismissed. Leave to appeal is thus refused. Accordingly, the instant appeal is dismissed.

Govt. Appeal dismissed. (E-8)

List ofcases cited: -

1. Bhadragiri Venketa Ravi Vs. Public Prosecutor High Court of A.P., Hyderabad 2013 (4) Supreme 450.

2. Kanhaiya Lal and others Vs. State of Rajasthan AIR 2013 SC 1940

(Delivered by Hon'ble Arvind Kumar Mishra-I, J.
Hon'ble Gautam Chowdhary, J.)

1. Heard learned A.A.G. for the State-appellant and perused the material on record.

2. The application has been filed by the State-appellant with the prayer that leave to appeal may be granted against the judgement and order dated 23.01.2003 passed by Additional Sessions Judge, Court No.2, Agra, in Sessions Trial No.925 of 1999, State Vs. Dharmendra and others arising out of Case Crime No.28 of 1999, under Sections 498A, 304B, 201 IPC, Police Station Basoni, District Agra whereby the accused-respondents Dharmendra Singh, Hawaldar Singh and Chameli Devi have been acquitted of charge under Sections 498A,

304B I.P.C. whereas accused-respondents Dharmendra Singh, Raj Kumar, Ravindra Singh, Santosh and Nand Kishore have been acquitted of charge under Section 201 I.P.C.

3. The prosecution version, as is apparent from the impugned judgment makes it evident that the written report was lodged by the informant Promod Kumar against the present accused-respondents under Section 498, 304B, 201 I.P.C. alleging therein that he got his sister Somwati wedded Dharmendra Singh on 11.07.1994. In the marriage, he gifted Rs.40000/-, television, stitching machine, fan, double bed, sofaset, gas oven, wrist watch, wall watch and utensils etc. After passage of time, a scooter was demanded from in-laws side. His sister was subjected to cruelty on account of non-fulfillment of the demand of scooter. Therefore, the informant's sister being perplexed, wrote a letter to her father. On receipt of the letter, when informant's father went there, she told the entire incident who took her to his home and got her educated up to class XII. In the meanwhile, though the in-laws side came to take his sister giving assurance that there will be no problem but his sister was subject to cruelty because of non-fulfillment of demand of scooter, the oral as well as written information whereof was given by his sister. Thereafter, on 27.06.199, Dharmendra, Hawaldar Singh and Chameli wife of Hawaldar Singh murdered his sister and caused disappearance of the body of his sister. This report is Ext. Ka-5.

4. Record further reveals that contents of the written information were taken down in the concerned Check FIR at Case Crime No.28 of 1999 under Sections 498A, 304B, 201 I.P.C., at Police Station Basoni, District Agra. Check FIR is Ext. Ka-7. On the basis of entries so made in the check F.I.R., a case was registered against the accused-respondents in the relevant G.D. at aforesaid case crime number at Police Station Basoni, under aforesaid sections of I.P.C. against accused-respondents. General diary copy is Ext. Ka-8.

5. The investigation ensued and the Investigating Officer took note of all materials, completed investigation and filed charge sheet (Ext. Ka-11) against the accused-respondents under Section 498A, 304B, 201 I.P.C., whereupon the case was committed to the court of Sessions for trial.

6. In the trial, accused-respondent Dharmendra Singh was charged for offence under sections 498A, 304B, 201 I.P.C., accused-respondents Hawaldar Singh and Chameli Devi were charged for offence under Sections 498A and 304B I.P.C. whereas accused-respondents Raj Kumar, Ravindra Singh, Santosh and Nand Kishore were charged for offence under Sections 201 I.P.C. Charge was read over and explained to them, to which they pleaded not guilty and claimed to be tried.

7. The prosecution in an endeavour to establish the above charge examined Pramod Kumar PW-1, Hem Singh PW-2, Smt. Shanti PW-3, Head Constable Ramveer Sharma PW-4, and the Investigating Officer, Ghanshyam Chaurasiya PW-5 besides proving relevant papers which have been elaborately dealt with in the impugned judgment by the trial court.

8. No more evidence was adduced on behalf of the prosecution. Therefore,

evidence for the prosecution was closed and statement of the accused-respondents was recorded under Section 313 Cr.P.C. wherein though they admitted the solemnization of marriage of the informant's sister Somwati with Dharmendra Singh but they denied demand of dowry and their involvement in the incident by saying that they have been falsely implicated in this case. The defence produced Chhotey Singh DW-1 and Dr. Birendra Kumar Garg DW-2. Thereafter, evidence for the defence was also closed and the case was posted for arguments.

9. The trial court after churning the entire facts and evidence recorded findings to the effect that testimony of the prosecution witnesses is full of contradictions and discrepancies and the same is not credible evidence. Testimony of the prosecution witnesses does not inspire confidence. Therefore, the trial court acquitted accused-respondents from all the charges. Hence this government appeal.

10. Learned A.A.G. for the State has submitted that as per charge and circumstances stated, the first information report was lodged by the informant on 01.07.1999 regarding dowry death being caused to the victim Somwati who was wedded to Dharmendra Singh on 11.07.1994. The basic allegation was regarding non-fulfillment of demand of dowry. It being so, there was ample proof of dowry death having been taken place within seven years of marriage. Factum of unnatural death, cruelty being perpetrated by the in-laws of the deceased was established, thus all the ingredients enshrined under Section 304B I.P.C. were very much attracted in this case still the trial court working on whims and conjectures by erroneous analogy and appraisal of facts and evidence on record recorded acquittal of the aforesaid accused which is not justified in the eye of law, for the reason that the burden of proof was primarily on the prosecution to the extent that the factum of the marriage, demand of dowry, perpetration of cruelty, and unnatural death was required to be proved which elements were proved reasonably and satisfactorily before the trial court. However, the trial court of its own supplemented reasoning which was not admissible and applicable to the scattered facts and circumstances of the case.

11. We have considered the aforesaid submissions and perused the judgment impugned in this appeal. The moot point involved for consideration in this appeal is as to whether the trial court based its finding of acquittal without any material?

12. In this context, we find that the accused have been acquitted of charges levelled against them. The core contention raised on behalf of the accused-respondents is whether all the ingredients as contained under Section 304B I.P.C. were established and proved beyond reasonable doubt. In that regard, there is specific finding primarily on the point of unnatural death being caused to the deceased Somwati which point has not been proved satisfactorily as the evidence on record very much suggests finding arrived by the trial court.

13. Similarly, the point of demand of dowry and perpetration of cruelty has not been established by the prosecution. As per evidence, the demand raised from the deceased and her family was specifically regarding a scooter. The trial court has exhaustively dealt with the aforesaid

aspect of the case and also taken note of several guidelines issued in several cases by Hon'ble Apex Court and these citations were discussed in paragraph no.11 of the judgment impugned in this appeal.

14. As per the settled law, the testimony of the prosecution witnesses regarding commission of offence is sufficient for convicting a person but in case where doubt is generated because of testimony and circumstances of the case regarding trustworthiness of the prosecution witnesses then right course open is to have some independent corroboration, which is missing in this case. In this regard we are in agreement with the finding so recorded by the trial court.

15. Before parting with judgment, it would be relevant to take note of fact that we after careful scrutiny of the impugned judgment discover no perversity in the judgment of trial court. We are fully conscious of fact that presumption of innocence is available to the accused even up to this appellate stage which got strengthened by order of acquittal in favour of accused by the trial court. Thus the view taken by the trial court in recording finding of acquittal is just and reasonable. Even if other view is possible it would not be proper to substitute our own view in place of finding recorded by the trial court. This approach is to be avoided and the view as taken by the trial court has got to be affirmed. This rationale/principle has been enunciated in detail in Bhadragiri Venketa Ravi Vs. Pubic Prosecutor High Court of A.P., Hyderabad ***2013 (4) Supreme 450.***

16. Similarly, in Kanhaiya Lal and others Vs. State of Rajasthan ***AIR 2013 SC 1940,*** Hon'ble Apex Court has observed that while dealing with an appeal against acquittal the court should keep in view the presumption of innocence in favour of the accused as the same gets fortified by his acquittal if the view taken by the trial court is well grounded and based on material on record.

17. In view of the discussion made hereinabove, we see no infirmity latent or patent in the judgment of acquittal recorded by the trial court. We are, accordingly, not inclined to interfere with the judgment and the order of acquittal recorded by the trial Judge in respect of the accused-respondents. The instant appeal is liable to be dismissed. Leave to appeal is thus refused.

18. Accordingly, the instant appeal is dismissed.

19. Let a copy of this order be certified to the court concerned.

(2020)02ILR A48
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.09.2018

BEFORE

THE HON'BLE BALA KRISHNA NARAYANA, J.
THE HON'BLE RAVINDRA NATH KAKKAR, J.

Habeas Corpus Writ Petition No. 3293 of 2018

Najar Quraishi ...Petitioner (In Custody)
Versus
Superintendent, Distt. Jail, Muzaffarnagar & Ors. ...Respondents

Counsel for the Petitioner:
Sri Daya Shankar Mishra, Sri Chandrakesh Mishra

Counsel for the Respondents:
G.A., A.S.G.I., Sri Pawan Kumar Srivastava

A. Constitution of India,1950 – Article 226— Habeas Corpus petition – National Security Act, 1980 - Section 3(2) - Detention - ground of challenge - petitioner not given any opportunity by the Advisory Board to be represented through a legal ractitioner/counsel of his choice before the Board - the impugned order legally unsustainable. (Para – 5,14)
In this petition, the validity of the detention of petitioner (detenu) has been challenged. He has been detained by the District Magistrate, Muzaffar Nagar under Section 3 (2) of the National Security Act, 1980 (Para-2)

Held:- The detenu must be allowed the facility of appearing before the Board through a legal practitioner. If it is denied to him then a clear case of breach of Article 14 is made out in favour of detenu.(Para-14)

Impugned order set-aside. (E-7)

List of cases cited:-

1. A. K. Roy V. Union of India , (1982) 1 SCC 271 : 1982 SCC (Cri) 152

2. Choith Nanikram Harchandani V. State of Maharashtra and Others , (2018) 2 SCC (Cri) 403

3. Bittu Choith Harchandani V. State of Maharashtra and Others, (2015) 17 SCC 688

(Delivered by Hon'ble Bala Krishna Narayana, J.)

1. The argument of this case was concluded on 19.09.2018. We then made the following order :-

"Heard Sri Daya Shankar Mishra, learned counsel for the petitioner, Sri Jitendra Prasad Mishra, learned counsel for Union of India, Smt. Manju Thakur, learned A.G.A.-I and Sri J. K. Upadhyay, learned A.G.A. for the State.

We will give reasons later. But we are making the operative order here and now.

This habeas corpus writ petition is allowed. The impugned detention order dated 13.04.2018 passed by respondent no. 2, District Magistrate, Muzaffar Nagar detaining the petitioner u/s 3 (2) of the National Security Act, 1980 is hereby set-aside.

The petitioner Nazar Quraishi (detenu) is set at liberty."

2. Here are the reasons :- In this petition, the validity of the detention of petitioner Najar Quraishi (detenu) has been challenged. He has been detained by the District Magistrate, Muzaffar Nagar by an order dated 13.04.2018 made under Section 3 (2) of the National Security Act, 1980 (hereinafter referred to as the NSA).

3. The impugned order of preventive detention was passed against the petitioner while he was confined to District Jail, Muzaffar Nagar on account of his being accused in following cases namely :-

(a) Case Crime No. 1175 of 2017 u/s 3/5/8 of U.P. Prevention of Cow Slaughter Act.

(b) Case Crime No. 1176 of 2017 u/s 147, 148, 149, 307, 323, 332, 336, 353, 427, 201, 224 I.P.C. & Section 7 of Criminal Law Amendment Act.

(c) Case Crime No. 2663 of 2017 u/s 429 I.P.C. & Section 3/11 of Prevention of Cruelty to Animals Act.

(d) Case Crime No. 118 of 2018 u/s 3/5/8 of U.P. Prevention of Cow Slaughter Act & Section 3/11 of Prevention of Cruelty to Animals Act.

(e) Case Crime No. 151 of 2018 u/s 3/5/8 of U.P. Prevention of Cow Slaughter Act & Section 3/11 of Prevention of Cruelty to Animals Act.

(f) Case Crime No. 497 of 2017 u/s 382 I.P.C.

4. Upon being served with the impugned detention order, the petitioner filed representations before the detaining authority, State Government, Central Government as well as the Advisory Board. The Advisory Board approved the detention order.

5. The only ground on which the learned counsel for the petitioner has challenged the impugned detention order is that the petitioner was not given any opportunity by the Advisory Board to be represented through a legal practitioner/counsel of his choice before the Board so as to enable him to place his case effectively before the Board. He next submitted that the Board had allowed participation and assistance of officials at the time of hearing of case against the petitioner and in view of the above, it was all the more necessary rather obligatory on the part of the Board to have granted opportunity to the petitioner to engage any legal practitioner to have represented his case. He further submitted that since the petitioner was denied the opportunity to represent his case effectively before the Board, the impugned order is not legally sustainable and deserves to be quashed on this ground alone. In support of his submissions, learned counsel for the petitioner has place reliance on two decisions of this Court in ***A. K. Roy V. Union of India*** reported in ***(1982) 1 SCC 271 : 1982 SCC (Cri) 152*** and ***Choith Nanikram Harchandani V. State of Maharashtra and Others*** with ***Bittu Choith Harchandani V. State of Maharashtra and Others*** reported in ***(2018) 2 Supreme Court Cases (Cri) 403, (2015) 17 Supreme Court Cases 688.***

6. In reply, learned counsel for the respondents supported the impugned order and prayed for its upholding, contending that the petitioner is not entitled to any indulgence. Moreover, no prayer was made by him before the Advisory Board to allow him to be represented through a counsel and hence, the impugned detention order is not liable to be set-aside on the aforesaid submissions made by the learned counsel for the petitioner.

7. We have heard learned counsel for the parties present and very carefully scanned the impugned order and the grounds of detention and also the counter affidavits filed on behalf of the respondent nos. 1 to 4 in this writ petition and the law reports cited before us by the learned counsel for the petitioner.

8. The issue is to whether the detenu has right to appear through a legal practitioner in the proceedings before the Advisory Board remains no more res integra and stands settled by the decision of the Constitution Bench of the Apex Court in ***A. K. Roy (supra).*** Y.V. Chandrachud, C.J. Speaking for the Bench succinctly dealt with this issue and held in para 93 as under : (SCC pp. 334-35)

"93. We must therefore hold, regretfully though, that the detenu has no right to appear through a legal practitioner in the proceedings before the Advisory Board. It is, however, necessary to add an important caveat. The reason behind the provisions contained in Article 22 (3) (b) of the Constitution clearly is that a legal practitioner should not be

permitted to appear before the Advisory Board for any party. The Constitution does not contemplate that the detaining authority or the Government should have the facility of appearing before the Advisory Board with the aid of a legal practitioner but that the said facility should be denied to the detenu. In any case, that is not what the Constitution says and it would be wholly inappropriate to read any such meaning into the provisions of Article 22. Permitting the detaining authority or the Government to appear before the Advisory Board with the aid of a legal practitioner or a legal adviser would be in breach of Article 14, if a similar facility is denied to the detenu. We must therefore make it clear that if the detaining authority or the Government takes the aid of a legal practitioner or a legal adviser before the Advisory Board, the detenu must be allowed the facility of appearing before the Board through a legal practitioner. We are informed that officers of the Government in the departments concerned often appear before the Board and assist it with a view to justifying the detention orders. If that be so, we must clarify that the Boards should not permit the authorities to do indirectly what they cannot do directly; and no one should be enabled to take shelter behind the excuse that such officers are not 'legal practitioners' or legal advisers. Regard must be had to the substance and not the form since, especially, in matters like the proceedings of Advisory Boards, whosoever assists or advises on facts or law must be deemed to be in the position of a legal adviser. We do hope that Advisory Boards will take care to ensure that the provisions of Article 14 are not violated in any manner in the proceedings before them. Serving or retired Judges of the High Court will have no difficulty in understanding this position. Those who are merely 'qualified to be appointed' as High Court Judges may have to do a little homework in order to appreciate it."

9. Similarly by the Apex Court in the case of ***Choith Nanikram Harchandani (supra)*** in paragraph 15 as held as hereunder :-

"In our considered opinion, since the detaining authority was represented by the officers at the time of hearing of the petitioner's case before the Advisory Board, the petitioner too was entitled to be represented through legal practitioner. Since no such opportunity was afforded to the petitioner though claimed by him, he was denied an opportunity of a fair hearing before the Advisory Board, which eventually resulted in passing an adverse order."

10. Applying the aforesaid principle to the facts of this case, we find in paragraph 20 of the writ petition in which the petitioner has categorically stated on oath that while the detaining authority was represented by officials, by legal advisers and legal officers before the Advisory Board, the petitioner was not allowed to be represented through legal practitioner despite request made by him before the Board in this regard. The petitioner was thus, denied the opportunity of a fair hearing before the Advisory Board which eventually resulted in passing of adverse order against him.

11. The reply to the contents of the paragraph 20 of the writ petition having been given by the respondent no. 2 in paragraph 22 of his counter affidavit in which he has failed to categorically deny the contents of the paragraph 20 of the writ

petition and has merely deposed that the petitioner was heard before the Advisory Board.

12. In paragraph 9 of the counter affidavit sworn by one Padmakar Shukla, Under Secretary, Home (Confidential) Department, U.P. Civil Secretariat, Lucknow and filed on behalf of the State of U.P., has merely stated that the petitioner was informed by the State Government vide letter dated 03.05.2018 that he could attend the hearing before the U.P. Advisory Board, Lucknow along with his next friend (non-advocate).

13. Thus, there is no denial in the counter affidavit of either of the respondents that at the time of hearing of the case before the U.P. Advisory Board, Lucknow, officers of the detaining authority were present and heard in the course of proceedings.

14. This infirmity being fatal renders the impugned order legally unsustainable as held in ***A. K. Roy (supra) :-***

"If the detaining authority or the Government takes the aid of a legal practitioner or legal adviser before the Advisory Board, the detenu must be allowed the facility of appearing before the Board through a legal practitioner. If it is denied to him then a clear case of breach of Article 14 is made out in favour of detenu. Since the expression "legal practitioner" was interpreted in ***A. K. Roy (supra)*** *to include even the officers of the Government when they appear before the Board to assist the proceedings against the detenu, the detenu too has to be provided with equal facility of appearing before the Board through legal practitioner."*

15. In view of the above, the impugned order cannot be sustained and is liable to be set-aside.

16. These are the reasons upon which we had set-aside the impugned order dated 13.04.2018 passed by the respondent no. 2, District Magistrate, Muzaffar Nagar.

(2020)02ILR A52
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 03.02.2020

BEFORE
THE HON'BLE MRS. SANGEETA CHANDRA, J.

Misc. Single No. 1383 of 2020

Raghvendra Tiwari ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Dilip Kumar Pandey, Akhilesh Kumar

Counsel for the Respondents:
C.S.C., Dilip Kumar Pandey

A. U.P Essential Commodities (Regulation of Sale & Distribution Control) Act-sec. 13(1)-challenging-order-cancelling his candidature-for allotment of-fair price shop-on the ground that-violation of principles of Natural Justice-found to be ineligible-as he is brother of gram pradhan-a disqualification-it would-revive-an illegal order-opposed to public policy-petition dismissed.

B. Held, Writ jurisdiction is a discretionary jurisdiction and a writ of certiorari would not ordinarily be issued as a matter of course. It has been settled by the Hon'ble Supreme Court that an order impugned does substantial justice between the parties, even if it does not strictly follow niceties of law, may still not be set aside on mere showing of irregularity in procedure, or want of jurisdiction. Reference can be made to the judgment rendered by the Hon'ble Supreme Court in the case of J.P. Builders V. A. Ramadas Rao, Civil Appeal Nos.9821-9822 of 2010 decided on 22.11.2010. The Hon'ble Supreme Court has also held in the case of Chandra Singh and Others Vs. State of Rajasthan and Another reported in 2003 (6)

SCC 545, that an order which appears to be illegal, may not be set aside and writ of certiorari may not issue only to revive an illegal order as it would be opposed to public policy. In case, this Court grants the prayer made by the petitioner and quashes the order dated 29.11.2019, on the ground that the petitioner was not heard, it would only revive an illegal order of allotment of Fair Price Shop to the petitioner on 19.05.2018 as the petitioner has been found to be ineligible to even put forward his candidature so long as his brother Shri Malendra Tewari remained sitting Gram Pradhan of the village concerned.

List of cases cited:-

1. Indrapal Singh Vs. State of U.P. and Others reported in 2014 (123) RD 504

2. Ram Murat Vs. State of U.P. and others reported in 2006 (5) ADJ 396

3. Phool Patti Vs. Ram Singh 2009 (13) SCC 22

4. Shiv Kumar Vs. Up-Ziladhikari Chakiya, District Chandauli and four Others decided on 20.08.2014 in Writ C-No.40973 of 2014.

5. Yogendra Singh Vs. State of U.P. through Principal Secretary and Others in Writ Petition No.23298 (M/S) of 2016 decided on 27.09.2016.

6. Virendra Singh vs Commissioner, Allahabad Division, 2006(24) LCD 1132

7. J.P. Builders V. A. Ramadas Rao, Civil Appeal Nos.9821-9822 of 2010 decided on 22.11.2010.

8. Chandra Singh and Others Vs. State of Rajasthan and Another reported in 2003 (6) SCC 545

(Delivered by Hon'ble Mrs. Sangeeta Chandra, J.)

1. Heard learned counsel for the parties and perused the record.

2. This petition has been filed by the petitioner challenging the order dated 29.11.2019 passed by the opposite party no.2-Dy. Commissioner (Food), Ayodhya Division, Ayodhya, in Appeal No.16 of 2019, under Section 13 (1) of U.P. Essential Commodities (Regulation of Sale and Distribution Control), Order, 2016, hereinafter referred to as the 2016 order.

3. It has been submitted by the learned counsel for the petitioner that he is a Resident of Village Dewai, Post Dayodhi, Block & Tehsil Sohawal, District Ayodhya, and he participated in the selection process for appointment of Fair Price Shop License for the said Gram Sabha. Agenda was circulated on 11.03.2018 for an open general meeting held on 04.04.2018. The meeting was held on 04.04.2018 in the presence of Observers appointed by the opposite party nos.5 & 6-i.e. the Assistant Development Officer, Panchayat and Assistant Development Officer (ST) and two Sub Inspectors of the concerned police station. The petitioner and one Ram Bhawan had putforward their candidature. Ram Bhawan raised an objection to the candidature of the petitioner on the ground that the petitioner is the brother of Village Pradhan and thus ineligible. The petitioner submitted that he was living separately and his family has been given a separate page in the Family Register/Parivar Register of the village concerned. The Candidature of the petitioner was accepted and he was recommended in the said meeting of the Gram Sabha by a Resolution dated 04.04.2018 The matter was sent to the S.D.M. who placed the same before Tehsil Level Committee where again the objection of Ram Bhawan was considered regarding ineligibility of the petitioner, the petitioner was thereafter allotted the Fair Price Shop of the village Dewai. The order of allotment dated 19.05.2018

clearly stated that the objections raised by Ram Bhawan was found to be inappropriate in view of legal advice given by the DGC (Civil), Faizabad, with regard to the applicability of Government Order dated 03.07.1990.

4. The opposite party no.7 one Prem Kumar being aggrieved by the order dated 19.05.2018 filed an Appeal before the Commissioner and it was registered as Appeal No.16 of 2019 under Section 13 of the 2016 order.

5. It has been submitted that after filing of the Appeal, although the petitioner was arrayed as Respondent, no notice was issued to him and he was not heard. The opposite party no.7 had raised two grounds in the Appeal one relating to the Coram of the open general meeting of the Gram Sabha held on 04.04.2018 and the second related to ineligibility of the petitioner under the Government Order dated 03.07.1990. It has been submitted that the opposite party no.7 had no locus to file the delayed Appeal, and Appellate Authority has arbitrarily allowed the Appeal by the order dated 29.11.2019.

6. It has been submitted by the learned counsel for the petitioner that the finding recorded by the Appellate Authority regarding the Government Order dated 03.07.1990 and Government Order dated 17.08.2002 are misconceived, as the opposite party no.2 has not considered the fact that the Parivar Register showed the petitioner to be living separately and the report of the concerned Revenue Officials also showed the petitioner to be living separately from his brother who was the sitting Gram Pradhan. Learned counsel for the petitioner has also stated vehemently that the petitioner was not heard by the Appellate Authority at all and the appellant Prem Kumar had no locus to file the Appeal.

7. Learned Standing Counsel appearing for the State-respondents has stated that under Paragraph 13 (1) of the 2016 Order, any person aggrieved against the allotment, suspension or cancellation of Fair Price Shop may file an Appeal. The opposite party no.7 was the resident of Gaon Sabha and a Card Holder entitled for receiving the benefits of essential commodities to be distributed from the Fair Price Shop of the village concerned. He had thus locus to file the Appeal.

8. It has also been submitted by the learned Standing Counsel that the order passed by the Appellate Authority is on the whole just, as it is based on the law as declared by this Court in its various judgments regarding the definition of "FAMILY" and "HOUSEHOLDS".

9. Having heard the learned counsel for the parties this Court has gone through the order impugned. It is evident therefrom that two grounds were taken with regard to the challenge of the allotment order dated 19.05.2018 by the appellant therein. Firstly, that the open general meeting held on 04.04.2018 of the Gram Sabha concerned had not been held in accordance with the Rules for holding such meeting. It was found from a perusal of record summoned by the Appellate Authority that no Agenda was circulated publicly as no copy of the Agenda Notice was present in the file. Moreover, the voting was allegedly done by raising of hands but in the recommendation/proposal of the Gaon Sabha there was no mention that who raised hand in favour of Ram Bhawan and who raised hand in favour of the

petitioner-Raghvendra Tewari. The open general meeting was held against Rule 32 of the U.P. Panchayat Rules framed under the Act. The Appellate Authority relied upon the judgment rendered by this Court reported in 2016 (1) 33 RD 46 to make an observations with regard to the illegality of the procedure adopted in holding the open general meeting dated 04.04.2018.

10. The Appellate Authority has also gone through the copies of the two pages of the Parivar Register filed at Page nos. 58 and 60 of the lower court record, and found therefrom that Raghvendra Tewari was the real brother of the sitting Gram Pradhan Shri Malvendra Tewari. The report of the Revenue Officials stated that they both lived in the same house. The petitioner Raghvendra Tewari was found ineligible in terms of Paragraph 4.7 of the Government Order dated 03.07.1990 and in terms of the Provisions of Government Order No.2715/29-6-2002-162-SAA/ 2001 dated 17.08.2002. The appointment of the petitioner was found to have been made against the settled position in law as given in judgments of the High Court reported in 2019 (142) RD 553 and 2019 (37) LCD 757. The order dated 19.05.2018 was set aside and a direction was issued to the S.D.M. Sohawal, to get a meeting held of the Gram Sabha Dewai within a period of two months for appointment of a new Fair Price Shop Licensee.

11. Learned counsel for the petitioner has stated at the bar that after this order was issued by the Appellate Authority, order was passed by the S.D.M. Sohawal, Ayodhya on 18.12.2019, cancelling the Fair Price Shop License of the petitioner and attaching the Ration Cards to the link shop of one Bhawan Kumar of Gram Panchayat Theyuanga, Development Block Sohawal and a direction was issued to the Block Development Officer, Sohawal to get an open general meeting of the Gram Sabha concerned held and to ensure recommendation is made for allotment of Fair Price Shop to some other candidate in accordance with the provisions of the new Government Order dated 05.08.2019.

12. A copy of the order dated 18.12.2019 has been produced before this Court by the learned counsel for the petitioner which is kept on record. From a perusal thereof, it is evident that the same has been passed as a consequence to the order passed by the Appellate Authority allowing the Appeal of the opposite party no.7.

13. With regard to the locus of the opposite party no.7, who filed the Appeal, it has rightly been submitted by the learned Standing Counsel that any person aggrieved by an order of allotment can file an Appeal in this case. The opposite party no.7 was a resident of the village concerned and a Ration Card Holder. The objection of the petitioner regarding the maintainability of the Appeal on ground of locus is, therefore, misconceived.

14. With regard to ground taken by Appellate authority regarding ineligibility of the petitioner, this Court finds that the judgment rendered by full Bench of this Court in ***Indrapal Singh Vs. State of U.P. and Others reported in 2014 (123) RD 504,*** has clearly held that a brother, even though living separately, would still come within the definition of family, and would, therefore, be subject to the disqualification under Paragraph 4.7 of the Government Order dated 03.07.1990 as further explained in the Government Order dated

17.08.2002 and the Government Order dated 17.05.2010.

15. A Division Bench in the case of ***Ram Murat Vs. State of U.P. and others reported in 2006 (5) ADJ 396,*** had taken a different view that although came within the definition of family his license could be cancelled only in the event if it was found that he had been dining together and had been staying under the same roof.

16. The Full Bench did not appreciate the observations made by the Division Bench in Ram Murat, with regard to the definition of family members including a brother but the brother not being ineligible as he did not dine together nor stayed under the same roof as the sitting Pradhan. The Full Bench of this Court made the following observations in Paragraph Nos.49 to 53 of the report.

"49. The term 'family' and 'household' are capable of wide and varying meaning and same cannot be left to be assigned a meaning in its general terms and same has to be interpreted in reference to the context it has been used keeping in view the overall object and purpose sought to be achieved.

50. The question as to whether incumbents are living together and are dining together shall always essentially be question of fact always giving a room to an incumbent to handle the situation and manipulate the situation and in order to remove all the doubts to be more precise in the matter of appointment of an agent a clear cut categorical policy decision has been taken at the first instance that Pradhan/Up-pradhan and their relatives so specified cannot be appointed as agents and secondly when Pradhan/Up-pradhan or such category of relatives in case they are elected as Pradhan or Up-pradhan, then his/her agency in question has to be terminated. The State has deliberately and intentionally defined "family" in the said context so that there is no element of doubt left on the spot that such category of incumbents who happen to be the blood relations and relations on account of marriage and also on account of dining and messing together on being elected, then the near and dear one will have to lose his/her fair price shop as there would be conflict of interest. In the definition of family there are blood relations plus relations which has been developed on account of marriage having taken place due to social order plus members who are residing and dining together, whereas the definition of household keeps within its fold, the one who normally eat food prepared in the same kitchen. All the incumbents who fall within the definition of family may or may not be a member of household, in such a situation and in this background, the State having the absolute authority to formulate the policy for fixing the terms and conditions of appointment of agent as well as the terms and conditions for disqualification of agent the definition of family has to be seen in the said context and "household" has to be read in the context of issuance of ration card and in no other context under the scheme of things provided for. In the matter of according of agency and in the matter of incurring disqualification on relative being elected as Pradhan or Up-pradhan, there is no escape route and agency has to be cancelled.

51. Accordingly, this Court is of the view that there is no conflict whatsoever in between the provisions of Clause 2 (o) Clauses 30 and 31 of U.P. Scheduled Commodities Distribution Order, 2004 vis.a.vis with the definition of

"family" as given in Government Order dated 3rd July, 1990 paragraph 4.7 and the Division Bench in Ram Murat's case 2006 (5) ADJ 396, defining the word "family" as given in Government Order dated 3rd July, 1990, Paragraph 4.7 lays down the correct law, even after enforcement of Control Order 2004, except to the extent of introducing concept of joint residence and joint kitchen in reference of Brother, whereas the definition of family is clearly inclusive of brother also and the definition of family as given in Clause 2 (o) of U.P. Scheduled Commodities Distribution Order, 2004 in no way would override the definition of family given in Paragraph 4.7 of the Government Order dated 3rd July, 1990 and the said definition has to be read in the context of issuance of ration cards and nothing beyond the same.

52. The Full Bench proceeds to clarify that in the case of Ram Murat (supra) the brother has been taken outside the scope of the defined family members as it has been mentioned therein that agency would be cancelled only in the event if brother is found that he has been dining together and has been staying under the same roof.

53. The Full Bench does not approve of the aforementioned portion of judgment in the case of Ram Murat (supra), inasmuch as, it is running contrary to the spirit of the Government Order dated 3rd July, 1990 and the purport and intention of Government Order when it proceeds to define the family members in the matter of engagement as well as disqualification of agent as himself, wife, son, unmarried daughter, mother, father, brother or any other member who stays together and who shares common kitchen, then by no stretch of imagination as per the spirit of aforementioned Government Order brother could have been disjuncted from the definition of family members and could have been clubbed with such category of members who were residing together and dining together. The definition of family members is specific i.e. inclusive of himself, wife, son, unmarried daughter, mother, father, brother or any other member who stays together and dines together in the common kitchen. "Or" word is normally disjunctive and same in its natural sense denotes an alternative, and intention of using such a word has to be gathered from its context. Here contextual situation clearly reflects that self, wife, son, unmarried daughter, mother, father, brother are identified class of family members, and on anyone of them being elected as Pradhan/Up-pradhan, the agency will have to be terminated/ cancelled. Not only this, other members who are residing and dining together, on their being also elected as Pradhan/Up-pradhan disqualification is to be incurred. Distinction drawn by the Division Bench, in the case of Ram Murat, by putting the brother along with other members who are residing and dining together, has no rational for it and merely on the assumption and presumption that brother don't have such close tie as compared to other family member defined, brother should be clubbed with other incumbents who are residing together and dining together cannot be approved of. On plain reading of the provision, i.e. definition of family, there are defined category of relatives such as self, wife, son, unmarried daughter, mother, father, brother and there are undefined category of relatives, who can be accepted at par with relatives defined, provided they are dining and residing together. The Courts have no authority to re-write the definition, and

specially when same on its plain reading is clear and categorical, with no ambiguity worth name. Apex Court in the case of Phool Patti Vs. Ram Singh 2009 (13) SCC 22 has clearly ruled that Courts cannot add words to statute, or change its language, particularly when on plain reading meaning becomes clear. In view of this, the definition of family which includes brother cannot be read in a fashion to exclude brother from defined family members and throw him and club him in the category of any other member, who has been staying together and has been dining together, in view of this, the said portion of the Ram Murat's Case (supra) is not being approved of."

(emphasis supplied)

17. It is evident from the observations of the Full Bench that this Court has considered the disqualification for holding a Fair Price Shop. In case the Licensee himself or his wife, Son, Unmarried daughter, the Mother, Father, Brother is elected, or is the sitting Gram Pradhan, besides the such blood relatives, a Daughter-in-law who is related by marriage and who stayed together and who shared the common Kitchen has also been included in the definition of family, by a Division Bench of this Court in ***Shiv Kumar Vs. Up-Ziladhikari Chakiya, District Chandauli and four Others*** decided on 20.08.2014 in Writ C-No.40973 of 2014.

18. In the case of Shiv Kumar (Supra), the Division Bench held that where the Daughter-in-law had been elected as Gram Pradhan and the Fair Price Shop License had been given to the Mother-in-law on compassionate ground after the death of her husband, the erstwhile Licensee, but the Mother-in-law would still attract the disqualification as envisaged under Clause 4.7 of the Government Order dated 03.07.1990 as she was enjoying common Kitchen with Daughter-in-law after the death of her husband.

19. The observations made by the Hon'ble Division Bench with regard to the object sought to be achieved by mentioning this condition of ineligibility are relevant to be quoted hereinbelow:-

"Even otherwise a fair price shop licence is a measure of public distribution system which is now contemplated under the Constitution of India to be a function of the local body. It is not a mere right to run the business of a fair price shop by any individual. Apart from this, the prohibitions that have been mentioned in Clause 4.7 of the Government Order dated 3.7.1990 is to prevent any monopoly in the hands of the Gram Pradhan or the relatives of such office holder. It is in order to prevent any favouritism or nepotism that such prohibitions have been engrained by making the definition of the word household and family extensive as explained by the full bench in the case of Indrapal Singh (supra).".

20. Learned counsel for the petitioner during the course of arguments has referred to a judgment passed by a Co-ordinate Bench of this Court in ***Yogendra Singh Vs. State of U.P. through Principal Secretary and Others*** in Writ Petition No.23298 (M/S) of 2016 decided on 27.09.2016. This Court has carefully perused the said judgment and after referring to the answers given by the Full Bench, in Indrapal Singh (Supra) to the question referred to it as follows:-

"(i) The Division Bench judgment in Ram Murat's case (supra) defining the word 'family' as given in the Government order dated 3.7.1990 (Paragraph 4.7) lays down the correct law except that the word 'brother' shall also be included in self, wife, son, unmarried daughter, mother, father and the condition of having living together and taking food from common kitchen shall apply only to 'any other member (अन्य कोई सदस्य)' which has been separated by word in the definition.

(ii)The definition of word 'family' as given in Clause 2 (o) of U.P. Scheduled Commodities Distribution Order, 2004 shall not override the definition of word 'family' as given in Paragraph 4.7 of the Government order dated 3.7.1990.

Let our answer be placed before the appropriate Bench hearing the writ petition."

21. The Co-ordinate Bench of this Court has observed as under:-

"Thus, the Full Bench categorically held that Clause 4.7 of the government order dated 3.7.1990, as modified by the government order dated 18.7.2002, as far as a definition of 'family' is concerned, is divided into two parts - the first part consists of the 'blood relations such as son, father, daughter etc.' and this part is not dependent upon the condition that the members should be dining and residing together. The second part consists of other relatives who are included in the definition of 'family', if they are found to be dining and residing together. The full bench considered exclusion of the relationship of brother from the first part and held it to be contrary to the letter and spirit of the government order dated 3.7.1990. Accordingly it included the said relationship by judicial mandate in the first part of the definition of 'family' meaning thereby this relationship was held not to be dependent upon the condition of dining and residing together.

In view of the Full Bench decision there is hardly any doubt that a father could not have been allotted the fair-price-shop if the son was Gram Pradhan, as this would be covered by the first part of the definition based on blood relationship.

As far as the contention of learned counsel appearing for the opposite party no.4 that the father was allotted the shop prior to the election of the son as Gram Pradhan is concerned the said plea is also not available to him in view of the government order dated 18.7.2002 which says that if it had been allotted, even then, it shall be cancelled. The said government order was also considered by the Full Bench Decision. As far as reliance placed by learned Counsel appearing for opposite party no.4 upon the Single Bench Decision of this Court in Virendra Singh vs Commissioner, Allahabad Division, 2006(24) LCD 1132, wherein it was held that para 4.7 of the government order dated 3.7.1990 would not apply to existing licensee is concerned, this court finds firstly, that the said judgement does not take into consideration the modification of para 4.7 of the government order dated 3.7.1990 by the subsequent government order dated 18.7.2002 which leaves no doubt about the policy of the government which is applicable to existing licensees also. Furthermore, a similar fact situation existed in the case of Ram Murat and others vs Commissioner Azamgarh Division, 2006 (5) ADJ 396 where the brother had been allotted the fair-price-shop earlier and the family member had

been elected as Gram Pradhan subsequently and it is in this case that a reference was made to the Full Bench which was considered in Indarpal Singh's case (supra) and it was held that the brother's licence was liable to be cancelled, therefore in view of the dictum of the Full Bench the reliance placed by the learned counsel for the opposite party no.4 upon the judgement in Virender Singh's case is misplaced and the aforesaid plea is rejected."

(emphasis supplied)

22. Rather than supporting the case of the petitioner the judgment in *Yogendra Singh (Supra)* goes against the petitioner's contention.

23. This Court has also considered the arguments raised by the learned counsel for the petitioner that the petitioner was never heard and the order has been passed in violation of the Principles of Natural Justice. This Court finds from the order impugned, no evidence that the petitioner was heard. However, the Principles of Natural Justice are not a straitjacket formula that have to be applied in all cases irrespective of the consequences. In this case, the petitioner was ineligible to have participated in the open general meeting and put-forward his candidature for allotment of Fair Price Shop of the village concerned. In accordance with law settled by the Full Bench of this Court in Indrapal Singh Vs. State of U.P. (Supra), an objection was raised by the contesting candidate which was over-ruled. The contesting candidate, thereafter, filed objection before the Tehsil Level Committee, the Tehsil Level Selection Committee sought advice of the DGC (Civil) in the matter who gave a misconceived advice, on the basis whereof the petitioner was allotted the Fair Price Shop License.

24. Writ jurisdiction is a discretionary jurisdiction and a writ of certiorari would not ordinarily be issued as a matter of course. It has been settled by the Hon'ble Supreme Court that an order impugned does substantial justice between the parties, even if it does not strictly follow niceties of law, may still not be set aside on mere showing of irregularity in procedure, or want of jurisdiction. Reference can be made to the judgment rendered by the Hon'ble Supreme Court in the case of ***J.P. Builders V. A. Ramadas Rao,*** Civil Appeal Nos.9821-9822 of 2010 decided on 22.11.2010.

25. The Hon'ble Supreme Court has also held in the case of ***Chandra Singh and Others Vs. State of Rajasthan and Another reported in 2003 (6) SCC 545,*** that an order which appears to be illegal, may not be set aside and writ of certiorari may not issue only to revive an illegal order as it would be opposed to public policy. In case, this Court grants the prayer made by the petitioner and quashes the order dated 29.11.2019, on the ground that the petitioner was not heard, it would only revive an illegal order of allotment of Fair Price Shop to the petitioner on 19.05.2018 as the petitioner has been found to be ineligible to even put forward his candidature so long as his brother Shri Malendra Tewari remained sitting Gram Pradhan of the village concerned.

26. The writ petition is, therefore, **dismissed**. No order as to costs.

(2020)02ILR A60
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 28.01.2020

BEFORE
THE HON'BLE MRS. SANGEETA CHANDRA, J.

Misc. Single No. 2439 of 2020

Shakuntala Devi Jan Kalyan Samiti & Ors. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Akhilesh Kumar Kalra, Gautam Kumar, Rahul Kapoor

Counsel for the Respondents:
C.S.C., Prashant Kumar Srivastava

A. SARFAESI Act-Challenging order passed by CJM-u/s.14-seeking removal of seal-from petitioner's house-and to restore possession over secured assets-Alternate Remedy available-u/s. 17-by filing application before DRT-writ jurisdiction-extra-ordinary jurisdiction-not to be exercised-where adequate statutory remedy available. Petition Dismissed.

B. Held, the petitioners have remedy against such action and the order passed by the Chief Judicial Magistrate concerned by filing an application before the Debts Recovery Tribunal under Section 17 of the Act. The Tribunal would have the benefit of pleadings already before it in the Securitization Application No.530 of 2019 and would be in a better position to appreciate all aspects of the matter. Writ Jurisdiction is an extraordinary jurisdiction and as has been observed by the Supreme Court in Satyawati Tandon (supra), such extraordinary jurisdiction ought not to be exercised in matters where adequate statutory remedy is available. The writ petition is dismissed as not maintainable on the grounds of availability of statutory remedy alone and the petitioners may, if they so advised, file an appeal before the appropriate forum.

List of cases cited: -

1. Kanaiyalal Lalchand Sachdev and others vs. State of Maharashtra and others, 2011 (2) SCC 782

2. United Bank of India vs. Satyawati Tandon and others 2010 (8) SCC 110

3. Mardia Chemicals Ltd. vs. Union of India (2004) 4 SCC 311

4. Smt. Asmaa vs. District Magistrate, Faizabad and others W.P No.6816 (MB) of 2017

5. Khalid vs. State of U.P. and others Writ-C No.30002 of 2018

6. M/s. Deccan Chronical Holdings Limited vs. Canara Bank (Mad.)

7. Kumkum Tentiwal vs. State of U.P. and others, 2019 (2) ADJ 125

8. Dheerendra Kumar and another vs. Authorized Officer, Aadhar Housing Finance Ltd. and another Writ-C No.11706 of 2018

9. Paisner and others vs. Goorich, [1955] 2 WLR 1071
10.

11. Sakshi vs. Union of India (2004) 5 SCC 518

12. State of Madhya Pradesh vs. Narmada Bachao Andolan (2011) 7 SCC 639

13. Bhavnagar University vs. Palitana Sugar Mills 2003 (2) SCC 111

14. Srinivasa Enterprises v. Union of India [(1980) 4 SCC 507]

15. Jalan Trading Co. (P) Ltd. v. Mill Mazdoor Sabha [AIR 1967 SC 691 : (1967) 1 SCR 15]

16. Collector of Customs v. Nathella Sampathu Chetty [AIR 1962 SC 316 : (1962) 3 SCR 786 : (1962) 1 Cri LJ 364]

17. Fatehchand Himmatlal [(1977) 2 SCC 670]

18. Kishan Chand Arora v. Commr. of Police [AIR 1961 SC 705 : (1961) 3 SCR 135]

19. Chinta Lingam v. Govt. of India [(1970) 3 SCC 768]

20. Organo Chemical Industries v. Union of India [(1979) 4 SCC 573 : 1980 SCC (L&S) 92]

21. Kishan Chand Arora [AIR 1961 SC 705 : (1961) 3 SCR 135]

22. Lachhman Dass v. State of Punjab [AIR 1963 SC 222 : (1963) 2 SCR 353]

23. Chairman, Board of Mining Examination v. Ramjee [(1977) 2 SCC 256 : 1977 SCC (L&S) 226]

24. Haryana Financial Corpn. v. Jagdamba Oil Mills [(2002) 3 SCC 496]

(Delivered by Hon'ble Mrs. Sangeeta Chandra, J.)
(Oral)

1. This petition has been filed challenging the order dated 1.11.2019 passed by the Chief Judicial Magistrate, Lucknow in Misc. Case no.2620 of 2019 (Bank of Baroda vs. M/s. Shakuntala Devi), and also praying for a direction to the respondents to remove the seal from the lock of the petitioner no.3 on the house and to restore possession of the secured asset to the petitioners and to refrain from taking coercive measures against the petitioners.

2. I have heard Sri Akhilesh Kalra, learned counsel for the petitioners and Sri Prashant Kumar Srivastava for the Bank.

3. Sri Prashant Kumar Srivastava has raised a preliminary objection as to the maintainability of the writ petition under Articles 226 and 227 of the Constitution of India, as he has relied upon several judgments of the Supreme Court and of this Court and also of various High Courts, to say that against an action taken under Section 14 by the District Magistrate or his authorized officer, the remedy of appeal under Section 17 of the SARFAESI Act is available to the aggrieved person.

4. Learned counsel for the respondents has relied upon the judgment in ***Kanaiyalal Lalchand Sachdev and others vs. State of Maharashtra and others, 2011 (2) SCC 782*** and Paras 19 and 20 thereof. It has been submitted on the basis of the said judgment that an action under Section 14 of the Act constitute an action taken after the stage of Section 13(4) of the Act and, therefore, the same would fall within the ambit of Section 17(1) of the Act and the efficacious remedy for the borrower or any person aggrieved by an action under Section 13(4) of the Act is to file an appeal before the Debts Recovery Tribunal. It has been submitted that in the judgment in Kanaiyalal Lalchand Sachdev (supra), the Supreme Court held that Section 14 action is a continuation of action taken under Section 13 of the Act and, therefore, they should be considered as one action.

5. Learned counsel for the respondents has placed reliance upon the judgment in ***United Bank of India vs. Satyawati Tandon and others 2010 (8) SCC 110,*** to state that in the judgment rendered in *Satyawati Tandon*, the Supreme Court considered more specifically action taken under Section 14 of the Act and he has referred Para 17 of the judgment, wherein it has been observed by the Supreme Court that if respondent no.1 had any tangible grievance against the notice issued under Section 13(4) or action taken under Section 14 of the Act, then she should have availed remedy by filing an application under Section 17(1) of the Act. The expression "any person" used in Section 17(1) if of wide import. It takes

within its fold, not only the borrower but also the guarantor or any other person who may be affected by the action taken under Section 13(4) or Section 14 of the Act. In *Satyawati Tandon* (supra), the Supreme Court observed that an action taken under Section 14 of the Act would be challenged in appeal before the Tribunal and that the High Court had overlooked the settled position in law that it will not ordinarily entertain a petition under Article 226 of the Constitution of India if any effective remedy is available to the aggrieved person and that this Rule applies with greater rigour in matters involving recovery of the public dues. The Supreme Court had observed that the High Court must keep in mind that the legislations enacted by Parliament and the State Legislatures for recovery of such dues are a code unto themselves inasmuch as they not only contain comprehensive procedure for recovery of the dues, but also envisage constitution of quasi-judicial bodies for redressal of the grievance of any aggrieved person, therefore, in all such cases, the High Court must insist that before availing remedy under Article 226 of the Constitution, a person must exhaust the remedies available under the relevant statute.

6. Learned counsel for the petitioners has submitted that both the aforesaid judgments were rendered by the Supreme Court before the proviso to Section 14 was added by way of amendment in the Act in January, 2013.

7. Sri Prashant Kumar Srivastava on the other hand, has placed reliance upon the judgment in ***Standard Chartered Bank vs. V. Noble Kumar and others (2013) 9 SCC 620,*** which was decided on 22.8.2013 by the Supreme Court, where the Supreme Court also considered the amended provisions of Section 14 of the Act. Learned counsel for the respondents has placed reliance upon Para 8 of the judgment, where the Supreme Court considered the grounds taken by the High Court for allowing the writ petition filed by the respondent to the civil appeal. The High Court had observed that the Bank cannot bye-pass Section 13(4) of the Act and invoke the provision of Section 14. Before invoking Section 14, notice under Section 13(4) is necessary as the proceedings under Section 14 cannot be questioned by filing an appeal before the Tribunal or before a Court. The second ground taken by the High Court was that the procedure contemplated under Rule 8 of the Security, Interest (Enforcement) Rules, 2002 was not followed before Section 14 was invoked and therefore, the order passed by the Chief Judicial Magistrate was contrary to the Rules and therefore, liable to be set aside.

8. It has been submitted by Sri Prashant Kumar Srivastava that both these aforesaid grounds taken by the contesting respondents therein and found to be feasible by the High Court were not found justified by the Supreme Court. The Supreme Court observed in Para-11 while referring to the arguments raised by the learned counsel for the Bank that the Act provided for two alternative procedures for taking possession of the secured assets under Sections 13(4) and 14 respectively. While Section 13(4) authorises the creditor himself to take possession of the secured assets without the aid of the State's coercive power, Section 14 enables the secured creditor to seek the assistance of the State's coercive power for securing the possession of the secured assets. It was always open to the secured creditor to

choose one of the abovementioned two procedures in a given case to obtain possession of the secured asset depending upon his own assessment of the situation regarding the possibility of resistance (by the debtor or guarantor as the case may be) for taking possession of the secured assets. The Supreme Court observed that it is not necessary that the procedure under Section 13(4) should be undertaken before action under Section 14 can be initiated.

9. In ***V. Noble Kumar*** (supra), the Supreme Court also considered the amendments made under Section 13 of the Act after the judgment rendered in *Mardia Chemicals Ltd. vs. Union of India (2004) 4 SCC 311*, but held thereafter that under the scheme of Section 14, a secured creditor who desires to seek the assistance of the State's coercive power for obtaining possession of the secured asset is required to make a request in writing to the District Magistrate or the officer authorized in that behalf. By way of amendment to the said Section, a proviso was added with nine sub-clauses and these amendments were made to provide safeguard to the interest of the borrower. Under the proviso, the secured creditor is required to file an affidavit, furnishing the information contemplated under various sub-clauses (1) to (9) of the said proviso and obligates the Magistrates to pass suitable orders regarding taking of possession of secured asset only after being satisfied with the contents of the affidavit. The satisfaction of the Magistrate contemplated under the second proviso to Section 14(1) of the Act necessarily requires the Magistrate to examine the factual correctness of the assertions made in such an affidavit, but it does not require any adjudication as such on the basis of legal niceties.

10. In Para 27 of the judgment rendered in ***V. Noble Kumar*** (supra), the Supreme Court further observed that under Section 14, the Magistrate is authorized only to take possession of the property and forward the connected documents to the secured creditor. Therefore, the borrower is always entitled to prefer an appeal under Section 17 after the possession of the secured asset is handed over to the secured creditor. It further observed that by whatever manner the secured creditor obtains possession, either through the process contemplated under Section 14 or without resorting to such a process obtaining of the possession of a secured asset is always a measure against which a remedy under Section 17 is available. With regard to observation of the High Court in its judgment under appeal, that Rule 8 of the Rules of 2002 provided for certain procedure to be followed by the secured creditor taking possession of the secured asset, the Supreme Court observed that the High Court was incorrect in observing that while taking action under Section 14 of the Act, compliance of Rule 8 is mandatory.

11. It has also been submitted by the learned counsel for the respondents that a Division Bench of this Court in ***Anuradha Singh and another vs. Chief Metropolitan Magistrate, Kanpur Nagar and two others: Writ-C No.13445 of 2018,*** decided on 13.4.2018, was considering a similar case where an auction notice was challenged by the petitioners on the ground that no notice was given by the Magistrate before passing the order under Section 14 of the Act. It was observed by the Division Bench that the petitioners had a remedy of filing an appeal against the action taken under Section 13 of the Act, which they had already availed of. There

was no interim order granted in appeal and, therefore, the Bank had sought possession in terms of Section 14 of the Act. They rejected the contention of the writ petitioners that opportunity should have been given to them before passing the order under Section 14 of the Act by the Magistrate, by observing that there was no statutory provision under the Act for providing an opportunity to the borrower at the stage of passing of an order under Section 14 of the Act nor any decision, either of this Court at Allahabad or the Apex court that may enable the Court to read such principles of administrative law into the statutory provisions of Section 14 of the Act. The Division Bench reiterated that the remedy under Section 17 was available even against an action taken under Section 14 of the Act and the borrower or any other person aggrieved can approach the Tribunal to protect his rights.

12. Learned counsel for the respondents has also placed reliance upon another Division Bench judgment of this Court rendered on 3.4.2017 in ***Writ Petition No.6816 (MB) of 2017: Smt. Asmaa vs. District Magistrate, Faizabad and others.***

13. Almost similar observations have been made by two Division Benches of this Court in ***Writ-C No.27473 of 2017: M/s. Glorious Enterprises and others vs. District Magistrate, Agra and others,*** decided on 20.6.2017, and ***Writ-C No.30002 of 2018: Khalid vs. State of U.P. and others,*** decided on 5.9.2018.

14. A judgment rendered by the High Court of Madras in ***M/s. Deccan Chronical Holdings Limited vs. Canara Bank,*** decided on 12.6.2015 has also been relied upon by the learned counsel for the respondents.

15. Learned counsel for the petitioners, on the other hand, has placed reliance upon a Division Bench judgment of this Court rendered in ***Writ-C No.38578 of 2018: Kumkum Tentiwal vs. State of U.P. and others,*** decided on 11.12.2018, reported in ***2019 (2) ADJ 125,*** where the writ petitioner had challenged the orders passed by the ADM (Finance and Revenue), Mathura, directing taking of possession of the property of the petitioner under Section 14 of the Act. Learned counsel for the Bank had argued that the writ petition was not maintainable as the remedy of appeal under Section 17 of the Act was provided. Learned counsel for the Bank had relied upon the judgment rendered in *V. Noble Kumar* (supra) and Para-27 of the said report, which has been referred to, hereinabove. The Bank had also relied upon the judgment rendered in Writ-C No.11706 of 2018: *Dheerendra Kumar and another vs. Authorized Officer, Aadhar Housing Finance Ltd. and another,* decided on 2.4.2018, where this Court relying upon various judgments of the Supreme Court had held that the remedy to the borrower was available under Section 17 of the Act.

16. The Division Bench in *Kumkum Tentiwal* (supra) however, observed that the Division Bench in *Dheerendra Kumar* (supra) did not consider the scope of procedure to be adopted while passing orders under Section 14 of the SARFAESI Act as well as the remedy available against the order passed under Section 14 of the SARFAESI Act. It was observed by the Division Bench in *Kumkum Tentiwal* (supra) that the judgment rendered by the Supreme Court in *Harsh Govardhan*

Sondagar v. International Assets Reconstruction Company Ltd., (2014) 6 SCC 1, was not considered by the Division Bench in *Dheerendra Kumar* (supra). In the case of *Harsh Govardhan Sondagar* (supra), the Supreme Court was considering the rights of a person emanating from the validly created lease and had observed that the District Magistrate or the officer authorized would have to give a notice and an opportunity of hearing to the person claiming to be a lessee, consistent with the principles of natural justice, and then take a decision. In the said judgment of *Harsh Govardhan Sondagar* (supra), the Supreme Court observed that the decision of the Chief Metropolitan Magistrate or the District Magistrate can be challenged before the High Court under Articles 226 and 227 of the Constitution of India by any aggrieved person.

17. The Division Bench in *Kumkum Tentiwal* (supra), after placing reliance upon *Harsh Govardhan Sondagar* (supra), observed that the borrower is also entitled to right of hearing prior to any order being passed by the District Magistrate while exercising powers under section 14 of the Act. It observed that the District Magistrate has to record a satisfaction with regard to contents of the affidavits filed by the Bank under proviso to sub-section (1) of Section 14 of the Act and such satisfaction can only be recorded after hearing the parties. It further observed in Para-12 that from the scheme of the Act, it is implicit that the procedure of Sections 13(2) and 13(4) is mandatory before initiating action under Section 14 of the Act. The borrower on initiation of action under section 14 of the Act, may at times plead that he was not provided any opportunity of hearing as envisaged under Section 13(2) of the Act, entitling him to payment of the dues within 60 days and therefore, the action under section 14 is illegal and misconceived. Thus, notice or opportunity of hearing is also necessary to the borrower or guarantor, although it may be as a formality at times, before initiating action under Section 14 of the Act.

18. The Division Bench in *Kumkum Tentiwal* (supra) relied upon the observations made by the Supreme Court in *Harsh Govardhan Sondagar* (supra) that the only recourse available against an order passed under Section 14 of the Act is under Articles 226 and 227 of the Constitution of India.

19. It has been submitted by Sri Akhilesh Kalra that the judgment rendered by the Division Bench in *Kumkum Tentiwal* (supra) on 11.12.2018 was challenged in SLP by the Bank, which SLP has been dismissed by the Supreme Court on 6.5.2019 and the judgment of the Division Bench has been affirmed.

20. Sri Prashant Kumar Srivastava has argued that the Division Bench in the case of *Kumkum Tentiwal* (supra) did not consider the law as propounded by the Supreme Court in the case of *V. Noble Kumar* (supra) in the right perspective. He has also argued that *Harsh Govardhan Sondagar* (supra) was a judgment rendered by the Supreme Court in the facts of the case where a person, who was in possession of the secured asset on the basis of valid lease, was sought to be dispossessed by the action taken under Section 14 of the Act. He has also argued that the judgment rendered in *Anuradha Singh* (supra) by a Division Bench of this Court, which was a judgment by a coordinate Bench and much prior in time,

was not considered in the judgment rendered in *Kumkum Tentiwal* (supra).

21. Sri Akhilesh Kalra has further relied upon the judgment rendered by the High Court of Uttarakhand at Nainital in ***Special Appeal No.901 of 2018: The Nainital Bank Ltd. vs. Naveen Kisan Rice Mill and others,*** decided on 10.1.2019, which relates to whether the power under Section 14 of the Act could have been delegated by the District Magistrate or the or the Chief Metropolitan Magistrate to any other officer. It relied upon the doctrine of *"delegatus non potest delegare"*, which says that a delegatee cannot further delegate his powers, to come to a conclusion that the power under Section 14 of the Act could not have been exercised by the Additional District Magistrate.

22. The judgment rendered in the case of *The Nainital Bank Ltd.* (supra) cannot be said to be applicable in the case of the petitioners as it related to the question whether delegation in contravention of Statute of power under Section 14 of the Act would be legal or not.

23. Sri Akhilesh Kalra has also relied upon a judgment rendered by the Court of Appeal in ***Paisner and others vs. Goorich, [1955] 2 WLR 1071*** and has relied upon the observations made by Lord Denning with regard to precedential value of the judgments and observations that when the Judges of the Court of Appeal gave a decision on the interpretation of an Act of Parliament, the decision itself was binding on them and their successors, but the words, which the Judges use in giving the decision are not binding. When interpreting a Statute, the sole function of the Court is to apply the words of the Statute to a given situation. Once a decision has been reached on that situation, the doctrine of precedent requires us to apply the statute in the same way in any similar situation, but not in a different situation. Whenever a new situation emerges, not governed by previous decisions, the Courts must be governed by the Statute and not by the words of the Judges.

24. In ***Sakshi vs. Union of India (2004) 5 SCC 518,*** the Supreme Court considered the precedential value of foreign precedents and held that such decisions must be construed in the context in which they are decided. In ***State of Madhya Pradesh vs. Narmada Bachao Andolan (2011) 7 SCC 639,*** the Supreme Court observed that a judgment cannot be read as a Statute as judicial utterances are made in the settings of facts of a particular case. A little difference in facts or additional facts may make a lot of difference to the precedential value of a decision.

25. The Supreme Court in the case of *Bhavnagar University vs. Palitana Sugar Mills 2003 (2) SCC 111*, has also made certain observations on the principles of "stare decisis" and binding precedent. It has been observed by the Supreme Court that a decision is an authority for that which it deduced and not what can logically be deduced therefrom. No doubt the ratio decidendi of a judgment rendered by a Bench of larger coram or even by a coordinate Bench is binding upon subsequent coordinate Benches. Each case has to be dealt with on the facts as mentioned therein and one additional fact by its mere presence or absence may

change the very precedential value of an otherwise binding precedent.

26. This Court has considered also the judgments rendered by the Supreme Court in *V. Noble Kumar* (supra). The judgment of the Supreme Court deals clearly with the amended provisions of Section 14(1) of the Act and still observes that the remedy lies for an action taken under Section 14(1) of the Act to a person aggrieved under Section 17 of the Act. Also, under the language of Section 14(1) of the Act, the Supreme Court had observed that the procedure under Rule 8 of the Rules of 2002 cannot be read.

27. The Division Bench judgment in the case of *Anuradha Singh* (supra) deals sufficiently with the question of notice being issued to the borrower, after the Bank initiates action under Section 14 of the Act by filing affidavit before the officer authorized or the District Magistrate.

28. In the judgment rendered by the Division Bench in *Anuradha Singh* (supra), the facts of the case are similar to the facts of the petitioners' case inasmuch as proceedings under Sections 13(2) and 13(4) were challenged by the petitioners by filing Securitization Application No.530 of 2019 before the Debts Recovery Tribunal, Lucknow, praying for setting aside the recovery proceedings. A copy of the Securitization Application has been filed as Annexure-8 to the petition.

29. In *Kumkum Tentiwal* (supra), the petitioner had filed the writ petition against the order passed by the Additional District Judge (Finance and Revenue), Mathura under Section 14 of the Act. It was not the case of the petitioner that the petitioner had challenged the notice and auction under Section 13(4) of the Act before the Debts Recovery Tribunal in Securitization Application, which was pending and where no interim order was granted.

30. Faced with such a situation where there are two Division Benches of this Court; one prior in point of time having been rendered on 13.4.2018 and the other rendered on 11.12.2018, this Court has gone through the judgment rendered in *Mardia Chemicals Ltd.* (supra), where validity of the Act was challenged and while dealing with the question of violation of principles of natural justice with respect to an action taken under Section 13(4) of the Act, the supreme Court observed that no doubt, the borrower is entitled to file its objections, which objections have to be considered by the secured creditor and reasons stated briefly for rejecting the same, but that would not give borrower any right to challenge the reasons given by the Bank or the secured creditor as an independent cause of action.

31. In *Mardia Chemicals Ltd.* (supra), the Supreme Court was considering the validity of the SARFAESI Act and the main question that arose before the Supreme Court in civil appeals, writ petitions and transfer petitions, were as under:

"(i) Whether it is open to challenge the statute on the ground that it was not necessary to enact it in the prevailing background particularly when another statute was already in operation?

(ii) Whether provisions as contained under Sections 13 and 17 of the Act provide adequate and efficacious

mechanism to consider and decide the objections/disputes raised by a borrower against the recovery, particularly in view of bar to approach the civil court under Section 34 of the Act?

(iii) Whether the remedy available under Section 17 of the Act is illusory for the reason it is available only after the action is taken under Section 13(4) of the Act and the appeal would be entertainable only on deposit of 75% of the claim raised in the notice of demand?

(iv) Whether the terms or existing rights under the contract entered into by two private parties could be amended by the provisions of law providing certain powers in a one-sided manner in favour of one of the parties to the contract?

(v) Whether provision for sale of the properties without intervention of the court under Section 13 of the Act is akin to the English mortgage and its effect on the scope of the bar of the jurisdiction of the civil court?

(vi) Whether the provisions under Sections 13 and 17(2) of the Act are unconstitutional on the basis of the parameters laid down in different decisions of this Court?

(vii) Whether the principle of lender's liability has been absolutely ignored while enacting the Act and its effect?"

32. In the said case, the Supreme Court while allowing the appeals, answered the questions framed by it in Paras 80 and 81 of the judgment as follows:

"80. Under the Act in consideration, we find that before taking action a notice of 60 days is required to be given and after the measures under Section 13(4) of the Act have been taken, a mechanism has been provided under Section 17 of the Act to approach the Debts Recovery Tribunal. The abovenoted provisions are for the purpose of giving some reasonable protection to the borrower. Viewing the matter in the above perspective, we find what emerges from different provisions of the Act, is as follows:

1. Under sub-section (2) of Section 13 it is incumbent upon the secured creditor to serve 60 days' notice before proceeding to take any of the measures as provided under sub-section (4) of Section 13 of the Act. After service of notice, if the borrower raises any objection or places facts for consideration of the secured creditor, such reply to the notice must be considered with due application of mind and the reasons for not accepting the objections, howsoever brief they may be, must be communicated to the borrower. In connection with this conclusion we have already held a discussion in the earlier part of the judgment. The reasons so communicated shall only be for the purposes of the information/knowledge of the borrower without giving rise to any right to approach the Debts Recovery Tribunal under Section 17 of the Act, at that stage.

2. As already discussed earlier, on measures having been taken under sub-section (4) of Section 13 and before the date of sale/auction of the property it would be open for the borrower to file an appeal (petition) under Section 17 of the Act before the Debts Recovery Tribunal.

3. That the Tribunal in exercise of its ancillary powers shall have jurisdiction to pass any stay/interim order subject to the condition as it may deem fit and proper to impose.

4. In view of the discussion already held in this behalf, we find that the requirement of deposit of 75% of the amount claimed before entertaining an appeal (petition) under Section 17 of the Act is an oppressive, onerous and arbitrary condition against all the canons of reasonableness. Such a condition is invalid and it is liable to be struck down.

5. As discussed earlier in this judgment, we find that it will be open to maintain a civil suit in civil court, within the narrow scope and on the limited grounds on which they are permissible, in the matters relating to an English mortgage enforceable without intervention of the court.

81. In view of the discussion held in the judgment and the findings and directions contained in the preceding paragraphs, ***we hold that the borrowers would get a reasonably fair deal and opportunity to get the matter adjudicated upon before the Debts Recovery Tribunal. The effect of some of the provisions may be a bit harsh for some of the borrowers but on that ground the impugned provisions of the Act cannot be said to be unconstitutional in view of the fact that the object of the Act is to achieve speedier recovery of the dues declared as NPAs and better availability of capital liquidity and resources to help in growth of the economy of the country and welfare of the people in general which would subserve the public interest."*** (Emphasis supplied)

33. Thereafter, the Supreme Court upheld the validity of the Act and its provisions except that of sub-section (2) of Section 17 of the Act, which was declared *ultra vires* of Article 14 of the Constitution of India.

While dealing with these questions and the arguments raised regarding the entitlement of the borrower to be heard before notice under sub-section (2) of Section 13 is issued, the Supreme Court in Paras 74 to 77 of the judgment in *Mardia Chemicals Ltd.* (supra) observed as under:

"74. A reference has also been made for similar observations in Srinivasa Enterprises v. Union of India [(1980) 4 SCC 507] at SCC pp. 513-14 and in Jalan Trading Co. (P) Ltd. v. Mill Mazdoor Sabha [AIR 1967 SC 691 : (1967) 1 SCR 15] at SCR p. 36. While referring to the observations made in Collector of Customs v. Nathella Sampathu Chetty [AIR 1962 SC 316 : (1962) 3 SCR 786 : (1962) 1 Cri LJ 364] at SCR pp. 829-30 it is submitted that the intent of Parliament shall not be defeated merely for the reason that it may operate a bit harshly on a small section of public where it may be necessary to make such provisions of achieving the desired objectives to ensure that the nefarious activities of smuggling, etc. had to be necessarily curbed. In Fatehchand Himmatlal [(1977) 2 SCC 670] where debts of the agriculturists were wiped off, this Court observed:

"44. Every cause claims its martyr and if the law, necessitated by practical considerations, makes generalizations which hurt a few, it cannot be helped by the Court. Otherwise, the enforcement of the Debt Relief Act will turn into an enquiry into scrupulous and unscrupulous creditors, frustrating through endless litigation, the instant relief to the indebted which is the promise of the legislature.? (SCC p. 689, para 44)

Yet in another decision referred to, in Kishan Chand Arora v. Commr. of Police [AIR 1961 SC 705 : (1961) 3 SCR 135] it has been held that absence of

appeal does not necessarily render the legislation unreasonable. Provision for appeal is not an absolute necessity. For same propositions a reference has also been made to Chinta Lingam v. Govt. of India [(1970) 3 SCC 768] , SCC at p. 772, where it has been observed that when the power has to be exercised by one of the highest officers the fact that no appeal has been provided is not material. In respect of the appellate provision once again our attention has been drawn to the observations made by this Court in SCC at pp. 582-83, paras 15 and 16 in Organo Chemical Industries v. Union of India [(1979) 4 SCC 573 : 1980 SCC (L&S) 92] to the effect that an appeal is a desirable corrective but not an indispensable imperative. It is, however, further observed in this decision that it may all depend upon the nature of the subject-matter, other available correctives and the possible harm flowing from the wrong orders.

75. In relation to the argument on behalf of the petitioners that they are entitled to be heard before a notice under sub-section (2) of Section 13 is issued failing which there is denial of the principles of natural justice, a reference has been made to certain decisions to submit that in every case, it is not necessary to make a provision for providing a hearing. For example, in the case of a licensing statute, see Kishan Chand Arora [AIR 1961 SC 705 : (1961) 3 SCR 135] . The other decisions referred to are: Lachhman Dass v. State of Punjab [AIR 1963 SC 222 : (1963) 2 SCR 353] , Chairman, Board of Mining Examination v. Ramjee [(1977) 2 SCC 256 : 1977 SCC (L&S) 226] , SCC at p. 262 and Haryana Financial Corpn. v. Jagdamba Oil Mills [(2002) 3 SCC 496] , SCC at p. 504, para 7 to submit that concept of natural justice is not a straitjacket formula. It, on the other hand, depends upon the facts of the case, nature of the enquiry, the rules under which the Tribunal is acting and what is to be seen is that no one should be hit below the belt. Relationship between the creditor and the debtor, it is submitted, is essentially in the realm of a contract.

76. In regard to the submission made by the parties as indicated in the preceding paragraphs, ***we would like to make it clear that issue of a notice to the debtor by the creditor does not attract the application of the principles of natural justice. It is always open to tell the debtor what he owes to repay. No hearing can be demanded from the creditor at this stage. So far as the provision of appeal is concerned,*** *we have already discussed in the earlier part of the judgment that proceedings under Section 17 of the Act have been wrongly described as appeal before the Debts Recovery Tribunal.* ***It is in fact a forum where proceedings are originally initiated in case of any grievance against the creditor in respect of any measure taken under sub-section (4) of Section 13 of the Act.*** *Hence, the decisions on the point as to whether provision for an appeal is essential or not are not of any assistance in the facts of the present case.*

77. It is also true that till the stage of making of the demand and notice under Section 13(2) of the Act, no hearing can be claimed for by the borrower. But looking to the stringent nature of measures to be taken without intervention of court with a bar to approach the court or any other forum at that stage, it becomes only reasonable that the secured creditor must bear in mind the say of the borrower before such a process of recovery is initiated so as to demonstrate that the reply of the borrower to the notice under

Section 13(2) of the Act has been considered applying mind to it. The reasons, howsoever brief they may be, for not accepting the objections, if raised in the reply, must be communicated to the borrower. True, presumption is in favour of validity of an enactment and a legislation may not be declared unconstitutional lightly more so, in the matters relating to fiscal and economic policies resorted to in the public interest, but while resorting to such legislation it would be necessary to see that the persons aggrieved get a fair deal at the hands of those who have been vested with the powers to enforce drastic steps to make recovery." (Emphasis Supplied)

34. This Court taking into account the judgments rendered by three Division Benches of this Court, as referred to hereinabove, and the observations of the Supreme Court in the case of *Mardia Chemicals Ltd.* (supra), is of the opinion that nothing can be read into the language of Section 14 of the Act, which has not been provided specifically therein by the Parliament.

After the judgment was rendered in *Mardia Chemicals Ltd.* (supra), the Act was amended and the provisions for pre-deposit of 75% was done away with for approaching the Tribunal.

35. Since in the statute itself there is no provision for giving opportunity of hearing in an action under Section 14 of the Act, this Court cannot provide such opportunity of hearing to the writ petitioner. It is settled position in law that the Court ought to decide matters on the basis of law as it exists and declare the same instead on the basis of what law should be.

36. In this case, this Court finds that the observations made by the Supreme Court in *Satyawati Tandon* (supra) and *V. Noble Kumar* (supra) with regard to special Statutes like the SARFAESI Act and the limited jurisdiction of the High Court where statutory remedy is available, cannot be ignored by this Court.

37. This Court has considered the submissions made by the learned counsel for the parties, including the submissions made on merits of the order dated 01.11.2019 passed by the Chief Judicial Magistrate, Lucknow and the arguments raised that there is no recording of satisfaction as is required under Section 14 of the Act with regard to the contents of the affidavit by the secured creditor i.e. the Bank.

38. This Court has noticed that the Chief Judicial Magistrate in his order dated 01.11.2019 referred to the fact that the affidavit had been filed by the Bank on all the nine points/sub-clauses of the first proviso to Section 14(1) of the Act. Moreover, the Bank has also stated that a notice under Section 13(2) had been given to the borrower. The borrower choose not to reply to the same. Moreover, there was no order passed by any competent Court in favour of the borrower even after notice under Section 13(4) was issued. After recording such satisfaction, the order impugned has been passed with the caveat that in case it is found that the affidavit submitted by the Bank contains incorrect statement, the responsibility would lie on the Bank for any legal proceedings taken by the borrower.

Since the petitioners have already approached the Tribunal against the action taken by the Bank under Section 13(4) of the Act and there is no interim

order of the Tribunal, the Bank could have and rightly proceeded by filing an application under Section 14 of the Act.

39. It cannot be said that there is no recording of satisfaction by the Chief Judicial Magistrate in the order impugned.

40. The petitioners have remedy against such action and the order passed by the Chief Judicial Magistrate concerned by filing an application before the Debts Recovery Tribunal under Section 17 of the Act. The Tribunal would have the benefit of pleadings already before it in the Securitization Application No.530 of 2019 and would be in a better position to appreciate all aspects of the matter.

41. Writ Jurisdiction is an extraordinary jurisdiction and as has been observed by the Supreme Court in *Satyawati Tandon* (supra), such extraordinary jurisdiction ought not to be exercised in matters where adequate statutory remedy is available.

42. The writ petition is ***dismissed*** as not maintainable on the grounds of availability of statutory remedy alone and the petitioners may, if they so advised, file an appeal before the appropriate forum.

43. Any observation made by this Court on the merits of the order passed by the Chief Judicial Magistrate may not be read against the petitioners as they may be able to satisfy the appellate authority that the order had been passed on misrepresentation of facts by the Bank.

(2020)02ILR A73
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 03.02.2020

BEFORE

THE HON'BLE MRS. SANGEETA CHANDRA, J.

Misc. Single No. 26230 of 2016

U.P.P.C.L. & Ors. ...Petitioners
Versus
Presiding Officer Labour Court Faizabad & Anr. ...Respondents

Counsel for the Petitioners:
Mata Prasad Yadav

Counsel for the Respondents:
C.S.C., Ishwar Dutt Shukla, Mohd. Mustafizul Haq, Santosh Kumar Mehrotra

A. Challenging-award-passed by O.P no. 1-reinstating O.P no. 2-who was engaged as workman on muster roll-and removed without any notice-has been granted reinstatement along with continuity of service & seniority-20% back wages-on the basis of experience certificate-issued by J.E-upon the claim made after 10 years-not barred by limitation-in case industrial dispute-raised by workman-Petition Dismissed.

B. Held, having perused the Award impugned, this Court finds that the O.P no. 1 has more or less stuck to the settled position in law while granting relief to the workman. It is found that there is 10 yrs delay in starting conciliation proceedings and therefore, 20% of the back wages have been granted to the workman from the date the application for conciliation proceeding was filed by the workman till the date of order of reinstatement. No back wages have been granted for the 10 yrs the workman remained out of employment with effect from 1992 to the year 2000. Moreover, the workman concerned has been given reinstatement only as muster roll, the original post on which he was working and he has been given service benefits that were similar to employees working on muster roll in the same establishment. The workman was found entitled to continuity in service & seniority also. This court finds no good ground to show interference in such discretion being judiciously exercised. Petition Dismissed.

Writ Petition dismissed. (E-8)

List of cases cited: -

1. Asst. Engineer, Raj. Development Corp. & Anr vs Gitam Singh (2013) 5 SCC 136

2. Uttaranchal Forest Development Corp. vs M.C Joshi (2007) 9 SCC 353

3. Mahboob Deepak vs Nagar Panchayat Gajraula & Anr (2008) 1 SCC 575

4. Devinder Singh vs Municipal Corp. Sanaur (2011) 6 SCC 584

5. Harijinder Singh vs Punjab State Warehousing Corp. (2010) 3 SCC 192

6. Ajaib Singh vs Sirhind Coop. Marketing-cum-processing Service Society Ltd 1999(6)SCC 82

7. Employers, in re Mgt. of Sudamdih Colliery of M/S Bharat Coking Coal Ltd vs their Workmen by Rashtriya olliery Majdoor Sangh 2006 (108) FLR 740

8. Ram Lakhan Singh vs P.O. Labour Court, Vns 1999 (2) UPLBEC 1226

9. UOI vs Sri Ram Mishra 2008 (26) LCD 1504

10. Jai Bhagwan vs Mgt. of Ambala Central Coop. Bank Ltd AIR 1984 SC 286

11. H.M.T Ltd. vs Labour Court, Ernakulam 1994 Lab LR 720 (SC)

12. Ram Chander Morya vs St. of Haryana 1999 (1) SCT 141

13. Nedungadi Bank Ltd vs K.P Madhavankutty 2000 (84) FLR 673 (SC)

14. Jasmer Singh vs St. of Haryana 2015 (4) SCC 458

(Delivered by Hon'ble Mrs. Sangeeta Chandra, J.)

1. Heard learned counsel for the parties and perused the record.

2. This petition has been filed by the petitioners challenging the Award dated 13.07.2016 passed by the opposite party no.1 in Adjudication Case No.90 of 2001 ***(U.P. Power Corporation Limited Vs. Rakesh Singh).***

3. The petitioners represented by Shri Ajay Kumar Yadav, holding brief of Shri Mata Prasad Yadav, have submitted that the opposite party no.2, Rakesh Singh, was engaged as Muster Roll Daily Wage Employee with effect from 10.05.1987 and continued upto 28.04.1990 on which date he abandoned the services and there was no order of termination passed. After ten years, the opposite party no.2 raised an Industrial dispute. The petitioners submitted before the Conciliation Officer that no proceedings can be initiated after a lapse of ten years. The Conciliation failed and thereafter, a Reference was made by the Government to the opposite party no.1 as to whether the termination of the opposite party no.2 on 28.04.1990 was justified and if not justified, then to what relief the opposite party no.2 was entitled to? Notice was issued to the petitioners and they filed a written statement wherein they again stated that opposite party no.2 had raised the Industrial dispute in the year 2010, although he alleges to have been terminated without notice and retrenchment compensation on 28.04.1990. The petitioners also denied the claim of the workman that he was paid his wages for three years and issued an Experience Certificate by the Junior Engineer concerned. It was the case of the petitioners that the opposite party no.2 could not have been engaged as the Department had stopped engaging Muster Roll employees since 01.07.1979.

4. It has been submitted by the learned counsel for the petitioners that the opposite party no.1 arbitrarily has allowed the claim raised by the opposite party no.2 only on the basis of Experience Certificate issued by the Junior Engineer. The Executive Engineer was the appointing Authority and had been declared as the Competent Officer to issue such Experience Certificate. No records relating to the work done by the opposite party no.2 were available in the office of the petitioners and the opposite party no.1 on their failure to produce record had drawn adverse inference against the petitioners.

5. After arguing at some length on the merits of the Award and the observations made by the opposite party no.1 that despite an application made by the opposite party no.2 for summoning of records, the Corporation had failed to do the same, the learned counsel for the petitioners has fairly limited his arguments only to the question of delay in entertaining the claim petition by the opposite party no.1.

6. It has been submitted that the opposite party no.2 allegedly worked only for three years in between 1987-1990 and he raised an Industrial dispute only in the year 2000, when there was no subsisting dispute between the parties. No reference could have been made by the Government on the delayed application of the opposite party no.2. Yet the claim petition was entertained and orders were passed for reinstatement of the opposite party no.2 with continuity in service and seniority and other consequential benefits arising therefrom. Back wages however, were limited to 20% by the opposite party no.1.

7. Learned counsel for the petitioners has placed reliance upon the judgment rendered by the Hon'ble Supreme Court in the case of ***Assistant Engineer, Rajasthan Development Corporation and Another Vs. Gitam Singh reported in (2013) 5 SCC 136*** to state that the delay defeats the claim made by the workmen. This Court has been led through several paragraphs of the judgment in ***Gitam Singh (Supra)*** to say that even if the services of a workman are terminated in violation of the provision of Section 6-N of the U.P. Industrial Disputes Act (In Pari Materia with Section 25-F of the Central Industrial Dispute Act), the grant of relief of reinstatement and full back wages and continuity of service in favour of retrenched workmen would not automatically follow, as a matter of course. The Supreme Court has in most of the cases modified the Award of reinstatement and granted monetary compensation to the workman instead.

8. In ***Uttranchal Forest Development Corporation Vs. M.C. Joshi reported in (2007) 9 SCC 353,*** the Supreme Court was concerned with a daily wager who worked in the Corporation from 01.08.1989 to 24.11.1991, and whose services were held to be terminated in violation of Section 6-N of the U.P. Act. The Labour Court had directed the reinstatement of the workmen with 50% back wages from the date the Industrial dispute was raised. While setting aside the order of reinstatement and back wages, the Supreme Court had Awarded compensation of Rs.75,000/- to the workmen keeping in view the nature of service rendered by him, the period of service as also the fact that the Industrial dispute was raised after six years.

9. Similarly, in the case of ***Mahboob Deepak Vs. Nagar Panchayat Gajraula and Another reported in (2008) 1 SCC 575,*** the Supreme Court had observed that an order of retrenchment passed in violation of Section 6-N of the U.P. Industrial Dispute Act may be set aside, but an order of reinstatement should not however, be automatically passed. The Court observed in Paragraphs 11 & 12 of the report as follows:-

The High Court, on the other hand, did not consider the effect of non-compliance of the provisions of Section 6N of the U.P. Industrial Disputes Act, 1947. Appellant was entitled to compensation notice and notice pay. It is now well settled by a catena of decisions of this Court that in a situation of this nature instead and in place of directing reinstatement with full back wages, the workmen should be granted adequate monetary compensation. (Madhya Pradesh Administration V. Tribhuban reported in 2007 (5) SCALE 397.)"

10. The Supreme Court observed further in the said judgment that in ***Devinder Singh Vs. Municipal Council, Sanaur, reported in (2011) 6 SCC 584*** and ***Harijinder Singh Vs. Punjab State Warehousing Corporation reported in (2010) 3 SCC 192,*** cited before it by the learned counsel, the Court was not dealing with a daily wage worker. It had come on record that the workmen so engaged, had worked for more than 240 days in a Calendar year preceding the termination of their services, without termination being made in accordance with the provisions of Section 25-F of the Central Act.

11. It observed in Paragraph 29 of the report that both *Devinder Singh (Supra)* and *Harjinder Singh (Supra)* do not lay down the general proposition that in all cases of wrongful termination reinstatement must follow. The Supreme Court clarified that in those cases the judicial discretion exercised by the Labour Court was disturbed by the High Court on a wrong assumptions that initial employment of the employee was illegal.

12. The Supreme Court observed further in Paragraph 29 of the report in *Gitam Singh* that it had in a long line of cases held that the award of reinstatement cannot be said to be proper relief, rather award of compensation in such cases would be in consonance with the demand of justice. Before exercising its judicial discretion, the Labour Court had to keep in view of relevant factors, including the mode and manner of appointment, nature of employment, length of service, the ground on which the termination had been set aside and the delay in raising the industrial dispute before grant of relief in an industrial dispute. The Court had distinguished repeatedly between a daily wager who does not hold a post and a permanent employee and held that where the daily wager had merely worked for more than 240 days in a year, the relief of reinstatement should not be given and monetary compensation would meet the ends of justice.

13. The opposite party no.2 is represented by Ms. Priyam Mehrotra, holding brief of Shri S.K. Mehrotra. She has placed reliance upon the judgment rendered by the Hon'ble Supreme Court in the case of ***Ajaib Singh Vs. Sirhind Co-operative Marketing-Cum-Processing Service Society Ltd. And Another reported in 1999 (6) SCC 82,*** and also on ***Employers, In Relation to The***

Management of Sudamdih Colliery of M/s Bharat Coking Coal Ltd. Vs. Their Workmen by Rashtriya Colliery Mazdoor Sangh Reported in [2006 (108) FLR 740] and judgments of Co-ordinate Benches of this Court rendered in ***Ram Lakhan Singh Vs. Presiding Officer, Labour Court, U.P. Varanasi & Others*** reported in ***1999 (2) UPLBEC 1226, Union of India and Others Vs. Sri Ram Misra and Another reported in 2008 (26) LCD 1504.***

14. Learned counsel for the petitioners in rejoinder has placed reliance upon the judgment rendered by a Co-ordinate Bench of this Court on 19.04.2018 in Writ Petition No.675 (M/S) 2017.

15. This Court having heard the submissions made by the learned counsel for the parties, has gone through the Award rendered by the opposite party no.1.

16. It was the case of the opposite party no.2 that he had been engaged as Daily Wage Muster Roll Employee in Electricity Distribution Division, Gonda, at its sub Station Colonelganj, by one Shri Prakash Sharma, Junior Engineer, and he had been paid his wages on Muster Roll by the Junior Engineer concerned upto 29.04.1990 but was discontinued thereafter without any retrenchment compensation and in violation of Section 6-N of the Act whereas his Juniors Sarvshri Brahmanand, Shivraj and other workmen continued to remain in service thereafter on Muster Roll. New workers on Muster Roll were also engaged, therefore, there was a violation of Section 6-P and Section 6-Q also.

17. When the petitioners made several representations to his Employers and they were not paying any heed, he approached the Conciliation Officer in the year 2000 and on Conciliation proceedings having failed, the Reference has been made by the Government to the opposite party no.1.

18. The Employers had submitted before the Labour Court that since 01.02.1979 there was a ban on engaging daily wagers, therefore, there could not be any engagement of any daily wager like the opposite party no.2, and therefore there could not be any question of dis-engagement as alleged on 28.04.1990. It was also stated that sometimes daily wagers were indeed engaged but their engagement was on daily basis and on completion of work, they automatically were disengaged, no termination orders were passed. It was also stated by the Employers before the opposite party no.1 that a Junior Engineer was not competent to engage the petitioner as Daily wager and he could not have issued any Experience Certificate to him.

19. The workman in rejoinder had stated that he was given his wages on Voucher Form No.28 and was issued an Experience Certificate by the Junior Engineer, Shri Prakash Sharma, and that he had worked for more than 240 days in the preceding twelve months to his termination and that the Attendance Register and the Payment Register be summoned which is available in the office of the Executive Engineer.

20. His application for summoning the record was resisted by the Employer even though an order was passed by the Labour Court for summoning the same. It was alleged by the Employer that since the records were quite old, they had been weeded out. The Employer, however, did not produce any evidence even after it being summoned by

the Labour Court, to show that such records had indeed be weeded out.

21. The opposite party no.1 has drawn the adverse inference on this ground saying that in all Government Departments including the Corporation which is a Government Company, a Register is maintained mentioning the records that have been weeded out. No such Register was produced to substantiate their claim that due to passage of time the old records had been weeded out.

22. The opposite party no.1 has also referred to statement of Employer's witness no.1 Shri Prakash Chandra Gangwal, Executive Engineer, Electricity Distribution Division, Gonda, who stated on Oath that there was no engagement on Muster Roll Employee after 01.02.1979, but on cross-examination it was admitted by him that he had been working as an Executive Engineer in the Division concerned only since 26.07.2008. The workers at the Sub-Station at Colonelganj, were supervised by the Junior Engineer and that he had not seen the record maintained at Sub-station at Colonelganj, with regard to the working of daily wagers.

23. The opposite party no.1 after considering the evidence recorded a finding that Board had issued an order on 25.02.1981 directing that Muster Roll Daily Wager may be engaged to do the work which was earlier being performed by the Contract Labourers, and that the Executive Engineer was designated as Competent Officer to issue Experience Certificate only in November, 1990, by the Board. The Experience Certificate issued to the opposite party no.2 was dated 30.04.1990. Having came to a definite conclusion on the basis of evidence produced by the opposite party no.2, that he had been engaged as Daily Wage Muster Roll Employee and worked for more than 240 days in the preceding year, the Labour Court found his termination to have been done without paying him retrenchment compensation.

24. With regard to the delay in initiating the Industrial dispute, the opposite party no.1 relied upon the *Ajaib Singh (Supra)* and also a judgment rendered by the Supreme Court in 2006 (108) FLR 740. This Court finds that the citations mentioned by the opposite party no.1 in the Award impugned for example 2006 (108) FLR 740 is non-existent, there may have been typographical error in recording the same.

25. Having found the termination of the opposite party no.2 to be in Violation of Section 6-N of the Act. The opposite party no.1 directed for reinstatement of the opposite party no.2 with effect from 30.04.1990 as Muster Roll Coolie and observed that since the opposite party no.2 had initiated the conciliation proceedings only on 03.01.2000, he may be given only 20% of the back wages with effect from 03.01.2000, till the date of his reinstatement. However, he was entitled to continuity in service and seniority and all benefits that have been given by the employers to similarly placed daily wage Muster Roll Employee in the meantime.

26. This Court shall now consider the judgments cited by the learned counsel for the opposite party no.2 namely *Ajaib Singh Vs. Sirhind Co-operative Marketing-Cum-Processing Service Society Ltd. (Supra).* In the said judgment the Hon'ble Supreme Court has observed, on the basis

of the history of Labour Legislation including the Statement of Objects and reasons of the Industrial Dispute Act, 1947, that Article 137 of the Limitation Act had not been specifically made applicable to the proceedings under the Industrial Disputes Act or to seeking a reference of Industrial Dispute to the Labour Court. It observed that the Legislature had intended to protect workmen against victimization and exploitation by the employer and to ensure termination of industrial disputes in a peaceful manner. The object of the Act, therefore, is to give succour to weaker sections of the society which is a pre-requisite for a welfare State.

27. The Supreme Court referred to judgment rendered earlier by it where it had been observed that the provisions of the Limitation Act applied only to proceedings in Courts and not to Appeals or applications before the bodies other than Courts, such as a quasi-judicial Tribunal, or Executive Authorities, notwithstanding the fact that such bodies or authorities may be vested within certain specified powers conferred on Courts under the Codes of Civil or Criminal Procedure.

28. The Supreme Court observed that in ***Jai Bhagwan V. Management of the Ambala Central Co-operative Bank Ltd. reported in AIR 1984 SC 286,*** the Supreme Court had declined to set aside the order of reinstatement of the workman who was found to be wrongly terminated, but having regard to the fact that he had raised the Industrial dispute after a considerable delay without doing anything in the meanwhile, he was not awarded back wages. The grant of half back wages from the date of termination of service until the date of the order and full back wages from that date till his reinstatement was found in the circumstances to meet the ends of justice.

29. In ***H.M.T. Ltd. V. Labour Court, Ernakulam, reported in 1994 Lab LR 720 (SC),*** the Supreme Court observed in respect of claim of full back wages that where there was a delay of 14 years in invoking the jurisdiction of the Labour Court, grant of 60% of back wages upon reinstatement of the workman would meet the ends of justice. It was moreover, observed in Paragraph 10 of the judgment rendered in *Ajaib Singh (Supra)* that the plea of delay if raised by the employer is required to be proved as a matter of fact by showing the real prejudice and not as a merely hypothetical defence. No reference to the Labour Court can be generally questioned on the ground of delay alone. Even in a case where the delay is shown to be existing, the Tribunal, Labour Court or the Board, dealing with the case can appropriately mould the relief by declining to grant wages to the workman till the date he raised the demand regarding his illegal retrenchment/ termination or dismissal. In some cases, the Court may grant compensation instead of part of back wages.

30. Referring to a Full Bench decision of the ***Punjab and Haryana High Court*** in ***Ram Chander Morya V. State of Haryana High Court reported in (1999) 1 SCT 141,*** which was cited by the respondent counsel in *Ajaib Singh (Supra),* the Supreme Court observed that :-

"We are of the opinion that the Punjab and Haryana High Court was not justified in prescribing the limitation for getting the reference made or an

application under Section 37-C of the Act to be adjudicated. It is not the function of the Court to prescribe the limitation where the Legislature in its wisdom had thought it fit not to prescribe any period. The courts admittedly interpret law and do not make laws, Personal views of the Judges presiding the Court cannot be stretched to authorize them to interpret law in such a manner which would amount to legislation intentionally left over by the Legislature. The judgment of the Full Bench of the Punjab and Haryana High Court has completely ignored the object of the Act and various pronouncements of this Court as noted hereinabove and thus is not a good law on the point of the applicability of the period of limitation for the purposes of invoking the jurisdiction of the Courts/Boards and Tribunal under the Act".

31. The Supreme Court further observed that in the facts of the case in *Ajaib Singh (Supra)*, the Tribunal ought to have moulded the relief and held that instead of the order of full back wages to be paid it should have given only part of the back wages for the unexplained delay in approaching the Labour Court.

32. Similar observations have been made by the Hon'ble Supreme Court *Employers, In Relation to The Management of Sudamdih Colliery of M/s Bharat Coking Coal Ltd. (Supra).* The Supreme Court considered the judgments rendered by it in ***Nedungadi Bank Ltd. V. K.P. Madhavankutty reported in 2000 (84) FLR 673 (SC)*** in Paragraph 7 of the report, Paragraph 7 in Sudamdih Colliery (Supra) is being quoted hereinbelow:-

"Law does not prescribe any time limit for the appropriate Government to exercise its powers under Section 10 of the Act It is not that this power can be exercised at any point of time and to revive matters which had since been settled Power is to be exercised reasonably and in a rational manner. There appears to us to be no rational basis on which the Central Government has exercised powers in this case after lapse of about seven years of order dismissing the respondent from service. At the time reference was made no industrial dispute existed or could be even said to have been apprehended. A dispute which is stale could not be the subject-matter of reference under Section 10 of the Act. As to when a dispute can be said to be stale would depend on the facts and circumstances of each case. When the matter has become final, it appears to us to be rather incongruous that the reference be made under Section 10 of the Act in the circumstances like the present one. In fact it could be said that there was no dispute pending at the time When the reference in question was made. The only ground advanced by the respondent was that two other employees who were dismissed from service were reinstated. Under what circumstances they were dismissed and subsequently reinstated is nowhere mentioned. Demand raised by the respondent for raising industrial dispute was ex facie bad and incompetent."

33. In the two Co-ordinate Bench decisions of this Court cited by the learned counsel for the respondent more or less the same settled position in law has been reiterated with regard to delay on the part of the workman in approaching the Labour Court and raising a dispute.

34. This Court has also found in ***Jasmer Singh Vs. State of Haryana reported in 2015 (4) SCC 458,*** The

Supreme Court has relied upon in *Ajaib Singh Vs. Sirhind Cooperative (Supra)* and reiterated that any limitation as prescribed under the Limitation Act would not apply in case an Industrial dispute is raised by a workman. No Reference to a Labour Court can be generally questioned on the ground of delay alone. In Raghuveer Singh Vs. General Manager, Haryana State Roadways Corporation, *Ajaib Singh (Supra)* has again been relied upon to hold that the question of limitation would not apply, although the Labour Court may have the discretion to mould the relief in case the workman approaches the Court with delay.

35. Having perused the Award impugned, this Court finds that the opposite party no.1 has more or less stuck to the settled position in law while granting relief to the workman. It is found that there was 10 years delay in starting conciliation proceedings and therefore, 20% of the back wages have been granted to the workman from the date the application for conciliation proceedings was filed by the workman till the date of order for reinstatement. No back wages have been granted for the ten years the workman remained out of employment with effect from 1992 to the year 2000. Moreover, the workman concerned has been given reinstatement only as Muster Roll Coolie, the original post on which he was working and he has been given service benefits that were similar to employees working on Muster Roll in the same Establishment. The workman was found entitled to continuity in service and seniority also.

36. The Labour Court having exercised its discretion judiciously in giving relief to the workman, this Court finds no good ground to show interference in such discretion being judiciously exercised.

37. This Court has also perused the order-sheet. When the writ petition was initially admitted by this Court on 03.11.2016, the impugned Award had been stayed on the condition that the opposite party no.2 shall be reinstated in service by the petitioner. It has not been disputed by the opposite party no.2 that he has not been reinstated in service on the basis of such conditional interim order.

38. This writ petition is, therefore, **dismissed**. No order as to costs.

(2020)02ILR A81
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 28.01.2020

BEFORE
THE HON'BLE RAJEEV SINGH, J.

Misc. Single No. 32181 of 2019

Sanjay Kumar ...Petitioner
Versus
Court of A.D.J./Spl. Judge P.C. Act-VII, Lko & Anr. ...Respondents

Counsel for the Petitioner:
Pal Singh Yadav, Chandra Shekhar Pandey, Prathama Singh

Counsel for the Respondents:
Govt. Advocate

A. Prevention of corruption Act, 1988-Secs. 7, 13(1)(d) & 13(2)-Code of Cr. Procedure-Secs. 205 (2) & 317(1)-Petitioner-aggrieved by-recording of examination-in-chief-of PW1-in the absence of petitioner and his counsel-normal rule-evidence shall be taken-in presence of accused-in his absence-his counsel must be present-Petition Allowed.

B. Held, that a question could be legitimately be asked—what might happen if the counsel engaged by the accused (whose personal appearance is dispensed with)does not appear or that the counsel does not cooperate in proceeding with the case? We may point out that the legislature has taken care of such eventualities. Sec. 205(2) says that Magistrate can in his discretion direct the personal attendance of the accused at any stage of the proceedings. The last limb of sec. 317(1) confers a discretion on the Magistrate to direct the personal attendance of the accused at any subsequent stage of the proceedings. He can even resort to other steps for forcing such attendance.

Thus, it is found that the examination-in-chief of PW1 was recorded in absence of the applicant as well as his counsel. Therefore, the order dated 06.11.2019 passed by the Special Judge P.C Act-VII, Lko is hereby set aside.

List of cases cited:-

1. Bhaskar Industries Ltd. vs. Bhawani Denim & Apparels Ltd. & Ors. 2001 (7) SCC 401

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

1. Heard Mr. Pal Singh Yadav, learned counsel for the petitioner, Mr. Aniruddh Kumar Singh, learned A.G.A. and perused the record.

2. By means of the present petition, the petitioner prayed for following prayers:-

i. To pass appropriate order for setting aside the examination in chief of the informant PW-1, the opposite party No.2.

ii. To pass appropriate orders for transfer of trial of criminal case No.1302 of 2018 from the court of Additional Sessions Judge/Special Judge-VII PC Act, Lucknow to any other competent court for trial of the case.

iii. To pass appropriate orders for initiating judicial enquiry in respect of aforesaid proceedings by misusing the powers.

3. Learned counsel for the petitioner submitted that on the written complaint of the Inspector Jai Shankar Singh, the F.I.R. as Case Crime No.240 of 2018, under Sections 7, 13(1)(d), 13(2) of Prevention of Corruption Act, 1988 was registered against the petitioner on 30.05.2018 and after investigation, the charge sheet was filed and the cognizance was taken by the competent court. After framing the charges, the prosecution witness was summoned. He further submitted that the matter was fixed on 06.11.2019. On the said date, the petitioner was unable to attend the court due to illness, as a result, he informed to his counsel and his counsel stated him that he is out of station, therefore, adjournment application would be moved alongwith application for exemption before the trial court by his junior counsel.

4. Learned counsel for the petitioner further submitted that a composite application was moved before the trial court by paying court fees of Rs.5/- for both the prayer (Rs.3 for adjournment and Rs.2 for exemption).

5. Learned counsel for the petitioner further submitted that the prayer for exemption was allowed and he further submitted that as it was properly informed to the trial court by moving the application that the counsel for applicant was out of station, so some other date may be fixed, but without considering the provisions of

Section 317 Cr.P.C., the Examination-in-Chief of PW1 was recorded. He further submitted that at about 3:00 p.m., the junior of the counsel for the applicant went to the court and found that prayer for exemption of the applicant was accepted but the Examination-in-Chief of PW1 was recorded in absence of counsel for the applicant, then another application was moved immediately by the junior of the counsel for the applicant with the prayer for the rejection of Examination-in-Chief of PW1, which was recorded in absence of the counsel for the applicant and also requested that the PW1 may be recalled for recording Examination-in-Chief afresh.

6. Learned counsel for the petitioner further submitted that the learned court below did interpolation in the order dated 06.11.2019 and deleted the sentence *"केवल आज के लिए स्वीकृत"।*

7. Learned counsel for the petitioner further submitted that thereafter, the Presiding Officer also endorsed on the application that two prayers cannot be prayed in a single application, hence application is not maintainable rejected and he further submitted that on the second application moved by the junior of the counsel for the applicant for recalling of Examination-in-Chief of PW1, as his Examination-in-Chief was recorded in absence of the accused person as well as counsel for the applicant, but his second application was also rejected by the Presiding Officer. The rejection order dated 06.11.2019 on the second application of the applicant is as under:-

06-11-19

पुकार कराई गई। अभि0 की हा0 माफी का प्रा0 पत्र प्रस्तुत है। ~~केवल आज के लिए स्वीकृत~~। निरस्त हुआ। बयान PW-1 अंकित किया गया। अभियुक्त के जु0 अधि उपस्थित। हस्ताक्षर से इन्कार किया। दि0 6/12/19 को वास्ते जीरह पेश।

8. Learned counsel for the petitioner further submitted that provisions of Section 317 Cr.P.C. clearly provides that in case, the presence of accused is exempted, then the presence of his counsel/lawyer for further proceeding is required. In the present case, by moving one duly stamped application making two prayer one for exemption of the accused and second for adjournment due to personal reasons of the lawyer. He further submitted that on the aforesaid application, the presence of the applicant was exempted by the court below, as it was mentioned in the application that the lawyer is out of station, but the Examination-in-Chief of PW1 was recorded in absence of the lawyer of the applicant and when this fact was apprised to the court below, then the interpolation was made in the order and the application was also rejected by endorsing a new order i.e. two prayers were made in the application, therefore, the application was not maintainable. He further submitted that the learned court below failed to appreciate the fact that the application was duly stamped and by making interpolation in the exemption order, the application for exemption was also rejected, but no any process for presence of the applicant was ordered either by the bailable warrant or any other coercive steps. It also reveals that change was made in the order sheet. He further submitted that the Examination-in-Chief of PW1 was recorded in the absence of lawyer of applicant cannot be considered as an evidence, therefore, the same is liable to be rejected and the court below may be directed to recall the PW1

for fresh Examination-in-Chief in presence of the lawyer of the applicant.

9. Mr. Gaurav Mehrotra, Advocate appearing on behalf of the opposite party No.1 informed that written instructions duly signed by the Presiding Officer of the court below are available and the photocopy of the same is taken on record and it is undisputed that at the first instance, the exemption application of applicant was allowed and thereafter, another order was endorsed on the application that two prayers cannot be prayed in a single application not maintainable rejected and on the order sheet, the exemption prayer was rejected on the next moment and he further submitted that there was no misuse of power by the court, no miscarriage of justice is caused to the petitioner by mere recording of Examination-in-Chief of witness and he further submitted that the present Presiding Officer has no objection, in case, the trial of the aforesaid case is being transferred to some other court.

10. Considering the arguments of learned counsel for the petitioner as well as Mr. Gaurav Mehrotra, Advocate appearing on behalf of ADJ/Special Judge P.C. Act VII, Lucknow and going through the records, it is undisputed that Case No.1302 of 2018 arising out of Case Crime No. 240 of 2018, under Sections 7/13(1)(d), r/w 13(2) of P.C. Act was fixed for evidence of prosecution witness and the applicant moved an application through junior of his counsel and prayed for his exemption and also prayed for fixing some other date, as his counsel was out of station and at the first instance, his application for exemption was allowed and it seems that the Examination-in-Chief of PW1 was recorded despite the fact that it was informed to the court below that the counsel for applicant was out of station and the case was fixed on 06.12.2019 for cross-examination of PW1, but in the afternoon, by way of second application which read as under:-

न्यायालय श्रीमान अपर जिला जज /PC ACT 7 महोदय लखनऊ

वाद सं0– 1302/18240/1

U/S 7/3 PC Act

थानाः– रायबरेली

नियत तिथिः– 6.11.19

सरकार बनाम

संजय कुमार

प्रार्थना पत्र वास्ते स्थगन आवेदन के उपरान्त विपक्षी अधिवक्ता की अनुपस्थिति में गवाही की कार्यवाही (PW 1) पर आपत्ति/पुनः गवाही PW 1 की गवाही कराये जाने के संबंध में

महोदय,

न्यायालय श्रीमानजी के समक्ष प्रार्थी/अभियुक्त की ओर से निम्नलिखित निवेदन है।

1. यह कि उपरोक्त वाद आज न्यायालय श्रीमान जी के समक्ष्ज्ञ नियत है।

2. यह कि उपरोक्त वाद में प्रार्थी/अभियुक्त के अधिवक्ता आज दि0 6.11.19 को न्यायिक कार्य से लखनऊ शहर से बाहर थे जिसका जिक्र हाजिरी माफी के आवेदन के साथ किया गया था। इसके उपरान्त भी ॅ 1 की गवाही विपक्षी अधिवक्ता की अनुपस्थिति में करवाई गई।

अतः श्रीमानजी से निवेदन है कि PW 1 की गवाही प्रार्थी/अभियुक्त के अधिवक्ता की अनुपस्थिति को खारिज करने की कृपा करें। एवं प्रार्थी के अधिवक्ता की उपस्थिति में PW 1 की गवाही पुनः कराने की कृपा करें। श्रीमानजी की महान कृपा होगी।

लखनऊ

प्रार्थी/अभियुक्त

दिनांक 6.11.19

द्वारा कनिष्ठ

समय– 3:00 बजे

अधिवक्ता

A request was made in the aforesaid application that some other date may be fixed and the PW1 may be recalled for his Examination-in-Chief a fresh, as his statement was recorded in the absence of learned counsel for the applicant, but

his application was rejected by saying that since the Examination-in-Chief of witness has been recorded with due permission of the court, therefore, his application was not maintainable and it is also evident that some changes were made in the order sheet as discussed above.

11. It is also relevant to mention here that the basic canon of criminal jurisprudence is that the accused is innocent till proven guilty and that the accused is entitled to a just and fair trial. A fair trial, no doubt, should be governing equally the accused, the prosecution or the victims. Prosecution in a Criminal trial gets an opportunity to first lead evidence. The defence cross examines the prosecution witness to escape their veracity.

12. According to **Bentham**, *"Witnesses are the eyes and ears of justice"* and the very existence of trial court is only for dispensation of justice, the process of court should not be used for harassment of the parties, as Section 273 Cr.P.C. provides that evidence shall be taken in presence of the accused or in the absence of accused when his personal attendance is dispensed with, in presence of his pleader.

13. As the Hon'ble Supreme Court in the case of ***Bhaskar Industries Ltd. Vs. Bhawani Denim & Apparels Ltd. and Others*** reported in ***(2001) 7 SCC 401*** observed that normal rule is that the evidence shall be taken in presence of the accused, however, in absence of the accused such evidence can be taken, but then his counsel must be present. The relevant paras of the judgment are being reproduced as under:-

*"**12.** We cannot part with this matter without adverting to the plea made by the second accused before the trial court for exempting him from personal appearance. He highlighted two factors while seeking such exemption. First is that the offence under Section 138 of the Negotiable Instruments Act is relatively not a serious offence as could be seen from the fact that the legislature made it only a summons case. Second is, the insistence on the physical presence of the accused in the case would cause substantial hardships and sufferings to him as he is a resident of Haryana. To undertake a long journey to reach Bhopal for making his physical presence in the court involves, apart from great hardships, much expense also, contended the counsel. He submitted that the advantages the court gets on account of the presence of the accused are far less than the tribulations the accused has to suffer to make such presence in certain situations and hence the court should consider whether such advantages can be achieved by other measures. Therefore, he relied on Section 317 of the Code. It reads thus:*

"317. Provision for enquiries and trial being held in the absence of accused in certain cases.--(1) At any stage of an enquiry or trial under this Code, if the Judge or Magistrate is satisfied, for reasons to be recorded, that the personal attendance of the accused before the court is not necessary in the interests of justice, or that the accused persistently disturbs the proceedings in court, the Judge or Magistrate may, if the accused is represented by a pleader, dispense with his attendance and proceed with such enquiry or trial in his absence, and may, at any subsequent stage of the proceedings, direct the personal attendance of such accused.

(2) If the accused in any such case is not represented by a pleader, or if the Judge or Magistrate considers his personal attendance necessary, he may, if he thinks fit and for reasons to be recorded by him, either adjourn such enquiry or trial, or order that the case of such accused be taken up or tried separately."

13. *Sub-section (1) envisages two exigencies when the court can proceed with the trial proceedings in a criminal case after dispensing with the personal attendance of an accused. We are not concerned with one of those exigencies i.e. when the accused persistently disturbs the proceedings. Here we need consider only the other exigency. If a court is satisfied that in the interest of justice the personal attendance of an accused before it need not be insisted on, then the court has the power to dispense with the attendance of that accused. In this context, a reference to Section 273 of the Code is useful. It says that:*

"273. Except as otherwise expressly provided, all evidence taken in the course of the trial or other proceeding shall be taken in the presence of the accused, or, when his personal attendance is dispensed with, in the presence of his pleader."

If a court feels that insisting on the personal attendance of an accused in a particular case would be too harsh on account of a variety of reasons, can't the court afford relief to such an accused in the matter of facing the prosecution proceedings?

14. *The normal rule is that the evidence shall be taken in the presence of the accused. However, even in the absence of the accused such evidence can be taken but then his counsel must be present in the court, provided he has been granted exemption from attending the court. The concern of the criminal court should primarily be the administration of criminal justice. For that purpose the proceedings of the court in the case should register progress. Presence of the accused in the court is not for marking his attendance just for the sake of seeing him in the court. It is to enable the court to proceed with the trial. If the progress of the trial can be achieved even in the absence of the accused the court can certainly take into account the magnitude of the sufferings which a particular accused person may have to bear with in order to make himself present in the court in that particular case.*

15. *These are days when prosecutions for the offence under Section 138 are galloping up in criminal courts. Due to the increase of inter-State transactions through facilities of the banks, it is not uncommon that when prosecutions are instituted in one State the accused might belong to a different State, sometimes a far distant State. Not very rarely, such accused would be ladies also. For prosecution under Section 138 of the NI Act the trial should be that of a summons case. When a Magistrate feels that insistence of personal attendance of the accused in a summons case, in a particular situation, would inflict enormous hardship and cost to a particular accused, it is open to the Magistrate to consider how he can relieve such an accused of the great hardships, without causing prejudice to the prosecution proceedings.*

16. *Section 251 is the commencing provision in Chapter XX of the Code which deals with trial of summons cases by Magistrates. It enjoins on the court to ask the accused whether he pleads guilty when the "accused appears or is brought before the Magistrate". The*

appearance envisaged therein can either be by personal attendance of the accused or through his advocate. This can be understood from Section 205(1) of the Code which says that:

"205. (1) Whenever a Magistrate issues a summons, he may, if he sees reason so to do, dispense with the personal attendance of the accused and permit him to appear by his pleader."

***17.** Thus, in appropriate cases the Magistrate can allow an accused to make even the first appearance through a counsel. The Magistrate is empowered to record the plea of the accused even when his counsel makes such plea on behalf of the accused in a case where the personal appearance of the accused is dispensed with. Section 317 of the Code has to be viewed in the above perspective as it empowers the court to dispense with the personal attendance of the accused (provided he is represented by a counsel in that case) even for proceeding with the further steps in the case. However, one precaution which the court should take in such a situation is that the said benefit need be granted only to an accused who gives an undertaking to the satisfaction of the court that he would not dispute his identity as the particular accused in the case, and that a counsel on his behalf would be present in court and that he has no objection in taking evidence in his absence. This precaution is necessary for the further progress of the proceedings including examination of the witnesses.*

***18.** A question could legitimately be asked -- what might happen if the counsel engaged by the accused (whose personal appearance is dispensed with) does not appear or that the counsel does not cooperate in proceeding with the case? We may point out that the legislature has taken care of such eventualities. Section 205(2) says that the Magistrate can in his discretion direct the personal attendance of the accused at any stage of the proceedings. The last limb of Section 317(1) confers a discretion on the Magistrate to direct the personal attendance of the accused at any subsequent stage of the proceedings. He can even resort to other steps for enforcing such attendance."*

14. Thus, it is found that the Examination in Chief of PW1 was recorded in absence of the applicant as well as his counsel. Therefore, the order dated ***06.11.2019*** passed by the Special Judge P.C. Act-VII, Lucknow in Case No.1302 of 2018 arising out of Case Crime No. 240 of 2018, under Sections 7/13(1)(d), r/w 13(2) of P.C. Act is hereby ***set aside.***

15. The trial court is directed to recall PW1 and record his Examination-in-Chief in accordance with the observation mentioned here and above and also proceed strictly, in accordance with law.

(2020)02ILR A87
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 27.12.2019

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.
THE HON'BLE RAJEEV MISRA, J.

PIL No. 2497 of 2019

Rajat Gangwar ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Kunal Shah, Sri Abhinav Bhattacharya

Counsel for the Respondents:

C.S.C., Sri Nimai Das

A. Constitution of India – Entry 17, list I Schedule VII – Citizenship Act, 1955 – Citizenship Amendment Act, 2019 – Power to make law – The statement of object and reasons for CAA, 2019 provides that in order to give protection to the persecuted members of certain minority communities in the three countries, namely, Pakistan, Bangladesh and Afghanistan, amendments have been made in Act, 1955 vide it – Entry 17, list I Schedule VII of Constitution provides subject of 'Citizenship, naturalisation and aliens' – Thus, power to make law in respect of citizenship is within the ambit of Parliament (Para 22 and 37)

B. Constitution of India – Article 19 – Right of peaceful protest and assembly – Voice of dissent – Limitation and Restriction – Fundamental right of speech and includes right of assembly or right of taking peaceful procession – A voice of dissent is fundamental in a democracy – Persons taking out processions are also under an obligation to take care that their exercise of fundamental right does not infringe fundamental rights of others as both have to be maintained and enjoyed simultaneously – Fundamental right of an individual or group of individuals cannot override similar fundamental rights of others, who are similarly situated, though not participants of such protest or procession. (Para 42)

C. Constitution of India – Article 226 – Guidelines issuing power – Exercise – In the presence of enough provision under the statute, the power of issuing Guidelines for taking out procession etc. cannot be exercised. (43)

Writ Petition dismissed. (E-1)

List of cases cited :-

1. In Re: Destruction of Public and Private Properties vs. State of Andhra Pradesh and others, 2009(5) SCC 212

2. Mazdoor Kisan Shakti Sangathan vs. The Union of India (UOI) and Ors., AIR 2018 SC 3476

3. Kodungallur Film Society and Ors. vs. Union of India (UOI) and Ors., 2018(10) SCC 713.

4. Ramlila Maidan Incident vs. Home Secretary, Union of India (UOI) and Ors., 2012(5) SCC 1

5. Writ Petition No. 36634 of 2019, Varaaki vs. Chief Secretary Tamil Nadu, decided on 22.12.2019

6. Mohammad Shujauddin vs. State of U.P. and others, 2011(1) ADJ 63

7. State of U.P. and others vs. Shah Mohammed and others, (1969) 1 SCC 771

8. Izhar Ahmad Khan vs. Union of India, 1962 AIR 1052

9. Joginder Kumar vs. State of U.P. and others 1994(4) SCC 260

(Delivered by Hon'ble Sudhir Agarwal, J. & Hon'ble Rajeev Misra, J.)

1. Heard Sri Kunal Shah and Sri Abhinav Bhattacharya, Advocates for petitioner and Sri Nimai Das, learned Additional Chief Standing Counsel assisted by Sri B.P. Singh Kachhawah, Standing Counsel for respondents.

2. Petitioner-Rajat Gangwar, has filed this writ petition claiming himself to be an Advocate registered with U.P. Bar Council, Enrollment No. U.P. (G) 6734/2014 and Advocate on Roll No. 1494/2016, practicing with Sri Mohd. Arif Khan, Senior Advocate and Sri Amrendra Nath Tripathi, Advocate, at Lucknow.

3. The writ petition has been filed as Public Interest Litigation *(hereinafter referred to as 'PIL')* with following prayer:

"(a) Issue a writ, order or direction in the nature of a mandamus directing the Respondents to formulate guidelines for grant of permission of peaceful demonstrations after taking into consideration the competing interests of various stake holders.

(b) Issue a suitable order for setting up of Claims Commissioner in the light of the guidelines stipulated by the Hon'ble Supreme Court in ***Destruction of Public and Private Properties v. State of A.P. and Others (2009) 5 SCC 212.***

(c) Issue a writ, order or direction in the nature of a mandamus directing the Respondents to upload information on accessible electronic database with respect to detainees who have been arrested in the aftermath of the protests that ensued in the State of Uttar Pradesh after the enactment of Citizenship Amendment Act, 2019, status reports of the investigation/trials and provide visitation rights to their lawyers and friends, as per law.

(d) Issue any other suitable writ, order or direction, which this Hon'ble Court may deem fit and proper in the facts and circumstances of the case;

4. Petitioner claims to espouse the cause of residents of State of U.P. including peaceful protesters, persons who have suffered loss of property and life due to protests, turning violent, and injured police personnel of State of U.P. Petitioner also seeks enforcement of various guidelines laid down by Supreme Court in **In Re: Destruction of Public and Private Properties vs. State of Andhra Pradesh and others, 2009(5) SCC 212; Mazdoor Kisan Shakti Sangathan vs. The Union of India (UOI) and Ors., AIR 2018 SC 3476; and, Kodungallur Film Society and Ors. vs. Union of India (UOI) and Ors., 2018(10) SCC 713.**

5. Brief facts stated in the writ petition are that, on 19.07.2016 Citizenship (Amendment) Bill, 2016 was introduced in Lok Sabha and on 12.08.2016 it was referred to Joint Parliamentary Committee. It was passed by Lok Sabha on 08.01.2019 but due to dissolution of Lok Sabha, Bill lapsed. Later on Citizenship (Amendment) Bill 2019 was introduced on 09.12.2019 in 17th Lok Sabha and passed on 10.12.2019. On 11.12.2019 Rajya Sabha also passed Bill. It received assent of President of India on 12.12.2012 and became Citizenship (Amendment) Act, 2019 *(hereinafter referred to as "CAA, 2019").* It is also stated in Para 15 of writ petition that vires of CAA, 2019 has been challenged before Supreme Court by filing writ petitions under Article 32 of Constitution of India. On 18.12.2019 Supreme Court issued notices and has fixed 22.01.2020 for hearing. In the meantime several protests ensued across the country which included protests held at Jamia Millia Islamia University, Delhi *(hereinafter referred to as 'JMIU')* and Aligarh Muslim University, Aligarh *(hereinafter referred to as 'AMU').* In State of U.P. also similar protests ensued at Lucknow on 19.12.2019 which turned violent resulting in damage to public property as also loss of life and injuries to several persons. Print and Electronic Media have reported information of spreading of similar protests which turned violent in different cities of State of U.P., i.e., Aligarh, Meerut, Muzaffarnagar, Bijnor, Bulandshahr, Kanpur, Rampur, Gorakhpur and Varanasi, wherein about 17

persons lost their life, to the best knowledge of petitioner. Police outpost and several private and government movable and immovable properties were vandalized and set ablaze. At some places stone pelting and firing by belligerent protesters also took place. District authorities imposed restrictions under Section 144 Cr.P.C. but violating the same various protests which turned violent were raised. Protests continued at different places in State of U.P. As per newspaper report the restrictions under Section 144 Cr.P.C. imposed on 20.12.2019 have been extended upto 31.01.2020. Chief Minister is also reported to have stated that no permission was granted by State authorities to anyone to observe protest amidst operation of restriction under Section 144 Cr.P.C. Similar statement was made by Director General of Police, State of U.P. *(hereinafter referred to as 'DGPUP').* It is further stated that though petitioner does not dispute that requirement of prior permission to exercise fundamental rights of peaceful protests and peaceful assembly guaranteed under Article 19(1)(a) and 19(1)(b) of Constitution of India is valid restriction, but respondents-authorities under the garb of restrictive orders, passed under Section 144 of Cr.P.C., cannot scuttle, efface or throttle fundamental rights of peaceful protesters and demonstrators. Their exists a duty on the part of State to balance competing interest i.e. rights under Article 19(1)(a) and 19(1)(b) of citizens vis-a-vis duty of State to maintain law and public order. It is to be undertaken in the manner as stated by Supreme Court in Para 29 of the judgments in **Ramlila Maidan Incident vs. Home Secretary, Union of India (UOI) and Ors., 2012(5) SCC 1; In Re: Destruction of Public and Private Properties vs. State of Andhra Pradesh (supra); Mazdoor Kisan Shakti Sangathan vs. The Union of India (supra);** and, **Kodungallur Film Society and Ors. vs. Union of India (supra).** State is under a dual obligation to bolster and foster fundamental rights of citizens under Article 19 of Constitution. At the same time, it is under an obligation to ensure public order, tranquility and social order. Rights of citizens can be regulated with reasonable restrictions but cannot be prohibited altogether. However, State has failed in its obligation to secure law and order and protect fundamental rights of citizens inasmuch as State Government did not conceive of any guidelines qua granting/refusal of permission in the wake of operation of orders under Section 144 Cr.P.C. State has failed to conceptualize guidelines for granting permission and regulating protesters. It is imperative upon State, as a part of regulative measures, to demarcate area, time slot of protest, identification etc. of protesters and credentials thereof, before grant of any permission for observing protests, processions etc. State is also under obligation to deploy adequate security forces, provide medical facilities, drone photography/videography, availability of fire brigades etc. It is also obligatory to deploy requisite strength of water cannons to ensure peaceful procession and to overcome any untoward incident.

6. Some directions were issued in similar matter by a Division Bench of Madras High Court in **Writ Petition No. 36634 of 2019, Varaaki vs. Chief Secretary Tamil Nadu,** decided on 22.12.2019 and the same are relied in para 37 of the writ petition.

7. It is pleaded by petitioner in para 39 onwards that State of U.P. is engulfed

in a very sorry state of affairs. There have been widespread destruction of public and private properties. The incident of violence has continued unabated for the past a few days and have gripped various cities of State of U.P. The said demonstrations/ protests have thrown public and private life and property in jeopardy. News of violence is continuing with each passing hour. Several police personnel, innocent citizens and protesters have sustained injuries. Some have lost lives. Public and private property have also been damaged by certain miscreants and anti-social elements. The miscreants have sabotaged peaceful protests and hindering the right of free speech of innocent citizens. They have also committed criminal acts qua private and public properties. It is imperative upon Government to assess damages caused to public and private property, by appointing a Claims Commissioner and thereafter to make investigation into the liability. Print and Electronic Media report shows that respondents have started identification of miscreants and to recover loss of public and private property, fixing liability and recovering the amount of damages. However, a road map or procedure qua assessment of damages has to be prepared in the light of guidelines laid down by Supreme Court in **In Re: Destruction of Public and Private Properties vs. State of Andhra Pradesh (supra).**

8. Petitioner has also stated in Para 46 that respondents must upload information on accessible electronic database with respect to the detainees and provide visitation rights to their lawyers, family members and friends, as per law. Respondents-authorities after the protest turned violent instead of devising a mechanism and participating with persons organising protests, have started a massive unprecedented crackdown on activists and other persons, arresting and detaining several of them. A number of activists including lawyers have also been detained by respondents.

9. Petitioner claims to have received telephonic calls in the evening of 21.12.2019, stating that some activists of Peoples Union for Civil Liberties *(hereinafter referred to as 'PUCL')* have been arrested and detained in Lucknow and Muzaffarnagar.

10. One Mohd. Shoaib, Advocate was detained in Lucknow by respondents and his whereabouts were not known to his kith and kin, resulting into filing of Habeas Corpus Writ Petition No. 36848 of 2019 before Lucknow Bench of this Court, wherein an order was passed on 21.12.2019 (copy of the said order has been placed on record as Annexure 9 to the writ petition). In Para 51 of the writ petition, it is stated that petitioner has received information from colleagues and other persons that various persons detained are facing similar predicaments and their whereabouts are not known to their kiths and kins. In this regard, a reference is made to the cases of Shamim Ahmad, Shavez Ahmad, Abdul Haffez and Ibad Ahmad, whose whereabouts have not been communicated to their kiths and kins and in this regard, a letter dated nil (Annexure 10 to the writ petition) has been submitted by one Raees Jahan, wife of Irshad Ahmad to the District Magistrate, Lucknow. In this backdrop, it has been prayed that directions be issued as prayed in the writ petition, which we have quoted above.

11. Learned counsel for petitioner contended that peaceful protest and

assembly is a part of fundamental right of speech and movement. Though reasonable restrictions may be imposed but fundamental rights of protest and assembly or raising voice of dissent cannot be prohibited in an arbitrary manner. In the garb of taking action against protest march, which turned violent, State authorities cannot penalize innocent protesters, ignoring the fact that violent activities have been dominated by some miscreants and anti-social elements who have intruded the peaceful protests. Instead of identifying those miscreants and anti-social elements, State is illegally arresting and detaining innocent people, attaching their properties, denying information, which they, under law, are bound to disclose, to their kith and kin. A large number of residents of State of U.P. are being denied their fundamental rights of free movement etc. at the pretext of arrest and detention. He further submitted that various guidelines and preventive actions which State authorities are obliged to observe in such circumstances as laid down by Supreme Court in various authorities are being ignored and blatantly, being violated. Since the number of such persons is so much that everyone cannot approach this Court, hence, this writ petition for protection of their rights in the hands of arbitrary and illegal action of the respondents.

12. Shri Nimai Das, learned Additional Chief Standing Counsel *(hereinafter referred to as 'ACSC')* assisted by Shri B.P. Singh Kachhawah, Standing Counsel, after receiving instructions, has stated that as on 25.12.2019 in all, 1022 persons have been arrested at different places and details thereof are as under :-

Sl.No.	**District**	**Number of persons arrested**
1.	Meerut	13
2.	Ghaziabad	62
3.	Muzaffarnagar	1
4.	Bareilly	63
5.	Pilibhit	10
6.	Amroha	10
7.	Bijnor	236
8.	Moradabad	2
9.	Rampur	50
10.	Sambhal	45
11.	Firozabad	24
12.	Aligarh	26
13.	Hathras	2
14.	Kanpur Nagar	24
15.	Fatehgarh	7
16.	Jhansi	4
17.	Lucknow	170
18.	Raebareilly	2
19.	Sitapur	19
20.	Ambedkarnagar	6
21.	Fatehpur	1
22.	Pratapgarh	5
23.	Hamirpur	8
24.	Deoria	17
25.	Gorakhpur	5
26.	Kushinagar	23
27.	Sant Kabir Nagar	1
28.	Gonda	1
29.	Bahraich	66
30.	Varanasi	68
31.	Jaunpur	3
32.	Azamgarh	13
33.	Mau	20
34.	Bhadohi	15
	Total	**1022**

13. He has also placed before us a copy of letter dated 26.12.2019 sent by the Additional Chief Secretary (Home) *(hereinafter referred to as 'Add. CS (Home)')* to the District Magistrates of Lucknow, Meerut, Hapur, Saharanpur, Rampur, Firozabad, Kanpur Nagar, Muzaffarnagar, Mau, Aligarh, Gorakhpur and Bulandshahar, directing them to make assessment of loss of public and private property and take action for recovery of damages from responsible protesters causing such damage, in accordance with Government Order dated 27.04.2011, which was issued pursuant to Supreme Court's judgment in **In Re: Destruction of Public and Private Properties vs. State of Andhra Pradesh (supra)** and this Court's judgment in **Mohammad Shujauddin vs. State of U.P. and others, 2011(1) ADJ 63.** Learned ACSC further stated that after making due identification of guilty persons i.e. after collecting video clipping, photographs etc. which have been prepared by individual residents of the affected area, media and police authorities etc., notices are being sent to those persons who are identified *prima facie*, giving them opportunity to reply and thereafter, appropriate action is under process. He clearly stated that without proper identification and ascertaining involvement of individual in destructive activities, causing damage to public and private property etc., no action would be taken by State against any individual who is otherwise innocent. Every care and precaution, as far as possible, to the highest extent, is being taken by State authorities in ensuring this objective.

14. We have heard parties at length. The entire genesis of dispute raised in this writ petition is Citizenship Act, 1955 *(hereinafter referred to as 'Act, 1955')* and amendment made therein vide CAA, 2019. It would, therefore, be appropriate to have a glimpse of aforesaid statute.

15. Part-II of Constitution of India deals with subject of 'Citizenship'. It has Articles 5 to 11. Article 5 provides that at commencement of this Constitution, every person who has his domicile in territory of India and (a) was born in the territory of India; or (b) either of whose parents was born in the territory of India; or (iii) who has been ordinarily resident in the territory of India for not less than five years immediately preceding such commencement, shall be a citizen of India.

16. Therefore, every person who had his domicile in territory of India and born before 26th January, 1950 or any of his parents was born in the territory of India or the individual was residing in territory of India for a period not less than five years before 26th January, 1950, shall be a citizen of India. This is 'Citizenship' conferred by Article 5 at the commencement of Constitution.

17. The term "territory of India" has been defined in Article 1. Article 6 talks of citizenship of such persons who migrated to India from Pakistan. Giving overriding effect over Article 5, Article 5 provides that a person who has migrated to territory of India from territory now included in Pakistan, shall be deemed to be a citizen of India at the commencement of Constitution if (i) he or either of his parents or any of his grandparents was born in India, as defined in Government of India Act, 1935 (as originally enacted); and (ii) in case where such person has so migrated before 19th July, 1948, he has been ordinarily resident in territory of India since the date of his migration; or in

the case where such person has so migrated on or after 19th July, 1948, he has been registered as a citizen of India by an officer appointed in that behalf by Government of the Dominion of India on an application made by him therefor to such officer before the commencement of Constitution in the form and manner prescribed by Government.

18. There is a proviso also that no person shall be so registered unless he has been resident in territory of India for at least six months immediately preceding the date of his application.

19. Article 7 talks of rights of citizenship of certain migrants to Pakistan after 1st March, 1947. It is stated that a person, who has after 1st March, 1947, migrated from territory of India to territory now included in Pakistan, shall not be deemed to be a citizen of India. There is a proviso, however, providing that a person who had so migrated to Pakistan, but then returned to territory of India under a permit for resettlement or permanent return issued by or under the authority of any law, every such person shall, for the purposes of Article 6 (b), be deemed to have been migrated to territory of India after 19th July, 1948. Article 7 has been given overriding effect over Articles 5 and 6 both.

20. Article 8 talks of right of citizenship to certain persons of Indian origin residing outside India. Article 9 talks of loss of citizenship of India if any person has voluntarily acquired citizenship of any foreign State. Article 10 provides that every person who is or is deemed to be a citizen of India under any of the provisions of Part-II of Constitution, shall, subject to the provisions of any law that may be made by Parliament, continue to be such citizen. Article 11 provides that nothing in the foregoing provisions of Part-II shall derogate from the power of Parliament to make any provision with respect to acquisition and termination of citizenship and all other matters relating to citizenship.

21. Considering the above provision, in **State of U.P. and others vs. Shah Mohammed and others, (1969) 1 SCC 771,** Court held that Constitution does not intend to lay down a permanent or comprehensive law relating to citizenship of India. Power to enact such a law is left to Parliament and it is not fettered by Articles 5 to 10. It is competent for Parliament, in exercise of power conferred by Article 11, to take away or effect citizenship already acquired under other articles of Part-II of the Constitution. This is what was also held in **Izhar Ahmad Khan vs. Union of India, 1962 AIR 1052.**

22. Entry 17, list I Schedule VII of Constitution provides subject of "Citizenship, naturalisation and aliens" and thus, power to make law in respect of citizenship is within the ambit of Parliament.

23. In exercise of aforesaid power, Parliament enacted Act, 1955. Section 3 of Act, 1955 deals with the subject of 'Citizenship by birth'; Section 4 talks of 'Citizenship by descent'; Section 5 provides 'Citizenship by registration' and Section 6 deals with 'Citizenship by naturalisation'. Section 8 confers power upon any citizen to renunciate citizenship and Section 9 talks of termination of citizenship. Section 10 talks of 'Deprivation of citizenship' in certain

cases. Section 13 makes a provision for Certificate of Citizenship in case of doubt, which can be issued by Central Government. It provides that such certificate, when issued, shall be conclusive evidence that person was citizen on date of such certificate, but this is without prejudice to any evidence that he was such a citizen at an earlier date. Section 16 confers power upon Central Government to delegate its powers, except Sections 10 and 18, to such officer or authority as may be so specified. Section 18 confers power of making rules upon Central Government.

24. Initially, there were four Schedules appended to Act, 1955, but First and Fourth Schedule having already been omitted, now, there remained only two schedules i.e. Second and Third Schedule. The Third Schedule provides qualifications for naturalisation i.e. in the context of subject of citizenship governed by Section 6(1) of Act, 1955.

25. After initial enactment, Act, 1955 has undergone four amendments vide Act 65 of 1985, Act 6 of 2004, Act 32 of 2005 and Act 1 of 2015.

26. The first amendment of 1985 i.e. Act 65 of 1985 was necessitated due to Memorandum of Settlement (Assam Accord) relating to foreigners' issue. It resulted in insertion of Section 6A, making special provisions as to citizenship of persons covered by Assam Accord.

27. The next amendment of 2004 was necessitated due to policy accepted by Central Government for providing dual citizenship to persons of Indian origin belonging to certain specified countries. It resulted in insertion of Sections 7A, 7B, 7C and 7D, which came into force on 3.12.2004, but these provisions have been substituted in order to give effect the later modified policy of Government of India by substitution of Section 7A to 7D w.e.f. 6.1.2015 vide Act 1 of 2015.

28. The amendment of 2005 i.e. Act 32 of 2005 resulted in omission of Clause 2(gg) and Fourth Schedule w.e.f. 28.06.2005.

29. The present amendment made in Act, 1955 i.e. CAA, 2019 has resulted in amendments of Section 2(1)(b) by insertion of a Proviso, insertion of Section 6B, insertion of Clause (da) in Section 7D and also insertion of Proviso after Clause (f) in Section 7D. It has also inserted Clause (eei) in Section 18 (2) and a Proviso in Clause (d) of Third Schedule.

30. Section 2(b) of Act, 1955 defines "illegal migrant". Earlier provision was substituted by Act 6 of 2004 w.e.f. 3.12.2004, replacing Clause (b) and (c) and Proviso, as existed earlier. Initially, Section 2 (b) and (c) read as under :-

"(b) "citizen", ***in relation to a country specified in the First Schedule, means a person who, under the citizenship or nationality law for the time being in force in that country, is a citizen or national of that country;***

"(c) "citizenship or nationality law", ***in relation to a country specified in the First Schedule,*** *means an enactment of the Legislature of that country which* ***at the request of the Government of that country, the Central Government may, by notification in the Official Gazette, have declared to be an enactment making provisions for the citizenship or***

nationality of that country:"
(emphasis added)

31. The aforesaid Clauses (b) and (c) of Section 2 were substituted by Clause (b) w.e.f. 3.12.2004 and it reads as under :-

(b) "illegal migrant" ***means a foreigner*** *who* ***has entered into India-***

(i) ***without a valid passport or other travel documents*** *and such other document or authority as may be prescribed by or under any law in that behalf; or*

(ii) with a valid passport or other travel documents and such other document or authority as may be prescribed by or under any law in that behalf ***but remains therein beyond the permitted period of time;***

(emphasis added)

32. Now, after Section 2(b)(i), a Proviso has been inserted by CAA, 2019 and it reads as under :-

"Provided that ***any person belonging to Hindu, Sikh, Buddhist, Jain, Parsi or Christian community*** *from Afghanistan, Bangladesh or Pakistan,* ***who entered into India on or before 31st day of December, 2014*** *and who has been* ***exempted by the Central Government by or under clause (c) of sub-section (2) of section 3 of the Passport*** *(Entry into India) Act, 1920 or from* ***the application of the provisions of the Foreigners Act, 1946*** *or any rule or order made thereunder,* ***shall not be treated as illegal migrant for the purposes of this Act;"***

(emphasis added)

33. Section 6B has been inserted for making special provisions as to citizenship of person covered by proviso to clause (b) of sub-section (1) of Section 2 and it reads as under :-

"6B. (1) The ***Central Government or an*** *authority specified by it in this behalf* ***may****, subject to such conditions, restrictions and manner as may be prescribed, on an application made in this behalf,* ***grant a certificate of registration or certificate of naturalisation to a person referred to in the proviso to clause (b) of sub-section (1) of section 2.***

(2) ***Subject to fulfilment of the conditions specified in section 5*** *or the* ***qualifications for naturalisation under the provisions of the Third Schedule, a person granted the certificate of registration*** *or certificate of naturalisation under sub-section (1)* ***shall be deemed to be a citizen of India from the date of his entry into India.***

(3) On and from the date of commencement of the Citizenship (Amendment) Act, 2019, any proceeding pending against a person under this section in respect of illegal migration or citizenship shall stand abated on conferment of citizenship to him:

Provided that such person shall not be disqualified for making application for citizenship under this section on the ground that the proceeding is pending against him and the Central Government or authority specified by it in this behalf shall not reject his application on that ground if he is otherwise found qualified for grant of citizenship under this section:

Provided further that the person who makes the application for citizenship under this section shall not be deprived of his rights and privileges to which he was entitled on the date of receipt of his application on the ground of making such application.

(4) ***Nothing in this section shall*** *apply to* ***tribal area of Assam, Meghalaya, Mizoram or Tripura as included in the Sixth Schedule to the Constitution*** *and the area covered under* ***"The Inner Line" notified under the Bengal Eastern Frontier Regulation, 1873."***

(emphasis added)

34. A perusal of Section 6B(4) shows that it has not been extended to tribal area of Assam, Meghalaya, Mizoram and Tripura as included in Sixth Schedule of Constitution and also to area covered under "The Inner Line" notified under Bengal Eastern Frontier Regulation, 1873.

35. Section 7D of Act, 1955 conferred power upon Central Government to cancel registration granted under Section 7A(1) to Overseas Citizen of India cardholders. Such power can be exercised by Central Government if it is satisfied that the conditions provided in Clauses (a) to (f) mentioned therein exist. By inserting clause (da), one more such condition has been provided in Section 7D. Further, at the end of Section 7D i.e. after Clause (f), a Proviso has been inserted that no order shall be passed under Section 7D without giving reasonable opportunity of being heard to the persons concerned i.e. Overseas Citizen of India cardholders. Section 18 is Rule-making power conferred upon Central Government and by inserting Clause (eei) in sub-Section (2) of Section 18, one more subject has been added in respect whereof rules can be framed by Central Government. Clause (eei) reads as under :-

"(eei) the conditions, restrictions and manner for granting certificate of registration or certificate of naturalisation under sub-section (1) of Section 6B;"

36. As we have already said that Third Schedule deals with qualification for naturalisation with reference to Section 6(1) of Act, 1955. By inserting a Proviso in Clause (d), a modified qualification has been provided with respect to period of residence or service of Government in India and instead of 11 years provided in Clause (d), it has been reduced to 5 years for the category of persons mentioned in said proviso.

37. The statement of object and reasons for CAA, 2019 provides that in order to give protection to the persecuted members of certain minority communities in the three countries, namely, Pakistan, Bangladesh and Afghanistan, amendments have been made in Act, 1955 vide CAA, 2019.

38. Learned ACSC submitted that under the Constitution of India, people of India, the source of power of making Constitution, as a matter of policy, while contemplating equality in all respects to the residents of India, still have protected on certain aspects, rights of minorities by virtue of Articles 29 and 30 of Constitution. Similarly, Parliament in its policy of protecting certain minority communities of three neighbouring countries, who are being persecuted thereat on account of the fact that they are religious minorities in those countries, have desired to provide protection to such persecuted persons and therefore aforesaid amendments have been made by CAA, 2019. He stated that earlier also, when dual citizenship to persons of Indian Origin was contemplated and given effect to by Amendment Act 6 of 2004, it was confined to Indians belonging to certain specified countries, but at that time also, persons of Indian Origin of Pakistan and

Bangladesh were excluded. When Amendment Act 32 of 2005 was enacted, exclusion of Pakistan and Bangladesh continued for the purpose of dual citizenship. He urged that selection of countries was within the realm of Parliament and made in accordance with policy. This time, when three countries have been chosen, integral reason is to protect continuous persecution of members of certain minority communities in the aforesaid countries only on account of their being religious minorities.

39. However, We need not go in further details of this aspect for the reason that neither rational of the aforesaid amendment is up for consideration before this Court nor anything has been argued on this aspect, but reference to the aforesaid provisions have been made only to understand the backdrop of large-scale protest, agitation and processions which have erupted, giving rise to the present writ petition. We are also informed that Supreme Court is already ceased with this matter.

40. Learned counsel for the petitioners stated that protest and procession is against discriminatory amendment based on religion, inasmuch as, members of other religion residing in aforesaid three countries viz. Pakistan, Bangladesh and Afghanistan, who do not belong to religions mentioned in the provisions, added by way of amendment by CAA, 2019 have been singled-out, only on the ground of religion, which is not permissible in the Constitution and it is per se arbitrary and discriminatory, hence, to oppose this discrimination founded only on religion, a large number of people at different places, have protested, taken out processions, which have resulted at some places, some violence and destructive activities. It is contended that petitioner is not, either supporting the amendment or opposing it; he is also not looking into genuineness of protest, march and processions taken out by individuals or groups of people, but what he is concerned about, is that every individual has a fundamental right of speech, assembly and movement and such fundamental right of individuals cannot be thwarted away by Executives by means of either resorting to restrictive provisions like Section 144 Cr.P.C. or by involving such individuals in various criminal cases, etc. He said that individual fundamental rights are being breached with impunity by resorting to illegal arrest and without following guidelines laid down by Supreme Court in the matters of arrest, etc. in **Joginder Kumar vs. State of U.P. and others 1994(4) SCC 260,** which read as under :

"1. An arrested person being held in custody is entitled, if he so requests to have one friend, relative or other person who is known to him or likely to take an interest in his welfare told as far as is practicable that he has been arrested and where is being detained.

2. The Police Officer shall inform the arrested person when he is brought to the police station of this right.

3. An entry shall be required to be made in the Diary as to who was informed of the arrest. These protections from power must be held to flow from Articles 21 and 22(1) and enforced strictly."

41. Per contra, Sri Nimai Das, learned Additional Chief Standing Counsel stated that State has taken all precaution and care to protect fundamental right of every individual, but simultaneously, it has

not allowed and cannot allow the so-called "protesters" to breach fundamental rights of other innocent peaceful residents. State is obliged to protect life, liberty including property of such people. State is also obliged to ensure non-infringement of their fundamental rights of movement, speech, assembly, etc. by creating obstruction, destruction and damage in various ways by such Protesters. Individual rights of non protesters and also protecting their property involves fundamental rights of non-protesters. He said that State has made all attempts to keep a balance in maintaining all such rights, but where protesters and processionists have crossed the limit of lawful and peaceful protest and demonstration and their act has entered into the realm of offence or criminal activity, State Authorities are bound and they have actually intervened at that stage to prevent commission of offence or unlawful activities. Where breach of law has continued and went unabated, State has taken all permissible steps including detention and arrest of persons indulged in such activities. He stated that wherever necessary, even temporary detention was resorted to and as soon as its necessity disappeared, those detainees were immediately released. He said that after verification of various material in the form of electronic and other evidence, identity of the persons has been verified and thereafter, action has been taken, which includes imposition of damages and also initiating criminal proceedings. He said that procedure for assessment of damage to public and private property has been laid down in relevant Government Order and that is being strictly followed. Every care is being taken so that no innocent person, who is not indulged in the wrong activities, is harassed, penalised or otherwise involved in various proceedings. He said that the status of a person is of no relevance. Merely for the reason that a person is a professional or a businessman or serviceman etc. it would not guide the authorities to see whether they should act against him or not even if such individual is indulged in illegal and unlawful activities. Every violator of law has to be dealt with equally. The illustration given by petitioners about Mohd. Shoaib, Advocate arrested by police would not help the petitioner in any manner, for the reason that a person even if an advocate, would not get a licence to indulge in unlawful, illegal and destructive activities. In order to enjoy own individual fundamental right of speech, movement, assembly, no person, even if he is an Advocate, has a licence, liberty or privilege to obstruct other innocent residents and citizens of State of U.P. in exercise of similar rights of their own self and property. If any property, public or private is damaged by anyone in the garb of exercising his fundamental right, such right ceases to be a valid exercise or enjoyment of fundamental right but becomes an illegal, unlawful activity, which is punishable and actionable in the manner provided in law.

42. The general propositions, as argued above on both sides, we find have consensus that fundamental right of speech and includes right of assembly or right of taking peaceful procession. A voice of dissent is fundamental in a democracy. A person, who raised his voice of dissent, cannot be held guilty of any illegal or unlawful activities so long as dissent is peaceful, maintains harmony, does not disturb public tranquility and also protects similar fundamental rights enjoyed by others, who are not part of such

processions or protests. Further, if a person or group of persons, collect or gather in a large number, constitute a procession and take out such procession on public way, obstructing movement of others, they violate fundamental rights of others of free movement and therefore, such persons taking out processions are also under an obligation to take care that their exercise of fundamental right does not infringe fundamental rights of others as both have to be maintained and enjoyed simultaneously. Fundamental right of an individual or group of individuals cannot override similar fundamental rights of others, who are similarly situated, though not participants of such protest or procession. A march on public road has to take care that free movement of traffic is not obstructed, other people's fundamental rights of movement is not obstructed, necessary services like ambulance, fire brigade, etc. are not obstructed. If any such obstruction takes place, it cannot be said that those, who are part and parcel of alleged protest or procession, are simply exercising their fundamental right, inasmuch as, exercise of fundamental right does not mean obstruction, defeat and infringement of fundamental rights of others. Further, those who carry out a procession on public road or public passage or path or public place, are responsible to ensure that no person i.e. the alleged miscreant or criminal element, intrude and become part of said procession or collection of such individuals protesting so as to cause any damage or destruction to public or private property. No defence is available to those who are collecting and not able to keep out such miscreants or criminal elements from becoming part of their own procession and thereby to contend that they have not done anything and it was responsibility of State to sift out those miscreants and criminal elements and detain them. When a group of persons is collected, it is their responsibility to identify a person who is not a member of their group, but has intruded their group and gets indulged in unlawful activities, for the reason that they better know, understand and identify members of their own group. If those who became part of a protest march, procession etc., claim that they do not identify each individual, still it is their responsibility to ensure maintenance of peace and tranquility else any action of one or more persons, who are part of such procession, whether with the knowledge of others or not, will make no difference and all who are part of said procession or protest march, etc. will be equally responsible. No one can claim that he can take out a procession with a gathering of hundreds of thousands persons, but still he has no liability or responsibility to ensure that such group or collection of people remain free from intrusion of miscreants. In our opinion, principle of **Rylands vs. Fletcher, (1868) 3 HL (LR) 330** can be extended to such cases also and those who intentionally and knowingly do something which may turn out in a situation causing loss of damage to public or private property or otherwise, harassment to the members of general public, they are responsible for the consequences caused by their own act and cannot shift responsibility upon State.

43. So far as guidelines for taking out procession etc. are concerned, we find that State is responsible to maintain law and order. For this purpose, enough provisions are available under various statutes. Whenever necessary, Executive also has been provided statutory power of imposing restrictions, exercising power under Section 144 of Cr.P.C. No challenge to the

validity of such restriction has been made in this case. Once restrictions are imposed, no one can claim that he, individually or collectively is entitled to breach such restrictions and still can claim that his action is lawful. Statutory Authority when exercises a statutory power and certain restrictions are imposed, such a statutory order is obligatory to be complied with by all concerned. No one can claim that with impunity such restriction can be violated, still he can claim immunity from legal action, for what has been done by him, individually or collectively.

44. At this stage, we find that petitioner has not placed on record any material to show that State has violated any statutory provision. This Court does not exercise its jurisdiction under Article 226 in absence of any cause of action or any reason to show that there is any infringement of legal or fundamental right of an individual or group of individual by the State. The stand taken by learned ACSC is very fair and we do not find infringement or even lack of transparency on the part of State, particularly when sufficient material is not on record to draw any otherwise inference or conclusion.

45. In our view, therefore, the relief sought by petitioner in the present writ petition is not justified to be granted at this stage.

46. Writ petition is therefore **dismissed** *in limine*.

(2020)02ILR A101

APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 08.01.2020

BEFORE

THE HON'BLE ANIL KUMAR, J.
THE HON'BLE SAURABH LAVANIA, J.

Review Petition Defective No. 75 of 2014

Dinesh Kumar Singh ...Petitioner
Versus
National Insurance Co. Ltd. ...Respondent

Counsel for the Petitioner:
Mukesh Singh

Counsel for the Respondent:

A. Principles of natural justice - to secure justice - to prevent miscarriage of justice - any order having civil consequences and adverse effect - on a person against whom it has been passed - if passed without hearing or giving opportunity of hearing to the person concerned/aggrieved - would be violative of the principles of natural justice - liable to be set-aside.(Para-14,15,20)

Without any notice to the review applicant and without giving any opportunity of hearing to him, the FAFO No. 521 of 99 was decided. (Para-20)

Held:- The application for condonation of delay as well as also the application for review are liable to be allowed in the interest of substantial justice - The judgment and order dated 28.02.2013 passed in FAFO No. 521 of 1999 is hereby recalled - restored to its original number.(Para-22)

Application for condonation of delay & review application allowed. (E-7)

List of cases cited:-

1. Amar Singh Vs. Union of India and others, (2011) 7 SCC 69

2. Neeraj Kumar Sainy and others Vs. State of Uttar Pradesh and others, (2017) 14 SCC 136

3. Maneka Gandhi Vs.. Union of India, (1978) 1 SCC 248 : (AIR 1978 SC 597)

4. Mohinder Singh Gill Vs. Chief Election Commissioner, (1978) 1 SCC 405 : (AIR 1978 SC 851)

5. D.K. Yadav Vs. J.M.A. Industries Ltd., (1993) 3 SCC 259

6. Canara Bank Vs. V.K. Awasthy, (2005) 6 SCC 321 : (AIR 2005 SC 2090)

7. Bidhannagar (Salt Lake) Welfare Assn. Vs. Central Valuation Board, (2007) 6 SCC 668 : (AIR 2007 SC 2276)

8. Devdutt Vs. Union of India, 2008 (3) ESC 433 (SC) : ((2008) 8 SCC 725 : AIR 2008 SC 2513)

9. Erusian Equipment and Chemicals Ltd. Vs. State of West Bengal and another, A.I.R. 1975 SC 266

10. Raghunath Thakur Vs. State of Bihar and others , A.I.R. 1989 SC 620

11. Gronsons Pharmaceuticals (P) Ltd. Vs. State of Uttar Pradesh and others , A.I.R. 2001 SC 3707

12. Smt Rajni Chauhan Vs. State of U.P and others , 2010 (6) AWC 5762 (All.)

(Delivered by Hon'ble Anil Kumar, J.
Hon'ble Saurabh Lavania, J.)

1. Heard Shri Mukesh Singh, learned counsel for the petitioner and Ms. Puja Arora holding brief of Shri S. C. Gulati, learned counsel for the respondent.

2. Initially, the respondent/National Insurance Co. Ltd. filed the appeal bearing F.A.F.O. No.521 of 1999 against the judgment and award 02.09.1999 passed by Vith Additional District Judge, Faizabad in Claim Petition No.2/93 (Ram Vishal Vs. Dinesh Kumar Singh), which was allowed by judgment and order dated 28.02.2013 passed by this Court.

3. By means of the present review petition, the applicant has sought for review of the judgment and order dated 28.02.2013 passed by this Court. The main grounds for seeking the review of the judgment and order dated 28.02.2013 are as under :

"1. Because the judgment and order dated 28.02.2013 has been passed by Hon'ble Court Ex-parte.

2. Because in fact, notices were never served to the applicant though he was the necessary party and owner of the vehicle in question against whom insurance company filed the aforesaid F.A.F.O.

3. Because the applicant was never given opportunity of hearing and contesting the appeal.

4. Because from the bare perusal of the reading of the impugned order dated 28.02.2013, it is clear that though the present appeal was directed against the award and judgment dated 02.02.1999 and applicant/owner was the necessary party but he was never given opportunity to contest the appeal and order dated 28.02.2013 was passed ex-parte therein.

5. Because Insurance Company in the most arbitrary manner, without complying with the order passed on 02.02.1999, did not serve the notice to the applicant and only because of this applicant remained unheard and judgment dated 28.02.2013 was passed ex-parte.

6. Because the appellant i.e. Insurance Company, by misleading the cout and by concealment of fact that steps have been taken to serve the notices to the necessary parties, got the appeal decided ex-parte, while opportunity of hearing was never afforded by the applicant.

7. Because on account of mistake or error apparent from the perusal of record, ti is clear that applicant was not given opportunity of hearing and he was

never heard to plead and establish his case before the Hon'ble Court and therefore since this Hon'ble Court has relied upon the submission made by the insurance Company for passing the judgment dated 28.02.2013, is liable to be reviewed."

4. Ms. Puja Arora, learned counsel for the respondent submits that affidavits filed by review applicant/Shri Dinesh Kumar Singh in the instant case including the better affidavit filed along with the application (C.M.A.No.140588 of 2019) for condontion of delay are liable to be ignored being not properly verified and being so on the basis of the same, neither delay can be condoned nor review petition can be allowed. In support of her arguments, she has placed reliance on the para 24 judgment given by Hon'ble the Apex Court in the case of ***Amar Singh vs. Union of India and others, (2011) 7 SCC 69,*** wherein it has been held as under :-

"24. Another Constitution Bench of this Court in A.K.K. Nambiar v. Union of India [(1969) 3 SCC 864 : AIR 1970 SC 652] , held as follows: (SCC p. 867, para 8)

"8. ... The appellant filed an affidavit in support of the petition. Neither the petition nor the affidavit was verified. The affidavits which were filed in answer to the appellant's petition were also not verified. The reasons for verification of affidavits are to enable the Court to find out which facts can be said to be proved on the affidavit evidence of rival parties. Allegations may be true to knowledge or allegations may be true to information received from persons or allegations may be based on records. The importance of verification is to test the genuineness and authenticity of allegations and also to make the deponent responsible for allegations. In essence verification is required to enable the Court to find out as to whether it will be safe to act on such affidavit evidence. In the present case, the affidavits of all the parties suffer from the mischief of lack of proper verification with the result that the affidavits should not be admissible in evidence."

5. We have heard learned counsel for the parties and gone through the records as well as the judgment cited by learned counsel for the respondent.

6. From the perusal of the record, it transpires that the appeal bearing F.A.F.O. No.521 of 1999 was filed against the judgment and award 02.09.1999 passed by Vith Additional District Judge, Faizabad in Claim Petition No.2 of 1993 (Ram Vishal Vs. Dinesh Kumar Singh). By judgment and order dated 28.02.2013, the appeal i.e. F.A.F.O. No.521 of 1999 was finally decided in favour of National Insurance Co. Ltd.-appellant (in short "Company").

7. After the judgment dated 28.02.2013, the Company filed the execution case. In the execution case, the recovery certificate was issued on 07.07.2013 and thereafter the review applicant came to know about the judgment dated 28.02.2013, under review. Thereafter, the review petition along with application for condonation of delay was filed before this Court mainly on the above said grounds.

8. From perusal of the order sheet, it appears that on 03.12.1999, the appeal was admitted and order to issue notice to respondents in the appeal was passed. The order dated 03.12.1999 is quoted below :

"Heard.

Admit.

Issue notice.

List after due service along with the record of the claim petition. The execution of the award shall remain stayed, provided the petitioner deposits 1/2 of the amount under the award including the amount, if any, deposited under Section 173 of the Motor Vehicle Act within one month from today."

9. Thereafter, the appeal was listed before this Court on 28.02.2013 and on the said date, the appeal was partly allowed.

10. From the record of the F.A.F.O. No.521 of 1999 it is evident that on behalf of respondent no.1 in appeal namely Sri Ram Vishal Pandey, two Vakalatnamas were filed. One Vakalatnama bears name of Sri Radhey Lal Misra, Advocate and Gaya Prasad Tiwari, Advocate and another Vakalatnama bears the name of Sri P. C. Agarwal, Adovate and Sri D. K. Srivastava, Advocates. The name of Sri P. C. Agarwal and Sri D. K. Srivastava appears in the judgment, under review.

11. It also appears from the record of F.A.F.O. No.521 of 1999 that neither steps were taken nor notices were issued nor the review-applicant-Sri Dinesh Kumar Singh, respondent no.2 in the F.A.F.O. No.521 of 1999 was served through any of the mode provided for service of notice nor there is anything on record, including Vakalanama, from which it can be presumed that the review applicant-Sri Dinesh Kumar Singh was served or was having knowledge of the F.A.F.O. No.521 of 1999 decided vide judgment dated 28.02.2013, against which, present review petition has been filed.

12. From the aforesaid, it is apparent that F.A.F.O. No.521 of 1999 was decided on 28.02.2013 without service of notice of F.A.F.O. upon opposite party no.2, the review applicant-Sri Dinesh Kumar Singh. and without hearing him.

13. Taking into account the aforesaid facts, which are evident from the record of F.A.F.O. No.521 of 1999, we would like refer the relevant portion of the judgment passed by the Hon'ble Apex Court in the case of ***Neeraj Kumar Sainy and others vs. State of Uttar Pradesh and others, (2017) 14 SCC 136,*** the same are as under :

*"**26.** The seminal question that is required to be posed is whether the maxim actus curiae neminem gravabit would be applicable to such a case. In Jang Singh v. Brij Lal [Jang Singh v. Brij Lal, AIR 1966 SC 1631], a three-Judge Bench noted that there was error on the part of the court and the officers of the court had contributed to the said occur. Appreciating the fact situation, the Court held: (AIR p. 1633, para 6)*

"6. ... It is no doubt true that a litigant must be vigilant and take care but where a litigant goes to Court and asks for the assistance of the Court so that his obligations under a decree might be fulfilled by him strictly, it is incumbent on the Court, if it does not leave the litigant to his own devices, to ensure that the correct information is furnished. If the Court in supplying the information makes a mistake the responsibility of the litigant, though it does not altogether cease, is at least shared by the Court. If the litigant acts on the faith of that information the courts cannot hold him responsible for a mistake which it itself caused. There is no higher principle for the guidance of the Court

than the one that no act of courts should harm a litigant and it is the bounden duty of courts to see that if a person is harmed by a mistake of the court he should be restored to the position he would have occupied but for that mistake. This is aptly summed up in the maxim: Actus curiae neminem gravabit."

27. *Noting that there was mistake by the District Court concerned, relief was granted by stating so: (Jang Singh case [Jang Singh v. Brij Lal, AIR 1966 SC 1631] , AIR p. 1633, para 8)*

"8. ... In view of the mistake of the court which needs to be righted the parties are relegated to the position they occupied on 6-1-1958, when the error was committed by the court which error is being rectified by us nunc pro tunc."

28. *Another three-Judge Bench in Jagannath Singh v. Ram Naresh Singh [Jagannath Singh v. Ram Naresh Singh, (1970) 1 SCC 573 : 1970 SCC (Cri) 238] , took note of the fact that the judgment by the High Court had been rendered ex parte, and the application for recall did not impress the High Court. Appreciating the factual matrix that there was an error in the cause-list and accepting that there was an omission to mention the case correctly in the cause-list and treating it as a mistake of the court, the Court held that though there was some negligence on the part of the counsel or of his clerk but it was not so grave as to disentitle the party to be heard, and in any event, the alleged contemnors could not be punished for a mistake on the part of their counsel or the counsel's clerk. Being of this view, this Court set aside the order with costs.*

29. *In Atma Ram Mittal v. Ishwar Singh Punia [Atma Ram Mittal v. Ishwar Singh Punia, (1988) 4 SCC 284] , this Court, in the context of interpretation of Section 13(1) in juxtaposition with Section 1(3) of the Haryana Urban (Control of Rent and Eviction) Act, 1973, adopting the purposive interpretation ruled: (SCC pp. 288-89, para 8)*

"8. It is well settled that no man should suffer because of the fault of the court or delay in the procedure. Broom has stated the maxim actus curiae neminem gravabit -- an act of court shall prejudice no man. Therefore, having regard to the time normally consumed for adjudication, the ten years' exemption or holiday from the application of the Rent Act would become illusory, if the suit has to be filed within that time and be disposed of finally. It is common knowledge that unless a suit is instituted soon after the date of letting it would never be disposed of within ten years and even then within that time it may not be disposed of. That will make the ten years' holiday from the Rent Act illusory and provide no incentive to the landlords to build new houses to solve problem of shortages of houses. The purpose of legislation would thus be defeated. Purposive interpretation in a social amelioration legislation is an imperative irrespective of anything else."

30. *The aforesaid authorities deal with three different situations. There cannot be an iota of doubt that no prejudice shall be caused to anyone due to the fault of the court, but it is to be seen in what situations the court can invoke the maxim actus curiae neminem gravabit. In this regard, reference to the authority in Jayalakshmi Coelho v. Oswald Joseph Coelho [Jayalakshmi Coelho v. Oswald Joseph Coelho, (2001) 4 SCC 181] would be apt. In the said case, the Principal Judge, Family Court, Bombay had modified the earlier decree. The same was challenged in the writ petition which was dismissed. The Division Bench confirmed the order of the learned Single Judge,*

which compelled the appellant to approach this Court. Dealing with the principle of rectification of decree under Section 152 CPC, the Court opined that there can be hardly any doubt that any error occurred in the decree on account of arithmetical or clerical error or accidental slip may be rectified by the court. It has been further observed that the basis of the said provision is founded on the maxim that an act of court will prejudice no man. The Court referred to the authorities in Assam Tea Corpn. Ltd. v. Narayan Singh [Assam Tea Corpn. Ltd. v. Narayan Singh, 1980 SCC OnLine Gau 7 : AIR 1981 Gau 41] , Janakirama Iyer v. Nilakanta Iyer [Janakirama Iyer v. Nilakanta Iyer, AIR 1962 SC 633] , Bhikhi Lal v. Tribeni [Bhikhi Lal v. Tribeni, AIR 1965 SC 1935] , Master Construction Co. (P) Ltd. v. State of Orissa [Master Construction Co. (P) Ltd. v. State of Orissa, AIR 1966 SC 1047] , Dwaraka Das v. State of M.P. [Dwaraka Das v. State of M.P., (1999) 3 SCC 500] and Thirugnanavalli Ammal v. P. Venugopala Pillai [Thirugnanavalli Ammal v. P. Venugopala Pillai, 1939 SCC OnLine Mad 222 : AIR 1940 Mad 29] and, eventually analysing the facts, opined that rectification of the decree was totally misconceived.

31. *In this regard, we may usefully refer to a passage from Kalabharati Advertising v. Hemant Vimalnath Narichania [Kalabharati Advertising v. Hemant Vimalnath Narichania, (2010) 9 SCC 437 : (2010) 3 SCC (Civ) 808] , wherein it has been ruled that the maxim actus curiae neminem gravabit, which means that the act of the court shall prejudice no one, becomes applicable when a situation is projected where the court is under an obligation to undo the wrong done to a party by the act of the court. In a case, where any undeserved or unfair advantage has been gained by a party invoking the jurisdiction of the court, and the same requires to be neutralised, the said maxim is to be made applicable.*

32. *In this regard, reference to the Constitution Bench decision in Sarah Mathew v. Institute of Cardio Vascular Diseases [Sarah Mathew v. Institute of Cardio Vascular Diseases, (2014) 2 SCC 62 : (2014) 1 SCC (Cri) 721] would be seemly. In the said case, the question for consideration was whether for the purposes of computing the period of limitation under Section 468 CrPC the relevant date is the date of filing of the complaint or the date of institution of the prosecution or whether the relevant date is the date on which a Magistrate takes cognizance of the offence. Answering the issue, the Court held that for that purpose computing the period of limitation under Section 468 CrPC the relevant date is the date of filing of the complaint or the date of institution of prosecution and not the date on which the Magistrate takes cognizance. In the course of deliberation, the larger Bench observed: (SCC pp. 96-97, para 39)*

39. ... The object of the criminal law is to punish perpetrators of crime. This is in tune with the well-known legal maxim nullum tempus aut locus occurrit regi, which means that a crime never dies. At the same time, it is also the policy of law to assist the vigilant and not the sleepy. This is expressed in the Latin maxim vigilantibus et non dormientibus, jura subveniunt. Chapter XXXVI CrPC which provides limitation period for certain types of offences for which lesser sentence is provided draws support from this maxim. But, even certain offences such as Section 384 or 465 IPC, which have lesser punishment may have serious social

consequences. The provision is, therefore, made for condonation of delay. Treating date of filing of complaint or date of initiation of proceedings as the relevant date for computing limitation under Section 468 of the Code is supported by the legal maxim actus curiae neminem gravabit which means that the act of court shall prejudice no man. It bears repetition to state that the court's inaction in taking cognizance i.e. court's inaction in applying mind to the suspected offence should not be allowed to cause prejudice to a diligent complainant. Chapter XXXVI thus presents the interplay of these three legal maxims. The provisions of this Chapter, however, are not interpreted solely on the basis of these maxims. They only serve as guiding principles."

14. It is settled principle that even administrative order which involve civil consequences must be passed after following the principle of natural justice and providing opportunity of hearing and the orders which have been passed against settled principle and are unsustainable. The basic idea of observing principles of natural justice is to secure justice or to put in another way to prevent miscarriage of justice.

15. Further, if any order which has civil consequences and adverse effect on a person against whom it has been passed, he should be given an opportunity of hearing prior to passing of the same. If the same is not done, then the order so passed will in violation of fair play, liable to be set aside.

16. A seven-Judges' Bench of the Hon'ble Apex Court in the case of Maneka Gandhi v. Union of India, (1978) 1 SCC 248 : (AIR 1978 SC 597) has held that the substantive and procedural laws and action taken under them will have to pass the test under Article 14 of the Constitution. The test of reasons and justice cannot be abstract. They cannot be divorced from the needs of the nation. The tests have to be pragmatic, otherwise they would cease to be reasonable. The procedure prescribed must be just fair and reasonable, even though there is no specific provision in a statute or rules, made thereunder, for showing cause against action proposed to be taken against an individual, which affects the right of that individual. The duty to give reasonable opportunity to be heard will be implied from the nature of the function to be performed by the authority which has the power to take punitive or damaging action. Even executive authorities which take administrative action in-volving any deprivation of or restriction on inherent fundamental rights of citizens, must take care to see that justice is not only done hut manifestly appears to be done. They have a duty to proceed in a way which is free from even the appearance of arbitrariness, unreasonableness or unfairness. They have to act in a manner which is patently impartial and meets the requirement of the natural justice.

17. In Mohinder Singh Gill v. Chief Election Commissioner, (1978) 1 SCC 405 : (AIR 1978 SC 851), the Apex Court reiterated the same view.

18. In the case of D.K. Yadav v. J.M.A. Industries Ltd., (1993) 3 SCC 259, the Apex Court observed that an order which involves civil consequences, must be just, fair, reasonable, unarbitrary and impartial and meet the principles of natural justice. Same view has been reiterated in the cases of Canara Bank v. V.K. Awasthy,

(2005) 6 SCC 321 : (AIR 2005 SC 2090); Bidhannagar (Salt Lake) Welfare Assn. v. Central Valuation Board, (2007) 6 SCC 668 : (AIR 2007 SC 2276); and Devdutt v. Union of India, 2008 (3) ESC 433 (SC) : ((2008) 8 SCC 725 : AIR 2008 SC 2513).

19. In the case of Erusian Equipment and Chemicals Ltd. v. State of West Bengal and another A.I.R. 1975 SC 266; Raghunath Thakur v. State of Bihar and others A.I.R. 1989 SC 620; and Gronsons Pharmaceuticals (P) Ltd. v. State of Uttar Pradesh and others A.I.R. 2001 SC 3707 and the decisions of the Division Bench of this Court in Smt Rajni Chauhan v. State of U.P and others 2010 (6) AWC 5762 (All.) also it has been held that an order which leads to civil consequences cannot be passed without affording an opportunity of hearing and the same must be passed in conformity of principles of natural justice.

20. Keeping in view the aforesaid facts, which are evident from the record of the FAFO No. 521 of 99 particularly that without any notice to the review applicant, Dinesh Kumar Singh and without giving any opportunity of hearing to him, the FAFO No. 521 of 99 was decided vide impugned judgment and order dated 28.02.2013 as well as the settled legal preposition of law that any order having civil consequences if passed without hearing or giving opportunity of hearing to the person concerned/aggrieved, then the same would be violative of the principles of natural justice and is liable to be set-aside, we are of the view that the arguments raised by the learned counsel for the Company has got no force.

21. Taking into consideration the aforesaid fact as well as the settled principles of law, we are of the view that the application for condonation of delay as well as also the application for review are liable to be allowed in the interest of substantial justice.

22. Accordingly, the application for condonation of delay as well as the review application are ***allowed***. The judgment and order dated 28.02.2013 passed in FAFO No. 521 of 1999 (National Insurance Company Ltd. v. Ram Vishal Pandey), is hereby recalled. The FAFO No. 521 of 1999 is restored to its original number.

23. Further, looking into the valuation of the appeal, the same is cognizable by a learned Single Judge.

24. Office is directed to place the F.A.F.O. No.521 of 1999 before appropriate Bench.

25. On the next date of listing, the name of Shri Mukesh Singh be shown as counsel for the respondent no.2 in the F.A.F.O. No.521 of 1999.

(2020)02ILR A108

APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 06.02.2020

BEFORE

THE HON'BLE JASPREET SINGH, J.

Second Appeal No. 37 of 2020

Jagdish Chandra & Ors. ...Appellants
Versus
Krishna Mohan Aggrawal ...Respondent

Counsel for the Appellants:
Samarth Saxena

Counsel for the Respondent:

Ashish Chaturvedi

A. Civil Law-Civil Procedure Code (5 of 1908) - Section 88 - Interpleader suit - Order 35 Rule 5 - tenants may not institute interpleader suits - Order 35 Rule 5 precludes the tenant from instituting an interpleader suit against his landlord - Evidence Act, Section 116 - doctrine of estoppel - Bar based on the doctrine of estoppel as the tenant cannot challenge the title of his landlord which is based on the principle of Section 116 of the Evidence Act, 1872

Plaintiffs are the tenants and the defendants are the landlords, therefore in view of embargo contained in Order 35 Rule 5 C.P.C - courts below have not committed any error in rejecting the plaint - Plaintiffs deposited the rent and continued to deposit rent in the SCC suit in favour of the defendants who have been substituted as landlords – Plaintiff are prevented from taking plea that there are two separate sets of person claiming and hence the requirement of an interpleader suit (Para 32)

B. Civil Law-Civil Procedure Code (5 of 1908) - O.7 R.11 - Rejection of plaint - suppression and concealment of the material facts - duty of the plaintiff to come before Court with clean hands - Plaintiff made concealment of facts - No mention regarding eviction suits filed by the landlords against the Plaintiff - it was plaintiff duty to have disclosed the pendency of all the suits which were filed and had been pending since 1998 - Plaint, liable to be rejected (Para 41)

Appeal dismissed. (E-5)

List of cases cited :

1. Yeshwant Bhikaji Vilankar Vs Sadashiv Govind Arekar & Ors 1940 ILR 842

2. State of Orrissa Vs Klockner & Company& Ors 1996 (8) SCC 377

3. T. Arivandam Vs T.V. Satyapal & Anr 1977 (4) SCC 467

4. Rajan Sharma Vs Labh Singh 2011 SCC Online P&H 5451

5. Sopan Sukhdeo Sable & Ors Vs Assistant Charity Commissioner & Ors (2004) 3 SCC 137

6. Popat & Kotecha Property Vs State Bank of India Staff Association (2005) 7 SCC 510

7. I.T.C. Limited Vs Debts Recovery Appellate Tribunal and Others (1998) 2 SCC 70

8. Raj Narain Sarin (Dead) Thru LRs. & Ors Vs Laxmi Devi & Ors (2002) 10 SCC 501

9. Maria Margarida Sequeira Fernandes & Ors Vs Erasmo Jack De Sequeira(Dead) thru LRs 2012 (5) SCC 370

10. Mudit Verma Vs Ram Kumar & Anr reported 2018 (8) ADJ 52

11. Bhaskar Laxman Jadhav & Ors. Vs Karamveer Kakasaheb Wagh Education Society & Ors. 2013 (11) SCC 531

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

1. Heard Sri Samarth Saxena, learned counsel for the appellants and Sri N.K. Seth, learned Senior Advocate along with Sri Ashish Chaturvedi for respondent no. 8.

2. The instant second appeal has been preferred by the plaintiffs/appellants against a concurrent judgment and decree passed by the two courts whereby the application under Order 7 Rule 11 C.P.C. has been allowed rejecting the plaint of the appellants.

3. The learned counsel for the appellants has urged that the two courts while rejecting the plaint in suit upon applying the provisions of Order 7 Rule 11 C.P.C. has not considered the true import of Order 35 Rule 5 C.P.C. and has

incorrectly applied the aforesaid provision in non-suiting the plaintiff which is a gross error of jurisdiction committed by the two courts, resulting in sheer miscarriage of justice.

4. The learned counsel for the appellants has submitted that an application under Order 7 Rule 11 is to be considered only on the basis of the averments contained in the plaint in suit. At the stage of such consideration, the Court cannot look into the written statement or the defence as raised by the defendants.

5. The learned counsel for the appellants has further submitted that it is one thing to state that the plaint does not disclose a cause of action and it is altogether different thing to urge that the plaintiff does not have a cause of action.

6. Elaborating his submission, it has been submitted that where on the meaningful reading of the plaint it does not disclose a cause of action, then the Court is then entitled to reject a plaint in terms of the Order 7 Rule 11 C.P.C., however, stating that the plaintiff does not have a cause of action, this necessarily would mandate the Court to consider the pleadings of the parties which necessarily involves looking into the written statement and only after the evidence is led can the Court reach such a conclusion that the plaintiff does not have a cause of action and this necessarily means that a plaint cannot be rejected as per Order 7 Rule 11 C.P.C. rather at best it would be a matter to be decided on merits.

7. It has been urged that the two courts have completely ignored the aforesaid distinction while rejecting the plaint and as such the appellant had suffered injustice.

8. It is also submitted that the two courts have not considered the provisions of Order 35 Rule 5 C.P.C. in the correct perspective and has rejected the plaint while all the ingredients required were clearly met and as such the plaint was very well maintainable which has erroneously been rejected.

9. In support of his submissions, the learned counsel for the appellant has relied upon a decision in the case of Yeshwant Bhikaji Vilankar Vs. Sadashiv Govind Arekar and Others reported in 1940 ILR 842 and State of Orrissa Vs. Klockner and Company and Others reported in 1996 (8) SCC 377.

10. Sri N.K. Seth, learned Senior Advocate assisted by Sri Ashish Chaturvedi, learned counsel for the respondent no. 8 has appeared on caveat and opposed the aforesaid submission.

11. It has been submitted that the interpleader suit as filed by the appellants was clearly hit by Order 35 Rule 5 C.P.C. as well as the proviso appended to Section 88 C.P.C. It has also been submitted that the appellants are the tenants of the property in question against whom the eviction suits are pending since 1998, hence in order to delay and to avoid the eventuality the alleged interpleader suit has been filed only in the year 2015, coupled with the fact that the alleged plaint suffers from gross concealment, inasmuch as, there is not a mention regarding the eviction suits filed by the landlords against the appellants. It has also been submitted by Sri N.K. Seth, that in paragraph 11 there is just a passing reference relating to the cause of action,

that a suit was filed for eviction in the year 2015 which has given the cause of action to the plaintiff to file the aforesaid suit which as per Sri Seth is deliberate misrepresentation as the plaintiff concealed that the suits are pending since 1998. It has also been submitted that the proviso appended to Section 88 C.P.C as well as in light of the mandate contained in Order 35 Rule 5 C.P.C. the plaint has rightly been rejected.

12. Sri Seth has further submitted that under Order 7 Rule 11 C.P.C., it is a duty on the Court to consider whether any of the sub-clauses contained in the aforesaid provision are attracted. The power of Order 7 Rule 11 can be exercised at any stage, coupled with the fact that in the present case not only did the plaint did not disclose any cause of action but at the same time, it was barred by law. The distinction as sought to be highlighted by the learned counsel for the appellant regarding the plaint not disclosing the cause of action and that the plaintiff did not have a cause of action pales into insignificance in the present case since as per the plaint averments alone it was clearly established and admitted that the plaintiff who are the appellants herein are the tenants and the defendants are the landlords, therefore, the bar contained in Order 35 Rule 5 C.P.C. was clearly attracted and, thus, irrespective of the fact whether the plaint disclose a cause of action or not, the plaint was barred and thus the two courts have not committed any error nor any substantial question of law arises and the aforesaid second appeal is liable to be dismissed at the admission stage itself.

13. Sri Seth, learned counsel for the respondents has placed reliance upon a decision of the Apex Court in the case of T. Arivandam Vs. T.V. Satyapal and Another reported in 1977 (4) SCC 467 and Rajan Sharma Vs. Labh Singh reported in 2011 SCC Online P&H 5451.

14. The Court has considered the submissions of the learned counsel for the parties and also perused the record.

15. In order to appreciate the submissions of the learned counsel for the parties and to put the controversy in a perspective, certain facts giving rise to the above second appeal are being noticed hereinafter first:-

16. The plaintiffs (appellants herein) instituted a suit in the Court of Civil Judge, Senior Division, Lakhimpur Kheri bearing R.S. No. 290 of 2016 as an interpleader suit impleading the defendant-respondents who are the legal heirs of Late Sri Murlidhar.

17. It has been pleaded that the property the subject matter of which the plaintiffs-appellants are the tenants in possession was let out by late Sri Murlidhar. Upon the death of Sri Murlidhar it is alleged that he was survived by his daughter Smt. Anar Devi and a son late Sri Badri Prasad. It is also stated that Sri Murlidhar also executed a will by virtue of which he has constituted a Trust. Since both Smt. Anar Devi and Sri Badri Prasad expired and their legal heirs are the defendants.

18. It was further submitted that the defendants belonged to two separate branches i.e. to say, some were heirs of Smt. Anar Devi and others were the heirs of Late Sri Badri Prasad. None of the defendants have filed any suit amongst

themselves to determine their right as the landlords, however, the defendants nos. 1 to 6 and 7, 8 and 10 have filed separate suits seeking eviction of the plaintiffs. It has been specifically stated in paragraph 11 that the cause of action accrued in the month of April, 2015 when the defendant nos. 1 to 6 instituted a suit for eviction while the defendants no. 8, 9 and 10 claimaning themselves to be the landlord have demanded rent from the plaintiffs and in the aforesiad backdrop it filed the interpleader suit on 17.08.2016 with the following reliefs:-

(i) The defendants be restrained from taking any action against the plaintiff in respect of the property in question;

(ii) That the defendants no. 1 to 6 and 7, 8 and 9 be required to interplead;

(iii) That till such time the matter is pending, the plaintiff be permitted to deposit the rent in Court or before any competent person to be appointed by the Court ;

(iv) That the costs of the suit be also awarded in favour of the plaintiff.

19. The defendants nos. 1 to 7 made an application under Order 7 Rule 11 C.P.C. stating therein that the plaintiff being the tenant does not have a right to institute the aforesaid interpleader suit in terms of Order 35 Rule 5 C.P.C. It was further indicated that it is incorrect of the plaintiff to state that the cause of action accrued in the Month of April, 2015 since eviction suits had already been filed against the plaintiffs in the year 1998 and the details of the aforesaid suits which were for eviction as well as release of the premises on account of bonafide need was already pending. It was also stated that the plaintiffs themselves had filed a writ petition before the High Court wherein the High Court had directed that the question regarding the ownership shall be decided, however, in order to delay the proceedings as well as to avoid the eventuality in the eviction suits the present interpleader suit has been filed and as such the plaint was liable to be rejected, apart from the fact that the suit was also barred by limitation.

20. It is in this backdrop that the Trial Court by means of its order dated 06.10.2017 allowed the application under Order 7 Rule 11 and rejected the plaint. While doing so the Trial Court relied upon Order 35 Rule 5 and found that since it is not disputed that the property in question was let out to the plaintiffs by Sri Murlidhar and they being the tenants, in light of the proviso, the tenant is precluded from filing an interpleader suit against the landlord, hence, it found that in the present case since the tenancy was governed by the U.P. Act 13 of 1972, hence as far as the relief claimed by the plaintiff was concerned regarding the deposit of rent he had a remedy before the appropriate court under the Rent Act and further in light of the embargo contained in Order 35 Rule 5 the plaintiff did not have a right to institute the suit and consequently the plaint was rejected.

21. The plaintiffs-appellants preferred a regular Civil Appeal before the District Judge, Lakhimpur Kheri which was registered as Regular Civil Appeal No. 79 of 2017. The lower appellate court after considering the material on record affirmed the judgment and decree passed by the Trial Court and dismissed the appeal. While doing so, it found that since Order 35 Rule 5 does not permit a tenant to file an interpleader suit against the landlord, hence, the plaintiff did not have a cause of action, coupled with the fact that

the since the tenancy was governed by the U.P. Act 13 of 1972 wherein under Section 30 Sub Section 2, he had a remedy of depositing the rent, consequently, the findings of the Trial Court were affirmed and the appeal was dismissed by means of judgment and decree dated 09.01.2020.

22. It is these two judgments which have been assailed in the present second appeal. In light of the submissions made by the learned counsel for the respecive parties, this Court has to ascertain whether the judgment and decree passed by the two courts can sustain judicial scrutiny.

23. In order to test the submissions, it will be necessary to understand whether the alleged bar of Order 35 Rule 5 C.P.C. is applicable in the present case or not. At the very outset, it will be relevant to mention that interpleader has been provided in Section 88 of C.P.C. The aforesaid section reads as under:-

Section 88.- Where interpleader -suit may be instituted.- Where two or more persons claim adversely to one another the same debts, sum of money or other property, movable or immovable, from another person, who claims no interest therein other than for charges or costs and who is ready to pay or deliver it to the rightful claimant, such other person may institute a suit of interpleader against all the claimants for the purpose of obtaining a decision as to the person to whom the payment or delivery shall be made and of obtaining indemnity for himself:

Provided that where any suit is pending in which the rights of all parties can properly be decided, no such suit of interpleader shall be instituted.

24. This is the substantive Section under which the interpleader suits owe their origin. The same are regulated in tems of Order 35 C.P.C.

25. To interplead means to litigate with each other to settle a point concerning a third party. Section 88 of the C.P.C. enacts that two or more persons claiming adversely to one another, the same debt, sum of money or other property, movable or immovable property from a person who does not claim any interest therein except the charges and costs incurred by him and is ready to pay or deliver the same to the rightful claimant may file an interpleader suit.

26. The object of the aforesaid is to get claims of rival defendants adjudicated. It is the process where the plaintiff calls upon the rival claimants to appear before the Court and get their respective claims decided. The decision of the Court in an interpleader suit affords idemnity to the plaintiff on the payment of money or delivery of property to the person whose claim has been upheld by the Court.

27. Before an interpleader suit can be instituted, the following conditions must be fulfilled:-

(i) There must be a debt, sum of money or some property movable or immovable due from the plaintiff; (ii) There must be two or more persons claiming adversely to one another; (iii) The plaintiff must not have any interest therein other than charges and cost; (iv) The plaintiff must be ready and willing to pay or deliver it to the rightful claimant; (v) The suit must be bonafide and there should not be collusion between the plaintiff and or any of the defendants/rival claimants.

28. Rule 1 of Order 35 clearly indicates that in every interpleader suit the plaint shall in addition to other statements necessary for claims say that the plaintiffs claims no interest in the subject matter in dispute and that the claim made by the defendants severally and there is no collusion between the plaintiff and any of the defendants.

29. In the present case at hand, Rule 5 of Order 35 is in the eye of the controversy and as such for ready reference is being reproduced hereinafter:-

5. Agents and tenants may not institute interpleader suits.- Nothing in this Order shall be deemed to enable agents to sue their principals, or tenants to sue their landlords, for the purpose of compelling them to interplead with any persons other than persons making claim through such principals or landlords.

Illustrations

(a) A deposits a box of jewels with B as his agent. C alleges that the jewels were wrongfully obtained from him by A, and claims them from B. B cannot institute an interpleader-suit against A and C.

(b) A deposits a box of jewels with B as his agent. He then writes to C for the purpose of making the jewels a security for a debt due from himself to C. A afterwards alleges that C s debt is satisfied, and C alleges the contrary. Both claim the jewels from B. B may institute in interpleader-suit against A and C.

30. From the bare perusal of the aforesaid provisions, it would indicate that the first part of Rule 5 prohibits an agent or a tenant from disputing the title of his principal or his landlord. The second part thereof provides an exception to the general rule. It will also be relevant to note that Rule 5 is accompanied by illustration which had already been reproduced hereinabove, first.

31. The illustrations (a) explains the principle as incorporated in the first part of the Rule 5 while the illustration (b) deals with the case of the exception as in case of third party (stranger) claiming through the principal.

32. The provision prohibiting that tenant from instituting an interpleader suit against his landlord is based on the doctrine of estoppel as the tenant cannot challenge the title of his landlord which is based on the principle of Section 116 of the Evidence Act, 1872. The aforesaid Rule 5 of Order 35 precludes the tenant from instituting an interpleader suit against his lanlord and any person other than a person making claim through such landlord.

33. Thus, applying the principles to the case at hand, it would be clear that the plaintiff in his plaint has clearly stated that he was inducted by late Lala Murlidhar, thus, on the plain reading of the aforesaid provision, the suit was not maintainable against Sri Murlidhar. However, the problem is little different, inasmuch as, Sri Murlidhar has expired and he was survived by his daughter Smt. Anar Devi and son late Sri Badri Prasad. Significantly, both Smt. Anar Devi and Sri Badri Prasad have also expired and the defendants to the suit are the legal heirs of Smt. Anar Devi and Sri Badri Prasad.

34. Now, whether they would be covered under the terms of landlord or they would be covered under the exception provided in the second part i.e. persons

other than claiming through the "principal or landlord".

35. To answer the aforesaid, it would be relevant to point out that the tenancy in question is governed by the Uttar Pradesh Urban Buildings (Regulations of Letting and Rent Eviction) Act , 1972. The aforesaid Act is a Code in itself and governs all rights, obligations of letting, eviction relating to the properties governed by the said Act both with regard to the landlord and the tenants. It is in light thereof it would reveal that once it is admitted by the plaintiff that Murlidhar was the landlord who had inducted the plaintiffs, upon his death, his legal heirs automatically step into the shoes and both Smt. Anar Devi and Sri Badri Prasad would be the landlord. Upon their death, their legal heirs jointly become the landlords of the property in question. Another fact which needs to be noticed here is that the suits for eviction were filed by Smt. Anar Devi and Sri Badri Prasad in their life times in the year 1998. It has been informed that there are two sets of proceedings which are pending (i) SCC Suit seeking arrears of rent and ejectment under Section 20 of U.P. Act No. 13 of 1972 and (ii) seeking release of the property in terms of Section 21 of the U.P. Act No. 13 of 1972.

36. It would be noticed that the plaintiffs had been depositing the rent in the eviction suit and as such as per Section 3 (j) of the U.P. Act of 1972 the word "landlord" has been defined which reads as under:-

(j) "Landlord", in relation to a builiding, means a person to whom its rent is or if the building were let, would be, payable and includes, except in Clause (g) the agent or attorney or such person;

37. Once the plaintiffs who could not dispute the factual position and had already deposited the rent and continued to deposit rent in the SCC suit in favour of the defendants who have been substituted as landlords, they are prevented from taking this plea to state that there are two separae sets of person claiming and hence the requirement of an interpleader suit.

38. It will also be relevant to point out that though there are many defendants and heirs of Smt. Anar Devi and Sri Badri Prasad but nevertheless in so far as the plaintiffs are cocerned, all of them are the joint landlords of the plaintiffs and this is by operation of law in terms of U.P. Act No. 13 of 1972. Having said that, it would be clear that as far as the defendants of the interpleader suit are concerned, they are the landlords and they do not fall within the exception as contained in Rule 5 of Order 35.

39. Thus, this Court is of the view that in so far as the embargo contained in Order 35 Rule 5 is concerned, the same was squarely applicable in the case of the plaintiffs and therefore the two courts have not committed any error in rejecting the plaint on the aforesaid embargo contained in Order 35 Rule 5 C.P.C.

40. Coming to the other submissions which is merely found since the bar has already been upheld by the Court, however, it would be appropriate to meet the other submission of the learned counsel for the appellants as well.

41. This Court finds that as far as the cause of action as pleaded in the plaint is concerned, the same is not appropriate. The plaintiff has grossly erred in resorting to gross suppression and concealment of

the material facts. It was the duty of the plaintiff to have come before the Court with clean hands, inasmuch as, it was their duty to have disclosed the pendency of all the suits which were filed and had been pending since 1998.

42. Though, in the paper book of the present second appeal, the appellant has filed a copy of an order passed by the High Court dated 26.11.2013 in W.P. No. 4728 (MS) of 2005 (Deewan Chandra Vs. ADJ, Court No. 1, Lakhimpur Kheri and Another). This order relates to the dispute in question. Sri Deewan Chandra is none other than the plaintiff-appellant no. 2 herein. Even the factum of the Kishan aforesaid writ petition was concealed by the plaintiff. While passing reference has been made in paragraph 11 of the plaint that a suit has been filed by the defendant nos. 1 to 6 and defendant nos. 8, 9 and 10 have demanded rent, however, this in itself was not a complete disclosure to make the cause of action subsisting.

43. It will be relevant to point out that the Apex Court in the case of T. Arivandandam Vs. T.V. Satyapal and Another reported in 1977 (4) SCC 467 while dealing with Order 7 Rule 11 has held as under:-

"5. .....The learned Munsif must remember that if on a meaningful-not formal-reading of the plaint it is manifestly vexatious, and meritless, in the sense of not disclosing a clear right to sue, he should exercise his power under Or. VII Rule 11, C.P.C. taking care to see that the ground mentioned therein is fulfilled. And, if clever, drafting has created the illusion of a cause of action, nip it in the bud at the first hearing by examining the party searchingly under Order X, C.P.C. An activist Judge is the answer to irresponsible law suits. The trial Courts would insist imperatively on examining the party at the first hearing so that bogus litigation can be shot down at the earliest stage....."(emphasis added)

44. The Apex Court in the case of Sopan Sukhdeo Sable and Others Vs. Assistant Charity Commissioner and Others; (2004) 3 SCC 137. In paragraph 17 of the aforesaid judgment, Supreme Court held:-

"17. ..... The real object of Order 7 Rule 11 of the Code is to keep out of courts irresponsible law suits. Therefore, Order 10 of the Code is a tool in the hands of the courts by resorting to which and by searching examination of the party, in case the court is prima facie of the view that the suit is an abuse of the process of the court, in the sense that it is a bogus and irresponsible litigation, the jurisdiction under Order 7 Rule 11 of the Code can be exercised." (emphasis added)

45. Similarly in the case of Popat and Kotecha Property Vs. State Bank of India Staff Association; (2005) 7 SCC 510, in paragraph-20 again, the Apex Court takes exactly the same view.

46. In the case of I.T.C. Limited Vs. Debts Recovery Appellate Tribunal and Others ; (1998) 2 SCC page 70, in paragraph-16 of which, the Court had stated:-

"16. The question is whether a real cause of action has been set out in the plaint or something purely illusory has been stated with a view to get out of Order 7 Rule 11 CPC. Clever drafting creating illusions of cause of action are not

permitted in law and a clear right to sue should be shown in the plaint.

(See T. Arivandandam Vs. T.V. Satyapal5)"

47. So also in the case of Raj Narain Sarin (Dead) Through LRs. and Others Vs. Laxmi Devi and Others; (2002) 10 SCC 501, after considering the facts in the concluding paragraphs-8, the Court held:-

"8. ..... The plaint is totally silent on that score, though, however, the existence of the deed of sale noticed above stands accepted by the plaintiff. The litigation, in our view, cannot but be termed to be utterly vexatious and abuse of the process of court, more so by reason of the fact that the deed of sale being executed as early as 1941 stands unassailed for a period of over 50 years. The decision of this Court in T. Arivandandam1 has its due application and having regard to the decision as noticed above and upon consideration of the relevant provisions as engrafted in the Code itself, we have no hesitation in accepting the order of the learned Additional District Judge....."(emphasis added)

48. Further reference may be made to the case of Maria Margarida Sequeira Fernandes and Others Vs. Erasmo Jack De Sequeira (Dead) through L.Rs. 2012 (5) SCC 370. In this case the Supreme Court has laid down at length the duty of the Court in finding of the truth and also with regard to the pleadings and the manner in which they are to be made by the parties. Relevant paragraphs of the said judgment are:-

"32. In this unfortunate litigation, the Court's serious endeavour has to be to find out where in fact the truth lies.

37. Lord Denning, in the case of Jones v. National Coal Board [1957] 2 QB 55 has observed that:

"In the system of trial [that we] evolved in this country, the Judge sits to hear and determine the issues raised by the parties, not to conduct an investigation or examination on behalf of [the] society at large, as happens, we believe, in some foreign countries."

38. Certainly, the above, is not true of the Indian Judicial system. A judge in the Indian System has to be regarded as failing to exercise its jurisdiction and thereby discharging its judicial duty, if in the guise of remaining neutral, he opts to remain passive to the proceedings before him. He has to always keep in mind that "every trial is a voyage of discovery in which truth is the quest". In order to bring on record the relevant fact, he has to play an active role; no doubt within the bounds of the statutorily defined procedural law.

40. World over, modern procedural Codes are increasingly relying on full disclosure by the parties. Managerial powers of the Judge are being deployed to ensure that the scope of the factual controversy is minimized.

41. In civil cases, adherence to Section 30 CPC would also help in ascertaining the truth. It seems that this provision which ought to be frequently used is rarely pressed in service by our judicial officers and judges.

51. In the administration of justice, judges and lawyers play equal roles. Like judges, lawyers also must ensure that truth triumphs in the administration of justice.

52. Truth is the foundation of justice. It must be the endeavour of all the judicial officers and judges to ascertain

truth in every matter and no stone should be left unturned in achieving this object. Courts must give greater emphasis on the veracity of pleadings and documents in order to ascertain the truth. "

49. In view of the above, it was not open for the plaintiff to have created an illusion of a cause of action. The plaintiff cannot be permitted to resort to clever drafting to get over the rigours of Order 7 Rule 11 C.P.C.

50. This Court is also fortified in its view in light of the decision rendered by a co-ordinate Bench of this Court in the case of Mudit Verma Vs. Ram Kumar and Another reported in 2018 (8) ADJ 52 wherein the provisions of Order 7 Rule 11 in context with suppression and concealment has been considered. The Coordinate Bench of this Court relying upon the various Supreme Court decisions held as under and the relevant portion thereof is being reproduced:-

"9. So far as the pleadings are concerned, again in the aforesaid judgment, Supreme Court has cast duty upon the Courts to be particular about the same. Reference may be made to the following paragraphs:

"61. In civil cases, pleadings are extremely important for ascertaining the title and possession of the property in question.

68. In order to do justice, it is necessary to direct the parties to give all details of pleadings with particulars. Once the title is prima facie established, it is for the person who is resisting the title holder's claim to possession to plead with sufficient particularity on the basis of his claim to remain in possession and place before the Court all such documents as in the ordinary course of human affairs are expected to be there. Only if the pleadings are sufficient, would an issue be struck and the matter sent to trial, where the onus will be on him to prove the averred facts and documents.

69. The person averring a right to continue in possession shall, as far as possible, give a detailed particularized specific pleading along with documents to support his claim and details of subsequent conduct which establish his possession.

71. Apart from these pleadings, the Court must insist on documentary proof in support of the pleadings. All those documents would be relevant which come into existence after the transfer of title or possession or the encumbrance as is claimed. While dealing with the civil suits, at the threshold, the Court must carefully and critically examine pleadings and documents.

72. The Court will examine the pleadings for specificity as also the supporting material for sufficiency and then pass appropriate orders.

73. Discovery and production of documents and answers to interrogatories, together with an approach of considering what in ordinary course of human affairs is more likely to have been the probability, will prevent many a false claims or defences from sailing beyond the stage for issues.

74. If the pleadings do not give sufficient details, they will not raise an issue, and the Court can reject the claim or pass a decree on admission. On vague pleadings, no issue arises. Only when he so establishes, does the question of framing an issue arise. Framing of issues is an extremely important stage in a civil trial. Judges are expected to carefully examine the pleadings and documents before framing of issues in a given case.

77. The Court must ensure that pleadings of a case must contain sufficient particulars. Insistence on details reduces the ability to put forward a non-existent or false claim or defence. In dealing with a civil case, pleadings, title documents and relevant records play a vital role and that would ordinarily decide the fate of the case."

(emphasis added)"

"16. From the facts noted above, it is also clear that the respondents-plaintiffs made serious concealment regarding possession in his plaint. In a suit for injunction, possession is of great relevance. Plaintiff cannot be permitted to make a false statement or conceal true facts from court with regard to same. What is the effect of the said serious concealment with regard to possession made from the Court? Such a question came for consideration before the Supreme Court, besides the afroresaid cases, in case of S.P. Chengalvaraya Naidu (Dead) by LRs. Vs. Jagannath (Dead) by LRs. and Others, reported in (1994) 1 SCC 1. In the said case, the plaintiffs concealed the fact of execution of a release date from the Court which came in knowledge of the Court later. In paragraph 5 and 6, the Supreme Court held:-

"5. ..... We do not agree with the High Court that "there is no legal duty cast upon the plaintiff to come to court with a true case and prove it by true evidence". The principle of "finality of litigation" cannot be pressed to the extent of such an absurdity that it becomes an engine of fraud in the hands of dishonest litigants. The courts of law are meant for imparting justice between the parties. One who comes to the court, must come with clean-hands. We are constrained to say that more often than not, process of the court is being abused. Property-grabbers, tax- evaders, bank-loan-dodgers and other unscrupulous persons from all walks of life find the court - process a convenient lever to retain the illegal-gains indefinitely. We have no hesitation to say that a person, who's case is based on falsehood, has no right to approach the court. He can be summarily thrown out at any stage of the litigation.

6. .....A litigant, who approaches the court, is bound to produce all the documents executed by him which are relevant to the litigation. If he withholds a vital document in order to gain advantage on the other side then he would he guilty of playing fraud on the court as well as on the opposite party. "

(Emphasis added)"

18. The Supreme Court in case of Bharvagi Constructions and Another Vs. Kothakapu Muthyam Reddy and Others, reported in 2017 (35) LCD 2505: 2017 SCC On Line 1053, where a similar objection was raised and the Court held that it is the law declared by the Court, which is also covered under the expression occurring in Order 7 Rule 11(d) of the Court. Relevant paragraphs of the said judgment are as follows:-

"32. The question as to whether the expression "law" occurring in clause(d) of Rule 11 of Order 7 of the Code includes "judicial decisions of the Apex Court" came up for consideration before the Division Bench of the Allahabad High Court in Virender Kumar Dixit Vs. State of U.P., 2014(9) ADJ 1506. The Division Bench dealt with the issue in detail in the context of several decisions on the subject and held in para 15 as under:

"15. Law includes not only legislative enactments but also judicial

precedents. An authoritative judgment of the Courts including higher judiciary is also law."

33. This very issue was again considered by the Gujarat High Court (Single Bench) in the case of Hermes Marines Limited Vs. Capeshore Maritime Partners F.Z.C. & Anr. (unreported decision in Civil Application (OJ) No.144 of 2016 in Admiralty Suit No.10 of 2016 decided on 22.04.2016). The learned Single Judge examined the issue and relying upon the decision of the Allahabad High Court quoted supra held in Para 53 as under:

"53. In the light of the above discussion, in the considered view of this Court, it cannot be said that the term "barred by any law" occurring in clause(d) of Rule 11 of Order 7 of the Code, ought to be read to mean only the law codified in a legislative enactment and not the law laid down by the Courts in judicial precedents. The judicial precedent of the Supreme Court in Liverpool & London Steamship Protection and Indemnity Association Vs. M.V. Sea Success, 2004(9) SCC 512 has been followed by the decision of the Division Bench in Croft Sales & Distribution Ltd. vs. M.V. Basil, 2011(2) GLR 1027. It is, therefore, the law as of today, which is that the Geneva Convention of 1999 cannot be made applicable to a contract that does not involve public law character. Such a contract would not give rise to a maritime claim. As discussed earlier, the word "law' as occurring in Order 7 Rule 11(d) would also mean judicial precedent. If the judicial precedent bars any action that would be the law."

34. Similarly, this very issue was again examined by the Bombay High Court (Single Judge) in Shahid s. Sarkar & Ors. Vs. Usha Ramrao Bhojane, 2017 SCC OnLine Bom 3440. The learned Judge placed reliance on the decisions of the Allahabad High Court in Virender Kumar Dixit Vs. State of U.P. (Supra) and the Gujarat High Court in Hermes Marines Limited (supra) and held as under:

"18.....The law laid down by the highest court of a State as well as the Supreme Court, is the law. In fact, Article 141 of the Constitution of India categorically states that the law declared by the Supreme Court shall be binding on all Courts within the territories of India. There is nothing even in the C.P.C. to restrict the meaning of the words "barred by any law" to mean only codified law or statute law as sought to be contended by Mr. Patil. In the view that I have taken, I am supported by a decision of the Gujarat High Court in the case of Hermes Marines Ltd....."

"19. One must also not lose sight of the purpose and intention behind Order VII Rule 11(d). The intention appears to be that when the suit appears from the statement in the plaint to be barred by any law, the Courts will not unnecessarily protract the litigation and proceed with the hearing of the suit. The purpose clearly appears to be to ensure that where a Defendant is able to establish that the Plaint ought to be rejected on any of the grounds set out in the said Rule, the Court would be duty bound to do so, so as to save expenses, achieve expedition and avoid the court's resources being used up on cases which will serve no useful purpose. A litigation, which in the opinion of the court, is doomed to fail would not further be allowed to be used as a device to harass a Defendant....."

35. Similarly, issue was again examined by the High Court of Jharkhand(Single Judge) in Mira Sinha &

Ors. Vs. State of Jharkhand & Ors., 2015 SCC OnLine Jhar.4377. The learned Judge, in paragraph 7 held as under:

"7. In the background of the law laid down by the Hon'ble Supreme Court, it is apparent that Order VII Rule 11(d) C.P.C. application is maintainable only when the suit is barred by any law. The expression "law" included in Rule 11(d) includes Law of Limitation and, it would also include the law declared by the Hon'ble Supreme Court....."

36. We are in agreement with the view taken by Allahabad, Gujarat, Bombay and Jharkhand High Courts in the aforementioned four decisions which, in our opinion, is the proper interpretation of the expression "law" occurring in clause (d) of Rule 11 of Order 7 of the Code. This answers the first submission of the learned counsel for the respondents against the respondents."

(Emphasis added)"

51. Thus, apart from what has been stated above, this Court finds that that the plaintiff did not come to Court with full disclosure and in light of the dictum of the Apex Court in the case of ***Bhaskar Laxman Jadhav & Ors. Vs. Karamveer Kakasaheb Wagh Education Society & Ors.*** Reported in ***2013 (11) SCC 531*** wherein in paragraph 42 to 47, the Apex Court has held as under:-

Suppression of fact

42. While dealing with the conduct of the parties, we may also notice the submission of the learned counsel for Respondent 1 to the effect that the petitioners are guilty of suppression of a material fact from this Court, namely, the rejection on 2-5-2003 of the first application for extension of time filed by the trustees and the finality attached to it. These facts have not been clearly disclosed to this Court by the petitioners. It was submitted that in view of the suppression, special leave to appeal should not be granted to the petitioners.

43. The learned counsel for the petitioners submitted that no material facts have been withheld from this Court. It was submitted that while the order dated 2-5-2003 was undoubtedly not filed, its existence was not material in view of subsequent developments that had taken place. We cannot agree.

44. It is not for a litigant to decide what fact is material for adjudicating a case and what is not material. It is the obligation of a litigant to disclose all the facts of a case and leave the decision-making to the court. True, there is a mention of the order dated 2-5-2003 in the order dated 24-7-2006 passed by the JCC, but that is not enough disclosure. The petitioners have not clearly disclosed the facts and circumstances in which the order dated 2-5-2003 was passed or that it has attained finality.

45. We may only refer to two cases on this subject. In Hari Narain v. Badri Das [AIR 1963 SC 1558] stress was laid on litigants eschewing inaccurate, untrue or misleading statements, otherwise leave granted to an appellant may be revoked. It was observed as follows: (AIR p. 1560, para 9)

"9. ... It is of utmost importance that in making material statements and setting forth grounds in applications for special leave care must be taken not to make any statements which are inaccurate, untrue or misleading. In dealing with applications for special leave, the Court naturally takes statements of fact and grounds of fact contained in the petitions at their face value and it would be unfair

to betray the confidence of the Court by making statements which are untrue and misleading. That is why we have come to the conclusion that in the present case, special leave granted to the appellant ought to be revoked. Accordingly, special leave is revoked and the appeal is dismissed. The appellant will pay the costs of the respondent."

46. More recently, in Ramjas Foundation v. Union of India [(2010) 14 SCC 38 : (2011) 4 SCC (Civ) 889] the case law on the subject was discussed. It was held that if a litigant does not come to the court with clean hands, he is not entitled to be heard and indeed, such a person is not entitled to any relief from any judicial forum. It was said: (SCC p. 51, para 21)

"21. The principle that a person who does not come to the court with clean hands is not entitled to be heard on the merits of his grievance and, in any case, such person is not entitled to any relief is applicable not only to the petitions filed under Articles 32, 226 and 136 of the Constitution but also to the cases instituted in others courts and judicial forums. The object underlying the principle is that every court is not only entitled but is duty-bound to protect itself from unscrupulous litigants who do not have any respect for truth and who try to pollute the stream of justice by resorting to falsehood or by making misstatement or by suppressing facts which have a bearing on adjudication of the issue(s) arising in the case."

47. A mere reference to the order dated 2-5-2003, en passant, in the order dated 24-7-2006 does not serve the requirement of disclosure. It is not for the court to look into every word of the pleadings, documents and annexures to fish out a fact. It is for the litigant to come upfront and clean with all material facts and then, on the basis of the submissions made by the learned counsel, leave it to the court to determine whether or not a particular fact is relevant for arriving at a decision. Unfortunately, the petitioners have not done this and must suffer the consequence thereof.

52. Thus, in light of the aforesaid discussions, this Court finds that the decision relied upon by the appellant in the case of Yashwant Bhikaji (supra) which is on a different fact situation does not come to the rescue. So also the decision of the Apex Court relied upon by the learned counsel for the appellant regarding the distinction in the cause of action as expressed by him are not applicable in the present case for the detailed reasons as already mentioned above, hence, the aforesaid decision also does not help the plaintiff-appellant.

53. In view of the aforesaid, there is no manner of doubt that the two courts below have rightly rejected the plaint, inasmuch as, it appears that the plaintiff instituted the interpleader suit only to delay the outcome and that too has resorted to concealment and, accordingly, this Court is not inclined to interfere nor does it find that any substantial question of law arises in the above second appeal which accordingly is dismissed at the admission stage. However, there shall be no order as to costs.

(2020)02ILR A122

REVISIONAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 23.01.2020

BEFORE

THE HON'BLE ALOK MATHUR, J.

Trade Tax Revision No. 14 of 2007

M/S Kores (India) Ltd., Lko. ...Revisionist
Versus
Comm. of Trade Tax, U.P. ..Opposite Party

Counsel for the Revisionist:
S.M.K. Chaudhary, Vikas Sharma, Yogesh Chandra Srivastava

Counsel for the Opposite Party:
C.S.C.

A. Sales/Trade Tax - Classification - first to see whether an item falls in any of the category mentioned in the schedule and only when such an item is not found falling in any of the schedule the same can be taxed in the ancillary clause - toner cartridges are part of a printer and are liable to be taxed at the same rate as printer

The printer is sold along with the 'Cartridge' and is included in the package containing the printer and therefore from the above fact it can be deduced that the printer includes 'Cartridge' and are sold together. 'Cartridge' being a consumable item has to be periodically replaced/recharged with the toner. (para 14)

B. Common Parlance test - to determine the nature of goods as dealt by the seller and the consumer of the product

Revision Allowed. (E-10)

List of cases cited:-

1. M/s Wep Peripherals Ltd. Lucknow through Authorized Secretary V. Commissioner of Commercial Taxes U.P. Lucknow Trade Tax Revision No. 85 of 2013

2. Canon India Private Ltd. V. State of Tamilnadu/ Commissioner of Commercial Taxes/Commercial Tax Officer Writ Petition No. 4042 of 2008

3. Commissioner of Trade Taxes V. Symphony Enterprises and ors 2007 INDLAW DEL 1301

(Delivered by Hon'ble Alok Mathur, J.)

1. Heard Sri Vikas Sharma, learned counsel for the revisionist as well as Sri Rohit Nandan Shukla, learned Standing Counsel for the respondent.

2. By means of this revision the revisionist has assailed the order dated 15.02.2007, passed by the Trade Tax Tribunal *(hereinafter referred to as "the Tribunal")*, thereby dismissing the second appeal of the revisionist and up holding the order dated 09.11.2006, passed by the Joint Commissioner (Appeals), Trade Tax, Lucknow in the first appeal of the revisionist. This revision pertains to assessment year 2003-04.

3. The revisionist is a Company engaged in the business of manufacture and sale of stationary items such as carbon paper, drawing paper, art material, computer printer, note counting machine etc. which are consumable items. The controversy involved in the present revision is with regard to the rate of tax on H.P. Printer toner and cartridges.

4. It has been submitted that on the sale of H.P. toner and cartridges rate of tax should be 4% while the Assessing Officer has taxed the said goods at the rate of 10%. Therefore, the controversy is whether the H.P. Printer toner and cartridges would be considered to be part of a computer printer or not. In case it is considered to be part of the printer then it will be liable to be taxed at the rate at which the printer is taxed i.e. at the rate of 4% and if it is considered to be an accessory then the same would be liable to be taxed at the rate of 10%.

5. The Tribunal while considering the aforesaid question had recorded

finding that the H.P. toner and cartridge does not fall into the category of parts of the printer and that they are just consumable goods and therefore same are liable to be taxed at the rate of 10%.

6. Learned Standing Counsel on the other hand submits that the Tribunal has considered the submissions made by the revisionist, various provisions of charging Sections and case law in this regard has been duly considered and therefore there is no infirmity in the order of the Tribunal.

7. Heard learned counsel for the parties and perused the record.

8. The question which falls for consideration of this Court is whether under the entry computer hardware, software and other computer consumable would include the toner and printer cartridge, which are used alongwith the computer printer.

9. To decide the aforesaid controversy, this Court will have to consider as to whether cartridge of printer is an essential component of a printer, without which the printer cannot function as a whole or is a cartridge consumable or supplementary or subordinate in nature and will not be needed in actual functioning of the product. It is an admitted position and a fact of common knowledge that a printer cannot function without a cartridge. Function of a printer is to produce printed pages and when blank page is inserted, printed page is turned out with printed words engraved there upon which is only because of the cartridge. In absence of a cartridge blank page will be turned out as a blank page without any impression or characters on it. A printer, therefore, is rendered useless without a cartridge and therefore it can safely be concluded that cartridge is an essential component and integral part of a computer printer, without which a printer cannot function.

10. This Court in **Trade Tax Revision No. 85 of 2013 - M/s Wep Peripherals Ltd. Lucknow through Authorised Secretary Vs. Commissioner of Commercial Taxes U.P. Lucknow** (decided on 25.10.2018) has considered the question with regard to nature of Ribbon Cartridge used in Dot Matrix Printers as to Whether the Ribbon Cartridge is not a part of computer printer, therefore, not a computer hardware as such not amenable to tax at the rate 4% instead it was taxable at the rate 10% as an unclassified item as it was an accessory of computer printer and not its part?

11. In the case of **M/s Wep Peripherals Ltd. Lucknow (supra)** the Court has resorted to the "common parlance test" i.e. how the commodity is understood and considered by those dealing in it, and therefore it took into account the fact that the Ribbon Cartridge is sold alongwith the printer which according to the Court was the safest test to conclude that the Ribbon Cartridge was part of the Dot Matrix Printer.

12. Learned counsel for the revisionist has also placed reliance on the judgment of Madras High Court in the case of **Canon India Private Limited Vs. State of Tamilnadu/ Commissioner of Commercial Taxes/Commercial Tax Officer** (Writ Petition No. 4042 of 2008 alongwith other connected matter, decided on 17th July, 2013). In the case of Cannon India Private Limited (supra) the Madras High Court has considered various

judgments and also the judgment of the Delhi High Court in the case of **Commissioner of Trade Taxes vs. Symphony Enterprises And Others, 2007 INDLAW DEL 1301,** wherein it has been clearly held that toners and cartridges are part and accessories to computer systems. The functioning of these cartridges was explained, from which it appears that ink cartridge is a sophisticated Engineering design to provide and regulate back pressure, which is essential to perform its job of delivering the right amount of ink to the printer nozzel and toner cartridge, which is fitted in laser jet printer generates laser beam which acts on the photo sensitive drum. Thus, the ink jet cartridge/toner cartridge is a part and accessory to a printer, which has been held to be a peripheral to a computer system. Therefore, all spare parts, components and accessories of such goods shall also be taxed at the same rate, as that of the goods if such spare parts, components and accessories are not specifically enumerated are liable to be tax in the same manner as goods enumerated in the schedule.

13. In order to determine the above controversy, it is necessary to examine the nature of goods as dealt by the seller and consumer of the said product or better known as the "Common Parlance Test".

14. Undoubtedly, the printer is sold along with the 'Cartridge' and is included in the package containing the printer and therefore from the above fact it can be deduced that the printer includes a 'Cartridge' and are sold together. 'Cartridge' being a consumable item has to be periodically replaced/recharged with toner.

15. In the light of the above discussion, this Court is of the considered view that toner cartridges are part of a printer and are liable to be taxed at the same rate as printer. It is the duty of the taxing authority, firstly to see that whether an item falls in any of the category mentioned in the schedule and only when such an item is not found falling in any of the schedule can the same be taxed in the ancillary clause.

16. In the instant case toner cartridge being part of printer, which are sold alongwith printers have to be taxed at the same rate as the printers and not under the residuary provision.

17. In view of the discussion made above, this Court is of the considered opinion that the impugned order passed by the Tribunal is not sustainable and the same is accordingly set aside.

18. The revision is **allowed**.

19. The question of law is answered accordingly.

(2020)02ILR A125

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 13.02.2020

BEFORE

THE HON'BLE BISWANATH SOMADDER, J.
THE HON'BLE DR. YOGENDRA KUMAR SRIVASTAVA, J.

Special Appeal Defective No. 117 of 2020

Vivek Kumar ...Appellant
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Appellant:
Sri Phool Chandra Yadav, Sri Sharad Kumar Srivastava

Counsel for the Respondents:
Sri Ankit Gaur (S.C.)

A. Service Law– Recruitment – Medical evaluation - A claim sought to be set up on the basis of a subsequent medical report produced by the candidate would not have the effect of overriding or setting at naught the expert opinion of the Medical Board set up as per the statutory rules in a recruitment process. (Para 13)

The appellant did not challenge the decision of the Medical Board for being arbitrary, capricious or not in accordance with relevant statutory procedure. (Para 12)

Special Appeal (D) dismissed. (E-4)

Precedent followed:

1. Union of India and others Vs. Parul Punia, 2016 (2) ADJ 14 (Para 9)

Present appeal is against the judgment and orders dated 27.05.2019, passed by Learned Single Judge, in Writ- A No. 7455 of 2019.

(Delivered by Hon'ble Biswanath Somadder, J. & Hon'ble Dr. Yogendra Kumar Srivastava, J.)

Civil Misc. Delay Condonation Application No.1 of 2020

1. After considering the submissions made by the learned advocates for the parties and upon perusing the application for condonation of delay, it appears that sufficient cause has been shown to explain the delay in filing of the appeal and as such, the delay is condoned.

2. The application for condonation of delay, being Civil Misc. Delay Condonation Application No.1 of 2020, is accordingly allowed.

Special Appeal Defective No.117 of 2020

1. This Special Appeal arises in respect of a judgment and order dated 27th May, 2019, passed by a learned Single Judge in Writ-A No.7455 of 2019 (Vivek Kumar Vs. State of U.P. and three others).

2. By the impugned judgment and order, the learned Single Judge proceeded to dismiss the writ petition holding the same to be devoid of merit.

3. The appellant before us is the writ petitioner.

4. The issue that was considered by the learned Single Judge was whether production of a subsequent medical examination report by the appellant-writ petitioner will override or set at naught, the medical opinion of the Regional/District Medical Boards dated 11th April, 2015 and 7th April, 2015, which clearly show that the appellant-writ petitioner was suffering from an ailment in the left ear and accordingly was assessed unfit.

5. The learned Single Judge, while deciding the matter, took note of the fact that even the medical examination report, produced by the petitioner before the writ court, indicated that he was suffering from an ailment in the left ear.

6. Although, the learned advocate for the appellant-writ petitioner placed reliance upon a Single Bench decision of this Court in order to contend that a fresh Medical Board ought to be directed to be constituted to re-examine the appellant-writ petitioner, the learned Single Judge took notice of a Division Bench judgment

of this Court (which was taken into consideration by the learned Single Judge whose judgment was sought to be relied upon by the learned advocate for the appellant-writ petitioner). The operative portion of the impugned judgment and order against which the present appeal has been preferred, reads as follows:-

"It is only in exceptional circumstances, when, there is overlapping evidence available on the record and such overlapping evidence is credible. The Court can intervene in the ends of justice.

The learned counsel for the petitioner failed to show that the medical opinion of the respective Medical Boards brought on record are doubtful as compared the medical report/opinion relied upon by the petitioner. All the medical opinions declare the petitioner that he is suffering from ailment in the left ear.

The writ petition being devoid of merit, is accordingly, dismissed."

7. The scope of interference in matters relating to assessment of fitness by a Medical Board constituted under the statutory rules in exercise of powers under writ jurisdiction, in our opinion, would be extremely limited.

8. The Courts have, time and again, emphasised the need for caution when candidates seek to assail the correctness of the findings of a Medical Board constituted under a recruitment process adopted by the State authorities, on the basis of some medical report obtained by them.

9. It would be apposite to refer to the observations made in the decision rendered in the case of **Union of India and others Vs. Parul Punia**, wherein it was observed as follows:-

"6. ...In a number of such cases, candidates who have been invalidated on medical grounds produce expert opinions of their own to cast doubt on the credibility of the official medical report constituted by the recruiting body. In such cases, the Court may not have any means of verifying the actual identity of the person who was examined in the course of the medical examination by the Doctor whose report is relied upon by the candidate. Hence, even though the authority whose medical report was produced by the candidate may be an expert, the basic issue as to whether the identity of the candidate who was examined, matches the identity of the person who has applied for the post is a serious issue which cannot be ignored..."

10. The Division Bench, in the aforesaid judgment, dealing with the parameters of exercise of writ jurisdiction in such matters, emphasised the need for caution and circumspection, and stated thus:-

"9. ...Undoubtedly, in a suitable case, the powers of the Court under Article 226 are wide enough to comprehend the issuance of appropriate directions but such powers have to be wielded with caution and circumspection. Matters relating to the medical evaluation of candidates in the recruitment process involve expert determination. The Court should be cautious in supplanting the process adopted by the recruiting agency and substituting it by a Court mandated medical evaluation. In the present case the proper course would have been to permit an evaluation of the medical fitness of the

respondent by a review medical board provided by the appellants. Otherwise, the recruitment process can be derailed if such requests of candidates who are not found to be medically fit for reassessment on the basis of procedures other than those which are envisaged by the recruiting authority are allowed. This would ordinarily be impermissible."

11. In a case where a recruitment process has been carried out as per prescribed statutory rules whereunder a procedure has been prescribed for testing the medical fitness of candidates by a duly constituted Medical Board, the report of the Medical Board is not to be normally interfered with, and that too, solely on the basis of a claim sought to be set up by a candidate on the basis of some subsequent report(s) procured by him from a private practitioner(s).

12. It is not the case of the petitioner that the decision of the Medical Board was arbitrary, capricious or not in accordance with the procedure under the relevant statutory recruitment rules.

13. Having regard to the foregoing discussion, we are of the view that a claim sought to be set up on the basis of a subsequent medical report produced by the candidate would not have the effect of overriding or setting at naught the expert opinion of the Medical Board set up as per the statutory rules in a recruitment process. Matters relating to medical evaluation of candidates in a recruitment process involve expert determination and it may not be desirable to supplant the procedure prescribed therefor as laid down under the relevant recruitment rules. Any other view, in our opinion, may have the effect of derailing the recruitment process.

14. A bare perusal of the impugned judgment and order reveals that the same has been rendered by the learned Single Judge with cogent and justifiable reasons.

15. In an Intra-Court Special Appeal, no interference is usually warranted unless palpable infirmities or perversities are noticed on a plain reading of the impugned judgment and order.

16. In the facts and circumstances of the instant case, on a plain reading of the impugned judgment and order, we do not notice any such palpable infirmity or perversity. As such, we are not inclined to interfere with the impugned judgment and order dated 27th May, 2019.

17. For reasons stated above, the Special Appeal is liable to be dismissed and stands, accordingly, dismissed.

(2020)02ILR A 128

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 10.02.2020

BEFORE

THE HON'BLE RAJESH SINGH CHAUHAN, J.

Service Single No. 816 of 2015

Uma Shankar Singh ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Shikhar Anand. Laxmi Prasad Srivastava

Counsel for the Respondents:
C.S.C.

A. Service Law– Pension/Retirement benefits – Civil Services Regulation: Article 361; U.P. Fundamental Rule 56

(Amendment and Validation) Act, 1975: Rules 56 (C), (E) – Petitioner rendered 33 years of continuous satisfactory service but he has not been paid post retiral benefits on the ground that his services were temporary as the issue of regularization remained pending till retirement. While allowing his claim the Court held as follows.

B. The provisions of Fundamental Rule 56 shall prevail over the Civil Service Regulation, if they are inconsistent. Condition – B of Art. 361, that the employment must be substantive and permanent, is clearly inconsistent with Fundamental Rule 56 and thus is in operative. (Para 7)

C. In service jurisprudence, a person who possesses the requisite qualification for being appointed to a particular post and appointed with the approval and consultation of the appropriate authority and continues in the post for a fairly long period, then such an appointment cannot be held to be "stopgap or fortuitous or purely ad hoc" – For the purpose of making payment of retiral dues the entire service, be it temporary or permanent shall be considered. (Para 7, 8, 9)

Writ petition allowed. (E-4)

Precedent followed:

1. Lakshman Veer Vs. State of U.P. and others, Writ-A No. 42848 of 2012 (Para 7)

(Delivered by Hon'ble Rajesh Singh Chauhan, J.)

1. Heard Sri Shikhar Anand, learned counsel for the petitioner and Dr. Udai Veer Singh, learned Addl. C.S.C. for the State-respondents.

2. By means of this petition the petitioner has prayed the following relief:

"i) Issue a writ, order or direction in the nature of Mandamus directing the opposite parties to pay pension as well as gratuity payable to petitioner with effect from the date of his retirement, that is 30.06.2012 till date as well as continue paying the pension in future.

ii) Issue a writ, order or direction in the nature of Mandamus directing the opposite parties to pay the all the post retirement benefits along with interest accrued thereupon till the date of actual payment."

3. The brief facts of the case are that the petitioner was appointed on the post of Skilled Machinist on 4.5.1979 as a temporary and adhoc employee pursuant to which the petitioner joined his duties with effect from 31.7.1979 at Rajkiya Madhyamik Pravidhik Vidyalaya, Gonda. Thereafter, in compliance of order dated 6.6.1996 passed by the Director, Technical Education, U.P. the petitioner discharged duties at Govt. Polytechnic with effect from 2 August 1996. It has been noted that the request of the petitioner for regularisation of service was forwarded by the Principal, Government Polytechnic, Faizabad vide letter dated 31.5.2010. Further, since the work and conduct of the petitioner was being appreciated by the authority competent, therefore, he was granted extension of service beyond the date of superannuation i.e. on 31.8.2010 till 30.6.2012 as he retired from that post on that date.

4. In view of above the petitioner had rendered his services for 33 years of continuous satisfactory service but he has not been paid his post retiral benefits such as pension and gratuity perhaps for the reason that he was not regularized in service.

5. Learned Addl. C.S.C. has drawn attention of this Court towards para 4 of

the counter affidavit of opposite party no. 3 and 4 wherein it has been submitted that the entire services of the petitioner are temporary and it is provided in Article 361 of the Civil Services Regulation that temporary / adhoc services are not tenable, therefore, the petitioner has not been paid his retiral benefits including the pension as prayed for.

6. Dr. Udai Veer Singh has further drawn attention of this Court towards para no. 4 of the counter affidavit of respondent nos. 1,2 and 5 wherein the detailed facts of the issue of the petitioner has been narrated and almost same ground has been taken that since the services of the petitioner was on temporary basis, therefore, he could have not been paid his retiral benefits as prayed in the writ petition.

7. Learned counsel for the petitioner has not only denied the contentions of counter affidavit but also placed reliance on the judgment of this Court dated 29.3.2019 in ***Lakshman Veer vs. State of U.P. and others in Writ-A No. 42848 of 2012*** referring para 27, 28, 31,32,33,34,35,36, 40,41,and 42 as under :

"27.Learned counsel for the petitioner has placed reliance upon Article 361 of Civil Service Regulation and the same is also being quoted here in below:-

"361. The service of an officer does not qualify for pension unless it conforms to the following three conditions:--

First--The service must be under Government.

Second--The employment must be substantive and permanent.

Third--The service must be paid by Government.

28. These three conditions are fully explained in the following Section.

1. Substantive service in a permanent post qualifying for pension unless the service in a particular post in specifically declared as non-qualifying under Article 350 C.S.R. when a temporary post is made permanent or a permanent post is sanctioned, it is not necessary to state that the post in question would also be pensionable under Article 361 C.S.R.

361-A. The State Government may, however, in the case of service paid from General Revenues, even though either or both of conditions (1) and (2) are not fulfilled:--

(1) declare that any specified kind of service rendered in a non-gazetted capacity shall qualify for pension;

(2) in individual cases and subject to such conditions as it may think fit to impose in each case, allow service rendered by an officer to count for pension.

31. Learned counsel for the petitioner has also placed reliance upon Rules 56(C) and (E) of Act, 1975 and the same is being quoted below:-

56(c). Notwithstanding anything contained in Clause (a) or Clause (b), the appointing authority may, at any time, by notice to any Government servant (whether permanent or temporary), without assigning any reason, require him to retire after he attains the age of fifty years or such Government servant may by notification to the appointing authority voluntarily retire at any time after attaining the age of fifty years or after he has completed qualifying service for twenty years.

56(e). A retiring pension shall be payable and other retirement benefits, if any, shall be available in accordance with an subject to the provisions of the relevant

rules to every Government servant who retires or is required or allowed to retire under this rule.

Explanation- (1) The decision of the appointing authority under Clause (c) to retire the Government servant as specified therein shall be nothing herein contained shall be construed to require any recital, in the order, of such decision having been taken in the public interest.

(2) Every such decision shall, unless the contrary is proved, the presumed to have been in the public interest.

(3) The expression 'appointing authority' means the authority which for the time being has the power to make substantive appointments to the post or service from which the Government servant is required or wants to retire; and the expression 'qualifying service' shall have the same meaning as the relevant rules relating to retiring person.

(4) Every order of the appointing authority requiring a Government servant to retire forthwith under the first proviso to clause(d) of this rule shall have effect from the afternoon of the date of its issue provided that if after the date of its issue, the Government servant concerned bona fide and in ignorance of that order, performs the duties of his office his acts shall be deemed to be valid notwithstanding the facts of his having earlier retired."

32. Rule 56(C) does not create any difference between permanent and temporary employee whereas Rule-56(E) clearly says that pension shall be payable to every government servants subject to provisions of relevant rules who retires or is required or allowed to be required under these rules. Therefore, argument raised by learned Senior Counsel appearing for the petitioner is acceptable in the light of Rules 56(C) &(E) and petitioner is entitled for pension.

33. So far as payment of pension to retiring person is concerned, learned Senior Counsel has placed reliance upon several judgment of Rudra Kumar Sain V. Union of India, (2000) 8 SCC 25, in which Supreme Court has considered the words 'ad hoc', 'stopgap' and 'fortuitous' and it has been answered in Paragraph No. 20 of the said judgment which is quoted below:-

"In service jurisprudence, a person who possesses the requisite qualification for being appointed to a particular post and then he is appointed with the approval and consultation of the appropriate authority and continues in the post for a fairly long period, then such an appointment cannot be held to be "stopgap or fortuitous or purely ad hoc".

34. Again in the case of Ramesh K. Sharma v. Rajasthan Civil Services (2001) 1 SCC 637, Apex Court has considered the word 'substantive basis' after relying upon the judgment of Baleshwar Dass v. State of U.P. (AIR 1981 SC 41) and held that if an incumbent holds the post for indefinite period, this cannnot be said to be adhoc appointment. In paragraph No. 4 of the said judgment, the Court has held as under:-

"If an incumbent is appointed after due process of selection either to a temporary post or a permanent post and such appointment, not being either stopgap or fortuitous, could be held to be on substantive basis. But if the post itself is created only for a limited period to meet a particular contingency, and appointment thereto is made not through any process of selection but on a stopgap basis then such an appointment cannot be held to be on substantive basis. The expression "substantive basis" is used in the service

jurisprudence in contradistinction with ad hoc or purely stopgap or fortuitous."

35. Again issue of payment of pension came before this Court in the matter of Dr. Hari Shanker Asopa v. State of U.P. and another (1989) UPLBEC 501, who was allowed to retire being permanent on any of the post hold by him during the tenure of his continuous service of State Medicine College of Uttar Pradesh and the court has replied the same after considering Article 361 and Clause (A) of Rules 1956 of Fundamental Rules as applied in U.P. Civil Service Regulation and held as under:-

"In the instant case, indisputably Dr. Asopa who allowed to retire under clause (c) of Rule 56 and the first and third conditions envisaged in Article 361 of the Regulations were satisfied. He, therefore, became qualified for a retiring pension notwithstanding the fact that he was not permanent on any of the posts held by him during the tenure of his continuous services of State Medical Colleges of Uttar Pradesh Government. Denial of retiring pension to Dr. Asopa on the ground of his not being permanent on any post of the government service was clearly violative of clause (e) of Rule 56 of the Rules. Condition contained in paragraph 2 of the order, dated 21st February, 1983 (annexure-10 to the writ petition), depriving Dr. Asopa of retiring pension cannot, therefore, be sustained. The contention of the learned Standing Counsel for the State of Uttar Pradesh that Dr. Asopa was not entitled to any pension lacks merit and has got to rejected."

36. Payment of pension in the similar matter again came before this Court in the matter of Hans Raj Pandey v. State of U.P. and others, 2007 (3) UPLBEC 2073 and the Court after considering the different law occupying the filed with regard to the payment of pension has held as under:-

"In the present case, so far as the condition Nos. A and C are concerned, they are satisfied and the dispute is only with respect to condition No. B i.e., lack of permanent character of service. However, in out view, the aforesaid provisions stand obliterated after the amendment of Fundamental Rule 56 by U.P.Act No. 24 of 1975 which allows retirement of a temporary employees also and provides in clause (e) that a retiring pension is payable and other retiral benefits, if any, shall be available to every Government Servant who retires or is required or allowed to retire under this Rule. Since the aforesaid amendment Rule 56 was made by an Act of Legislature, the provisions contained otherwise under Civil Service Regulations, which are pre-constitutional, would have to give way to the provisions of Fundamental Rule 56. In other words, the provisions of Fundamental Rule 56 shall prevail over the Civil Service Regulations, if they are inconsistent. Condition -B (supra) of Article 361 of Civil Service Regulations are clearly inconsistent with Fundamental Rule 56 and thus is in operative."

40.Therefore, in the light of discussion made herein above, order dated 03.01.2015 is not sustainable in the light of rules as well as law laid down by this Court and petitioner is also entitled for payment of his pension from the date of his superannuation i.e. 30.06.2011, therefore, order dated 03.01.2015 is hereby quashed.

41.At this stage, another issue before this court is that whether matter should be remanded back to Regional Committee constituted under the provisions of U.P. Act No. 5 of 1982 for taking a fresh decision or not. Similar issue was came before Division Bench this

Court in the matter of Tileshwar Nath Vs. State of U.P. & another (Writ-A No. 8224 of 2012) decided on 11.04.2018, and the Court has held as follows:-

.....

"There is another issue before the Court whether the matter should be remanded back to the Tribunal or not to consider and decide again in light of observation made herein above. Court is of the view that when charge sheet itself does not establish any charge and matter is pending since long, no fruitful purpose shall be served to remand the matter back to the Tribunal to decide again, when the petitioner has already retired from service on 31.01.2006."

.....

42. In the present case too, grounds taken in order dated 03.01.2015 is absolutely baseless and petitioner has also attained the age of superannuation on 30.06.2011, therefore, instead of remanding back the matter to Regional Committee, respondents are directed to pay pension to the petitioner forthwith on month to month basis and also pay arrears of pension along with 6% interest from the date of his retirement i.e. 01.07.2011 within three months from the date of production of certified copy of this order."

8. By means of aforesaid judgment this Court has referred the settled proposition of law in question by citing the judgments of Division Bench of this Court as well as the judgment of Hon'ble Apex Court and has arrived at conclusion that for the purpose of making payment of retiral dues the entire services be it temporary or permanent shall be considered.

9. Considering the rival contentions of the learned counsel for the parties and the settled position of law, as above, the petitioner is liable to get pension and all retirement benefits counting his entire service till his date of retirement. In the present case since the issue of the regularisation remained pending till the retirement of the petitioner as no decision had been taken, therefore, at this stage I do not feel it appropriate to remand the matter before the competent authority for taking the decision thereon when the law is settled on the point that for the purpose of retiral dues the entire services of the employee shall be considered.

10. Accordingly, the writ petition is allowed.

11. A writ in the nature of mandamus is issued to pay the pension as well as gratuity payable to petitioner with effect from the date of his retirement, that is 30.06.2012 till date as well as the petitioner shall be paid his continuous pension.

12. The compliance of the aforesaid order shall be made within three months from the date of production of certified copy of the order of this Court failing which the petitioner shall be liable for the interest @ 6% on the entire arrears of dues.

(2020)02ILR A133

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 10.02.2020

BEFORE

THE HON'BLE RAJESH SINGH CHAUHAN, J.

Service Single No. 2713 of 2020
And
Service Single No. 2748 of 2020

Jitendra Kumar Singh ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Mohd. Ateeq Khan, Poonam Singh

Counsel for the Respondents:
C.S.C.

A. Service – Suspension - U.P. Police Officers of the Subordinate Ranks (Punishment and Appeal) Rules, 1991: Rules 14(2), 17 – An authority vested with the power to act under the statute alone should exercise its discretion following the procedure prescribed therein and interference on the part of any authority upon whom the statute does not confer any jurisdiction, is wholly unwarranted in law. It violates the constitutional scheme. (Para 9)

The impugned suspension orders were quashed, as were passed by Superintendent of Police, Barabanki, in pursuance to the direction issued by Joint Secretary of the Department of Home.

Writ petition allowed. (E-4)

Precedent followed:

1. Joint Action Committee of Air Line Pilots' Association of India (ALPAI) & others Vs. Director General of Civil Aviation & others, (2011) 5 SCC 435 (Para 8, 9, 10)

Petition against orders of suspension dated 30.12.2019, passed by Superintendent of Police, Barabanki.

(Delivered by Hon'ble Rajesh Singh Chauhan, J.)

1. Heard Mohd. Ateeq Khan, learned counsel for the petitioner and Sri Vishal Verma, learned Addl. C.S.C. for the State-respondents.

2. Since in both the aforesaid writ petitions, the impugned orders of suspension is same i.e. 30.12.2019 issued by the Superintendent of Police, Barabanki and facts and circumstances of the case are also same inasmuch as in case of Sub-Inspector, Surendra Pratap Singh, the show cause notice under Rule 14(2) has been issued but at the dictate of State Government, the said show cause notice was cancelled and the Sub-Inspector Surendra Pratap Singh has been placed under suspension. In the same manner, the Sub-Inspector Jitendra Kumar Singh has been placed under suspension. The State Counsel has received common instructions in both the cases vide letter dated 08.02.2020 and same stand has been taken by the Authority in both the cases, therefore with the consent of the learned counsel for the parties, both the matters are decided by the common order.

3. This Court has passed the order dated 31.01.2020 as under:

"Heard Mohd. Ateeq Khan, learned counsel for the petitioner and Sri Ran Vijay Singh, learned Additional Chief Standing Counsel for the State-respondents.

By means of this writ petition, the petitioner has assailed the impugned suspension order dated 30.12.2019, passed by the Superintendent of Police, District-Barabanki.

The case set-forth by learned counsel for the petitioner is that for the allegation in question the departmental inquiry against the petitioner was initiated by the Competent Authority under Rule 14 (2) of U.P. Police Officers of the Subordinate Ranks (Punishment and Appeal) Rules, 1991 (here-in-after referred to as the "Rules, 1991").If any inquiry is initiated under the aforesaid rules, the incumbent can be provided minor punishment only if the charges are proved.

Learned counsel for the petitioner has demonstrated that a show cause notice dated 25.07.2019 was to the petitioner to that effect, which has been annexed as Annexure No.5 to the writ petition. He has further submitted that despite the aforesaid show cause notice being issued to the petitioner under Rule 14 (2) of the Rules, 1991, the Joint Secretary of the Department of Home has directed the Superintendent of Police, Barabanki vide order dated 18.12.2019 (Annexure No.8 to the writ petition) to set aside the show cause notice being issued against the petitioner under Rule 14 (2) of the Rules, 1991 and place the petitioner under suspension. Therefore, pursuant to the direction being issued by the Joint Secretary of the Department of Home the petitioner has been placed under suspension by means of an order dated 30.12.2019.

Therefore, learned counsel for the petitioner has contended that the law is settled on the point that an employee can only be placed under suspension if the allegations are so serious entailing the major punishment if the charges and allegations are proved and in the present case even the show cause notice was issued to the petitioner under Rule 14 (2) of the Rules, 1991. He has further submitted that the law is also settled on the point that the order of suspension can be passed only by the Appointing/ Disciplinary / Punishing Authority. As the impugned order has been passed on the dictate of the authority who is not a Competent Authority, therefore, in view of the aforesaid reasons the impugned suspension order dated 30.12.2019 is liable to be set aside.

The matter requires consideration.

List this petition on 10.02.2020 as fresh to enable the learned Additional Chief Standing Counsel to seek complete instructions in the matter, failing which, the interim relief application of the petitioner may be considered on the next date."

4. In compliance of the aforesaid order, learned Addl. C.S.C. has produced the instructions vide letter dated 08.02.2020 preferred by the Superintendent of Police, Barabanki addressing to the Addl. C.S.C. of this Court enclosing their letters dated 18.12.2019 and 04.07.2019, the same is taken on record.

5. As per the aforesaid instructions, the Superintendent of Police, Barabanki has admitted that in compliance of the letter dated 18.12.2019 preferred by the Joint Secretary of the Department, the petitioner has been placed under suspension.

6. Section 17 of U.P Police Officers of Subordinate Rank (Punishment and Appeal) Rules, 1991 provides that a police officer against whose conduct an enquiry is contemplated, or is proceeding, may be placed under suspension pending the conclusion of enquiry *in the discretion of Appointing Authority or by any other Authority not below the rank of Superintendent of Police* authorized by him in this behalf. It clearly means that to place any employee under suspension is the sole discretion of the Appointing Authority. He may place any employee under suspension applying his independent mind and independent satisfaction to that effect.

7. In the present case, the Superintendent of Police has followed the direction of Special Secretary of the Home

Department who has suggested that the petitioner should be placed under suspension and his show cause notice issued under Rule 14(2) be set aside. The Superintendent of Police, Barabanki has followed the aforesaid direction and not only placed the petitioner under suspension, but also the above notice issued against the petitioner under Rule 14(2) has been cancelled by the Superintendent of Police, Barabanki as shown in the instructions letter dated 08.02.2020.

8. The Hon'ble Apex Court In Re: ***Joint Action Committee of Air Line Pilots' Association of India (ALPAI) & Ors. vs. Director General of Civil Aviation & Ors. reported in (2011) 5 SCC 435*** vide para 26 and 27 has considered the identical controversy relating to competence of passing any order and held that only the Competent Authority can pass such orders.

9. The paras 26 and 27 are reproduced herein under:

"26. The contention was raised before the High Court that the Circular dated 29.5.2008 has been issued by the authority having no competence, thus cannot be enforced. It is a settled legal proposition that the authority which has been conferred with the competence under the statute alone can pass the order. No other person, even a superior authority, can interfere with the functioning of the Statutory Authority. In a democratic set up like ours, persons occupying key positions are not supposed to mortgage their discretion, volition and decision making authority and be prepared to give way to carry out commands having no sanctity in law. Thus, if any decision is taken by a statutory authority at the behest or on suggestion of a person who has no statutory role to play, the same would be patently illegal. (Vide: The Purtabpur Co., Ltd. v. Cane Commissioner of Bihar, Chandrika Jha v. State of Bihar, Tarlochan Dev Sharma v. State of Punjab and Manohar Lal v. Ugrasen).

27. Similar view has been reiterated by this Court in Commissioner of Police, Bombay v. Gordhandas Bhanji, Bahadursinh Lakhubhai Gohil v. Jagdishbhai M. Kamalia and Pancham Chand & Ors. v. State of Himachal Pradesh observing that an authority vested with the power to act under the statute alone should exercise its discretion following the procedure prescribed therein and interference on the part of any authority upon whom the statute does not confer any jurisdiction, is wholly unwarranted in law. It violates the constitutional scheme." (emphasis supplied)

10. Considering the rival submissions of the learned counsel for the parties and perusal of the relevant material available on record as well as the dictum of the Hon'ble Apex Court in the case of ***Joint Action Committee of Air Line Pilots' Association of India (supra), I*** hereby quash the suspension orders dated 30.12.2019 passed by the Superintendent of Police, Barabanki which is appended to the writ petitions.

11. The opposite party is directed to reinstate the petitioners and post at an appropriate place where the Disciplinary Authority deems fit and proper in the circumstances of the decision.

12. Consequences to follow.

13. It is needless to say that the Disciplinary Authority may pass any

appropriate orders but following due procedure of law.

14. In view of the aforesaid terms, both the writ petitions bearing Nos. 2713(S/S) of 2020 and 2748 (S/S) of 2020 are **allowed**.

15. No order as to costs.

(2020)02ILR A137

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 04.02.2020

BEFORE

THE HON'BLE SAURABH LAVANIA, J.

Service Single No. 2941 of 2020

Ram Adhar Singh Yadav ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Rakesh Kumar Singh

Counsel for the Respondents:
C.S.C., Shishir Jain

A. Service Law– Repatriation - Uttar Pradesh Absorption of Government Servants in Public Undertakings Rules, 1984 – Petitioner claims that he cannot be repatriated on the basis of allegations made against him. The Court held that, it is settled principle that deputationist can always and any time be repatriated to his parent department to serve on his substantive post, at the instance of either of the departments and there is no vested right in such person to continue for long on deputation. (Para 22)

Writ petition dismissed. (E-4)

Precedent followed:

1. Kunal Nanda Vs. Union of India and another, (2000) 5 SCC 362 (Para 8, 9)

2. Ravindra Singh Vs. State of U.P., [2015 (33) LCD 1915] (Para 9)

3. Ratilal B. Soni and others Vs. State of Gujrat and others, 1990 (Supp) SCC 243 (Para 10)

4. Prasar Bharti and others Vs. Amarjeet Singh and others, (2007) 2 SCALE 486 (Para 11)

5. State of U.P. Vs. Ashok Kumar Saxena, AIR 1998 SC 925 (Para 11)

6. Mohd. Masood Ahmad Vs. State of U.P. and others, JT 2007 (12) SC 467 (Para 11)

7. U.P. Gram Panchayat Adhikari Sangh & others Vs. Daya Ram Saroj and others, (2007) 2 SCC 138 (Para 12)

8. Gauri Shanker Vs. State of U.P. and others, 2005 (1) AWL 426 (Para 13)

9. Dr. Seema Kundra Vs. State of U.P., 2003 (1) AWL 520 (Para 14)

10. Devi Kumar Vs. Rajya Krishi Utpadan Mandi Parishad, 2004 (3) UPLBEC 2318 (Para 15)

11. Ashok Kumar Pandey Vs. State of U.P. and others, Writ Petition No. 52527 of 2005, decided on 03.08.2005 (Para 16)

Present petition challenges order of repatriation dated 04.12.2019.

(Delivered by Hon'ble Saurabh Lavania, J.)

1. Heard Sri Rakesh Kumar Singh, learned counsel for the petitioner, Sri Alok Sharma, learned Addl. Chief Standing Counsel for the respondent No. 1 and Sri Shishir Jain, learned counsel for the respondent Nos. 2 to 6.

2. By means of the present writ petition, a challenge has been made to the order dated 04.12.2019, whereby the petitioner has been repatriated to his parent

Department i.e. Public Works Department of State of Arunachal Pradesh.

3. It is stated that the petitioner was sent on deputation from the Public Works Department of State of Arunachal Pradesh to U.P. Rajkiya Nirman Ltd. (in short "Nigam") vide order dated 01.07.2014 and pursuant to the same, he was permitted to join the duties of Nigam on 17.07.2014. In this regard, reliance has been placed on the letter dated 18.07.2014 (Annexure No. 3 to the writ petition).

4. It is further stated that during the period of deputation in Nigam, the petitioner performed his duties and responsibilities with full satisfaction of the Authorities concerned. However, on the basis of the enquiry report dated 30.11.2019, the petitioner has been repatriated vide order impugned dated 04.12.2019. So far as the case of the petitioner is concerned, the enquiry report is vague. The petitioner is not responsible for the allegations made in the report dated 30.11.2019, which relate to Inter Unit Transaction. In this regard, learned counsel for the petitioner placed reliance on Para No. 246 of the Basic Responsibilities of Staff and Officers, which provides basic duties of sub-Engineers of the Nigam.

5. It is also stated that in the facts of the case, the order of repatriation dated 04.12.2019, mentioning therein the allegations related to embezzlement is unsustainable in law and is liable to be interfered with by this Court.

6. Per contra, Sri Shishir Jain, learned counsel appearing for the Nigam submitted that admittedly the petitioner has discharged the duties in Nigam on deputation and deputationist has no right to continue on the said post.

7. It is also stated that the petitioner was sent on deputation vide order dated 01.07.2014 and he has completed 5 year on deputation in the Nigam and as per the Rules known as The Uttar Pradesh Absorption of Government Servants in Public Undertakings Rules, 1984 (in short "Rules, 1984"), a deputationist cannot continue after expiry of 5 years. The relevant portion of the Rules, 1984 is quoted hereunder:-

"4. Time limit for deputation: No Government servant shall ordinarily be permitted to remain on deputation for a period exceeding five years."

8. It is also stated that a deputationist can be repatriated, if his/her integrity is found doubtful and in the instant case, the integrity of the petitioner has been found doubtful and for the said reason, the respondent No. 6/Additional Project Manager, Uttar Pradesh Rajkiya Nirman Nigam Limited, Bahraich has recommended for deputation of petitioner and initiation of disciplinary proceedings against the petitioner. In this regard, reliance has been placed on letter of respondent No. 6 dated 02.12.2019 (Annexure No. 7 to the writ petition). The petitioner has been repatriated keeping in view the fact that certain allegations have been made against him in the enquiry report. The integrity of the petitioner, prima facie, is doubtful, so he has been repatriated. The order of repatriation is justified in the facts of the case. In this regard, reliance has been placed on the judgment of the Apex passed in the Case of Kunal Nanda v. Union of India and Another reported in (2000) 5 SCC 362.

*"**5.** Heard the learned counsel for the appellant and Shri R.N. Trivedi, learned Additional Solicitor General. The least said about the conduct of the appellant, the better for him. The appellant, indisputably, is only a deputationist so far as CBI is concerned and his parent Department is only CRPF and his substantive position and appointment is only in that Department and ordinarily a deputation, as per governing Rules, cannot last for a period more than five years. The frivolous claim that a person like him need not be a graduate for absorption and appointment in CBI, apart, the appellant appears to have rendered himself unreliable by making, to put it in the most mild terms, an incorrect representation of his basic educational qualification to be a graduate while factually it is not so, and this one ground, strongly urged is enough to non-suit him. This itself will be sufficient to disentitle him to even continue in CBI any longer. The Screening Committee which appears to have initially recommended for absorption also seems to have proceeded on the basis of the erroneous representation of the appellant of his basic educational qualification and the copy of the proceedings made available disclose this serious lapse and consequently no advantage can be claimed on the basis of the recommendation, made on a mistaken view of the facts more so, when such mistake was the making of the appellant himself. This assertion of the respondent CBI Department was specific and reiterated in unmistakable terms from the beginning before the Tribunal [vide paras 4(h) and 5 of the reply] and thereafter before the High Court in the counter filed [vide para 3(e)] and finally before this Court also [vide para 5(c) of the counter filed on behalf of the respondent]. Throughout, the response of the appellant to those assertions at various stages was evasive and nebulous and neither direct nor specific in refutation of the facts in particular. Being an appeal under Article 136 of the Constitution of India, this Court will be justified in even rejecting this appeal, on this ground alone.*

***6.** On the legal submissions also made there are no merits whatsoever. It is well settled that unless the claim of the deputationist for a permanent absorption in the department where he works on deputation is based upon any statutory rule, regulation or order having the force of law, a deputationist cannot assert and succeed in any such claim for absorption. The basic principle underlying deputation itself is that the person concerned can always and at any time be repatriated to his parent department to serve in his substantive position therein at the instance of either of the departments and there is no vested right in such a person to continue for long on deputation or get absorbed in the department to which he had gone on deputation. The reference to the decision reported in Rameshwar Prasad v. M.D., U.P. Rajkiya Nirman Nigam Ltd. [(1999) 8 SCC 381 : 2000 SCC (L&S) 60] is inappropriate since the consideration therein was in the light of the statutory Rules for absorption and the scope of those Rules. The claim that he need not be a graduate for absorption and being a service candidate, on completing service of 10 years he is exempt from the requirement of possessing a degree needs mention, only to be rejected. The stand of the respondent Department that the absorption of a deputationist being one against the direct quota, the possession of basic educational qualification prescribed for direct recruitment i.e. a degree is a must and essential and that there could be*

no comparison of the claim of such a person with one to be dealt with on promotion of a candidate who is already in service in that Department is well merited and deserves to be sustained and we see no infirmity whatsoever in the said claim."

9. This Court in the case of Ravindra Singh v. State of U.P. reported in [2015 (33) LCD 1915] after considering the judgment passed by the Apex Court in the case of Kunal Nanda (supra) and various other judgments on the issue in question observed that no person has right to continue in a foreign service and it is always open to the competent Authority to repatriate the employee concerned to his parent department.

10. In Ratilal B. Soni and others. Vs. State of Gujrat and others, 1990 (Supp) SCC 243, the Court held :-

"5.The appellants being on deputation they could be reverted to their parent cadre at any time and they do not get any right to be absorbed on the deputation post....."

11. The concept of transfer and deputation has been explained by the Apex Court in Prasar Bharti and others Vs. Amarjeet Singh and others 2007 (2) SCALE 486 and it has been held that a person sent in a cadre outside his substantive cadre has no right to continue in foreign cadre and can be repatriated to his parent cadre at any point of time without assigning any reason. Further, the authorities cannot be required to assign any reason, whatsoever, in an order of transfer and such power of transfer cannot be fettered by requiring them to record reason. Which employee should be posted where is absolutely within the domain of the authority concerned and unless it is shown that a order of transfer/repatriation is contrary to the statutory rules or is otherwise mala fide or has been passed by the incompetent authority, only then the Court may interfere and not otherwise. (See: State of U.P. Vs. Ashok Kumar Saxena AIR 1998 SC 925, Mohd. Masood Ahmad Vs. State of U.P. & others JT 2007 (12) SC 467).

12. The Apex Court in U.P. Gram Panchayat Adhikari Sangh & Ors. Vs. Daya Ram Saroj & Ors. (2007) 2 SCC 138 held that the persons having been sent to deputation have no right to continue and they can be repatriated to their parent department.

13. A Division Bench of this Court also in Gauri Shanker Vs. State of U.P. and Others 2005 (1) AWL 426 held as under:

".....A deputationist has no right to remain on deputation and he can be sent back to his Parent Department at any time....."

14. The same view has been followed by another Division Bench of this court in the case of Dr. Seema Kundra Vs. State of U.P. 2003 (1) AWL 520.

15. In Devi Kumar Vs. Rajya Krishi Utpadan Mandi Parishad 2004 (3) UPLBC 2318, this court observed as under:

".....The period of deputation originally fixed can be cut short, if considering necessary, a deputationist has no right to continue in the deputation post....."

16. This court in Ashok Kumar Pandey Vs. State of U.P. and Others, writ petition no 52527 of 2005, decided on 3rd August 2005, held:

".....It is well settled that a deputationist has no right to remain on deputation and he can be sent back to his Parent Department at any time....."

17. Heard the submissions advanced by learned counsel for the parties and perused the record.

18. The admitted facts of the present case are to the effect that the petitioner was sent on deputation on 01.07.2014 and he joined the post in issue in the Nigam on 17.07.2014 and till passing of the order impugned dated 04.12.2019, he continued on the said post. The Rule quoted above specifically provides the term of the deputationist on deputation, according to which ordinarily a deputationist can serve only upto 5 years and not beyond that period.

19. It also appears from the record that after taking into consideration the contents of enquiry report/letter dated 30.11.2019 of respondent No. 5/General Manager, U.P. Rajkiya Nirman Nigam Limited, Ayodhya Region, Ayodhya and the letter dated 02.12.2019 of the respondent No. 6, whereby repatriation of the petitioner has been recommended, the petitioner has been repatriated to his parent department. Initiation of disciplinary proceedings against the petitioner has also been recommended.

20. In nutshell, the case of the petitioner is that he is a deputationist and he cannot be repatriated on the basis of the allegations made against him. Accordingly, he may be allowed to continue on deputation.

21. No rule or pronouncement either of this Court or the Apex Court has been placed before this Court in support of right to continue as deputationist in Nigam.

22. In regard to right of a deputationist, now it is settled principle that a deputationist can always and any time be repatriated to his parent department to serve in his substantive position, in other words on his substantive post, at the instance of either of the departments and there is no vested right in such person to continue for long on deputation in the department, in which he had gone on deputation.

23. Keeping in view the aforesaid admitted position as well as the settled legal position with regard to right of deputationist, this Court is of the view that the order impugned dated 04.12.2019 is not liable to interfered with.

24. For the foregoing reasons, the writ petition lacks merit. Accordingly, it is ***dismissed***.

25. At this stage, learned counsel for the petitioner submitted that the salary of four months has not been paid to the petitioner.

26. In this regard, Sri Shishir Jain, learned counsel for the respondent Nos. 2 to 6 has stated before this Court that the salary of the period served by the petitioner would be released in his favour within 15 days, if there is no other legal impediment.

(2020)02ILR A141

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 18.01.2020

BEFORE

THE HON'BLE SAURABH LAVANIA, J.

Service Single No. 36959 of 2018

Shiv Kumar Vishwakarma ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Ghaus Beg

Counsel for the Respondents:
C.S.C.

A. Service Law– Regularization - Uttar Pradesh Regularization of persons Working on Daily Wages or on Work Charge or on Contract in Government Department on Group 'C' and Group 'D' Posts (Outside the Purview of the Uttar Pradesh Public Service Commission) Rules, 2016: Rules 7, 8, 9 – Petitioner has challenged order providing prospective regularization. The Court held that the regularization should be prospective and not retrospective so that seniority of those, who are already in service, is not affected. (Para 13, 14)

Those regularized under the said Rules will be placed below those appointed in accordance with the service Rules prior to them. Rule 9 makes a valid distinction between two different classes of employees, one which is regular and other not so. (Para 14)

Writ petition dismissed. (E-4)

Precedent followed:

1. Registrar General of India & another Vs. V. Thippa Setty & others, (1998) 8 SCC 690 (Para 13)

2. Union of India and others Vs. Sheela Rani, (2007) 15 SCC 230. (Para 13)

3. State of Haryana Vs. Jasmer Singh, (1996) 11 SCC 77 (Para 13)

Petition against order dated 15.09.2017, passed by the Director, U.P. Museum Directorate.

(Delivered by Hon'ble Saurabh Lavania, J.)

1. Heard Sri Ghaus Beg, learned counsel for the petitioner and Dr. Udai Veer Singh, learned Addl. Chief Standing Counsel for the State-Respondents.

2. The present writ petition has been filed for following main reliefs:-

"(i) Issue a writ, order or direction in the nature of certiorari quashing the impugned office order No.616/U.P. San. Nid.-1 (54)/2016 dated 15.09.2017 passed by the Director, U.P. Museum Directorate (opposite party No.2) so far as it relates to regularization of petitioner's services prospectively i.e. from the date of assuming the charge on the post of Driver at International Ram Katha Sangrahalaya (opposite party No.4), as contained in Annexure No. 1 to the writ petition.

(ii) Issue a writ, order or direction in the nature of mandamus commanding the opposite parties to consider the case of the petitioner on the post of Driver alongwith all consequential services benefits from the date of initial date of appointment i.e. 30.07.1996 as per the provisions of U.P. Regularization of Persons Working on Daily Wages or On Work-Charge or On Contract in Government Departments on 'Group-C' and 'Group-D' Posts (Outside the Purview of the U.P. Public Service Commission) Rules, 2016 read with Government orders dated 13.08.2015 and 24.02.2016, within the time specified by this Hon'ble Court.

(iii) Issue a writ, order or direction in the nature of mandamus commanding the opposite parties to pay the petitioner difference of salary for the period 30.07.1996 to 15.09.2017 alongwith dearness allowance and other

admissible allowances as being paid to regularly appointed Drivers of the State Government."

3. Admittedly, the petitioner was appointed on the post of Driver as daily wager on 30.07.1996 and continued on the said post without any obstruction till December, 2005 and thereafter, he was disengaged from the service by the opposite parties. Aggrieved by the disengagement, the petitioner approached this Court by means of the Writ Petition No. 1247 (S/S) of 2006, which was disposed of finally by means of the judgment and order dated 25.01.2017. The relevant portion of the judgment and order dated 25.01.2017 reads as under:-

"The trivial question now left is with regard to regularization of the petitioner on the post of Driver.

Learned Counsel for the petitioner has argued that he has continued on the post of Group D since his engagement in the year 1996. The work of the post of the Driver has been taken and in view of the engagement as daily wager on Class IV post w.e.f 15.12.1988, he is entitled for regularization on the post in question under Uttar Pradesh Regularization of Daily Wages Appointments on Group "D' Posts Rules, 2001 (in short referred to as '2001 Rules').

It has also been contended by the learned Counsel for the petitioner that in identical situation, this Court has passed the judgment and order dated 18.9.2015 in Writ Petition No. 4052 (SS) of 2014 wherein it has been held that an employee, who had been appointed as daily wager on Group D post before 29.6.1991 and is continuing on his post on 21.12.2001, are fully eligible and entitled to be considered for regularization. Therefore, denial of regularization to the petitioner is wholly unjustified and in breach of the provisions of the aforesaid Rules.

After scrutiny of records, there is no quarrel on the point that the petitioner was engaged in 1996 and today also he is working with respondents but his services have yet not been regularized. It may be clarified that the requirement under the the 2001 Rules is that an incumbent was directly appointed on daily wage basis in a government service before 29.6.1991 and is/are continuing in service as such on the date of commencement of the said Rules. The further requirement under the Rules is that the person must have possessed requisite qualification required for regular appointment on that post at the time of such employment on daily wage basis.

It is also relevant to mention that this Court in the case of Janardan yadav vs.State of U.P. [(2008) 1 UPLBEC 498, has held that this Court does not find any ambiguity in Rule 4(1) providing as to which kind of persons would be entitled for regularization and it nowhere requires that the incumbent must have worked throughout from the date of initial engagement till the date of commencement of the Rules. In the situation, such a stand of the State that the employee had not worked continuously or there are breaks in service, would be contrary to the Rules and would amount to adding and reading certain words in Rule 4(1) which have not been inserted by the legislature. As the rules are applicable only to daily wage employees, the Rules framing authority was well aware that such employee could not have worked continuously throughout and therefore, has clearly provided that the engagement must be before 29.6.1991 and he is continuing as such on the date of commencement of the Rule.

Needless to observe here that recently the State Government has issued a Government Order dated 13.8.2015 whereby it has been provided that persons working on daily wage/work charge/contractual basis in the department of the State Government, its autonomous bodies, public undertakings/local bodies, development authorities and Zila Pancahyat, who were engaged upto 31.3.1996 shall be regularized. In these circumstances, there is no justification in not regularizing the service of the petitioner when it is an admitted fact that the petitioner was engaged as daily wager before 29.6.1991 and he was continuing on the post on 21.12.2001 and even thereafter. Now, recently the State Government vide government order dated 24th February, 2016 has changed the cut of date to 31.12.2001 and has again provided that if the post is not available then necessary steps be taken for creation of supernumerary post.

Considering the facts in its entirety and the legal position, this Writ Petition is disposed of finally with the direction to the respondents to consider regularization of services of the petitioner in light of the aforesaid observation and Regularization Rules read with Government Order dated 13.08.2015 and 24.02.2016 keeping in mind that the petitioner is in service since the year 1996, within three months from the date of receipt of certified copy of this order."

4. Pursuant to the order dated 25.01.2017, passed by this Court in the Writ Petition No. 1247 (S/S) of 2006, the case of the petitioner was considered under the Uttar Pradesh Regularization of Persons Working on Daily Wages or on Work Charge or on Contract in Government Departments on Group 'C' and Group 'D' Posts (Outside the Purview of the Uttar Pradesh Public Service Commission) Rules, 2016 (in short "Regularization Rules of 2016") and vide order dated 15.09.2017, the petitioner was regularized in the service. The order 15.09.2017 on reproduction reads as under:-

"कार्यालय आदेश

रिट याचिका संख्या–1247(एस/एस)/2006 श्री शिवकुमार विश्वकर्मा बनाम उ0प्र0 सरकार व अन्य वाद में मा0 उच्च न्यायालय, लखनऊ बेन्च, लखनऊ द्वारा पारित आदेश दिनांक 25.01.2017 के समादर तथा वित्त (वेतन आयोग) अनुभाग–2 के शासनादेश संख्या–44 /2015 /वे0आ0–2–795 /दस–54(एम)/2008 टी0सी0 दिनांक 13 अगस्त, 2015 तथा शासनादेश, संख्या–9/2016/वे0आ0–2–201/ दस–2016–8(मु0स0स0) /2011 टी0सी0, दिनांक 24 फरवरी, 2016 एवं कार्मिक अनुभाग–2 की अधिसूचना संख्या–9/ 2016 / 2/ 197–का–2/2016, दिनांक 12.09.2016 में निहित व्यवस्था के अनुसार विनियमितकरण हेतु गठित समिति की संस्तुति पर श्री शिवकुमार विश्वकर्मा, वाहन चालक (नियत वेतन) को अन्तर्राष्ट्रीय रामकथा संग्रहालय, अयोध्या, फैजाबाद में वेतनमान रू0 5200–20200 व ग्रेड वेतन रू0 1900 में रिक्त वाहन चालक पद के सापेक्ष वाहन चालक पद पर विनियमित करते हुए कार्यभार ग्रहण करने की तिथि से तैनात किया जाता है।

श्री विश्वकर्मा मुख्य चिकित्साधिकारी, फैजाबाद के समक्ष उपस्थित होकर अपना स्वास्थ्य परीक्षण कराकर स्वस्थता प्रमाण पत्र मूलरूप में तथा अन्य शैक्षिक प्रमाण पत्रों की प्रमाणित प्रतियों के साथ उप निदेशक, अन्तर्राष्ट्रीय रामकथा संग्रहालय, अयोध्या, फैजाबाद के कार्यालय में प्रस्तुत करेंगे एवं आदेश निर्गमन की तिथि से 15 दिन के अन्दर अपना कार्यभार ग्रहण करना सुनिश्चित करे अन्यथा उक्त विनियमितीकरण स्वतः निरस्त समझा जायेगा।"

5. Sri Ghaus Beg, learned counsel for the petitioner in support of his claim, as raised in the present writ petition submitted that in fact the order dated 15.09.2017, which provides regularization to the petitioner with prospective effect, is contemptuous in nature and while issuing

the said order, the opposite parties have ignored the true spirit of the judgment and order dated 25.01.2017, passed by this Court.

6. In view of the above, the prayer is to interfere in the order dated 15.09.2017 passed by the opposite party No. 2, which as per the counsel for the petitioner is contrary to the spirit of the judgment and order dated 25.01.2017.

7. Dr. Udai Veer Singh, learned Addl. Chief Standing Counsel for the State-Respondents in support of the order dated 15.09.2017 submitted that the writ petition for the main prayers sought by the petitioner is not maintainable in view of the Regularization Rules of 2016.

8. It is further stated that in view of the provisions made under the Regularization Rules of 2016, the retrospective regularization i.e. the regularization from the initial date of engagement as daily wager employee cannot be granted.

9. Heard the submissions made by learned counsel for the parties and perused the record.

10. Admittedly, the petitioner was engaged as daily wager against the post of Driver on 30.07.1996 and he was allowed to continue on the said post till December, 2005 and subsequently, on his disengagement he approached this Court by means of the Writ Petition No. 1247 (S/S) of 2006, which was disposed of by means of the judgment and order dated 25.01.2017 with directions to the opposite parties to consider the case of the petitioner for regularization in view of the Regularization Rules as well as the Government Order applicable. In the intervening period, the petitioner was allowed to continue on the strength of the interim order dated 16.02.2006, passed by this Court.

11. For the purposes of adjudicating the issue involved in the present writ petition, it would be appropriate to take note of the relevant Rules i.e. Rule(s) 7, 8 and 9 of the U.P. Regularization of Persons Working on Daily Wages or On Work-Charge or On Contract in Government Departments on 'Group-C' and 'Group-D' Posts (Outside the Purview of the U.P. Public Service Commission) Rules, 2016 , which are quoted below:-

"Appointments

7. The appointing authority shall, subject to the provisions of sub-rule(2) of rule 6, make appointments from the list prepared under sub-rule(6) of the said rule, in the order in which their names stand in the list.

Appointments be deemed to be under the relevant service rules etc.

8. Appointments made under these rules shall be deemed to be appointments under the relevant service rules or orders, if any.

Seniority

9. (1) A person appointed under these rules shall be entitled to seniority only from the date of order of appointment after selection for regularisation in accordance with these rules and shall, in all cases, be placed below the persons appointed in accordance with the relevant service rules or, as the case may be, the regular prescribed procedure, prior to the appointment of such person under these rules.

(2) If two or more persons are appointed together their seniority inter se

shall be determined in the order mentioned in the order of appointment."

12. It is apparent from the Rule(s) 7, 8 and 9 of the Regularization Rules of 2016 that a person can be considered in cadre only from the date of regularization and not prior to the said date. Further, the observations and directions issued by this Court vide judgment and order dated 25.01.2017 passed in the writ petition filed by the petitioner are also not in support of the case of the petitioner. Learned counsel for the petitioner in support of his case has also not placed any provision or rule or judgment.

13. The Supreme Court in the case of **Registrar General of India & another vs. V. Thippa Setty & others, (1998) 8 SCC 690,** has held that the regularisation should be prospective and not retrospective so that seniority of those, who are already in service, is not affected. This judgement has been followed in the case of **Union of India and others vs. Sheela Rani (2007) 15 SCC 230.** Reference may also be made to the case of **State of Haryana vs. Jasmer Singh (1996) 11 SCC 77.**

14. Appointment with retrospective effect is normally not permissible. One of the reasons being it will adversely affect others, who have been appointed as per Service Rules in the interregnum, in matters of seniority, promotion etc. In a case of regularization of service retrospectivity will adversely affect such rights of others who have already been regularly appointed in the regular cadre as per the Service Rules and are better placed. It is with this object that the above quoted Rules are made part of the Regularization Rules of 2016. Rule 9 of the Regularization Rules of 2016 contains a stipulation that those regularized under these Rules will be placed below those appointed in accordance with service Rules prior to them. The Rule makes a valid distinction between two different classes of employees, one which is regular and other not so. There is a rationale basis for such objective as also nexus with an object, as referred above.

15. In view of the aforesaid facts, the writ petition lacks merit and is hereby ***dismissed***. There shall be no order as to costs.

(2020)02ILR A146

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 06.11.2019

BEFORE

THE HON'BLE J.J. MUNIR, J.

Writ B No. 1445 of 1997

Ram Badan ...Petitioner
Versus
The D.D.C. Azamgarh & Ors. ...Respondents

Counsel for the Petitioner:
Sri R.N. Singh, Sri Karuna Srivastava, Sri Mayank Krishna, Sri S. Chandel, Sri Santosh Kumar Srivastava, Sri V.K. Chandel, Sri R.C. Singh

Counsel for the Respondents:
S.C., Sri D.K. Pandey, Sri Devesh Kumar Verma, Sri P.K.S. Paliwal, Sri R.B. Pal, Sri Suresh Chandra Verma, Sri Imtiaz Ali

A. U.P. C&H Act-challenging-order-depriving the petitioner-of his road side-valuable land-inherited by him-without assigning any reason-unless-authorities left with no option-under a compelling circumstance-in violation of settled

legal principle-valuable land either to be excluded from consolidation operations or-included in the chak of the original chakholder-impugned order-illegal & arbitrary-Petition Allowed.

B. Held, the added fact that a sector road now runs through between those plots where the third respondent claims his Abadi and old Khasra No. 60/3 that is the petitioner's original holding, occurrence of even a slight prejudice to the third respondents, let alone a compelling circumstance that may leave no option with the Authorities but to deprive the petitioner of some part of his valuable roadside land, part of Khasra No. 60/3 (old), is a conclusion that cannot be said to be a legitimate exercise of discretion by the Consolidation Authorities, one way. Here is a case where the Deputy Director of Consolidation affirming the Settlement Officer of Consolidation has deprived the petitioner of valuable roadside land in violation of settled legal principles that valuable roadside land is either to be excluded from consolidation operations or included in the Chak of that Chakholder, who held it as original holding. This principle is to be departed from for very compelling reasons that are not forthcoming in this case. In the result this writ petition succeeds and is allowed. The impugned order dated 30.12.1996 passed by the Deputy Director of Consolidation, Azamgarh in Revision No. 251, Ram Badan vs. Ram Murat and others is hereby quashed. It is further ordered that the entire area of Khasra No. 60/3 (old) shall be included in the petitioner's chak which already carries the remainder area of the aforesaid plot. Necessary adjustment to parties Chaks shall be made by the Deputy Director of Consolidation. There there shall be no order as to costs.

List of cases cited: -

1. Ram Prasad vs. Deputy Director of Consolidation, Allahabad and others, 2006 (100) RD 434

2. Ramadhar Singh and Another vs. Deputy Director of Consolidation and others, 2009 (106) RD 772

3. Sanjay and Another vs. Deputy Director of Consolidation, 2013 (121) RD 561

4. Smt. Uttama Devi @ Dayamati vs. Deputy Director of Consolidation, Basti and others, 2002 (93) RD 239

5. Jagdish Sharma and others vs. Addl. Collector (F&R)/D.D.C. and others, 2015 (128) RD 646

6. Ram Shanker vs. Deputy Director of Consolidation, Basti and others , 2006 (101) RD 247

7. C/M Baroda U.P Gramin Bank A-1 Civil Lines Raebareli vs P.O Employees Provident Fund

(Delivered by Hon'ble J.J. Munir, J.)

1. Heard Sri R.C. Singh, learned Senior Advocate assisted by Sri Santosh Kumar Srivastava, learned counsel for the petitioner, learned Standing Counsel appearing on behalf of respondent nos. 1 and 2 and Sri Suresh Chandra Verma, learned counsel appearing for respondent no. 3.

2. This writ petition is directed against an order dated 30.12.1996, passed by the Deputy Director of Consolidation, Azamgarh in Revision No. 251 arising out of proceedings under Section 20 of U.P. Consolidation of Holdings Act, 1953 (hereinafter referred to as 'the C.H. Act'). The case of petitioner is that he is *Chak* holder no. 5, whereas respondent no. 3 is *Chak* holder no. 210. It is claimed that the said *Chak* was originally recorded in the name of the petitioner's father which he has inherited being his son and sole heir. It is the petitioner's case that plot no. 60/3 ad-measuring 570 kari which is part of his original holding, abuts the Azamgarh Bilariyaganj Road and located at a distance of 3 kms from the city of Azamgarh. It is claimed to be a valuable piece of land carrying a high market value. The petitioner had been proposed three *Chaks* by the Assistant Consolidation Officer in the Provisional Consolidation Scheme. Lateron, the Consolidation Officer by his order dated 06.05.1986

allotted two *Chaks* to the petitioner, instead of three as proposed. One of those *Chaks* included plot no. 60/3 to the extent of an area of 149 links alone, as against his original holding where the said plot bore an area of 570 links. The other *Chak* allotted to the petitioner comprised his original holding in plot no. 19.

3. Aggrieved by the aforesaid orders passed by the Consolidation Officer, the petitioner carried an Appeal to the Settlement Officer of Consolidation who dismissed it by a judgment and order dated 5th April, 1990. It requires to be clarified here that another Appeal against the same determination was lodged by the petitioner's father, who was alive at that time, and both these Appeals came to be decided by different orders. The Appeal filed by the petitioner's father was decided vide order dated 15.03.1995. Both Appeals met the same fate and were dismissed by the Settlement Officer of Consolidation. The petitioner filed three Revisions to the Deputy Director of Consolidation, Azamgarh that were numbered as Revision Nos. 251, 238 and 240. These Revisions were consolidated, heard and decided by a common judgment and order dated 30th December, 1996. Revision Nos. 238 and 240 were partly allowed but so far as Revision No. 251 (Ram Badan Vs. Ram Murat & Others) was concerned, it is the petitioner's case that the same was dismissed, though the operative portion of the order shows it to be partly allowed. The success in Revision nos 238 and 240 led to restoration of some further area for the petitioner on his original holding in plot no. 60/3. This writ petition is confined in its challenge to the judgment and order passed by the Deputy Director of Consolidation, rendered in Revision No. 251 and not the other revisions decided by the said judgment.

4. The petitioner's grievance primarily appears to be about plot no. 60/3 where he has demonstrated before this Court from the entries in C.H. Form 23 that he had an original holding of 570 links. It is pointed out by Sri R.C. Singh learned Senior Advocate for the petitioner, that in the second *chak* that includes the petitioner's original holding, comprised of plot no. 60/3, renumbered as plot no. 378, he has been allotted a total area of 321 links alone as against the original holding indicated above.

5. Sri Suresh Chandra Verma, learned counsel for the contesting respondents has disputed this submission and has pointed out that another 134 links have been allotted to the petitioner in plot no. 60/3 (old) which is evident from the order passed in a reference dated 23.10.2003, a copy of which has been filed by the petitioner as part of Annexure No. SRA 2 appended to the supplementary rejoinder affidavit dated 18th July 2019. A perusal of the said order does show that an additional 134 links have been added to the petitioner's *Chak* by the Deputy Director of Consolidation, vide his order dated 23.10.2003 passed in reference no. 72 pending this writ petition.

6. Sri R.C. Singh has disputed this submission to say that the aforesaid additional area of land that was *Bachat* has been shown which does not add to the total area of his holding or restore his original holding in plot no. 60/3 (old) to the dimensions and location as it existed. What is important to note is the fact that it is the petitioner's case that the land in dispute, that is to say plot no. 60/3, ad-measuring 570 links is a valuable roadside land wherefrom 137 links have been taken away and given to the third respondent.

Learned counsel for the petitioner submits that roadside land of commercial value which plot no. 60/3 certainly is, either ought to be excluded from consolidation operations altogether or the whole of it should be included in the petitioner's *Chak*. In this connection learned counsel for the petitioner has referred to a circular dated 26.05.1981, issued by the Consolidation Commissioner U.P, a copy of which is on record as Annexure 6 to the writ petition.

7. Learned counsel for the respondent on the other hand says that the 137 links of plot no. 570 that have been given to him are those that abut his *Abadi* and lie in front of it. It is land appurtenant to the third respondent's *Abadi*, where he has his dwelling unit. It is on those considerations that a relatively small area of 137 links was taken away from the petitioner's holding, and rightly so, by the Deputy Director of Consolidation, in the learned Counsel's submission.

8. Sri R.C. Singh, learned Senior Advocate in support of the petitioner's case has placed reliance upon a decision of this Court in **Ram Prasad vs. Deputy Director of Consolidation, Allahabad and others, 2006 (100) RD 434,**where it has been held:-

"5. In the present case, the consolidation authorities while preparing the consolidation record did not consider the principles laid down under the U.P.C.H. Act and illegally included the land in dispute and allotted the same in the *Chak* of Opposite Party No. 2 who has no concern with the original holding of the petitioner. The appeal preferred by the petitioner against the allotment of his original holding situated on the main road to contesting Opposite Party No. 2, illegally, the appellate authority passed an order dated 9th December, 1999 strictly in accordance with the principles governing consolidation scheme. The Deputy Director of Consolidation erred in law in holding that as no objection was filed by the petitioner, the land in dispute situated on the main road was rightly allotted to a stranger. It was duty of the consolidation authorities to exclude the land situated on the main road and of commercial value from the consolidation operation. Land in dispute was wrongly included in the consolidation scheme. In any case this should have been allotted to the original tenure-holder, but it was wrongly allotted in favour of contesting Opposite Party No. 2 who has no concern with the land in dispute and has evil eyes on the land of the petitioner. The Settlement Officer, Consolidation on appeal rightly excluded the land in dispute from the consolidation scheme as a result of which land in dispute was allowed to be continued With the petitioner who is original tenure-holder. The order passed by the Settlement Officer, Consolidation was strictly passed in accordance with the Government order dated 26th May, 1981 which is part of the consolidation scheme and was issued under the provision of the U.P.C.H. Act. Deputy Director of Consolidation erred in law in reversing the order of the Settlement Officer, Consolidation Without considering the Government Order dated 26th May, 1981."

9. Learned Senior Counsel appearing on behalf of the petitioner has also placed reliance upon a decision of this Court in **Ramadhar Singh and Another vs. Deputy Director of Consolidation and others, 2009 (106) RD 772,** where it has been held:

"7.....There cannot be any dispute that a tenure holder is entitled to have his *chak* on his plot, which is adjoining to the road. The Consolidation Officer allowed the objection of respondent No. 3 and allotted him plot No. 45, which was taken out by the Settlement Officer Consolidation without giving any reason. The Deputy Director of Consolidation has rightly taken the view that the respondent No. 3 could not have been removed from his *chak* at plot No. 45. There was sufficient justification for allowing the *chak* of respondents No. 3 and 4 adjoining to each other, they being husband and wife. The submission of the petitioner that the case of the petitioner was not considered by the Deputy Director of Consolidation, is not correct. It was the petitioners who were allotted plot No. 45 by the Settlement Officer Consolidation. The Deputy Director of Consolidation held that there was no reason for removing the *chak* of the respondent No. 3 from plot No. 45 which was adjoining the road. The above reason was the basis of the order of the Deputy Director of Consolidation. From the order of the Settlement Officer Consolidation, it is clear that the Settlement Officer Consolidation did not give any reason for removing the *chak* of the respondent No. 3 from plot No. 45. The Deputy Director of Consolidation emphasising on the above fact, has rightly allowed the revision. The respondents in their affidavit have also brought on record a site plan of different plots which were original holdings of the parties and their allotment which site plan matches: with the *chak* map filed by the petitioner as Annexure-4. A perusal of the *chak* map and site plan indicates that plots No. 1520, 45, 37, 38, 39, 45 were the plots on the *chak*-road. The plot No. 45 was the only plot which was given to the respondent No. 3 which was on the chakroad...."

10. To the same end, reliance has been placed on behalf of the petitioner on a more recent decision in **Sanjay and Another vs. Deputy Director of Consolidation, 2013 (121) RD 561,** where the question of priority in allotment of a roadside land has been dealt with by this Court thus:

10. So far as the arguments of the counsel for the petitioners that findings recorded by Consolidation Officer and Settlement Officer Consolidation have not been considered by Deputy Director of Consolidation, is concerned, the Consolidation Officer and Settlement of Consolidation have illegally failed to notice the grievances and arguments of Pankaj that he was deprived from the roadside land. His arguments has been meeted out by Settlement Officer, Consolidation, by holding that plot no. 323 is adjacent to the roadside and his *chak* on plot no. 324 is adjacent to plot no. 323. The Settlement Officer, Consolidation has illegally failed to notice that plot no. 323 was already allotted in the *chaks* of the other persons, as such, Pankaj will not get frontage on the roadside as his *chak* on plot no. 324 was in the back side. The Consolidation Commissioner, U.P. has issued a Circular to allot roadside land to the original tenure holder. This Court has also consistently held that roadside land has to be allotted to original the tenure holder. The order of Settlement Officer Consolidation and Consolidation Officer were contradictory to the law laid down by this Court as well as circular of Consolidation Commissioner U.P. The findings of the Consolidation Officer and Settlement Officer, Consolidation were not worth reliable by the Deputy Director of Consolidation.

11. Sri Suresh Chandra Verma, learned counsel appearing on behalf of respondent No. 3 has reposed faith in the decision of this Court in **Smt. Uttama**

Devi @ Dayamati vs. Deputy Director of Consolidation, Basti and others, 2002 (93) RD 239, where it has been held:

6. So far as the demand of Smt. Uttama Devi is concerned, that is based on the Government Order, referred to above. The said Government Order is nothing but a guideline for allotment, which has got no statutory force nor the provisions of the Act, particularly Section 19, stand amended by the said order. Major portion of the plot No. 30, i.e., 3 bighas 18 biswas and 18 biswansis, has already been allotted to the petitioner, therefore, in my opinion the judgment and order passed by the Deputy Director of Consolidation does not suffer from any infirmity or illegality. He has recorded cogent reasons for the adjustment made by him in the *chaks* of the parties. He has done justice between the parties while making allotment/adjustment in the *chaks* of the parties.

12. Learned counsel for the respondent no. 3 has placed further reliance upon a decision of this Court in **Jagdish Sharma and others vs. Addl. Collector (F&R)/D.D.C. and others, 2015 (128) RD 646.** He has referred to paragraph 10 of the report, where it has been held:

10. I have considered the arguments of the counsel for the parties and examined the record. A perusal of objection of Sharejang shows that he was claiming for change in his second *chak* and for allotment of part of its valuation near his original holdings of plot 8950 and remaining valuation on his original holding of plot 1518. In the objection, the petitioner was not impleaded as party nor allotment made to him on plot 1517/3 was challenged. Consolidation Officer without considering possibility for allotment of *chak* to Sharejang on plot 1518, has disturbed the *chak* of the petitioner. By order of Consolidation Officer, Sharejang was allotted second *chak* on plots 1517/3 (area 1-2-5 bigha), 1635 (area 0-1-9 bigha), 1636 (area 0-13-4 bigha) and 1637/2 (area 0-5-10 bigha) (total area 1-12-8 bigha). Sharejang was satisfied and did not file any appeal. By the order of Deputy Director of Consolidation, area of *chak* of Sharejang on plot 1517/3 has been exceeded 2 bigha. Deputy Director of Consolidation has failed to examine original demand of Sharejang and entertained a totally new demand in revision although in *chak* carvation matter, a party should not allowed to change his original demand.

13. Further reliance has been placed by learned counsel for the third respondent on a decision of this Court in **Ram Shanker vs. Deputy Director of Consolidation, Basti and others , 2006 (101) RD 247.** He has emphasized what was held in Ram Shanker (*supra*) in paragraph 5 of the report which reads thus:

5. Consolidation proceeding settles dispute for generations to come and in case a person is allotted a *chak* in front of others residential house, it may cause great and irreparable injury and inconvenience to both the parties for decades to come. Therefore, Deputy Director of Consolidation being last Court of consolidation proceeding is bound to consider all grievances of the parties raised before him as well as to consider whether principle of allotment of *chaks* to the parties including private source of irrigation was followed or not..

14. This Court has keenly considered the submissions advanced on both sides.

The Court has also been taken through the map, drawn up post consolidation, which shows that new *khasra* nos. 369, 370 and 378 that are carved out of old no. 60/3, including some part of *Gaon Sabha* land, do lie abutting the highway. It is indeed, valuable land. Some part of it does include that land which was *Gaon Sabha* land where the rights of the third respondent could be adjusted, without any objection from the petitioner. However, so far as land that was originally part of plot no. 60/3 is concerned, it is certainly valuable and roadside land.

15. The consensus of principle that emerges from the decisions in **Ram Prasad** (*supra*), **Ramadhar Singh** (*supra*) and **Sanjay and another** (*supra*) is that valuable roadside land that is the original holding of a tenure holder, is to be declared *chak* out or allotted to him as part of his *Chak*, unless it be imperative on account of some compelling circumstances that may require some marginal departure from the Rule. There is no finding recorded by the Deputy Director of Consolidation or the Settlement Officer that allotment of the entire area of *Khasra* No. 60/3 (old) to the petitioner, that is part of the petitioner's original holding lies in front of the third respondent's *Abadi* and would cause the third respondent some great inconvenience or irreparable injury as spoken of in the decision of this Court in **Ram Shanker** (*supra*). The remark of the Deputy Director of Consolidation that though it is not appropriate to include any part of this plot in the third respondent's *chak* as it is not part of his original holding, considering his *Abadi*, the same may not be disturbed as ordered by the Settlement Officer of Consolidation, is flawed. To this, is added a remark that, therefore, it would not be proper to remove the part of the plot in dispute included in the *Chak* of the third respondent. For one, it is not reason enough to deprive the petitioner of a substantial part of his valuable roadside land in favour of the third respondent. Moreover, a look at the confirmed consolidation map shows that between one part of old *Khasra* No. 60/3 (now renumbered as 369) and included in the third respondent's *chak* and the third respondent's *Abadi*, there is a sector road running through. This confirmed map is on record as part of Annexure No. SRA-1 to the supplementary rejoinder affidavit dated 18th July, 2019 filed on behalf of the petitioner. There is no dispute about this.

17. The added fact that a sector road now runs through between those plots where the third respondent claims his *Abadi* and old *Khasra* No. 60/3 that is the petitioner's original holding, occurrence of even a slight prejudice to the third respondents, let alone a compelling circumstance that may leave no option with the Authorities but to deprive the petitioner of some part of his valuable roadside land, part of *Khasra* No. 60/3 (old), is a conclusion that cannot be said to be a legitimate exercise of discretion by the Consolidation Authorities, one way. Here is a case where the Deputy Director of Consolidation affirming the Settlement Officer of Consolidation has deprived the petitioner of valuable roadside land in violation of settled legal principles that valuable roadside land is either to be excluded from consolidation operations or included in the *Chak* of that Chakholder, who held it as original holding. This principle is to be departed from for very compelling reasons that are not forthcoming in this case.

18. In the result this writ petition **succeeds** and is **allowed**. The impugned order dated 30.12.1996 passed by the

Deputy Director of Consolidation, Azamgarh in Revision No. 251, Ram Badan vs. Ram Murat and others is hereby **quashed.** It is further ordered that the entire area of *Khasra* No. 60/3 (old) shall be included in the petitioner's *chak* which already carries the remainder area of the aforesaid plot. Necessary adjustment to parties *Chaks* shall be made by the Deputy Director of Consolidation. There there shall be no order as to costs.

(2020)02ILR A153

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 16.11.2019

BEFORE

THE HON'BLE J.J. MUNIR, J.

Writ B No. 7677 of 1987

Bangali ...Petitioner
Versus
Asst. Director Consolidation Ghazipur & Ors. ...Respondents

Counsel for the Petitioner:
Sri R.S. Misra, Sri Arun Kumar, Sri R.P. Mishra

Counsel for the Respondents:
Sri T.D. Singh, Sri Abhishek Kumar, Sri Jagdish Lal, Sri Kirtika Pande, S.C., Santosh Kumar Singh, Sri T.D. Singh

A. U.P C&H Act-Challenging-revisional order-completely altering and reducing-area of petitioner's chak-manifestly illegal-as it makes-cryptic redetermination of chaks-w/o assigning reasons-depriving petitioner-of his original holdings-Petition Allowed.

B. Held, this Court does not intend to say that in appropriate circumstances, the subordinate Authorities with the permission of the Director of Consolidation or the Deputy Director of Consolidation cannot reduce the area beyond 25% or the Deputy Director cannot in fit cases exercise that power. However, before that power to reduce the area beyond 25% is exercised, even by the Deputy Director, there must be valid reasons assigned to take this drastic step. In this case, no such reasons have been assigned. It is the last limb of the submissions of Sri Arun Kumar, learned counsel for the petitioner that the area of Chak holder No. 714 has been increased from 6.96 acres to 9.24 acres whereas his area has been reduced from 10.88 acres to 7.10 acres. It is a very inequitable adjustment of Chaks, done by the Deputy Director of Consolidation. This submission is not required to be gone into by this Court, in view of what has already been said above. The submission of Sri Santosh Kumar Singh on the other hand that no prejudice to the petitioner has been caused, inasmuch as, he has been provided a Chak that is not far flung from his original holding, does not appeal to this Court for reasons of the indicated prejudice that has been caused to the petitioner. In the result, this writ petition succeeds and his allowed. The impugned order dated 09.04.1987 passed by the Assistant Director of Consolidation, Ghazipur Camp Office Bareilly in Revision No. 362 is hereby quashed. The Revision shall stand restored to the file of the concerned Assistant Director/Deputy Director of Consolidation, who will determine it afresh after hearing both parties in accordance with law. Both parties will appear before the District Deputy Director of Consolidation/Collector, Ballia on 09.12.2019.

List of case cited: -

1. Asbaran vs. DDC and another, 1986 RD 430

2. Shri Nath vs. D.D.C., Sultanpur reported in 1986 RD 209

3. Sheo Pal vs. Basu Deo & others, 2017 (135) RD 335

4. Union of India v. Mohan Lal Capoor MANU/SC/0405/1973 : (1973) 2 SCC 836

5. Rajvinder Singh vs. Deputy Director of Consolidation, 2014 (123) RD 76

6. Arjun vs. Deputy Director of Consolidation Faizabad and another, 2015 (129) RD 205

7. Gulab Chandra vs. DDC, 2019 (143) RD 783

8. Haridas and others v. Deputy Director of Consolidation and another 2005 (98) RD 593

(Delivered by Hon'ble J.J. Munir, J.)

1. This writ petition seeks to impugn an order dated 09.04.1987, passed by the Assistant Director of Consolidation, Ghazipur, Camp Office, Ballia in Revision No. 362. The petitioner is *chak* holder No. 666, whereas contesting respondent Nos. 2 to 9 are all *chak* holders no. 714. The petitioner had an original holding, comprising 88 plot numbers admeasuring a total of 12.83 acres, of which after excluding *Chakout* land, the area that was in hand of the Consolidation Authorities, is a figure of 10.88 acres. The petitioner was proposed two *Chaks* by the Assistant Consolidation Officer. The first *Chak* comprised 20 plots with an area of 4.31 acres. This *Chak* included seven plots from the original holding of the petitioner. The second *Chak*, proposed, carried 12 plots with an area of 3.37 acres, where four plots came from the original holding.

2. It is the petitioner's case that he filed no objections and was satisfied with the proposal. The contesting respondents, however, filed objections under Section 20 of the U.P. Consolidation of Holdings Act (for short, the 'Act') against the ACO's proposal. On the basis of those objections Case Nos. 2011 and 2100 were registered before the Consolidation Officer, Khadsara, District Ballia. The objections filed by respondent Nos. 2 to 9 that were registered as Case No. 2011 were rejected but objections that gave rise to Case No. 2100 were partly allowed, granting a reduction of value of land allotted to respondent Nos.2 to 9, leading to an increase in area on their original holding.

3. Aggrieved, respondent Nos. 2 to 9 filed an Appeal to the Settlement Officer of Consolidation, where it was registered as Appeal No. 558. Respondent Nos. 5 to 9 claimed relief of further reduction in value and allotment of a *chak* on their original holding, that would include plot Nos. 3248 and 3260.

4. The Appeal aforesaid came to be partly allowed, vide order dated 24.03.1981, in terms that valuation of Plot No. 499/2 admeasuring 11 links was reduced in value from 10 *annas* to 7 *annas*. The resultant increase in area was made part of a third *Chak* allotted to respondent Nos. 2 to 9.

5. The grievance of respondent Nos. 2 to 9, that still survived was that they were not given a *Chak* on their original holding, comprising Plot Nos. 3248, 3260 and 3033. The respondents, therefore, went up in Revision before the Deputy Director of Consolidation, after a delay of six years applying for condonation. The Revision was numbered as 362. It was consolidated with Revision Nos. 360 and 145/402 by the Deputy Director of Consolidation and decided by a common judgment and order dated 09.04.1987, treating Revision No. 145/402 as the leading case. The said Revision was allowed by the order last mentioned, and hereinafter referred to as the 'impugned order' in terms that the contesting respondents were given one *Chak* admeasuring 4.31 acres, a second *chak* admeasuring 2.79 acres, and a third of 1.14 acres.

6. The petitioner's first *Chak* as carved out by the Settlement Officer of Consolidation was almost completely altered and reduced in area, though with an increase in one plot number in the manner that all the original holding of the petitioner, comprising seven plots, were

taken away and entered in the contesting respondent's *Chak*, and the area of the petitioner's *chak* was reduced from 4.31 acres, as determined by the Settlement Officer of Consolidation, to an area of 3.56 acres. The original holding that was taken out of the petitioner's *Chak* includes Plot Nos. 3033/10, 3033/11, 3033/17, 3033/18, 3244, 3245 and 2246. All these plots comprising original holding of the petitioner went to the contesting respondents and made part of their *Chak* admeasuring 4.31 acres. The second *Chak* of the petitioner was not altered much, except that some area in two plot numbers was increased in order to adjust the loss in area of the first *Chak*. The area of the second *Chak* was increased from 3.31 to 3.54 acres.

7. Heard Sri Arun Kumar, learned counsel for the petitioner, Sri Santosh Kumar Singh, learned counsel appearing for respondent Nos. 7 to 9 and Sri Satish Mohan Tiwari, learned Standing Counsel appearing on behalf of respondent No. 1.

8. The submission of the learned counsel for the petitioner is that the impugned order passed by the Deputy Director of Consolidation is manifestly illegal, inasmuch as it makes a cryptic re-determination of *Chaks* without assigning reasons why it has made that drastic an alteration where the petitioner has been deprived of all his original holding, in his first *Chak*. It is argued by Sri Arun Kumar that the Deputy Director of Consolidation despite his wide powers under the newly added 3rd Explanation to Section 48 of the Act, is still a Court of Revision, who must deal with what has been determined by the two Authorities below. He must, for reasons howsoever briefly recorded, reverse or affirm their findings and bring about a recarvation of *Chaks*, if he has to do that, for intelligible reasons.

9. It is argued that the impugned order does not do that; it just orders a rejigging of the two *Chaks* much to the prejudice of the petitioner where all his original holding has been excluded and given to *Chak* holder No. 714, who are respondent nos. 2 to 9 here. It is further argued that the first *Chak* carried the largest part of the petitioner's original holding and what the Deputy Director of Consolidation has done on recarvation of it in Revision is to place the petitioner at a completely different location, giving him a flying *Chak*. Learned counsel, however, hastens to add that his *Chak* as carved out by the Deputy Director of Consolidation is located adjacent to his original holding. Still he says that the order prejudices him much because he has been completely removed from whatever comprised the largest part of his original holding.

10. It is also urged that the first *Chak* that has been allotted to him is asymmetrical. It is not rectangulated but is 'L' shaped. He has invited the attention of the Court to a supplementary affidavit filed by the respondent, dated 24th January, 2011 to which a sketch map of the relative location of *Chaks* allotted to the parties here, is shown. Indeed, *Chak* No. 666 after recarvation by the Deputy Director of Consolidation, is a 'L' shaped plot which by the Settlement Officer's determination, was a well rectangulated and compact area. It is also argued that the petitioner's area comprising his first *Chak*, which was his largest, has been reduced, whereas that of the contesting respondents has been increased with no corresponding adjustment of equities between parties.

11. It is further argued by Sri Arun Kumar, learned counsel for the petitioner that on a juxtaposition of the total area the

petitioner has in hand, in consequence of the impugned order, there is a decrease by more than 35%. The original holding of the petitioner, as already said, was an area of 10.88 acres, whereas the holding comprising the two *Chaks* in terms of the impugned order, is a total area of 7.10 acres. It is emphasized that a decrease in area by more than 25% is frowned upon under the Act, and it is for this reason that the Consolidation Authorities have been forbidden from reducing the consolidated area below 25%, without prior permission of the Director of Consolidation. It is urged that no such permission was taken in this case. It is also argued that if that permission be not required, the policy of the law is clear that reductions more than 25% are to be avoided.

12. It is also argued that the area of *Chak* holder No. 714 has been increased from 6.96 acres to 9.24 acres which, according to the learned counsel for the petitioner, is again a very inequitable carvation done by the Deputy Director of Consolidation.

13. In reply, Sri Santosh Kumar Singh has submitted that there is no prejudice caused to the petitioner, inasmuch as he has been given a *Chak* that is not far-flung from his original holding. It is located almost on the door-steps of his original holding. In this connection, Sri Santosh Kumar Singh has invited the attention of the Court to a decision of this Court in **Asbaran vs. DDC and another, 1986 RD 430. In Asbaran** (*supra*) it has been held by this Court thus:

".....The requirement of allotting original plot of the holding to the tenure holder in his *chak* has been mandated only in Section 19(1)(f), according to which, if there exists private source of irrigation or other improvement on the plot in question, then it has got to be allotted in the *chak* of the tenure holder. The allotment of *chak* in violation of the provisions contained in Section 19(1)(f) would certainly make allotment illegal being violative of specific provisions. But in my opinion, an allotment of a ' Urban ' *chak* cannot be taken to be illegal and without jurisdiction if such a *chak* has been allotted at a place quite near the original land held by the tenure holder in its vicinity and not excessively exceeding the valuation of his original plots in that sector.

Thus, in view of the above, I find that no interference is called for with the impugned order by this Court in exarches of powers Under Article 226 of the Constitution merely on the ground that the tenure holder has been allotted a ' Uraa ' *chak* although he has been allotted a *chak* of compact area at the place where he had held original land of his holding. A ' Urban ' *chak* can be said to be irregular in those cases where the tenure holder is not allotted *chak* at a place in the vicinity of original land held by him in the Sector Area, but the allotment of a ' Urban ' *chak* to a tenure holder at a place quite near to his original plot of the holding cannot be said to be invalid merely on the ground that being a ' Urban ' *chak* it could not be legally allotted. I find that there exists no legal bar to the allotment of a ' Urban ' *chak* or prohibiting allotment of such a *chak*."

14. It is on the strength of the aforesaid decision that Sri Santosh Kumar Singh, learned counsel for the respondent nos. 7 to 9 has stressed that what has been allotted to the petitioner cannot be said to have prejudiced him. It can hardly be called a *Udan Chak*, in the sense it is

understood under the Consolidation Law. It is further argued that so far as the prohibition against a decrease in area by more than 25 % under Section 19(1)(b) of the Act is concerned, the said prohibition is applicable to subordinate consolidation Authorities alone. It is applicable to the Consolidation Officer and the Settlement Officer of Consolidation. He submits that this prohibition carried in under Section 19(1)(b) is not at all applicable in a case where the Deputy Director of Consolidation decides to exceed this limit of 25% of reduction. In support of his contention, learned counsel for the respondents has placed reliance on a decision of this Court in **Shri Nath vs. D.D.C., Sultanpur** reported in **1986 RD 209.** In **Shri Nath** (*supra*) on the point being canvassed, it has been held:

"....The permission of the Director of Consolidation, as envisaged under the aforesaid proviso to Section 19(1)(b) would be necessary if the subordinate consolidation authorities would make allotment of a *chak* having difference of more than 25 percent without obtaining prior permission. But where the Director of Consolidation or the Deputy Director of Consolidation, who exercises delegated powers of the Director of Consolidation under the Act, has made allotment of such a *chak* to a tenure holder having a difference of more than 25 per cent in area, it would in my opinion, not be invalid because the permission for such an allotment would be inherently manifest therein. If the Authority which is required to give permission to an allotment of *chak* having a difference in area by more than 25 per cent itself makes the allotment of such a *chak* in the process of making appropriate adjustment in chalks of parties while deciding a revision it cannot be taken to be invalid and without jurisdiction and no interference would be called for by this Court in exercise of writ jurisdiction. "

15. It is also argued that what has weighed with the Deputy Director of Consolidation in disturbing what has been consistently done by the Authorities below is that the first *Chak* given to the contesting respondents, taking away plots from the petitioner's first *Chak*, including his original holding was to meet an objection from the contesting respondents that he had been given a *Chak* that was far away from the village with no source of irrigation. It was also urged that the valuation of land that was basis of the carvation of *Chaks* done by the Authorities below, was on the lower side, disadvantaging the contesting respondents. It is argued that it was bearing in mind all these considerations that the Deputy Director of Consolidation adjusted equities between parties. It is, in the last, submitted that the Deputy Director of Consolidation is the last Court of fact as well as law under the statute. He is invested with exceptional powers, particularly, after addition of the 3rd Explanation to Section 48 of the Act with retrospective effect from the year 1980. The impugned order passed by him brings about a determination in exercise of all those powers that have been exercised on valid considerations and strikes equity between parties. In the submission of the learned counsel for the respondents, the impugned order passed by the Deputy Director of Consolidation is for all these reasons not liable to be disturbed.

16. The Court has given a thoughtful consideration to the contentions advanced on both sides.

17. So far as the first submission of the learned counsel for the petitioner goes that the impugned order is bad as it does

not assign any reasons, it is required to be tested with reference to the contents of the order impugned. A reading of the impugned order shows, so far as consideration of the petitioner's rights are concerned, find mention in paragraph 4.

18. A perusal of paragraph 4 of the impugned order shows in great detail how the Deputy Director of Consolidation has gone about adjusting *Chaks* of parties and ordering their recarvation, but it does not show even a word for a reason, why those changes or adjustments are being made. A reading of the impugned order passed by the Deputy Director of Consolidation leaves an impression that the *Chaks* have been modified or redone only because the Deputy Director of Consolidation has thought it fit to do so. It does not show why he has done it.

19. It is trite to say for a legal principle that an order passed by any judicial or quasi-judicial Authority, or for that matter even Administrative Authorities, where rights of parties are decided ought to disclose reasons for the decisions reached. As is often said, reasons are the soul and heart of a decision and convey to the persons affected, as also a superior Authority or a Superior Court, the considerations that have weighed with the decision maker in arriving at his conclusions. Bereft of reasons, the decision is inherently arbitrary. On howsoever good and valid consideration a decision may have been rendered, the absence of reasons would make it foul of Article 14 of the Constitution. In this connection, reference may be made to a decision of this Court rendered in **Sheo Pal vs. Basu Deo & others, 2017 (135) RD 335.** The said case also involved a writ petition against an order passed by a Deputy Director of Consolidation under Section 48 of the Act. The Deputy Director of Consolidation had reversed the orders of the Authorities below. In the context of those facts, it was held:

"1. .....The only argument advances is that without giving any reason by a totally non-speaking order revision has been allowed by DDC.

3. A bare perusal thereof would leave no manner of doubt that it is totally a non-speaking and unreasoned order. The issues raised by petitioner has not been discussed at all and straightway conclusion have been recorded by DDC.

4. It is well known that "conclusions" and "reasons" are two different things and reasons must show mental exercise of authorities in arriving at a particular conclusion. In Union of India v. Mohan Lal Capoor MANU/SC/0405/1973 : (1973) 2 SCC 836, as under:

"Reasons are the links between the materials on which certain conclusions are based and the actual conclusions. They disclose how the mind is applied to the subject matter for a decision whether it is purely administrative or quasi-judicial. They should reveal a rational nexus between the facts considered and the conclusions reached."

10. Since the impugned order passed by DDC is wholly unreasoned and non-speaking the same cannot be sustained. ..."

20. Again, in **Rajvinder Singh vs. Deputy Director of Consolidation, 2014 (123) RD 76,** this Court emphasized the necessity for the Deputy Director of Consolidation to record reasons while reversing a finding or writing a judgment of reversal. To like effect is a decision of

this Court sitting at Lucknow in **Arjun vs. Deputy Director of Consolidation Faizabad and another, 2015 (129) RD 205,** where it has been held thus:

"14. Further, From the perusal of the impugned order passed by D.D.C., Faizabad, the position which emerges out is that he has not given any valid reasons that under what circumstances, the finding given by the Court below/Settlement Officer Consolidation has been reversed only the reason which has been given while passing the impugned order is that the same has been done only on the statement given by the villagers while the said statement is neither on record nor supplied to the petitioner, so the case of the revisionist/Mewa Lal deserves to be allowed and on the basis of which the impugned order has been passed.

15. Thus, from the record, it is established that no valid reasons has been given by the Deputy Director of Consolidation, Faizabad while passing the impugned order, rather it is based on no evidence and has not scrutiny the whole case again to determine the correctness, legality or propriety of the orders passed by the authorities subordinate to him. Hence, the impugned order is liable to be set aside. "

21. This aspect of the matter as to how the Deputy Director of Consolidation, while exercising his powers of Revision, should exercise those powers fell for consideration of this Court in **Gulab Chandra vs. DDC, 2019 (143) RD 783,** where dealing with the manner in which the Revisional Court ought to write its judgment, in addition to the obligation of assigning reasons, it was held:

22. This Court is rather disconcerted to find that a reading of the judgment of the Consolidation Officer, the Assistant Settlement Officer, and particularly, the impugned order passed by the Deputy Director of Consolidation in Revision, read like three original judgments, all written in exercise of a concurrent jurisdiction. The judgment of a Revisional Court cannot proceed to address the issues laid before it by parties, deal with them and decide, for that is to be done by the Court or Authority of first instance. The judgment of a Re-visional Court has to open, go through and end like a judgment of reappraisal of what the two Courts or Authorities below have done. The approach of reappraisal has to be supervisory, and not open appellate. May be, in the case of a revision under section 48 of the Act, the standard of reappraisal is wider than that traditionally associated with exercise of Revisional jurisdiction. But, all the same, a Revisional Court cannot decide and write its judgment as if it were a Court of first instance, without referring to and affirming or reversing the findings of the two Authorities below, in the context of the present Act. In the present case, the impugned judgment has precisely done that. It reads like an original judgment written in the third instance. It does not give any reason to disagree with what the Appellate Court has said, though it may have given its own reasons. In the context of dealing with criminal appeals and revisions, concerned about the trappings of an Appellate or Revisional Court's judgment or order, and how it should read and proceed, their Lordships of the Supreme Court In Re: To issue certain guidelines regarding inadequacies and deficiencies in criminal trials (Suo Motu Writ (Crl.) No. 1 of 2017 vide order dated 30.3.2017, issued the following guidelines regarding the manner in which Appellate and Revisional Courts

in criminal matters ought to write judgments, and what are the essentials to be adhered to while writing an Appellate or Revisional judgment. The said guidelines hold equally good in case of exercise of any Appellate or Revisional Authority by a Court or other Authority in any other jurisdiction. Guideline No. 7 in Suo Motu Writ (Crl.) No. 1 of 2017 (*supra*) reads thus:

"7. Repetition of pleadings, evidence, and arguments in the judgments and orders of the Trial Court, Appellate and Revisional Courts be avoided. Repetition of facts, evidence, and contentions before lower Courts make the judgments cumbersome, and takes away the precious time of the Court unnecessarily. The Appellate/Revisional Court judgment/order is the continuation of the lower Court judgment and must ideally start with " in this appeal/revision, the impugned judgment is assailed on the following grounds" or "the points that arise for consideration in this appeal/revision are". This does not of course, take away the option/jurisdiction of the Appellate/Revisional Courts to re-narrate facts and contentions if they be inadequately or insufficiently narrated in the judgment. Mechanical re narration to be avoided at any rate."

23. Particularly, relating to the jurisdiction of the Deputy Director of Consolidation under section 48 of the Act, the aforesaid issue though in the context of a title matter was considered by this Court in Haridas and others v. Deputy Director of Consolidation and another 2005 (98) RD 593, where dealing with the obligations of a Revisional Court while writing its opinion, it was held thus:

"8. It is well settled that, while setting aside the judgment of inferior Court or Tribunal a Revisional Court or higher Tribunal has to deal with the findings given by the inferior Court or Tribunal and is required to consider the entire evidence on record. Thus while recording the contrary findings the Deputy Director of Consolidation was under obligation to consider entire evidence on record and also to record reasons of differing with the findings of Consolidation Officer and Settlement Officer Consolidation....."

24. In the conspectus of the above facts and the law, this Court is of firm opinion that the impugned judgment passed by the Revisional Court suffers from a manifest error of law in ignoring from consideration material evidence, that is part of its own record, in particular, CH Form-2-A and CH Form-41, and also in exercising its jurisdiction, where it has proceeded to decide a revision so much like a Court of original jurisdiction that it has lost its character of a Revisional order. On both these counts, the impugned order is found to be flawed and vitiated and, thus, liable to be quashed with a remit of the matter to the Deputy Director of Consolidation to hear parties afresh, consider relevant evidence on record with opportunity to parties to place such evidence on record as may be relevant and to decide the revision afresh, all to be done within a period of six months from the date of receipt of a certified copy of this order.

22. It has been recorded above that the revisional order does nothing more than to order about changes in the *Chaks* of parties with no reference at all to the determinations made by the two Authorities below. There is no indication of reasons that weighed with the Deputy Director of Consolidation to reach the conclusions that he has done. More

importantly, he has not made any reference to the orders of the two Authorities below, much less reverse their findings to record his own which renders the impugned order bad; it makes it bad at least about the decision making process.

23. The other contention of the learned counsel for the petitioner that he has been given a *Chak*, so far as his first *Chak* is concerned that does not include any part of his original holding and is a *Udan Chak*, carries some substance. While it is true that the *Chak* is not truly speaking a *Udan Chak* in the sense of the term that it sends away the petitioner to a far flung location from his original holdings, it certainly has the effect of completely depriving the petitioner of the major part of his original holding in the first *Chak*, comprised of seven plots. This would not be much to his prejudice as urged by the learned counsel for the respondent, had the petitioner been given a compact *Chak*, well rectangulated. But it appears from a perusal of the map that has been placed before the Court that the petitioner's *Chak* has been rendered 'L' shaped. It has become asymmetrical. A perusal of the order passed by the Deputy Director of Consolidation does not show that he has bestowed any consideration to this aspect of the matter.

24. The submission of the learned counsel for the respondent that the Deputy Director of Consolidation must be imputed, knowledge of all these facts and further an assumed consideration of all these factors while recording his decision, cannot be accepted. This is so because it does not reflect in the order impugned that he has considered any of these facts.

25. The next submission of the petitioner that his area has been reduced by 35% which is contrary to what the law provides under Section 19(1)(b) may have been successfully repelled by the learned Counsel for the respondent for a proposition of law by placing reliance upon the decision in **Asbaran** (*supra*), which holds that the inhibition does not apply to the Deputy Director of Consolidation, but the fact remains that the law does frown upon reduction in area beyond 25%. This is but obvious and for good reason. It is for the reason that the object of the Act is to provide tenure holders with compact rectangulated and consolidated holdings, where they can carry on their agricultural activities with greater convenience. This is the entire scheme of the Act. A drastic reduction in area would militate against the aforesaid object. A prohibition on reduction in area beyond 1/4th appears to embody a legislative policy to prevent an ex-propriety carvation of *Chaks* that would deprive a tenure holder of his valuable property in the garb of consolidation.

26. This Court does not intend to say that in appropriate circumstances, the subordinate Authorities with the permission of the Director of Consolidation or the Deputy Director of Consolidation cannot reduce the area beyond 25% or the Deputy Director cannot in fit cases exercise that power. However, before that power to reduce the area beyond 25% is exercised, even by the Deputy Director, there must be valid reasons assigned to take this drastic step. In this case, no such reasons have been assigned. It is the last limb of the submissions of Sri Arun Kumar, learned counsel for the petitioner that the area of *Chak* holder No. 714 has been increased from 6.96 acres to 9.24 acres whereas his area has been reduced from 10.88 acres to 7.10 acres. It is a very inequitable

adjustment of *Chaks*, done by the Deputy Director of Consolidation. This submission is not required to be gone into by this Court, in view of what has already been said above. The submission of Sri Santosh Kumar Singh on the other hand that no prejudice to the petitioner has been caused, inasmuch as, he has been provided a *Chak* that is not far flung from his original holding, does not appeal to this Court for reasons of the indicated prejudice that has been caused to the petitioner.

27. In the result, this writ petition succeeds and his **allowed.** The impugned order dated 09.04.1987 passed by the Assistant Director of Consolidation, Ghazipur Camp Office Bareilly in Revision No. 362 is hereby **quashed**.

28. The Revision shall stand restored to the file of the concerned Assistant Director/Deputy Director of Consolidation, who will determine it afresh after hearing both parties in accordance with law. Both parties will appear before the District Deputy Director of Consolidation/Collector, Ballia on **09.12.2019.**

29. The District Deputy Director of Consolidation will assign the matter to the competent Deputy Director of Consolidation (unless he chooses to take up the Revision himself) who will proceed to decide this Revision as directed hereinabove, within a period of six months of the parties first appearing before him.

30. There shall be no order as to costs.

(2020)02ILR A162

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 05.02.2020

BEFORE

THE HON'BLE RAJNISH KUMAR, J.

Consolidation No. 8422 of 1987

Keshav Dayal & Ors. ...Petitioner
Versus
Addl. Collector ...Respondent

Counsel for the Petitioner:
Nirmal Tiwari, Nirmal Tewari

Counsel for the Respondent:
C.S.C., Birendra Narain Shukla

A. U.P C&H Act-challenging-order allowing ojection of R.4-directing names of R-4 to 7-to be recorded as co-tenure holders-Petitioner's father-khudkasht of-land in dispute-cannot be divided-amongst co-sharers of other properties-merely for this reason-co-sharers right can't be waived-unless-proved-land in dispute-self acquired-and not ancestral-petitioners failed to prove the same-Dismissed.

B. Held, in the present case it has been proved from the pleadings and evidence that the land in dispute was acquired by Durga Prasad and the petitioners have neither set up nor established the plea of 'ouster'. Therefore all the sons of Durga Prasad have equal share and the Consolidation Officer has rightly directed to record the names of opposite party nos.4 to 7 as co-tenure holders and determined their shares accordingly.The appeal filed by the petitioners was duly considered and rejected by the Settlement Officer Consolidation. Similarly the Deputy Director of Consolidation in the revision found that the name of Vidyadhar was recorded on behalf of all and rejected the revision. This Court does not find any illegality or error in the findings recorded by the learned Consolidation Officer, Settlement Officer Consolidation and the Deputy Director of Consolidation which are based on cogent evidence and correct appreciation of evidence and law. Therefore the present writ petition is misconceived and lacks merit.The writ-petition is, accordingly, dismissed.

Writ Petition dismissed. (E-8)

List of cases cited:

1. Rama Kant Singh & Others vs D.D.C & Ors;1965 ALJ 313

2. Dharam Prakash and anr vs D.D.C, U.P. Lko; 1970 ALJ 193.

3. Kailash Rai versus Jai Jai Ram; (1973) 1 SCC 527.

(Delivered by Hon'ble Rajnish Kumar, J.)

1. Heard, Sri Nirmal Tiwari, learned counsel for the petitioners and Sri Birendra Narain Shukla, learned counsel for the opposite parites.

2. The instant writ petition has been filed challenging the order dated 18.02.1976 passed in Case No.581 under Section 9-A(2) of the Consolidation of Holdings Act by the Consolidation Officer, by means of which the objection filed by the respondent no.4 was allowed and the names of opposite party nos. 4 to 7 has been directed to be recorded as co-tenure holders and order dated 29.09.1976 passed by Settlement Officer Consolidation in Appeal No.829 filed under Section 11 of the Consolidation of Holdings Act and order dated 21.01.1987 passed on revision No.15/1344/36 under Section 48 of the Consolidation of Holdings Act filed by the petitioners.

3. Submission of learned counsel for the petitioners is that the dispute relates to Khata No.12, which was recorded in the name of the father of the petitioners as *Khudkasht* in the 1356 Fasli and 1359 Fasli. Therefore it cannot be divided and recorded in the name of the co-sharers of the other properties. He further submitted that merely because Vidyadhar was appointed *Lambardar* and the power of attorney was in his favour, the land recorded as *Khudkasht* in the name of the petitioners cannot be divided. His further submission is that without considering the objection of the petitioners, the objection of the opposite party no.4 has been allowed and the property has been divided. The appeal filed by the petitioners has been dismissed by the Settlement Officer Consolidation and the Deputy Director of Consolidation has also rejected the revision without considering the aforesaid facts. Therefore the impugned orders are liable to be quashed and the writ petition is liable to be allowed with cost.

4. In support of his submissions, learned counsel for the petitioners has relied on the judgments of this Court in the case of ***Rama Kant Singh & Others versus Deputy Director of Consolidation & Others;1965 ALJ 313 and Dharam Prakash and another verus Deputy Director of Consolidation, U.P. Lucknow; 1970 ALJ 193.***

5. On the other hand, learned counsel for the respondents submitted that though the land was recorded in the name of the father of the petitioners, Vidyadhar but the land was acquired by the grand father of the petitioners; namely, Durga Prasad and his three sons namely Gangadhar, Laxmidhar and Vidyadhar were his legal heirs and co-sharers of property. However, since their father was old and used to remain ill and two brothers were living out therefore they had executed power of attorney in favour of the petitioners' father Vidyadhar in regard to the land in question. Vidyadhar was also got appointed as *Lambardar* for the property in question by his father and two brothers. Therefore merely because the name of the petitioners' father was recorded as *Khudkasht*, he is not entitled for the said

land to be recorded in his exclusive name because his name was recorded on behalf of all co-sharers. It is settled proposition of law that even if the land was recorded in the name of one of the co-sharer, i.e., father of the petitioners in the present case, the same was on behalf of all the co-sharers. Therefore the power of attorney was given to him and he was got appointed as *Lambardar* also by them.

6. The respondents had filed the evidence before the Consolidation Officer and after considering the same, objection of the opposite party no.4 was allowed and the property was divided and their names were directed to be recorded. Therefore the present writ-petition is mis-conceived and liable to be dismissed with cost. In support of his submissions, learned counsel for the respondents has relied on the judgment of the Hon'ble Apex Court in the case of ***Kailash Rai versus Jai Jai Ram; (1973) 1 SCC 527***.

7. I have considered the submissions of learned counsel for the parties and perused the records.

8. The dispute in the present writ petition relates to Khata No.12, which was recorded in the basic year in the name of Vidyadhar, Son of Durga Prasad; father of the petitioners no. 1 and 2 and grand father of petitioner no.3/1. The objection was filed by the opposite party no.4 before the Consolidation Officer under Section 9-A(2) for recording their names as co-tenure holders stating therein that some land out of the land in dispute was acquired by their grand father Durga Prasad through *Sankalp* and the remaining land was purchased by him, the sale deed of which was got executed in the name of his sons namely Gangadhar, Laxmidhar and Vidyadhar. The said land is ancestral property. The grand father Durga Prasad had become old and used to remain ill, therefore, he had executed power of attorney in the name of the father of the petitioners i.e, Vidyadhar. The other two sons namely Gangadhar and Laxmidhar were in service and out of town. Therefore they had also executed power of attorney in favour of Vidyadhar and got him appointed as Lambardar. Vidyadhar used to live in the village and look after the cultivation on behalf of all, therefore all of them have equal share in the land in dispute and their names should be recorded as co-tenure holders and partitioned accordingly.

9. The father of the petitioners had denied the objections and possession of the opposite parties and stated that he is in exclusive possession. Vidyadhar died during pendency of the case and after his death his widow namely Smt. Shanti Devi had filed the objections stating therein that she has got the land through Will from her husband. Therefore her name should be recorded. The petitioners also filed objections and stated that the said land was neither acquired in *Sankalp* nor purchased by Durga Prasad. The said land was the sole *Khudkasht* of their father Vidyadhar and there is no right of Smt. Gyan Devi in the said property and Smt.Jagdei, the other wife of their father has died.

10. The petitioners had filed Khataunis of 1356 falsi,1359 fasli, 1373 to 1375 fasli, Jotbahi 1376 fasli to 1378 fasli,irrigation slips, land revenue receipts,taqavi receipts, copy of the order dated 04.08.1973 passed by the Consolidation Officer and copy of the Aakar Patra No..41 and 45, Khatauni 1369 to 1371 fasli and Aakar Patra 23. The

opposite parties had filed a copy of the power of attorney executed by Badri prasad in favour of Vidydhar and copies of the sale deed dated 17.07.1928,11.04.1932 and 30.08.1938, copy of the order passed by the Munsif dated 17.08.1930, copy of the order passed by the Sub Divisional Officer dated 05.04.1930, *Sankalp* dated 04.10.1989, the application for Lambardar in favour of Vidyadhar dated 25.03.1949, copy of the order dated 19.04.1950 passed by the Sub Divisional Officer in regard to *Lambardar* and *Khudkasht* of 1359 Fasli etc.

11. After considering the pleadings of the parties and evidence, the Consolidation Officer has recorded that the land in dispute is of Muhals of Badri Prasad and Lakshman Prasad. The name of Vidyadhar as *Khudkasht* is recorded in 1356 fasli and 1359 fasli for the last 11 years and after abolition of Zamindari it has been recorded as Bhumidhar in his name. Vidyadhar was *lambardar* and as per Khewat 1359 fasli, the land in dispute was of Zamindar and in accordance with the Khewat 1359 fasli all the three brothers have equal shares in the said land. The father and brothers had executed power of attorney in favour of Vidyadhar, from which it is apparent that since Vidyadhar used to live at home and his two brothers were living out therefore he used to look after the Zamindari and manage the cultivation. Accordingly, his name was recorded in the revenue records as *Khudkasht* and subsequently his name was solely recorded as Bhumidhar. It has been proved by the application of his brothers and the order passed by the Sub Divisional officer that Vidyadhar was appointed *Lambardar* after the consent of the brothers of the Vidyadhar, from which it is apparent that there was a joint consent of all the three brothers. It is settled proposition of law that if there was a Joint Hindu family and the name of one of the family member was recorded out of all the Khewatdars,all will have equal share. Vidyadhar in his lifetime had filed objection but he had not taken a plea of 'ouster' of his two brothers. Though he had stated that he is solely in possession of the property as *Khudkasht*. Subsequently after his death his sons i.e. petitioners had filed objections claiming that it was self acquired and recorded as *Khudkasht* in the name of their father. Therefore the other brothers of Vidyadhar have no right in the said property. If the separation would have taken place, then Vidyadhar would not have been appointed as *Lambardar* which is apparent from the order dated 19.04.1950 and application dated 29.03.1949. Vidyadhar also would have got partition done on the basis of Khewat, if he had no intention to give the shares to his brothers.

12. On the basis of above, learned Consolidation Officer has recorded a finding that Vidyadhar used to manage the cultivation from the time of Zamindari on behalf of all brothers and his sole possession was not against his brothers but it was on behalf of all the brothers and therefore his name was also recorded as *Khudkasht* on behalf of all.

13. On due consideration of pleadings and evidence, as discussed by the learned Consolidation Officer, this Court does not find any illegality or error in the findings recorded by the learned Consolidation Officer because nothing could be pointed out against the aforesaid findings except that since the land in dispute was recorded in the name of Vidyadhar as *Khudkasht* in the 1356 fasli

and 1359 fasli therefore it could not have been divided. Submission may be correct but if the name of the father of the petitioners was recorded on the ancestral property on behalf of all and others have also given him power of attorney and got him appointed as *Lambardar* to manage the property, it cannot be said that since it was recorded as *Khudkasht* in the name of father of the petitioners therefore the other brothers have no right and it cannot be divided.

14. The Hon'ble Apex Court in the case of ***Kailash Rai versus Jai Jai Ram(supra)*** considered the issue of *Khudkasht* in the light of provisions of Section 18 of the U.P. Zamindari Abolition and Reforms Act, 1950 and held that if the plea of ouster has not been set up then in law the possession of the co-sharer is both on his behalf as well as on behalf of all other co-sharers,unless ouster is pleaded and established and if one co-sharer is in possession of the land the other co-sharers must be in constructive possession of the land. The relevant paragraphs no.7 to 10 are extracted below:-

"7. This will be the convenient stage to refer to the, material provisions of the Abolition Act. Section 3 defines the various expressions. In clause 26, it is provided that certain other expressions referred to therein, including khudkasht and sir, shall have the, meaning assigned to them in the United Provinces Tenancy Act, 1939 (hereinafter referred to as the Tenancy Act). Section 3(9) of the Tenancy Act defines khudkasht as "land other than sir culti- vated by a landlard, and under-proprietor or a permanent tenure-holder as such either himself or by servants or by hired labour". Sir is defined in section 6 occurring in chapter 11 of the Tenancy Act. Section 4 of the Abolition Act provides for vesting of estates. from a date to be specified by notification. Section 18(1) of the Abolition Act, which is relevant for our purpose, runs as follows :-

"18. Settlement of certain lands with intermediaries or cultivators as bhumidhars- (1) subject to the provisions of sections 10,15,16and 17, all lands-(a) in possession of or held or deemed to be held by an intermediary as sir, khudkasht or an intermediary's grove,

(b) held as a grove by, or in the personal cultivation of a permanent lessee in Avadh.

(c), held by a fixed-rate tenant or a rentfree grantee as such, or

(d) held as such by-

(i) an occupany tenant, Possessing the right to

(ii) a hereditary tenant, transfer the holding by

(iii) a tenant on patta sale.

dawami or istaim rari referred to in section 17.

(e) held by a grove holder, on the date immediately preceding the date of vesting shall be deemed to be settled by the State Government with such intermediary, lessee, tenant, grantee or grove-holder, as the case may be, who shall, subject to the provisions of this Act, be entitled to take or retain possession as bhumidhar thereof."

8. There is no controversy that the date of vesting is July 1 1952 and the date immediately preceding the date of vesting is 30-6-1952. Under section 18 (1) (a), broadly speaking, it will be seen, all lands in possession of, or held, or deemed to be held by an intermediary as sir, khudkasht or an intermediary's grove on 30-61952, shall be deemed to be settled by the State Government with such intermediary. The said intermediary is entitled to take or retain possession as

bhumidar subject to the provisions of the Abolition Act. In order to claim rights under clause (a), it is necessary that the lands should be, (1) in possession of an inter- mediary as khudkanst or sir or (2) held by an intermediary as khudkasht or sir or (3) deemed to be held by an intermediary as khudkasht or sir. If any one of these alternatives is established, clause (a), will stand attracted. Khudkasht, as we have already pointed out, means land, other than sir cultivated a landlord 'either by himself or by servants or by hired labour.

9. The question is whether the appellant can be considered to be in "possession' of the lands as khudkasht or whether it can be considered that the lands are "held or deemed to be held by him" as khudkasht. The finding sent by the District Court is no doubt prima-facie against the appellant. But we cannot ignore the decree that has been obtained by him in suit No. 918 of 1945 and the further fact that he is working out the said decree by asking for partition in the present proceedings. According to the High Court, as possession is with the defendants, the plaintiff-appellant cannot get any relief.

10. It should be remembered that the District Court has recorded a definite finding that the defendants have not set up any plea of ouster. This finding, so far as we would see, has not been disturbed by the High Court. The decree in suit No. 918 of 1945 clearly recognises the right of the appellant as a co-sharer along with the defendants. In law the possession of one co-sharer is possession both on his behalf as well as on behalf of all the other co-sharers, unless ouster is pleaded and established. In this case, as pointed out by us earlier, the finding is that the defendants have not raised the plea of ouster. There is no indication in the Abolition Act or the Tenancy Act that bhumidari rights are not intended to be conferred on all the co-sharers or co-proprietors, who are entitled to the properties, though only some of them may be in actual cultivation. One can very well visualise a family consisting of father and two sons, both of whom are minors. Normally, the cultivation will be done only by the father. Does it mean that when the father is found to be cultivating the land on 30-6-1952, he alone is entitled to the bhumidhari rights in the land and that his two minor sons are not entitled to any such rights ? In our opinion, the normal principal that possession by one co-sharer is possession for all has to be, applied. Further, even when one co-sharer is in possession of the land, the other co- sharers must be considered to be in constructive possession of the land. The expression 'possession' in clause (a), in our opinion, takes in not only actual physical possession, but also constructive possession that a person has in law. If so, when the defendants were in possession of the lands and when no plea of ouster had been raised or established, such possession is also on behalf of the plaintiff- appellant. Under such circumstances, the lands can be considered to be the possession of the appellant or, at any rate, in his constructive possession."

15. The Hon'ble Apex Court, in the aforesaid case, further considered the contingencies namely lands held as *Khudkasht* or lands deemed to be held as *Khudkasht* and held that 'held' means 'lawfully held' and 'held' must have a meaning different from personal cultivation. The relevant paragraphs 11 and 12 are extracted below:-

"11. Clause (a), as we have pointed out, takes in two other contingencies also, namely, lands held as khudkasht or lands deemed to be held as

khudkasht. Even assuming that, in view of the finding of the District Court, the defendants are in possession and on that basis the plaintiff cannot be considered to be also in possession, nevertheless, the lands in question can be considered to be held or deemed to be held by the appellant also. The expression 'held' occurs in section 9 of the Abolition Act. In interpreting the said expression, this court in Budhan Singh & Anr. v. Nab Bux & Anr. (1) has held that it means 'lawfully held'. This court has further observed that-

"According to Webster's New Twentieth Century Dictionary the word 'held' is technically understood to mean to possess by legal title. Therefore by interpreting the word 'held' as 'lawfully held' there was no addition of any word to the section. According to the words ofs. 9 and in the context of the scheme of the Act It is, proper to construe the 'word 'held' in the section as 'lawfully held'."

12. Mr. Bagga, however, contended that the expression 'held' in clause (a) denotes actual possession. As the finding on that point is against the appellant, the lands cannot be considered to be 'held' by him. We are not inclined to accept this contention. In clause (b) occurs the words 'held' as a grow by'. If the expression 'held' occurring in clause (a) means actual possession, then the same meaning must be given to the same word occurring in clause (b) also. But it will be seen that in the latter part of clause (b), the legislature has used the expression 'personal cultivation with reference to Avadh, whereas it has not used any such expression in the first part of clause (b). Therefore, the expression 'held' must have a meaning different from personal cultivation. In our opinion, the expression 'held' can only be taken to connote the existence of a right or title in a person. The appellant's right and title as holder of the lands has been declared and settled in suit No. 918 of 1945. It can also be held that the lands can be considered to be 'deemed to be held' by the appellant. The expression 'deemed to be held' has been used by the legislature to treat persons like the appellant bhumidhars by creating a fiction."

16. The Hon'ble Apex Court, in the aforesaid case, has also considered the case of ***Rama kant Singh versus Deputy Director of Consolidation and others(supra)*** of this Court relied by learned counsel for the petitioners and found that the said decision has been passed without considering the various aspects referred by Hon'ble Apex Court which are in regard to Section 18(1) of the U.P. Zamindari Abolition and Land Reforms Act and has not agreed by the view taken by the High Court. The relevant paragraph no.14 is extracted below:-

"14. It is now necessary to consider the decision of the Allahabad High Court in Rama kant Singh versus Deputy Director of Consolidation and others(supra) following which the present decision under appeal has been rendered. It is no doubt true that the said decision does support the respondents in the sense that it holds that only that co- proprietor who is in cultivatory possession, becomes khudkasht holder and that possession over proprietary rights by itself does not confer khudkasht holder's rights. The said decision, we find, has laid undue emphasis on cultivatory possession, which alone will attract clause (a) of section 18(1). There is no consideration in the said decision of the various aspects referred to by us and we are not inclined to agree with the view

taken by the High Court in the said decision."

17. It has also not been disputed by learned counsel for the petitioners that *Lambardar* as defined in Section 3(3) of the Land Revenue Act means a co-sharer of a Mahal appointed under this Act to represent all or any of the co-sharers in that Mahal. The power of a *Lambardar* as contained in Section 245 of the U.P. Tenancy Act is primarily to collect rents and other dues and to settle and eject tenants to enhance rents and to manage the estate with a view to the common benefit. The appointment of father of the petitioners as *Lambardar* with the consent of his brothers has not been disputed by the petitioners. Therefore it is in fact admitted that he was a co-sharer but the dispute has only been raised because his name was recorded as *Khudkasht* on behalf of all.

18. In view of above, the judgment cited by learned counsel for the petitioners in the case of ***Rama Kant Singh versus Deputy Director of Consolidation and others(supra)*** does not hold a good law and is not applicable on the facts and circumstances of the present case.

19. The other judgment cited by learned counsel for the petitioners in the case of ***Dharam Prakash versus Deputy Director of Consolidation(supra)*** is also of no assistance to the case of the petitioners rather it is against because in the said case it has been held that the proprietor who cultivates by that act acquires *Khudkasht* rights in relation to that plot. But once a proprietor becomes a *Khudkasht* holder of a given plot and then he dies, the entire body of his heirs at that time would together become the *Khudkasht* holder. His *Khudkasht* rights will devolve on the heir whosoever he may be. If the *Khudkasht* holder dies leaving two sons both of them would become *Khudkasht* holders of that plot. Thereafter one of the two cultivators may alone cultivate the land, but nonethless both of them will remain the *Khudkasht* holders unless the 'ouster' of one of them is pleaded and established.

20. In view of above this Court is of the considered opinion that merely by recording a land as *Khudkasht* in the name of one co-tenure holder it cannot be held that it cannot be divided among co-sharers unless it is proved that it was not ancestral and his self acquired as *Khudkasht* and a plea of 'ouster' is set up and established.

21. In the present case it has been proved from the pleadings and evidence that the land in dispute was acquired by Durga Prasad and the petitioners have neither set up nor established the plea of 'ouster'. Therefore all the sons of Durga Prasad have equal share and the Consolidation Officer has rightly directed to record the names of opposite party nos.4 to 7 as co-tenure holders and determined their shares accordingly.

22. The appeal filed by the petitioners was duly considered and rejected by the Settlement Officer Consolidation. Similarly the Deputy Director of Consolidation in the revision found that the name of Vidyadhar was recorded on behalf of all and rejected the revision. This Court does not find any illegality or error in the findings recorded by the learned Consolidation Officer, Settlement Officer Consolidation and the Deputy Director of Consolidation which are based on cogent evidence and correct

appreciation of evidence and law. Therefore the present writ petition is misconceived and lacks merit.

23. The writ-petition is, accordingly, **dismissed.**

24. No order as to costs.

(2020)02ILR A170

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 29.1.2020

BEFORE

THE HON'BLE J.J. MUNIR, J.

Writ B No. 14851 of 1984

Ganga Prasad ...Petitioner
Versus
D.D.C. Agra & Ors. ...Respondents

Counsel for the Petitioner:
Sri S.D. Pathak, Sri Anil Kumar Aditya, Sri Hemant Sharma

Counsel for the Respondents:
Sri N.B. Nigam

A. U.P C&H Act-challenging order-allowing revision-disturbing petitioner's chak-excluding 0.79 acres-used as sahan-for ingress & egress-without considering-evidences on record-no reasons recorded-for differing with the Courts below-failed to reappraise-reasons given by C.O & S.O.C-cannot pass judgements as court of original jurisdiction-Petition-succeeds-allowed in part.

Held, the D.D.C, while deciding a revision cannot write his judgment like that of a court exercising original jurisdiction. He has to write his judgments in the fashion of a court of revision. The powers of the DDC, in view of the third proviso to sec 48 of the Act, have been immensely enlarged retrospectively w.e.f 1980, that would apply in this case. Post amendment, the DDC, exercises a most non conservative kind of revisional jurisdiction where he is a court entitled to decide all questions of fact and law, like a court of regular appeal. But that notwithstanding, the obligation of a revisional court to exercise jurisdictionin the manner a court f revision is supposed to do, cannot be said to be done away with. As a revisional court, the DDC is obliged to reappraise the reasoning of the C.O and SOC, and then reverse, affirm or modify the orders impugned before him. He cannot write his judgment in the fashion of a third court of original jurisdiction, after the CO and SOC have dealt with the matter as authorities of original and Appellate Jurisdiction. This court finds impugned order to be flawed. Writ succeeds and is allowed in part.

Writ Petition partly allowed. (E-8)

List of cases cited: -

1. Gulab Chand & Ors vs DDC & ors 2019 (6) ADJ 857

2. Haridas & ors vs DDC & Anr 2005 SCC online All 2263; 2005 (98) RD 593

(Delivered by Hon'ble J.J. Munir, J.)

Order on Civil Misc. Intervening Application No.2 of 2019

1. This is an application on behalf of one Suresh Chandra Rawat, who has sought to intervene in these proceedings. The applicant could be heard under Chapter XXII Rule 5-A of the Rules of Court without formal impleadment as a party. However, when the case was called on, no one appeared on behalf of the applicant who is represented by Sri Anil Kumar Aditya, Advocate.

2. This application is, accordingly, rejected.

Order on the Writ Petition

3. This writ petition has been filed challenging an order of the Deputy

Director of Consolidation dated 04.08.1984, passed in *Chak* Revision No.580/878 Ram Niwas Vs. Khached Mal and Others, whereby the Revision aforesaid brought by the second-respondent has been allowed, disturbing the petitioner's *chak*, that was maintained to the petitioner's satisfaction until the appellate determination by the Settlement Officer of Consolidation. The petitioner's case is that *Khasra* No.854, admeasuring a total area of 0.93 acres, is part of his original holding to the extent of the entire area. In the said plot number, the petitioner had his *Abadi* being 0.11 acres whereas the remainder area of this plot, being 0.79 acres was utilized by the petitioner as his courtyard (*Sehan*) and also for the purposes of ingress and egress to his house. It is asserted by the petitioner that the rest of the area of Plot No.854, that is to say, other than that which is *Abadi* is unfit for cultivation. It is pointed out that in the provisional consolidation scheme, the petitioner's *Abadi* in 0.11 acres of Plot No.854, was excluded from consolidation operations as *chak* out land whereas the remainder of the area was proposed by the ACO to be included in the petitioner's *Chak*.

4. This proposal was objected to by the second-respondent before the C.O., and, further, in Appeal before the SOC under Section 21 of the U.P. Consolidation of Holdings Act, (for short 'the Act'). The Consolidation Officer decided the objections preferred by the second respondent, along with a number of others, relating to the village by a common order dated 05.03.1984. The petitioner's *chak* in *Khasra* No.854 was not disturbed.

5. The second-respondent, aggrieved by the order of the Consolidation Officer, Sahpau, District Mathura, preferred an appeal to the SOC, Mathura being Appeal No.1143 under Section 21(2) of the Act. The appeal aforesaid was allowed in part resulting in some improvement of rights for Ram Niwas. Though, he was given land comprising Plot Nos.827, 828 and 853, the petitioner's *Chak* in Plot No.854 was not interfered with.

6. Aggrieved, the second-respondent went up in Revision to the Deputy Director of Consolidation, who heard and determined it by the impugned order dated 04.08.1984. The Revision was allowed drastically affecting the petitioner's *Chak*, by excluding from it an area of 0.79 acres. It makes for the entire area, according to the petitioner, that abuts his *Abadi* and is used by him as his courtyard (*Sehan*).

7. Though, no one has appeared on behalf of the contesting respondent No.2, the Court has looked into the counter affidavit filed on his behalf. The material allegations raising challenge to the impugned order are carried in paragraph No.3 of the writ petition. These have been met in paragraph No.4 of the Counter Affidavit. It is contended that the petitioner is not the sole tenure holder of Plot No.854, admeasuring 0.93 acres. The entire area is not his original holding. The petitioner is a co-sharer in Plot No.854, including the 0.11 acres of *Abadi*, that is a joint *Abadi* of Ramji Lal, Bhola and others with a 1/3rd share, Ganga Ram (1/3rd share), Ram Prakash and Ram Niwas (1/3rd share). It is not the exclusive holding of the petitioner either for the part that is *Abadi*, or the remainder of it that is agricultural, according to respondent No.2. The contesting respondent has also averred that doors of the petitioner's house do not open into Plot No.854 and the remainder

of the area of the said plot is agricultural in nature, that has also been cultivated. It is pleaded that the door of the petitioner's house opens in the north. It is also asserted that the second-respondent's house is situate adjacent to the petitioner's where doors of all houses of the co-sharers open towards the north and not towards the south, that is to say, the site of the land in dispute. It has been denied that the land has been utilized as the petitioner's courtyard (*Sehan*). It has also been asserted that the case urged before this Court, that the land in dispute is the petitioner's courtyard (*Sehan*), was never urged before the Deputy Director of Consolidation.

8. Heard Sri Hemant Sharma, learned counsel for the petitioner. No one appears for the second-respondent or respondent Nos.3, 4 and 5. Sri Kailash Prakash Pathak, learned State Law Officer, has been heard on behalf of respondent No.1.

9. This Court has considered the submissions advanced by learned counsel for the petitioner and Sri Kailash Prakash Pathak, learned State Law Officer appearing on behalf of the State, who has defending the impugned order.

10. It may be true that the petitioner is not the sole tenure holder of Plot No.854, but the said fact does not figure in the order impugned, or the orders of the Authorities below. Assuming that the petitioner and respondent No.2, alongside the other respondents are co-sharers, the Deputy Director of Consolidation was required to consider petitioner's case that the area of Plot No.854, that has been entered in the second-respondent's *Chak*, is his courtyard (*Sehan*) and that it provides ingress and egress to his house. The second-respondent's case that the doors open to the other side, is also a case which the Deputy Director of Consolidation was required to consider. The order of the Deputy Director of Consolidation, however, shows that nothing of this kind has gone into consideration, while recording the order impugned. The order of the Deputy Director of Consolidation proceeds largely on a consideration of the fact that the second-respondent is a small tenure holder, and by the orders of the Authorities below, he has been given four Chaks.

11. No doubt, in accordance with the proviso to Clause (e) of sub-section (1) of Section 19 of the Act, a tenure holder is not to be allotted more than three Chaks, except with the approval in writing of the Deputy Director of Consolidation. However, when the Deputy Director of Consolidation is seized of the matter, he may have good reason to depart from this restriction. That, however, is not the point on which the validity of the impugned order turns. The impugned order, in the opinion of this Court, is manifestly illegal as it does not consider the petitioner's case at all that the balance area of Plot No.854 (substantially) has been given away to the second-respondent, where the petitioner's courtyard (*sehan*) is located, as well as his way, that provides him ingress and egress to his house. There is, in fact, absolutely no consideration bestowed to the petitioner's case by the Deputy Director of Consolidation. The conclusions drawn are based on a one side consideration of the second-respondent's case.

12. In addition, the impugned order passed by the Deputy Director of Consolidation, also appears to be flawed for another reason.

13. This Court in **Gulab Chand and Others Vs. DDC and Others** has held thus:

"22. This Court is rather disconcerted to find that a reading of the judgment of the Consolidation Officer, the Assistant Settlement Officer, and particularly, the impugned order passed by the Deputy Director of Consolidation in Revision, read like three original judgments, all written in exercise of a concurrent jurisdiction. The judgment of a Revisional Court cannot proceed to address the issues laid before it by parties, deal with them and decide, for that is to be done by the Court or Authority of first instance. The judgment of a Revisional Court has to open, go through and end like a judgment of reappraisal of what the two Courts or Authorities below have done. The approach of reappraisal has to be supervisory, and not open appellate. May be, in the case of a revision under Section 48 of the Act, the standard of reappraisal is wider than that traditionally associated with exercise of Revisional jurisdiction. But, all the same, a Revisional Court cannot decide and write its judgment as if it were a Court of first instance, without referring to and affirming or reversing the findings of the two Authorities below, in the context of the present Act. In the present case, the impugned judgment has precisely done that. It reads like an original judgment written in the third instance. It does not give any reason to disagree with what the Appellate Court has said, though it may have given its own reasons. In the context of dealing with criminal appeals and revisions, concerned about the trappings of an Appellate or Revisional Court's judgment or order, and how it should read and proceed, their Lordships of the Supreme Court **In Re: To issue certain guidelines regarding inadequacies and deficiencies in criminal trials (Suo Motu Writ (Crl.) No.1 of 2017 vide order dated 30.03.2017**, issued the following guidelines regarding the manner in which Appellate and Revisional Courts in criminal matters ought to write judgments, and what are the essentials to be adhered to while writing an Appellate or Revisional judgment. The said guidelines hold equally good in case of exercise of any Appellate or Revisional Authority by a Court or other Authority in any other jurisdiction. Guideline no.7 in **Suo Motu Writ (Crl.) No.1 of 2017 (supra) reads thus:**

"7. Repetition of pleadings, evidence, and arguments in the judgments and orders of the Trial Court, Appellate and Revisional Courts be avoided. Repetition of facts, evidence, and contentions before lower Courts make the judgments cumbersome, and takes away the precious time of the Court unnecessarily. The Appellate/ Revisional Court judgment/order is the continuation of the lower court judgment and must ideally start with " in this appeal/revision, the impugned judgment is assailed on the following grounds" or "the points that arise for consideration in this appeal/revision are". This does not of course, take away the option/jurisdiction of the Appellate/Revisional Courts to re-narrate facts and contentions if they be inadequately or insufficiently narrated in the judgment. Mechanical re narration to be avoided at any rate."

23. Particularly, relating to the jurisdiction of the Deputy Director of Consolidation under Section 48 of the Act, the aforesaid issue though in the context of a title matter was considered by this Court in **Haridas and others vs. Deputy**

Director of Consolidation and another, 2005 SCC OnLine All 2263: 2005(98) RD 593, where dealing with the obligations of a Revisional court while writing its opinion, it was held thus:

"**8.** It is well settled that, while setting aside the judgment of inferior Court or Tribunal a Revisional Court or higher Tribunal has to deal with the findings given by the inferior Court or Tribunal and is required to consider the entire evidence on record. Thus while recording the contrary findings the Deputy Director of Consolidation was under obligation to consider entire evidence on record and also to record reasons of differing with the findings of Consolidation Officer and Settlement Officer Consolidation. ....."

(emphasis supplied)

14. The Deputy Director of Consolidation, while deciding a Revision cannot write his judgment like that of a Court exercising original jurisdiction. He has to write his judgments in the fashion of a Court of Revision. The powers of the Deputy Director of Consolidation, in view of the third proviso to Section 48 of the Act, have been immensely enlarged retrospectively w.e.f. 1980, that would apply in this case. Post amendment, the Deputy Director of Consolidation, exercises a most non conservative kind of revisional jurisdiction where he is a Court entitled to decided all question of fact and law, like a Court of regular appeal. But that notwithstanding, the obligation of a Revisional Court to exercise jurisdiction in the manner a Court of Revision is supposed to do, cannot be said to be done away with. As a Revisional Court, the Deputy Director of Consolidation is obliged to reappraise the reasoning of the Consolidation Officer and the SOC, and then reverse, affirm or modify the orders impugned before him. He cannot write his judgment in the fashion of a third Court of original jurisdiction, after the Consolidation Officer and the SOC have dealt with the matter as Authorities of original and Appellate jurisdiction.

15. This Court finds the impugned order to be flawed on both counts.

16. Accordingly, this writ petition **succeeds** and is **allowed in part.** The impugned order dated 04.08.1984 passed by the Deputy Director of Consolidation in **Revision No.580/878 Ram Niwas Vs. Khached Mal and Others** is hereby **quashed** with a remit of the matter to the Deputy Director of Consolidation to decide the Revision afresh, bearing in mind what has been said in the body of this judgment, and after hearing all parties. The Deputy Director of Consolidation shall decide the Revision afresh within a period of six months from the date of receipt of a certified copy of this order.

17. There shall be no order as to costs.

(2020)02ILR A174

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 16.10.2019

BEFORE

THE HON'BLE RAMESH SINHA, J.
THE HON'BLE AJIT KUMAR, J.

Writ C No. 21 of 2019

Adesh Singh Yadav ...Petitioner
Versus
Collector/D.M. Bareilly & Ors.
...Respondents

Counsel for the Petitioner:
Sri Mangal Prasad Rai, Sri Indra Raj Singh, Sri Rajesh Kumar Yadav, Sri Rakesh Kumar Mathur

Counsel for the Respondents:
C.S.C., Sri Ashok Kumar Rai, Sri Krishna Dutt Awasthi, Sri Girja Shankar Singh

A. Civil Law-U.P. Kshettra Panchayat & Zila Panchayat Act, 1961 – Section 15 – No Confidence – Period of Notice – Mandatory effect – Legislature intends that there has to be a notice of not less than 15 days, in any case, to the elected members of the Kshettra Panchayat to consider the no confidence motion – the notice has to be sent in the form as prescribed for under the schedule and has to be sent by registered post – There was only 13 days notice of the scheduled meeting – Thus, the requirement of not less than 15 days notice as contemplated under the provision of Adhiniyam, 1961 has not been fulfilled. (Para 8, 9 and 11)

Writ Petition allowed. (E-1)

List of cases cited :-

1. Writ- C No.- 9763 of 2013 (Kamal Sharma v. State of U.P. and others) decided on 05.10. 2013

2. Civil Misc. Writ petition No.- 41077 of 2012 (Kamla Devi v. State of U.P and others) decided on 14.02.2014

3. Writ- C No. 41600 2017 (Praveen Siddiqui v. State of U.P. and others) 06.11.2017

(Delivered by Hon'ble Ramesh Sinha, J.
Hon'ble Ajit Kumar, J.)

1. Heard Sri Indra Raj Singh, learned counsel for the petitioner, Sri Ashok Kumar Rai, learned counsel for the respondent No.6 and learned Standing Counsel for the State-respondents and perused the record.

2. The controversy in the present case centres around the legality of the notice of no confidence motion issued by the District Magistrate, Barielly in purported exercise of power under Section 15 of the U.P. Kshettra Panchayat & Zila Panchayat Adhiniyam, 1961 (hereinafter referred to as 'Adhiniyam, 1961') on 21st December, 2018. By the said notice the District Magistrate, Barielly fixed meeting of the Kshettra Panchayat, Alampur, Jafarabad, District Barielly on 6th January, 2019 to discuss the motion notice which was mooted by more than half members of the Kshettra Panchayat.

3. Learned counsel for the petitioner has drawn our attention to the notice itself which is in the form of an order dated 21st December, 2018 directing for meeting of the Kshettra Panchayat to consider the motion of no confidence. He points out that in the order itself after it has been signed, it has been forwarded for information and necessary action to the Block Development Officer and the necessary action contemplated in the order is that the notice of no confidence motion is to be pasted on the notice board on 22nd December 2018 and further directed the District Panchayat Raj Officer to issue notice by registered letter to all the members of Kshettra Panchayat.

4. Learned counsel for the petitioner has also drawn our attention to page 16 of the writ petition and also the photo copy of the envelop that contained the notice to demonstrate that notice in fact was issued by the registered post on 22nd December, 2018 only.

5. The argument, therefore, advanced by the learned counsel for the petitioner is that in the light of the provisions as contained under the relevant provision of the Adhiniyam, 1961, there has to be a

clear 15 days notice for the scheduled meeting of the members of the Kshettra Panchayat. He argues that the notice as contemplated in the provisions of the Adhiniyam, 1961, uses the words 'not less than' and, therefore, in computing the period of 15 days, one has to keep in mind that there has to be a clear 15 days notice. He argues that 15 clear days notice means the date of issuance of the notice and the date on which the meeting scheduled, has to be excluded. He has relied upon the Division Bench judgment of this Court in the case of **Kamal Sharma v. State of U.P. and others** decided on 5th October, 2013 in Writ- C No.- 9763 of 2013. He has further placed reliance upon another Division Bench judgment of this Court in the case of **Kamla Devi v. State of U.P and others,** decided on 14th February, 2014 in Civil Misc. Writ petition No.- 41077 of 2012, in which it has been held that if a clear 15 days notice is not there then the notice per se is illegal and is not sustainable and, therefore, even if during pendency of the writ petition, scheduled meeting was permitted to be held and the motion is alleged to have been carried out, it would amount to a nullity. He submits that if the notice itself is bad, the consequential action to the notice is also turned out to be bad.

6. *Per contra*, the argument advanced by the learned counsel for the contesting respondents is that a form of notice is mere formality and is not mandatory in nature. He argued that intendment of the Legislature as is reflected from the relevant provisions of the Adhiniyam, 1961 is that a person against whom the notice is slated, should have the knowledge of the notice and then those who have participated in the meeting should have also the knowledge of the notice. Whether the notice is pasted on the notice board of the Kshettra Panchayat or sent by the registered post hardly makes a difference. He argues that even otherwise, this Court while entertaining this writ petition had permitted the meeting to be held on the scheduled date and the motion has been carried out as has been stated in the counter affidavit and the petitioner has virtually lost the confidence of the House and, therefore, this Court should not go into the technicality involved in the case and should dismiss the writ petition out-rightly.

7. Having heard learned counsel for the parties and having perused the record, we find that the core issue is the period that has to be provided by the District Magistrate under the provisions of the Adhiniyam, 1961 for scheduling a meeting to consider the no confidence motion as far as the intimation to the person is concerned. In order to appreciate the argument advanced by the learned counsel for the petitioner it is necessary to reproduce Section 15 of the Adhiniyam, 1961 in its entirety. Section 15 of the Adhiniyam, 1961 is runs as under:-

"15. Motion of non-confidence in Pramukh or Up-Pramukh- *(1) A motion expressing want of confidence in the Pramukh or any Up-Pramukh of a Kshetra Panchayat may be made and proceeded with in accordance with the procedure laid down in the following sub-sections.*

(2) A written notice of intention to make the motion in such form as may be prescribed, signed by at least half of the total number of [elected members of the Kshetra Panchayat] for the time being together with a copy of the proposed motion, shall be delivered in person, by

any one of the members signing the notice, to the Collector having jurisdiction over the Kshetra Panchayat.

(3) The Collector shall thereupon:-

(i) convene a meeting of the Kshettra Panchayat for the consideration of the motion at the office of the Kshettra Panchayat on a date appointed by him, which shall not be later than thirty days from the date on which the notice under sub-section (2) was delivered to him, and

(ii) give to the [elected member of the Kshettra Panchayat] notice of not less than fifteen days of such meeting in such manner as may be prescribed.

Explanation - *In computing the period of thirty days specified in this sub-section, the period during which a stay order, if any, issued by a Competent Court on a petition filed against the motion made under this section is in force plus such further time as may be required in the issue of fresh notices of the meeting to the members, shall be excluded.*

(4) ....."

(emphasis supplied)

8. From the bare reading of the aforesaid provision it is clearly revealed that the Legislature intends that there has to be a notice of not less than 15 days, in any case, to the elected members of the Kshettra Panchayat to consider the no confidence motion and such notice has to be sent in a manner as may be prescribed. The rules that govern the field regarding procedure to be followed in the prescribed form for the purposes of the notice as meant under relevant rules are also reproduced hereunder:-

RULES

1. A written notice of intention to make a motion expressing want of confidence in the Pramukh or the Up-Pramukh of a Kshettra Samiti shall be in Form I of the Schedule given below.

2. The notice under clause (ii) of sub-section (3) of Section 15 of the U.P. Kshettra Samitis and Zila Parishads Adhiniyam, 1961, shall be in Form II of the Schedule given below and shall be sent by registered post to every member of the Kshettra Samiti at his ordinary place of residence. It shall also be published by affixation of a copy thereof on the notice board of the office of the Kshettra Samiti.

SCHEDULE

FORM I

(Form of the written notice of intention to make a motion expressing want of confidence in the Pramukh/Up-Pramukh of a Kshettra Samiti)

To

The Collector,

.....

NOTICE

Sir,

We the undersigned members of the ..... Kshettra Samiti hereby give this notice to you of our intention to make the motion of non-confidence in Sri ..... the Pramukh/Up-Pramukh of our Kshettra Samiti and also annex hereto a copy of the proposed motion of non-confidence.

2. The total number of members, who for the time being constitute the Kshettra Samiti ..... is.....

Yours faithfully,

1.
2.
3.
4.

Place .....
Dated 196

FORM II

(Form of the notice of a meeting of the Kshettra Samiti to be held for the consideration of the non-confidence motion against the Pramukh / Up-Pramukh)

To,

Sri

Member of ..... Kshettra Samiti, district.....

Notice

This notice is hereby given to you of the meeting of ..... Kshettra Samiti which shall be held at the office of the said Kshettra Samiti on .....(date) at .....(time) for consideration of the motion of non-confidence which has been made against Sri ..... the Pramukh/Up-Pramukh of the said Kshettra Samiti.

A copy of the motion is annexed hereto.

Place .....

Dated.....,196

Collector .....

9. From the rules as quoted hereinabove it is clear that the notice has to be sent in the form as prescribed for under the schedule and has to be sent by registered post. Apart from its publication and affixation of a copy thereof on the notice board of the office of the Kshettra Panchayat, the Division Bench of this Court in the case of **Kamal Sharma** (*supra*) had the occasion to consider the legal aspect involved in the matter and has compared this provision with the provision as contained under Section 87(A) of the U.P. Municipality Act, 1960 holding it to be *pari materia*. After detailed deliberation over the subject matter and discussing various authorities relating to the same, the Division Bench vide paragraph 26 of the judgment (*supra*) has held thus:-

*"26. There is no difference in the words **"at least"** and **"not less than".** Admittedly, the notice dated 13.2.2013 was dispatched to the elected members on 14.2.2013 by speed post for convening the meeting which was scheduled to be held on 1.3.2013. While computing 15 days period the two terminal dates have to be excluded. Thus 15 days clear notice was not given to the elected members."*

10. We notice in this case that the District Magistrate while passed the order on 21st December, 2018 but directed the notices to be issued with the copy thereof being pasted on the notice board on 22nd December, 2018. The question, therefore, is that what is the date of issuance of the notice as contemplated under the relevant provisions of the Adhiniyam, 1961.

11. In our considered opinion, the first date of notice which makes the notice public including the members of the Kshettra Panchayat scheduling a meeting to consider the motion of no confidence is 22nd December, 2018. The date fixed for the meeting is 6th January, 2018. Thus, if we follow the Division Bench judgment (*supra*) it is clearly borne out that there was only 13 days notice of the scheduled meeting. Thus, the requirement of not less than 15 days notice as contemplated under the provision of Adhiniyam, 1961 has not been fulfilled.

12. The argument advanced by learned counsel for the respondents that the provision of notice is mandatory but the manner in which notice is sent is directory even if so accepted then there has to be not less than 15 days notice. In any event notice is published on 22nd December, 2018. Now, excluding the date of issuance of notice, the date on which

the meeting is slated is also excluded, it comes out only 14 days notice. So even if it is accepted that there was an effective notice issued on 22nd December, 2018 with its affixation on notice board, the mandatory requirement of the period for the notice is not fulfilled.

13. Learned counsel for the respondent has, in a submission though relied upon a Division Bench judgment in the case of **Praveen Siddiqui v. State of U.P. and others,** decided on 6th November, 2017 in Writ- C No. 41600 2017, does not help him either, because in the said case the Court was dealing with the issue of the manner of service of notice. The Division Bench did not discuss about the notice being not less than 15 days. Moreover the Division Bench has not considered another judgment of the concurrent Bench of this Court in the case **Kamal Sharma** (*supra*) and also **Kamla Devi** (*supra*) and, therefore, in the light of the law a concurrent Bench could not have taken view different from another concurrent Bench and thus, the judgment of the Division Bench does not have a binding force. In the case of **Kamla Devi** (*supra*), the Division Bench considered this aspect of the matter and has held that if the notice itself was not as per the mandatory requirement of law, even if the motion is carried out, it will not be held to be legal one. The Division Bench has observed as under:-

"We have considered the ratio of the decisions that have been cited at the bar and we do not find any good reason to defer from the view already taken by several division benches as referred to hereinabove. One of the decisions, namely, Satya Prakash Mani (supra), has also taken into consideration the full bench decision of 1975 in the case of Gyan Singh (supra) as relied upon by Sri Tripathi counsel for the respondent. The decision in the case of Phula Devi (supra) has already held that the provisions are mandatory except for the manner in which the notice has to be sent. Thereafter in Paragraph 30 of the aforesaid judgment in the case of Satya Prakash Mani (supra) also holds that the requirement of 15 days notice is mandatory.

In the instant case, the dispute is not with regard to the proforma of the notice but the period of 15 days clear notice. The respondents have not been able to establish the dispatch of notice prior to 13.8.2012. The pasting of the notice has been clearly denied by the petitioner. In the circumstances, the contention raised that the requirement of 15 days clear notice had not been complied with deserves to be accepted on the facts of the present case."

14. It has further observed by the Division Bench that *it is settled principle that parties to a litigation have to be allowed to contest the matter, and determined, on the date when the lis began. If one of the parties succeeds, then he or she has to be put back in the same position that was existing on the date when the lis began. Once it is found that the meeting on 25.8.2012 was convened in violation of the mandatory provision of Section 15(3)(ii), then the resolution passed on the said date has to fall through. The no confidence motion therefore could not have been passed in an invalidly convened meeting and consequently there would be no removal of the petitioner. If the petitioner is not removed then there is no vacancy and as such any notification for subsequent elections and the election of the respondent no. 4, being directly*

dependent on this contingency has also to fall through.

To our mind such a contingency as involved in the present case, which is peculiar in its nature, arising out of the pendency of the writ petition and the facts aforesaid cannot be subject matter of an election petition as urged by Sri Tripathi. The bar of the constitutional provisions as urged therefore is not at all attracted.

The decision of the apex court in the case of K. Venkatachalam (supra), in the aforesaid circumstances therefore comes to the aid of this Court for exercise of jurisdiction under Article 226 of the Constitution of India and not to the contrary as suggested by Sri Tripathi.

The question of a majority having already voted against the petitioner has to be considered in the background of a valid meeting. As already held hereinabove since the meeting was itself invalid, then the submission of Sri Tripathi that a vast majority having voted against the petitioner, can be of no consequence. In our opinion, the reliefs prayed for by the petitioner are very much entertainable and the petition deserves to be allowed.

15. In view of the above, the writ petition succeeds and is allowed. The order/ notice of no confidence motion scheduling the meeting under the order of District Magistrate dated 21st December, 2018 is hereby quashed and so also any consequential action if it is taken place pursuant to such order/ notice stand quashed.

16. We may clarify that since we have held that notice itself was bad, the provisions as contained under sub-section 12 of Section 15 shall not come in the way of members if they so desire to move another notice of no confidence motion.

17. With the aforesaid observations, the writ petition stands allowed.

(2020)02ILR A180

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 02.01.2020

BEFORE

THE HON'BLE PANKAJ MITHAL, J.
THE HON'BLE VIPIN CHANDRA DIXIT, J.

Writ C No. 580 of 2014

Mohd. Baqar Agha ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Manish Goyal, Sri Siddharth Singhal

Counsel for the Respondents:
C.S.C., Sri Brijendra Kumar Ojha

A. Land Law-Urban Land (Ceiling and Regulation) Act, 1976 – Section 10(5) and 10(6) – Surplus land – Effect of taking or not taking the possession – After the land was declared to be surplus, no proceedings for taking its possession were drawn and that at least no notice under Section 10 (5) of the Act was served upon the petitioner to surrender or deliver the possession of the surplus land – The respondents have not taken possession of the land so declared to be surplus – The respondents have not brought any memo of possession on record which may have been executed under Section 10 (6) of the Act – It is admitted legal position that once possession of the land declared to be surplus under the Act has not been taken and in the meantime the Act has been repealed, the respondents cannot initiate any proceedings under the said Act for its possession. (Para 11, 15 and 17)

Writ Petition allowed. (E-1)

(Delivered by Hon'ble Pankaj Mithal, J. & Hon'ble Vipin Chandra Dixit, J.)

1. Heard Sri Siddharth Singhal, learned counsel for the petitioner, learned Standing Counsel for the respondents and Sri B.K. Ojha, learned counsel appearing for Allahabad (Now Prayagraj) Development Authority.

2. The parties have exchanged pleadings and agree for the final disposal of the writ petition at the admission stage itself.

3. The petitioner has preferred this petition for the quashing of the order dated 07.12.2013 passed by the District Magistrate, Allahabad (Now Prayagraj) and the revenue entry in respect of plot No. 1075 on the ground that as the urban ceiling proceedings in respect of the said land were never finalized, the name of the State could not have been entered in the revenue records and the petitioner cannot be dispossessed from the said land after the repeal of the Urban Land (Ceiling and Regulation) Act, 1976.

4. There is no dispute to the fact that about 1123 square meters of land of the petitioner of Araji No. 1075 situate in Bamrauli Uparhar, District Allahabad was declared to be surplus vide order dated 08.03.1996 passed by the competent authority under the aforesaid Act. The said order became final and conclusive as it was not challenged by the petitioner in any higher forum.

5. The petitioner continued to be in possession of the said land as the proceedings for taking possession of it were never completed.

6. In the meantime, the Urban Land (Ceiling and Regulation) Repeal Act, 1999 was enforced w.e.f. 18.03.1999.

7. In the above circumstances, the petitioner filed Writ Petition No. 49298 of 2006 alleging that as he continues to be in actual possession of the land declared to be surplus, its possession cannot be taken over by the respondents. The said writ petition was disposed off vide order dated 07.09.2006 with the observation that as the Act has been repealed, no further proceedings can be taken if the petitioner continues to be in actual possession of the excess land or the land which has been declared to be surplus. At the same time, District Magistrate was directed to decide the representation of the petitioner by a speaking order and till its decision parties were directed to maintain status-quo over the said land.

8. It is in pursuance of the above order that the District Magistrate has passed order dated 07.12.2013 refusing to delete the name of the State from the revenue records and to restore that of the petitioner alleging that the aforesaid land was declared to be surplus which order has acquired finality.

9. The District Magistrate in passing the above order has not mentioned or referred to the fact of possession of the said land. The order is completely silent if pursuant to the declaration of the land to be surplus the possession was taken over by the State or not.

10. In the writ petition, petitioner has categorically stated in paragraph 6 that he is still in possession, his constructions exist over the said land and he is using electricity and telephone in the said

premises. The bills thereof clearly establish that he is in possession.

11. In paragraph 30 of the writ petition, it has been stated that after the land was declared to be surplus, no proceedings for taking its possession were drawn and that at least no notice under Section 10 (5) of the Act was served upon him to surrender or deliver the possession of the surplus land. The respondents have not taken possession of the land so declared to be surplus.

12. In the counter affidavit filed by the Allahabad Development Authority, no possession memo has been brought on record. It has not been stated that the possession of the land was surrendered by the petitioner voluntarily or that it was taken over under Section 10 (6) of the Act.

13. In counter affidavit of the State, in paragraph 3, it has been alleged that pursuant to the declaration of the land to be surplus, notices under Section 10 (1) and 10 (3) of the Act were published in the Gazettes but there is no averment that any proceedings under Section 10 (5) or 10 (6) of the Act were initiated meaning thereby that the respondents never actually took possession of the land in question.

14. In reply to the paragraph 30 of the writ petition, the only thing stated is in paragraph 9 of the counter affidavit and that is to the effect that as per the direction of this Court, the representation of the petitioner has been rightly decided by the District Magistrate and since it was found to be baseless, it has been rejected. Again, the averments made regarding possession of the petitioner over the land in dispute have been left uncontroverted.

15. The respondents have not brought any memo of possession on record which may have been executed under Section 10 (6) of the Act.

16. In view of the above, as pursuant to the declaration of the land to be surplus, the possession of it was never taken over by the State, the said land has not come under the ownership of the State so as to permit the respondents to record it in the name of the State.

17. It is admitted legal position that once possession of the land declared to be surplus under the Act has not been taken and in the meantime the Act has been repealed, the respondents cannot initiate any proceedings under the said Act for its possession.

18. The petitioner despite land being declared to be surplus, in the absence of the possession continues to be in its possession and to be the owner.

19. Accordingly, he is entitle for getting his name restored in the revenue records if on the basis of declaration of the land to be surplus, his name has been deleted.

20. In view of the aforesaid facts and circumstances, the impugned order dated 07.12.2013 passed by the District Magistrate, Allahabad is hereby quashed and it is directed that the name of the petitioner be restored in the revenue records.

21. The writ petition is, accordingly, **allowed** with no order as to costs.

(2020)02ILR A183

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 09.01.2020

BEFORE

THE HON'BLE AJAY BHANOT, J.

Writ C No. 619 of 2020

Ram Sukh & Anr. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Rakesh Prasad

Counsel for the Respondents:
C.S.C., Sri Diwakar Singh

A. Civil Law-Uttar Pradesh Revenue Code, 2006 – Section 24(3) – Period of three months to dispose of matter – Mandatory or Directory – Legislature has set pragmatic standards which are achievable and not created idealistic goals which are beyond reach – The realities of administration of justice in revenue courts have been balanced with the ideals of speedy justice – Good authority thus holds that statutes fixing timelines to accomplish an action are directory in nature – Mere failure to decide the case within three months does not violate the statutory mandate. (Para 19, 29 and 32)

B. Interpretation of Statute – Word 'shall' – Meaning and Scope – The words of a statute are the best guide to legislative intent – The settled canons of interpretation of statutes are the best tools to ascertain the scope of the statutory duties – Consequences of using the word 'shall' can vary and are not uniform – The mandatory effect of the word 'shall' can be diluted depending upon the context in which the word 'shall' is employed and the statutory scheme in which it is placed. In the context the word 'shall' is also qualified by the words 'as far as possible' – The latter words limit the mandatory effect of the word 'shall' – The word 'shall' is indicative of the mandatory nature of the provision, but it is not conclusive. (Para 16, 20 and 22)

Writ Petition disposed of. (E-1)

List of cases cited :-

1. Haryana Vs. Raghubir Dayal (1995) 1 SCC 133

2. N.K. Chauhan Vs. State of Gujarat and others (1977) 1 SCC 308

3. P.T. Rajan Vs. T.P.M. Sahir and others (2003) 8 SCC 498

4. Sharif-Ud-Din Vs. Abdul Gani Lone (1980) 1 SCC 403

5. Vikas Trivedi Vs. State of U.P. and others, reported at (2013) 2 UPLBEC 1193

6. Karnal Improvement Trust, Karnal Vs. Smt. Parkash Wanti (Dead) and another (1995) 5 SCC 159

7. State of Haryana Vs. P.C. Wadhwa, IPS, Inspector General of Police and another (1987) 2 SCC 602

8. Regional Provident Fund Commissioner Vs. K.T. Rolling Mills Pvt. Ltd. (1995) 1 SCC 181

(Delivered by Hon'ble Ajay Bhanot, J.)

1. The petitioner instituted a proceeding under Section 24 of The Uttar Pradesh Revenue Code, 2006 before the Sub-Divisional Officer, Phulpur, District Allahabad in the year 2009 which was registered as Case no. 269 of 2009-10 (Ram Sukh Vs Gram Sabha and others). The dispute pertains to demarcation of the boundaries of the disputed plots.

2. The petitioner is aggrieved by the failure of the statutory authority to decide the aforesaid proceeding, more than 10 years after institution of the case.

3. The only prayer made by Sri Rakesh Prasad, learned counsel for the

petitioners is for issuance of a writ in the nature of mandamus directing the learned trial court/Sub-Divisional Officer, Phulpur, District Allahabad before whom the matter is pending, to decide the case within a stipulated period of time.

4. Sri Rakesh Prasad, learned counsel for the petitioners calls attention to the ordersheet to contend that the final decision in the matter is being inordinately delayed for no good reasons or valid basis in law. He also relies on Section 24 of the Uttar Pradesh Revenue Code, 2006 to contend that the learned trial court is under an obligation of law to conclude the proceedings under the aforesaid section within a period of three months as far as possible. The learned trial court has flouted its statutory mandate, by failing to perform its statutory duty.

5. Heard Sri Rakesh Prasad, learned counsel for the petitioners, Sri Diwakar Singh, learned counsel for the Gaon Sabha and learned Standing Counsel for the State respondents.

6. A perusal of the ordersheet discloses that the suit instituted in the year 2009 came up for hearing for the first time on 03.11.2010 for the first time. The learned trial court/Sub-Divisional Officer, Phulpur, District Allahabad issued notices to the defendants in the suit on 03.11.2010. Thereafter the suit saw the light of day on 21.1.2011 wherein the matter was fixed for 29.01.2011 by providing a "general date". Similar cryptic one line orders fixing various dates for hearing were passed on 21.01.2011, 29.01.2011, 28.02.2011, 08.03.2011, 16.03.2011, 31.03.2011, 04.04.2011, 12/13.04.2011. Such orders were also passed on 12.05.2011, 23.05.2011, 08.06.2011, 22.10.2016. No order is in the record of the ordersheet from 08.06.2011 till 22.10.2016.

7. On 22.10.2016 matter was posted for 12.01.2017. The case was adjourned on 12.01.2017 as the Presiding Officer was unavailable. Similarly the case was adjourned on 18.12.2017, 26.04.2017 and on 26.04.2017, due to non availability of the Presiding Officer for various reasons. On 27.06.2017 once again a general order fixing the matter on 27.07.2017 was passed. The ordersheet then reflects that the matter could not be heard on 29.08.2017, 08.11.2017, 20.12.2017, 15.03.2018, 26.03.2018, 25.04.2018, 04.06.2018 because the Presiding Officer was not available due to his engagement in election related duties, administrative work and other meetings.

8. The matter was not heard on a number of days due to strike of counsels. The dates which record absence of counsels due to lawyers' strikes were 25.04.2011, 14.06.2017, 8.08.2017, 29.08.2017, 05.04.2018, 28.04.2018, 10.05.2018, 22.05.2018, 25.06.2018, 24.07.2018, 13.08.2018, 28.12.2018, 08.03.2019, 14.06.2019, 16.08.2019. The defendants appeared before the trial court on 27.07.2017, when time was granted for filing their pleadings/responses.

9. It is evident from the ordersheet that for the past 11 years no effective hearing has taken place in the matter except on one occasion when the defendants were granted time to file their response.

10. The ordersheet has already been extracted almost fully in the preceding part of the judgment. A perusal thereof shows that dates of hearing have been fixed

initially as a matter of course. The orders are cryptic and demonstrate that the proceeding is being adjourned for no reasons at all. The second categories of dates are when the matter was not be heard due to no availability of the Presiding Officer for various reasons. The third category of the orders granting adjournments are on account of strike of counsels.

11. The tenor of the ordersheet is sufficient to defeat the mandate of the statute in this case. Serious efforts to decide the appeal with expedition are clearly lacking in this case. It is a shocking state of affairs that even eleven years after the institution of the proceeding effective hearings have not happened and the proceeding has not been concluded. On all dates of hearing adjournments are granted or the hearing was postponed by one line orders. The reasons for postponement of hearing which are described in the earlier part of the judgment are specious and unsustainable in law. Judicial proceedings cannot be stalled for the reasons recited in the ordersheet.

12. The statutory authority has failed to discharge his duties is under the Uttar Pradesh Revenue Code, 2006. Abstention from work by the counsels is obstructing the implementation of the statutory mandate. It is not a ground to halt the judicial process.

13. The reasons of the statutory authority/trial court for adjourning the matter on account of engagement in administrative duties is no defence against the failure to perform statutory functions. The cases have to be transferred to another Presiding Officer who is holding the Court in case any one Presiding Officer is not available.

14. In light of the preceding discussion this Court finds that the provisions of Section 24(3) of The Uttar Pradesh Revenue Code, 2006, have been flouted by the Sub-Divisional Officer, Phulpur, District Allahabad as well as the counsels for the parties. The authority has a statutory duty to perform its obligation under law to decide the matter as far as possible within three months. The counsels being officers of the court are expect to cooperate and assist in a final conclusion of the matter.

15. The failure to implement the statutory mandate can be determined once the nature of the statutory mandate is understood. Understanding the nature of the statutory mandate is essentially an exercise in interpretation of the statute.

16. The words of a statute are the best guide to legislative intent. The settled canons of interpretation of statutes are the best tools to ascertain the scope of the statutory duties.

17. Section 24 of the Uttar Pradesh Revenue Code, 2006 lays down a procedure and a time frame for concluding the proceedings. The provision is extracted herein under for ease of reference:

"24. Disputes regarding boundaries.- *(1) The Sub-Divisional Officer may, on his own motion or on an application made in this behalf by a person interested decide, by summary inquiry, any dispute regarding boundaries on the basis of existing survey map or, where the same is not possible in accordance with the provisions of the Uttar Pradesh Consolidation of Holding Act, 1953, on the basis of such map.*

(2) If in the course of an inquiry into a dispute under sub- section (1), the

Sub-Divisional Officer is unable to satisfy himself as to which party is in possession or if it is shown that possession has been obtained by wrongful dispossession of the lawful occupant, the Sub-Divisional Officer shall -

(a) in the first case, ascertain by summary inquiry who is the person best entitled to the property, and shall put such person in possession;

(b) in the second case, put the person so dispossessed in possession, and for that purpose use or cause to be used such force as may be necessary and shall then fix the boundary accordingly.

(3) Every proceeding under this section shall, as far as possible, be concluded by the Sub-Divisional Officer within [three months] from the date of the application.

(4) Any person aggrieved by the order of the Sub-Divisional Officer may prefer an appeal before the Commissioner within 30 days of the such order. The order of the Commissioner shall, subject to the provisions of Section 210, be final."

18. A perusal of the scheme of the Uttar Pradesh Revenue Code, 2006, particularly Section 24 shows that the intent of the legislature is clearly to ensure an expeditious disposal of the case by the learned trial court/Sub-Divisional Officer. The legislature was clearly aware of the realities of governance and the limitations of revenue courts. In such circumstances, the legislature was conscious that it may not be possible to adhere to the letter of a strict time frame. But it was within the reach of the learned trial court/Sub-Divisional Officer, Phulpur, District Allahabad to comply with the spirit of deciding the case with dispatch and expedition. The intendment of the legislature is revealed by the words employed in the provisions.

19. The legislature has taken a practical view. In the Uttar Pradesh Revenue Code, 2006 the legislature has set pragmatic standards which are achievable and not created idealistic goals which are beyond reach. The realities of administration of justice in revenue courts have been balanced with the ideals of speedy justice.

20. The legislative mandate to the learned trial court/Sub-Divisional Officer, Phulpur, District Allahabad is that "Every proceeding under this section shall, as far as possible, be concluded by the Sub-Divisional Officer within [three months] from the date of the application.". The word "shall" is indicative of the mandatory nature of the provision, but it is not conclusive. The Hon'ble Supreme Court considered the import and consequences of the word "shall" used by the legislature in different statutes.

21. The Hon'ble Supreme Court in the case of **State of Haryana Vs. Raghubir Dayal, reported at (1995) 1 SCC 133,** undertook this exercise and held thus:

"5. The use of the word 'shall' is ordinarily mandatory but it is sometimes not so interpreted if the scope of the enactment, on consequences to flow from such construction would not so demand. Normally, the word 'shall' prima facie ought to be considered mandatory but it is the function of the Court to ascertain the real intention of the legislature by a careful examination of the whole scope of the statute, the purpose it seeks to serve and the consequences that would flow from the construction to be placed thereon. The word 'shall', therefore, ought to be construed not according to the

language with which it is clothed but in the context in which it is used and the purpose it seeks to serve. The meaning has to be ascribed to the word 'shall' as mandatory or as directory, accordingly/Equally, it is settled law that when a statute is passed for the purpose of enabling the doing of something and prescribes the formalities which are to be attended for the purpose, those prescribed formalities which are formalities which are essential to the validity of such thing, would be mandatory. However, if by holding them to be mandatory, serious general inconvenience is caused to innocent persons or general public, without very much furthering the object of the Act, the same would be construed as directory."

22. Clearly the consequences of using the word "shall" can vary and are not uniform. The mandatory effect of the word "shall" can be diluted depending upon the context in which the word "shall" is employed and the statutory scheme in which it is placed. In the context the word "shall" is also qualified by the words "as far as possible". The latter words limit the mandatory effect of the word "shall".

23. The phrase "as far as practicable" was interpreted by the Hon'ble Supreme Court in the case of **N.K. Chauhan Vs. State of Gujarat and others, reported at (1977) 1 SCC 308,** the Hon'ble Supreme Court held thus:

"26. What does 'as far as practicable' or like expression mean, in simple anglo-saxon ? Practicable, feasible, possi- ble, performable, are more or less interchangeable. A skiagraph of the 1959 Resolution reveals that the revival of the direct recruitment, method was motivated by 'the inter- est of administration'--an overriding object which must cast the benefit of doubt if two meanings with equal persuasive- ness contend. Secondly, going by the text, 50% of the substantive vacancies occurring in the cadre should be filled in by selection in accordance With appended Rules. 'As far as practicable' finds a place in the Resolution and the Rule. In the context what does it qualify ? As far as possible 50% ? That is to say, if 50% is not readily forth- coming, then less ? Within what period should be imprac- ticabilitv to felt ? What is the content of impracticabi- litv' in the given administrative 'setting ? Contrariwise, can you not contend that impracticability is not a license to deviate, a discretion to disobey or a liberty with the ratio ? Administrative tone is too impor- tant to be neglected but if sufficient numbers to fill the direct recruits' quota are not readily available, substan- tive vacancies may be left intact to be filled up when direct recruits are available. Since the exigencies of administration cannot wait, expediency has a limited role through the use of the words 'as far as practicable'. Thereby Government is authorised to make ad hoc appointments by promotion or by creation of ex cadre posts to be filled up by promotees, to be absorbed in the 50% portion falling to the promotional category in later years. In short 'as far as practicable means, not interfering with the ratio which fulfils the interest of administration, but flexible provision clothing government with powers to meet special situations where the normal process of the government Reso- lution cannot flow smooth. It is a matter of accent and import which affords the final test in the choice between the two parallel interpretations.

27. We have given close thought to the competing contentions and are

inclined to the view that the former is the better. Certainly, Shri Garg is right that the primary purpose of the quota system is to improve administrative efficiency. After all, the Indian administration is run for the service of the people and not for opportunities for promotion to a few persons. But theories of public administration and experiments in achieving efficiency are matters of governmental policy and business management. Apparently, the State, having given due consideration to these factors, thought that a blended brew would serve best. Even so, it could not have been the intention of government to create artificial situations, import legal fictions and complicate the composition of the cadre by deviating from the natural course. The State probably intended to bring in fresh talent to the extent reasonably available but not at the sacrifice of sufficiency of hands at a given time nor at the cost of creating a vacuum by keeping substantive vacancies unfilled for long. The straightforward answer seems to us to be that the State, in tune with the mandate of the rule, must make serious effort to secure hands to fill half the number of vacancies from the open market. If it does not succeed, despite honest and serious effort, it qualifies for departure from the rule. If it has become non-feasible impracticable and procrastinatory to get the requisite quota of direct recruits, having done all that it could, it was free to fill the posts by promotion of suitable hands if the filling up of the vacancies was administratively necessary and could not wait. 'Impracticable' cannot be equated with 'impossible'--nor with 'unpalatable'--and we cannot agree with the learned judges of the High Court in construing it as colossally incapable of compliance. The short test, therefore, is to find out whether the government, in the present case, has made effective efforts, doing all that it reasonably can, to recruit from the open market necessary numbers of qualified hands. We do not agree that the compulsion of the rule goes to the extreme extent of making government keep the vacancies in the quota of the direct recruits open and to meet the urgent needs of administration by creating ex cadre posts or making ad hoc appointments or resorting to other out-of-the-way expedients. The sense of the rule is that as far as possible the quota system must be kept up and if not 'practicable', promotees in the place of direct recruits or direct recruits in the place of promotees may be inducted applying the regular procedures, without suffering the seats to lie indefinitely vacant."

24. In the case of **P.T. Rajan Vs. T.P.M. Sahir and others, reported at (2003) 8 SCC 498** while considering similar provision, the Hon'ble Supreme Court held thus:

"48. Furthermore even if the statute specifies a time for publication of the electoral roll, the same by itself could not have been held to be mandatory. Such a provision would be directory in nature. It is well-settled pinciple of law that where a statutory functionary is asked to perform a statutory duty within the time prescribed therefor, the same would be directory and not mandatory."

25. A mandatory provision is required to be complied with strictly on pain of invalidation. But merely because a provision is held to be directory, it does not provide an option of non-compliance to the authorities. The law has to be complied with in all circumstances. This is

the essence of the rule of law. However, the rigors of compliance may vary depending upon the statutory provision. In case of a directory provision, a substantial compliance of the same would suffice to meet the ends of law.

26. The Hon'ble Supreme Court has often dealt with the distinction between a mandatory provision and a directory provision, and the issue of compliance of directory provisions. The Hon'ble Supreme Court in the case of **Sharif-Ud-Din Vs. Abdul Gani Lone, reported (1980) 1 SCC 403** held thus:

"9. The difference between a mandatory rule and a directory rule is that while the former must be strictly observed, in the case of the latter, substantial compliance may be sufficient to achieve the object regarding which the rule is enacted (emphasize added). Certain broad propositions which can be deduced from several decisions of courts regarding the rules of construction that should be followed in determining whether a provision of law is directory or mandatory may be summarized thus: The fact that the statute uses the word 'shall' while laying down a duty is not conclusive on the question whether it is a mandatory or directory provision. In order to find out the true character of the legislation, the Court has to ascertain the object which the provision of law in question is to sub-serve and its design and the context in which it is enacted. If the object of a law is to be defeated by non-compliance with it, it has to be regarded as mandatory. But when a provision of law relates to the performance of any public duty and the invalidation of any act done in disregard of that provision causes serious prejudice to those for whose benefit it is enacted and at the same time who have no control over the performance of the duty, such provision should be treated as a directory one. Where however, a provision of law prescribes that a certain act has to be done in a particular manner by a person in order to acquire a right and it is coupled with another provision which confers an immunity on another when such act is not done in that manner, the former has to be regarded as a mandatory one. A procedural rule ordinarily should not be construed as mandatory if the defect in the act done in pursuance of it can be cured by permitting appropriate rectification to be carried out at a subsequent stage unless by according such permission to rectify the error later on, another rule would be contravened. Whenever a statute prescribes that a particular act is to be done in a particular manner and also lays down that failure to comply with the said requirement leads to a specific consequence, it would be difficult to hold that the requirement is not mandatory and the specified consequence should not follow."

27. A Full Bench of this Court in the case of **Vikas Trivedi Vs. State of U.P. and others, reported at (2013) 2 UPLBEC 1193** held as under:

"15. Maxwell On the Interpretation of Statutes (Twelfth Edition) in Chapter 13,while discussing "Imperative And Directory Enactments" said following:

'The first such question is: when a statute requires that something shall be done, or done in a particular manner or form, without expressly declaring what shall be the consequence of non-compliance, is the requirement to be regarded as imperative (or mandatory) or

merely as directory (or permissive)? In some cases the conditions or forms prescribed by the Statute have been regarded as essential to the act or thing regulated by it, and their omission has been held fatal to its validity. In others, such prescriptions have been considered as merely directory, the neglect of them involving nothing more than liability to a penalty, if any were imposed, for breach of the enactment. An absolute enactment must be obeyed or fulfilled exactly, but it is sufficient if a directory enactment be obeyed or fulfilled substantially.' It is impossible to lay down any general rule for determining whether a provision is imperative or directory. 'No universal rule', said Lord Campbell, L.C., 'can be laid down for the construction of statutes, as to whether mandatory enactments shall be considered directory only or obligatory with an implied nullification for disobedience. It is the duty of Courts of Justice to try to get at the real intention of the Legislature by carefully attending to the whole scope of the statute to be construed.' And Lord Penzance said: 'I believe as far as any rule is concerned, you cannot safely go further than that in each case you must look to the subject matter; consider the importance of the provisions that has been disregarded, and the relation of that provision to the general object intended to be secured by the Act; and upon a review of the case in that aspect decide whether the matter is what is called imperative or only directory."

"76. At this juncture a note of caution is required to be given. All provisions of the statute are required to be complied with. It is useful to quote paragraph 5-052 of De-Smith Judicial Review 6th Edition in which while dealing with mandatory and directory statutes, following was observed:-

"5-052. A second reason for the tangle in this area is the use of the terms "mandatory" and "directory"; the latter term is especially misleading. All statutory requirements are prima facie mandatory. However, in some situations the violation of a provision will, in the context of the statute as a whole and the circumstances of the particular decision, not violate the objects and purpose of the statute. Condoning such a breach does not, however, render the statutory provision directory or discretionary. The breach of the particular provision is treated in the circumstances as not involving a breach of the statute taken as a whole. Furthermore, logically, a provision cannot be mandatory if a court has discretion not to enforce it."

28. In the case of **Karnal Improvement Trust, Karnal Vs. Smt. Parkash Wanti (Dead) and another, reported at (1995) 5 SCC 159,** the Hon'ble Apex Court laid down the law in the following terms:

"11. There is distinction between ministerial acts and statutory or quasi-judicial functions under the statute. When the statute requires that something should be done or done in a particular manner or form, without expressly declaring what shall be the consequence of non-compliance, the question often arise: What intention is to be attributed by inference to the legislature? It has been repeatedly said that no particular rule can be laid down in determining whether the command is to be considered as a mere direction or mandatory involving invalidating consequences in its disregard. It is fundamental that it depends on the scope and object of the enactment. Nullification

is the natural and usual consequence of disobedience, if the intention is of an imperative character. The question in the main is governed by considerations of the object and purpose of the Act; convenience and justice and the result that would ensure. General inconvenience or injustice to innocent persons or advantage to those guilty of the neglect, without promoting the real aim and object of the enactment would be kept at the back of the mind. The scope and purpose of the statute under consideration must be regarded as an integral scheme. The general rule is that an absolute enactment must be obeyed or fulfilled exactly but it is sufficient if a directory enactment be obeyed or fulfilled substantially. When a public duty, as held before, is imposed and statute requires that is shall be performed in a certain manner or within a certain time or under other specified conditions, such prescriptions may well be regarded as intended to be directory only in cases when injustice or inconvenience to others who have no control over those exercising the duty would result if such requirements are not essential and imperative."

29. Good authority thus holds that statutes fixing time-lines to accomplish an action are directory in nature. In various cases the legislative intent was sought to be defeated by a highly delayed compliance on the pretext of the provision being directory in nature. Such action of the authorities was on a misconception of law. This action of the authorities was invalidated and such interpretation was negatived by the Hon'ble Supreme Court. Inordinate delay does not satisfy the requirement of substantial compliance of a directory provision.

30. The Hon'ble Supreme Court in the case of **State of Haryana Vs. P.C. Wadhwa, IPS, Inspector General of Police and another, reported at (1987) 2 SCC 602,** while laying down the law, dispelled all such doubts. The relevant parts of the judgement are being extracted for ease of reference:

"14. The whole object of the making and communication of adverse remarks is to give to the officer concerned an opportunity to improve his performance, conduct or character, as the case may. The adverse remarks should not be understood in terms of punishment, but really it should be taken as an advice to the officer concerned, so that he can act in accordance with the advice and improve his service career. The whole object of the making of adverse remarks would be lost if they are communicated to the officer concerned after an inordinate delay. In the instant case, it was communicated to the respondent after twenty seven months. It is true that the provisions of Rules 6, 6A and 7 are directory and not mandatory, but that does not mean that the directory provisions need not be complied with even substantially. Such provisions may not be complied with strictly, and substantial compliance will be sufficient. But, where compliance after an inordinate delay would be against the spirit and object of the directory provision, such compliance would not be substantial compliance. In the instant case, while the provisions of Rules 6, 6A and 7 require that everything including the communication of the adverse remarks should be completed within a period of seven months, this period cannot be stretched to twenty seven months, simply because these Rules are directory, without serving any purpose consistent with the spirit and objectives of these Rules. We need not, however, dilate upon the question any more and consider whether on the ground of inordinate and

unreasonable delay, the adverse remarks against the respondent should be struck down or not, and suffice it to say that we do not approve of the inordinate delay made in communicating the adverse remarks to the respondent."

31. The statutes which do not provide for specific time frame to do an act, do not provide a clear guidance to the authorities regarding the time period in which the act has to be done. In such cases, the Hon'ble Supreme Court ironed out such creases in law in the case of **Regional Provident Fund Commissioner Vs. K.T. Rolling Mills Pvt. Ltd. reported at (1995) 1 SCC 181** and held:

"4. There can be no dispute in law that when a power is conferred by statute without mentioning the period within which it could be invoked, the same has to be done within reasonable period, as all powers must be exercised reasonably, and exercise of the same within reasonable period would be a facet of reasonableness. When this appeal was heard by us on 7-9-1994 and when this aspect of the matter came to our notice, we desired an affidavit from the Commissioner to put on record regarding the point of time when he came to know about the default and to explain the cause of delay. Pursuant to that order, the Commissioner filed his affidavit on 10-11-1994, according to which the power of levying damages came to be delegated to the Commissioner by an order dated 17-10-1973. As, however, large number of establishments were in existence in the State of Maharashtra -- the number of which in 1985 was 22,189 -- and there was only one Regional Provident Fund Commissioner having power to levy damages, delay was caused in detection of the cases of belated payment. According to the affidavit, the default at hand was located on 19-4-1985 and the damages came to be levied by order dated 5-11-1986."

32. In case, the proceeding is decided within three months, the letter and spirit of the statute is implemented. However, mere failure to decide the case within three months does not violate the statutory mandate. In the latter case, the statutory obligation will be defined by the quality of the efforts made to decide the suit/proceeding with promptitude and dispatch. The statutory obligation will be discharged if the case is decided within a reasonable time, after the expiry of three months from the date of its institution.

33. Statutes of limitation are statutes of repose. Statutes with time lines for decision making are statutes of endeavour. Statutory duty is discharged not only when the act is done but also when effort is made. However, the leeway to the authority is not unlimited and the time to accomplish the act is not indefinite.

34. The statutory duty of the trial court/Sub-Divisional Officer, Phulpur, District Allahabad, in the event the case is not decided within three months is to be seen. The trial court/Sub-Divisional Officer, Phulpur, District Allahabad in discharge of its statutory duties has to make earnest efforts to decide the case expeditiously in a reasonable time after the expiry of three months from the institution of the suit. While the statutory duty of the trial court/Sub-Divisional Officer, Phulpur, District Allahabad is to make earnest efforts to decide expeditiously, the proof of its performance is in the order-sheet of the court. The order-sheet of the

trial court/Sub-Divisional Officer, Phulpur, District Allahabad is the most reliable evidence of the sincerity or earnestness of the efforts made by the appellate authority. The order-sheet of the trial court/Sub-Divisional Officer, Phulpur, District Allahabad is true testimony to the accomplishment of the statutory duty or the failure of the authority to perform its statutory duty. In the latter case the authority is liable to be mandamused.

35. In the light of the legal position stated above, the facts of the case will be analyzed.

36. The ordersheet has been analysed at length in the earlier part of the judgment. A perusal of the order-sheet discloses that the matter is being adjourned repeatedly without any good reason and that virtually no effective hearing has taken place since the institution of the proceedings in the year 2009. This discloses a clear failure of the authority below to perform its statutory functions prescribed by law.

37. No lis can remain pending indefinitely before a court of law. Indefinite pendency of a lis goes to the root of administration of justice. Such delay is not permitted by law and cannot be countenanced by the court.

38. In light of the preceding discussion, a writ in the nature of mandamus is issued commanding the respondent no. 2, trial court/Sub-Divisional Officer, Phulpur, District Allahabad, before whom the Case No. 269 of 2009-10 (Ram Sukh Vs Gram Sabha and others) is pending to execute the following directions:

I. The respondent no. 2, trial court/Sub-Divisional Officer, Phulpur, District Allahabad, shall decide the Case No. 269 of 2009-10 (Ram Sukh Vs Gram Sabha and others), after giving an opportunity of hearing to all the parties to the proceedings within a period of six months from the date of receipt of a certified copy of this order.

II. The respondent no. 2, trial court/Sub-Divisional Officer, Phulpur, District Allahabad, shall not grant any unnecessary adjournment to the parties.

III. In case any adjournment is granted in the paramount interest of justice, the respondent no. 2, trial court/Sub-Divisional Officer, Phulpur, District Allahabad, shall impose costs not below Rs. 10,000/- for each adjournment, upon the party seeking adjournment.

IV. In case the counsel for any party does not appear before the respondent no. 2, trial court/Sub-Divisional Officer, Phulpur, District Allahabad, on any date on the ground of strike of advocates, the respondent no. 2, trial court/Sub-Divisional Officer, Phulpur, District Allahabad, shall not permit such counsel (of either party) to appear in this case on future dates.

V. The respondent no. 2, trial court/Sub-Divisional Officer, Phulpur, District Allahabad, shall proceed with the case on a day to day basis, if required, to adhere to the above stipulated time line of six months. In case the court is vacant the Commissioner, Prayagraj Division, Prayagraj, shall nominate another court which is sitting to ensure that the above stipulated time period of six months to decide the case, is strictly adhered to.

39. With the aforesaid direction, the writ petition is disposed of finally.

(2020)02ILR A194

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 26.09.2019

BEFORE
THE HON'BLE RAMESH SINHA, J.
THE HON'BLE AJIT KUMAR, J.

Writ C No. 2946 of 2019

M/s Dwarka Creations & Ors. ..Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Amrendra Pratap Singh, Sti Subhendra Singh

Counsel for the Respondents:
C.S.C., Sri Anuj Pratap Singh, Sri Prabhakar Awasthi

Petitioners-valid allotties of industrial plot by the corporation respondent-allotment done on 20.04.2011-possession memo executed on 09.02.2016-entire premium paid-barely after 9 months from possession- notice issued for not completing construction work within five years-extension fee of Rs.12,29,859/- charged-fees paid with some delay-no third party right created-impugned order rejected renewal of leas-illegal-quashed-W.P. allowed.

Held, such a situation, therefore, is quite unhappy one and if Corporation's action in taking such a coercive measure as is reflected from the orders passed by the Corporation from time to time in the present case is justified, no one will come forward to believe this Government agency and then it will be a serious blow to the industrial policy. **(para 10)**

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

1. Heard Sri Amrendra Pratap Singh, learned counsel for the petitioners, Sri Prabhakar Awasthi, learned counsel for the respondent Nos. 2 & 3 and learned Standing Counsel for the State.

2. The petitioners are admittedly valid allotties of the industrial plot by the U.P. State Industrial Development Corporation Limited (hereinafter referred to as 'Corporation') - the 2nd respondent. The allotment of the plot was done on 20th April, 2011 and the petitioners claim to have paid the entire premium amount between 1st July, 2012 and 1st July, 2017. Consequently, a registered lease deed came to be executed on 15th October, 2011. The petitioners' claim was that though formal possession letter came to be issued on 10th July, 2012 on account of serious opposition by the villagers blocking the passage to the plot but in the absence of any clear approach to the plot, the petitioners could not carry out the exercise of construction work over the plot and it is reiterated that virtually there was no physical possession given of the plot. Ultimately, the Corporation managed and facilitated the physical possession of the plot to the petitioners by executing the possession memo on 9th February, 2016. So, the petitioners claim, no project work could be started prior to 9th February, 2016. However, barely 9 months had passed the date of physical delivery of the plot that the respondent Corporation issued notice to the petitioners for not completing the construction work/ set up of an industrial unit within five years as prescribed for under the allotment order and it was provided that the petitioners may apply for extension of time in accordance with law and terms of allotment. The petitioners pleaded for waiver of the extension fee from 2011 to 2016 as he was denied possession for none of his fault but no heed was paid to his request and surprisingly a letter was issued

to him on 25th October, 2017 making a demand of charges to the tune of Rs.12,29,859/- payment of which was to be done by 31st December, 2017 failing which the allotment was liable to be cancelled. The petitioners treated it to be an illegal act, on the part of the respondent Corporation, of charging penalty and, accordingly represented the matter.

3. Relying upon certain clauses of the lease deed, the petitioners allege in the writ petition that they filed earlier a writ petition bearing Writ-C No.- 5250 of 2018 for quashing the demand note dated 10th May, 2017 and letter dated 15th May, 2017 that had been issued, to the extent it provided for cut off date as 31st December, 2017 and while the matter came up for hearing on 7th February, 2018 the Corporation informed that vide order dated 23th January, 2018 the lease itself has been cancelled. Consequently petitioner filed another Writ-C No.- 7331 of 2018 in which following order was passed:-

"Heard Mr. Siddharth Nandan, learned counsel for the petitioners and Mr. Prabhakar Awasthi, learned counsel for respondent nos. 2 and 3 - Corporation.

This petition basically challenges the order dated 23.01.2018 passed by the respondent Corporation, cancelling allotment made in favour of petitioners of industrial plot bearing No. B-22, IIDC, District Chandauli, on the ground that petitioners did not complete/commence construction of their industrial unit within 18 months from the date of possession. Admittedly, possession was handed over to the petitioners on 9.02.2016. It appears that on 25.10.2017, the respondent Corporation had issued a letter to the petitioners, asking them to deposit a sum of Rs. 12,29,859/- with an application seeking extension of time to commence and complete the construction within time frame. Petitioners did not make the payment and, hence, the impugned order has been issued.

Counsel for the petitioners, on instructions, submits that petitioners are prepared to deposit the amount, as per letter/order dated 25.10.2017, unconditionally and the respondent Corporation may be directed to consider their request for restoration of the plot allotted to them and extend the time to make construction of industrial unit as per Additional Condition No.2 in the lease agreement dated 15.10.2011. Counsel for the respondent Corporation submits that if petitioners make the payment, as aforementioned, the respondent Corporation shall consider the same and pass appropriate orders within two weeks thereafter. His statement is recorded and accepted. In view thereof, we dispose of this writ petition with liberty to the petitioners to make payment of Rs. 12,29,859/- to the respondent Corporation within a period of 15 days from today. On such payment being made by petitioners, the respondent Corporation shall consider their request and pass appropriate orders within a period of two weeks thereafter."

4. In view of the directions as contained in the order dated 28th February, 2018 (*supra*) the petitioners paid the amount vide demand draft bearing No.- 335025 (Rs.6,14,930/-) and demand draft No.-028445 (Rs.6,14,930/-) issued by the Dena Bank and Bank of India respectively, alongwith covering letter dated 11th May, 2018. As it is clear from the order that the petitioners were to make payment within a period of 15 days from the date of the order dated 28th February,

2018 but the petitioners could pay the amount only by 11th May, 2018, the respondent rejected the application of the petitioners only on the ground that the petitioners have failed to comply with the order of the High Court by depositing the requisite money within a period of 15 days from the date of order. It is this order dated 13th December, 2018 which has been impugned. The respondents have declined to renew the lease only on this above technical ground that the petitioners failed to comply with the order of the High Court within the prescribed period as provided under the order.

5. Learned counsel for the petitioners has argued that the petitioners have substantially complied with the order of the Court and the delay that has been caused in compliance, on account of the financial stress for which the petitioners could not manage the requisite money within the time specified by the Court. It is submitted by the learned counsel for the petitioners that no third party rights in respect of the plot in question has been created and the petitioners having not only paid the original premium amount but even the late fee and renewal charges, they stand prejudiced for no fault of their because the actual physical possession itself had been given to them only in the year 2016.

6. It is argued that the relevant clause of the allotment order should be read in such a manner so as to make it workable and that too quite sensibly because unless and until the physical possession of the land is given and an approach is provided to the plot, no construction work for setting up the industrial unit can be carried out. In the present case, it is submitted that the respondents have not denied that they have not been even delivered the possession prior to 9th February, 2016, the date when possession memo was executed.

7. Per contra, the argument advanced by Sri Prabhakar Awasthi, learned counsel for the respondent- Corporation is that it was the writ petition of the petitioners in which specific direction was issued and it would be taken to be an undertaking on his part otherwise he should have asked for some time when it was being provided in the order or he should have moved an appropriate application seeking extension of time for its compliance. He submits that the respondents cannot be taken to be at fault if the petitioners themselves have not been vigilant and have failed to comply themselves with the order passed on their own writ petition. However, Sri Prabhakar Awasthi, learned counsel appearing for the Corporation does not deny that the plot still lies vacant and no third party right has been created in respect of the said plot.

8. Having heard learned counsel for the parties and their arguments advanced across the Bar and having perused the record, we find that it is one of those cases where the Court should balance the equity. It is a case where an industrial plot has been allotted to a prospective entrepreneur to set up an industrial unit. U.P. State Industrial Corporation virtually provides platform for the entrepreneurs to set up their industrial units so as to give growth to the economy of the State as well as of the Nation. Therefore, the Corporation should always ensure that a safe and secured land is provided for setting up an industrial unit. It is duty of the Corporation to always ensure that physical possession of the allotted land is given in time and lease deed in respect of such plot is executed well within time. If an

entrepreneur has come forward to believe the Corporation that a very safe and secured land was being provided at a fair price to set up an industrial unit, if such an entrepreneur is provided with a disputed land or a land of which physical possession is not given for long period of time then such an entrepreneur cannot be made to suffer for such misrepresentation at the end of the Corporation.

9. In the present case there is no grievance of the Corporation that the petitioners had been in default towards any payment schedule and if at all any dues was there, Corporation was well within its right to recover the same. But here we find that while the Corporation itself handed over the physical possession in February, 2016, strangely enough, it put the petitioners to notice for not setting up industrial unit within a year of such physical possession.

10. In our considered opinion, no magic can be done to set up an industrial unit within a span of 10 months or 12 months when the Corporation itself provided five years time as a condition for setting up industrial unit in the original allotment order. Such a situation, therefore, is quite unhappy one and if Corporation's action in taking such a coercive measure as is reflected from the orders passed by the Corporation from time to time in the present case is justified, no one will come forward to believe this Government agency and then it will be a serious blow to the industrial policy. A Constitutional Court cannot remain a passive spectator in such a situation. State run industrial policy is aimed at overall development of economy with which public interest is directly related. One must remember that unemployment in a developing economy is of prime concern. The employment to people is concomitant to industrial growth. While private players having huge financial background keep purchasing vast agricultural fields paying heavy considerations to poor farmers resulting in unchecked industries coming up giving serious jolt to agrarian economy, the unorganized and unchannelized growth brings more disparity and small and marginal industrialists looking forward to such a State run industrial Corporation with aspirations, get disappointed with Corporation failing to provide safe and secured land and in time delivery of possession. It is the duty of the Constitutional Courts to ensure that the Corporation takes pragmatic view of overall circumstances and render a helping hand to see that the purpose with which Corporation was set up is achieved. In our considered opinion the case in hand is one such case.

11. We, therefore, are of the view that if the petitioners have deposited all the surcharges including fee for renewal/ extension of time for setting up an industrial unit, there is full substantial compliance of the order of High Court.

12. It is true that the time period provided under the order of High Court was only 15 days but since no third party rights have accrued at the end of Corporation in respect of the plot in question, we see no justification in rejecting the claim of the petitioners only on account of such delayed compliance of Court's order. The order impugned does not assign any other reason either.

13. In view of the above, the writ petition succeeds and is allowed. The orders impugned dated 13th December,

2018 and 29th December, 2018 are hereby quashed in the special facts and circumstances of the case.

14. The respondents are directed to consider the application for extension of time and renewal of the lease as the petitioners have already deposited the renewal amount as per the demand notice on 25th October, 2017 and positive direction be issued, positively within a period six weeks from the date of production of certified copy of this order.

(2020)02ILR A198

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 03.01.2020

BEFORE
THE HON'BLE J.J. MUNIR, J.

Writ C No. 4975 of 2001
Connected With
Writ C Cases No. 4976 of 2001, 20683 of 2001 & 20684 of 2001

U.P. State & Sugar Development Corp. Ltd. ...Petitioner
Versus
The Presiding Officer, Labour Court, Gorakhpur & Ors. ...Respondents

Counsel for the Petitioner:
Sri R.K. Srivastava, Sri Shakti Swarup Nigam, Sri Alok Kumar Srivastava

Counsel for the Respondents:
C.S.C., Sri P.C. Singh, Sri Santosh K. Srivastava, Sri Sumitra Singh, Sri Bhoopendra Nath Singh

Industrial dispute-impugned order-no finding that workmen have worked for certain crushing seasons-and completed their probationary period under clause B-1(4) of Standing orders-Labour Court could not have granted seasonal status-impugned order illegal-findings cannot be recorded -under Article 226-being facts-impugned orders quashed-W.P. partly allowed.

Cases cited:

1. State of Karnataka v. Umadevi (3), (2006) 4 SCC 1 : 2006 SCC (L&S) 753

2. A. Umarani v. Registrar, Coop. Societies [(2004) 7 SCC 112 : 2004 SCC (L&S) 918]

3. State of U.P. v. NeerajAwasthi [(2006) 1 SCC 667 :2006 SCC (L&S) 190]

4. State of Karnataka v. KGSD Canteen Employees' Welfare Assn. [(2006) 1 SCC 567 : 2006 SCC (L&S)158 : JT (2006) 1 SC 84]

5. Union Public Service Commission v. GirishJayantiLalVaghela [(2006) 2 SCC 482: 2006SCC (L&S) 339 : (2006) 2 Scale 115]

6. KesavanandaBharati v. State of Kerala [(1973) 4 SCC 225 : 1973 Supp SCR 1]

7. Indra Sawhney v. Union of India [(2000) 1 SCC 168 : 2000 SCC (L&S) 1 : 1999 Supp (5) SCR 229]

8. Indian Drugs & Pharmaceuticals Ltd. vs. Workmen, (2007) 1 SCC 408 : (2007) 1 SCC (L&S) 270

9. Rama Muthuramalingam v. Dy. Supdt. of Police [AIR 2005 Mad 1]

10. State of Karnataka v. Umadevi (3) [(2006) 4 SCC 1 : 2006 SCC (L&S) 753]

11. Executive Engineer, ZP Engg. Divn. v. Digambara Rao, (2004) 8 SCC 262 : 2004 SCC (L&S) 1097

12. BSNL v. Bhurumal, (2014) 7 SCC 177 : 2014 (140) FLR 901 : (2014) 2 SCC (L&S) 373

13. Chandra Shekhar Azad KrishiEvamProdyogikiVishwavidyalaya vs. United Trades Congress, (2008) 2 SCC 552 : (2008) 1 SCC (L&S) 504

14. Deputy Executive Engineer vs. KuberbhaiKanjibhai, (2019) 4 SCC 307 : 2019 (160) FLR 651

15. Syed Yakoob v. K.S. Radhakrishnan [AIR 1964 SC 477] and Surya Dev Rai v. Ram Chander Rai [(2003) 6 SCC 675]

16. Maharashtra SRTC v. Casteribe Rajya Parivahan Karmchari Sanghatana

17. Indian Drugs & Pharmaceuticals Ltd. (supra),

18. Mahatma Phule Agricultural University vs. Nasik ZillaShethKamgar Union, (2001) 7 SCC 346

19. State of Maharashtra vs. R.S. Bhonde, (2005) 6 SCC 751

20. Aravali Golf Club vs. Chander Hass, (2008) 1 SCC 683

(Delivered by Hon'ble J.J. Munir, J.)

1. These are four writ petitions arising out of awards passed by the Presiding Officer, Labour Court, U.P., Gorakhpur dated 11.08.1999 and 13.08.1999 in Adjudication Case nos.103 of 1987 & 118 of 1987 and Misc. Case nos.404 of 1987, 90 of 1991 & 403 of 1987. The Labour Court has entered awards in the four industrial disputes between the U.P. State Sugar Corporation Limited, Unit Munderwa, District Basti (since re-named as U.P. Sugar and Cane Development Corporation, Unit Munderwa, Basti) and its various workmen who brought these industrial disputes, accepting the workmen's claims. These various workmen are the respondents to the writ petitions, whereas the U.P. Sugar and Cane Development Corporation, Unit Munderwa, Basti are the petitioners. The U.P. Sugar and Cane Development Corporation, Unit Munderwa, Basti is hereinafter referred to as the Employers whereas the private respondents in each of the writ petitions are hereinafter referred to as the workmen (except for singular reference where the name of the particular workman is mentioned).

2. All the four petitions involve similar questions of fact and law. As such, all the petitions were connected and heard together with Writ - C No.4975 of 2001, being treated to be the leading case. Nevertheless, in order to indicate precise facts that are individual to the different writ petitions, the cause of action and course of proceedings in each involved, those facts and the course of proceedings in the four writ petitions would be set out separately in a brief statement about it.

3. Writ - C No.4975 of 2001 has been preferred by the Employer assailing an award of the Presiding Officer, Labour Court, U.P., Gorakhpur passed in Adjudication Case no.103 of 1987 between the Employer and the registered Union of their workmen known as Sugar Mill Munderwa Mazdoor Panchayat, Munderwa Bazar, Lalganj Road, Munderwa, Basti (for short the Union), representing the interest of the workmen numbering fifteen, with particulars detailed in the Annexure to the order of reference.

4. The State Government vide Government Order no.5170-75(**श्र0आ0)/36-श्रम (I) सी0बी0 68/86 बस्ती,** dated 11.02.1987, made the following reference under Section 2-K of the U.P. Industrial Disputes Act, 1947 (for short the Act) to the adjudication of the Presiding Officer, Labour Court, U.P., Gorakhpur:

क्या सेवायोजकों द्वारा संलग्न सूची में अंकित 15 कर्मचारियों को मौसमी श्रमिक घोषित किया जाना चाहिए? यदि हां, तो किस तिथि से तथा अन्य किस विवरण सहित?

5. The Labour Court proceeded to hear and determine the aforesaid Adjudication Case vide judgment and award dated 11.08.1999, whereby it held that the fifteen workmen whose names are appended to the order of reference are declared seasonal, and that they would be entitled to all benefits of seasonal engagement with effect from the year 1985-86. The Employers were ordered to pay in costs a sum of Rs.100/-.

6. Aggrieved, this writ petition has been filed.

7. Pending the aforesaid Adjudication Case, the Employers terminated the services of the workmen by an oral order with effect from 10.03.1987 without service of any notice or pay in lieu of the period of notice, or payment of retrenchment compensation. This led fourteen of the fifteen workmen, for whose benefit Adjudication Case no.103 of 1987 had been brought by the Union to file Misc. Case no.404 of 1987, under Section 6-F of the Act, on basis that pending adjudication of the Industrial Dispute, termination of their service was one in violation of Section 6-E. The workmen through the aforesaid misc. case sought reinstatement in service with continuity and back-wages, besides consequential benefits. A similar application giving rise to Misc. Case no.90 of 1991 was filed by the fifteenth workman, Ram Lal, also under Section 6-F of the Act.

8. Both the misc. cases were heard together and decided by the Labour Court, also vide a judgment and award dated 11.08.1999, whereby it was held that the act of the Employers in terminating the services of the fifteenth workmen was unlawful and improper. It was further awarded that all the workmen are entitled to reinstatement.

9. Writ - C No.20684 of 2001 has been brought by the Employers against the last mentioned award, passed in the two misc. cases under reference.

10. Writ - C No.4976 of 2001 has been preferred by the Employers from a judgment and award of the Presiding Officer, Labour Court, U.P., Gorakhpur, dated 13.08.1999, passed in Adjudication Case no.118 of 1987, between the Employers and the Union representing the interest of twenty-five workmen, whose details are mentioned in the attached schedule to the order of reference giving rise to the last mentioned adjudication case. The twenty-five workmen are arrayed as respondent nos.3 to 27 to this petition. Some of these workmen have died pending this writ petition and their heirs and legal representatives have been brought on record. Adjudication Case no.118 of 1987 was registered on the basis of an order of reference, bearing Government Order no.5261-66(**श्र0आ0)/36-श्रम (I) सी0बी0 69/86 बस्ती,** dated 11.02.1987, which came to be made after a failed conciliation between the Employers and the Union representing the workmen's interest. The order under Section 2-K of the Act above mentioned, referred the following dispute to the adjudication of the Presiding Officer, Labour Court, U.P., Gorakhpur:

1. क्या सेवायोजकों द्वारा संलग्न परिशिष्ट में अंकित 25 श्रमिकों को मौसमी श्रमिक घोषित न किया जाना अनुचित तथा/ अथवा अवैधानिक है? यदि हां, तो संबन्धित श्रमिक क्या लाभ/ क्षतिपूर्ति (रिलीफ) पाने के अधिकारी हैं तथा किन अन्य विवरणों सहित?

2. यदि वाद पद संख्या-1 श्रमिकों के पक्ष में निर्णीत होती है तो क्या संबंधित श्रमिकों को कार्य के अनुरूप निर्धारित वेतनमान दिया जाना चाहिए? यदि हां तो किस तिथि से तथा अन्य किस विवरण सहित?

11. The Labour Court proceeded to hear and determine the aforesaid adjudication case vide judgment and award dated 13.08.1999, whereby it held that the twenty-five workmen whose names are detailed in the schedule appended to the order of reference are declared seasonal and entitled to be paid salary as determined by the Wage Board, together with other benefits from the season 1985-86.

12. Aggrieved, this writ petition has been filed.

13. Pending the aforesaid adjudication case, it appears that the Employers terminated the services of eighteen of the twenty-five workmen, on whose behalf the Union had raised the industrial dispute under reference on various dates without service of any prior notice or payment of wages in lieu of notice. These eighteen workmen are arrayed as respondent nos.3, 4, 5, 6, 7, 9, 10, 11, 12, 13, 15, 17, 20, 21, 23, 24, 25 and 26. The other private respondents appear to have been unnecessarily impleaded. These workmen, accordingly, filed a miscellaneous application, dated 29.07.1987 in the pending Adjudication Case no.118 of 1987, under Section 6-F of the Act, alleging termination of their services in violation of Section 6-E. This application came to be registered as Misc. Case no.403 of 1987. These workmen sought relief that the industrial dispute be registered and it be awarded that the workmen were entitled to reinstatement on the post that they were working together with payment of salary, continuity of service, arrears of salary for the period of their unlawful termination of services and other consequential benefits, together with due interest.

14. The aforesaid miscellaneous case came up for determination before the Presiding Officer, Labour Court, U.P., Gorakhpur, who after hearing the workmen and the Employers, held that the services of the workmen have been terminated in violation of Section 6-E of the Act, and awarded that they be reinstated to the posts they were working, together with all consequential benefits. The workmen were further awarded Rs.100/- in costs.

15. Aggrieved, Writ - C No.20684 of 2001 has been filed.

16. Heard Sri Shakti Swarup Nigam, learned Senior Advocate assisted by Sri Alok Kumar Srivastava, learned Counsel for the petitioner, Sri Lalloo Singh, learned Advocate holding brief of Sri B.N. Singh, learned Counsel appearing on behalf of the respondent-workmen and Sri Ajeet Kumar Singh, learned Standing Counsel appearing on behalf of respondent no.1, in all the writ petitions.

17. In the leading writ petition upon issue of notice by the Labour Court, the Employers and the Union on behalf of the fifteen workmen, put in their pleadings. The Union acting on behalf of the workmen filed their written statement dated 29.07.1987 whereas the Employers filed their written statement on 05.07.1989. The workmen filed their rejoinder statement whereas the Employers

filed their rejoinder statement dated 14.04.1993, answering amendments, that were brought in by the workmen through an application dated 11.01.1993, also the basis of two separate miscellaneous cases in the adjudication case, seeking to assail the pendentilite termination of their services, in violation of Section 6-F of the Act. The Labour Court, of course, while deciding the adjudication case did not go into that part of the cause of action, that was subject matter of Misc. Case no.404 of 1987 and Misc. Case no. 90 of 1991.

18. The case of the workmen before the Labour Court was to the effect that all fifteen of them were engaged with the Employers' establishment regularly for the past 6 - 7 years as Centrifugal Machine Men, during each successive season. The further case was that the workmen were arbitrarily shown by the Employers, by manipulating documents that were in their control, as daily-wagers instead of seasonal workmen. It was also pleaded that the attendance of the workmen was recorded in the Attendance Register, but their salary was paid through vouchers in an arbitrary fashion. It was pleaded that in order to avoid extending benefit of emoluments as determined by the Wage Board and other benefits admissible, the Employers in an arbitrary fashion would manipulate records relating to the workmen. It is said further in the written statement that the Employers have in their establishment twenty-three Centrifugal Machines, that run everyday in successive shifts. The twenty-three machines worked during successive shifts require after taking into reckoning the reliever workmen, a total of eight-one Centrifugal Machine Men, on a regular basis. The establishment instead retains 32 - 35 workmen as Centrifugal Machine Men on a seasonal basis. The remainder vacant posts are manned by the workmen, shown to be engaged as temporary hands on daily-wages during each season, throughout. It is also pleaded that the job of a Centrifugal Machine Man and the relative work is regular and seasonal in nature. The employment of the workmen on the said job, showing them to be temporaries is unfair labour practice. It is pleaded further that the workmen were paid salary, worked out on the basis of Rs.7.50 per day, and by manipulating records regarding rate of wages, the workmen's attendance is shown short. It is then specifically pleaded that disbursement of salary at times is not shown in the records at all as wages paid to the workmen, but shown as outgoings under other heads. It is claimed that all the workmen are entitled to be declared seasonal workmen and paid wages, according to recommendations of the Wage Board, payable to workman of that class.

19. The Employers filed their written statement traversing the workmen's case, apart from certain pleas as to maintainability of the industrial dispute, raised on behalf of the workmen by the Union which does not appear to have been pressed before the Labour Court. The Employers pleaded in paragraph 3 of the written statement that the workmen were not at all on the rolls of the Corporation at the time of its takeover, on 28.10.1984. They were temporary hands with the erstwhile Employer. At this juncture, it must be remarked that mention of the erstwhile Employer and the Corporation bears reference to the U.P. State Sugar Corporation Limited that was acquired by the State of U.P. under the provisions of the Uttar Pradesh Sugar Undertakings

(Acquisition) Act, 1971 with effect from 28.10.1984.

20. It is pleaded that the workmen were employed, on occasions as temporary hands, to cope with the absence of regular hands and to meet the exigencies of extra work. It is the Employers' further case that the workmen have never worked against any vacancy and do not hold lien on any post. There are breaks in their services. It is also pleaded that the Employers have the required strength of unskilled hands and there is no vacancy. The Union has raised this industrial dispute on baseless grounds. It was also specifically pleaded that before the Conciliation Officer, the Union were seeking promotion for these workmen from temporary hands to seasonal. It is urged that promotion is an exclusive right of the Management. Casual employees have no claim to promotion. It is also said that the workmen were seeking renewal of their contract, as they were not on the rolls of the employers, when the conciliation proceedings were initiated on their behalf by the Union. The right of the workmen to be declared seasonal has been outrightly disputed.

21. The workmen in order to establish their case, made an application to the Labour Court to summon from the Employers, the Attendance Register for the crushing seasons 1980-81 to 1986-87, besides the Cashbook, ledger and vouchers for the relative period. The Labour Court has recorded for a fact that the Employers objected to this prayer. It has also been recorded that on 14.07.1988, the workmen filed an inspection note, but that too was objected to by the Employers.

22. On behalf of the Employers, all that is offered in evidence are two witnesses, that is to say, one Ramakar Prasad Pandey, Time Officer Incharge in the Employers' establishment, who deposed as EW-1 and S.N. Tripathi, Chief Chemist in their establishment, who deposed as EW-2. For the workmen, three workmen deposed, to wit, Sumeshar Tiwari, Kuber Nath and Ram Prasad Yadav, each of whom testified as DW-1, DW-2 and DW-3, respectively.

23. The Labour Court on consideration of the evidence on record has passed the impugned award, subject matter of challenge here.

24. Before this Court, Sri Nigam, learned Senior Advocate has emphatically urged that the Labour Court went utterly wrong in declaring the workmen seasonal, who were otherwise casual hands, hired during crushing seasons to cater to the additional workload as and when required. He has emphasized that they did not work against any existing vacancy, and that there were no vacancies available with the Employers' Unit, against which these persons could have been declared seasonal.

25. It has been argued that by declaring temporary hands, seasonal workmen, the Labour Court has granted the workmen promotion which is essentially a managerial function. That cannot be done under an award of the Labour Court. It has been re-emphasized by the learned Senior Advocate that the Labour Court fell in manifest error in not considering that seasonal status can be conferred depending upon the vacancies available with the Employers' Unit, and that too, after taking into account the inter se seniority of those workmen, who were retained as temporary hands on daily-

wages. Also, their eligibility, qualification, skill etc. have to be appraised by the Management before taking a decision to appoint the workmen as seasonal staff against the available sanctioned strength.

26. It has also been urged on a case pleaded for the first time before this Court that pending this petition, the U.P. State Sugar Corporation Ltd. has been declared sick under the SICA by the Board of Industrial and Financial Reconstruction (BIFR), vide its order dated 21.08.1995. Subsequently, the State Government have taken a decision in the year 1999, under which eleven Units of the Corporation, including the Employers, that is to say, the Unit at Munderwa, Basti, has been closed down. It has been further pleaded that from 1999, the Employers have been closed down, and no production whatsoever is undertaken there. It has been argued by Sri S.S. Nigam, learned Senior Advocate that in these circumstances, the direction to declare a workman seasonal is manifestly illegal and impossible to implement.

27. Learned Senior Counsel for the Employers has argued that rights of the workmen involved are to be determined with reference to the Standing Orders, governing the conditions of employment of workmen in Vacuum Pan Factories of Uttar Pradesh, enforced with effect from 27th September, 1988, and issued by the State Government, in exercise of their powers under Clause (b) of Section 3 of the Act.

28. In the submission of the learned Senior Counsel, there is no provision under the Standing Orders which says that a temporary hand on daily-wages who has worked for a particular number of seasons, can be declared seasonal. It is also submitted by him that there is no scheme by way of any tripartite agreement adopted by the sugar factories in Uttar Pradesh that a daily-wager who has worked in a season, would be declared seasonal workman. It is also urged that there is no Government Order issued in exercise of powers under Section 3 of the Act, entitling or requiring a daily-wager to be considered as seasonal, who has worked during a whole season, or successive seasons. It is urged also that the Labour Court did not consider the impact of the impugned award declaring the workmen seasonal, which would entitle them to wages prescribed by the Wage Board, and its resultant financial impact upon the Employers. It is in the last submitted that the Labour Court should have exercised judicial restraint in the matter, and not awarded in the manner it has done, which encroaches upon executive functions.

29. In support of his contention, learned Senior Counsel has placed reliance upon the decision of the Constitution Bench of their Lordships of the Supreme Court in **Secretary, State of Karnataka vs. Umadevi (3), (2006) 4 SCC 1 : 2006 SCC (L&S) 753.** He has, in particular, referred to paragraphs 34, 37, 38 and 40 of the report, where it has been held:

"34. In *A. Umarani v. Registrar, Coop. Societies* [(2004) 7 SCC 112 : 2004 SCC (L&S) 918] a three-Judge Bench made a survey of the authorities and held that when appointments were made in contravention of mandatory provisions of the Act and statutory rules framed thereunder and by ignoring essential qualifications, the appointments would be illegal and cannot be regularised by the State. The State could not invoke its power

under Article 162 of the Constitution to regularise such appointments. This Court also held that regularisation is not and cannot be a mode of recruitment by any State within the meaning of Article 12 of the Constitution or any body or authority governed by a statutory Act or the rules framed thereunder. Regularisation furthermore cannot give permanence to an employee whose services are ad hoc in nature. It was also held that the fact that some persons had been working for a long time would not mean that they had acquired a right for regularisation.

37. It is not necessary to multiply authorities on this aspect. It is only necessary to refer to one or two of the recent decisions in this context. In *State of U.P. v. Neeraj Awasthi* [(2006) 1 SCC 667 : 2006 SCC (L&S) 190] this Court after referring to a number of prior decisions held that there was no power in the State under Article 162 of the Constitution to make appointments and even if there was any such power, no appointment could be made in contravention of statutory rules. This Court also held that past alleged regularisation or appointment does not connote entitlement to further regularisation or appointment. It was further held that the High Court has no jurisdiction to frame a scheme by itself or direct the framing of a scheme for regularisation. This view was reiterated in *State of Karnataka v. KGSD Canteen Employees' Welfare Assn.* [(2006) 1 SCC 567 : 2006 SCC (L&S) 158 : JT (2006) 1 SC 84]

38. In *Union Public Service Commission v. Girish Jayanti Lal Vaghela* [(2006) 2 SCC 482 : 2006 SCC (L&S) 339 : (2006) 2 Scale 115] this Court answered the question, who was a government servant and stated: (SCC p. 490, para 12)

"12. Article 16 which finds place in Part III of the Constitution relating to fundamental rights provides that there shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State. The main object of Article 16 is to create a constitutional right to equality of opportunity and employment in public offices. The words "employment' or "appointment' cover not merely the initial appointment but also other attributes of service like promotion and age of superannuation, etc. The appointment to any post under the State can only be made after a proper advertisement has been made inviting applications from eligible candidates and holding of selection by a body of experts or a specially constituted committee whose members are fair and impartial through a written examination or interview or some other rational criteria for judging the inter se merit of candidates who have applied in response to the advertisement made. A regular appointment to a post under the State or Union cannot be made without issuing advertisement in the prescribed manner which may in some cases include inviting applications from the employment exchange where eligible candidates get their names registered. Any regular appointment made on a post under the State or Union without issuing advertisement inviting applications from eligible candidates and without holding a proper selection where all eligible candidates get a fair chance to compete would violate the guarantee enshrined under Article 16 of the Constitution (see *B.S. Minhas v. Indian Statistical Institute* [(1983) 4 SCC 582 : 1984 SCC (L&S) 26 : AIR 1984 SC 363])."

40. At this stage, it is relevant to notice two aspects. In *Kesavananda Bharati v. State of Kerala* [(1973) 4 SCC 225 : 1973 Supp SCR 1] this Court held that Article 14, and Article 16, which was described as a facet of Article 14, is part of

the basic structure of the Constitution. The position emerging from *Kesavananda Bharati* [(1973) 4 SCC 225 : 1973 Supp SCR 1] was summed up by Jagannadha Rao, J. speaking for a Bench of three Judges in *Indra Sawhney v. Union of India* [(2000) 1 SCC 168 : 2000 SCC (L&S) 1 : 1999 Supp (5) SCR 229] . That decision also reiterated how neither Parliament nor the legislature could transgress the basic feature of the Constitution, namely, the principle of equality enshrined in Article 14 of which Article 16(1) is a facet. This Court stated: (*Indra Sawhney case* [(2000) 1 SCC 168 : 2000 SCC (L&S) 1 : 1999 Supp (5) SCR 229], SCC p. 202, paras 64-65)

"64. The preamble to the Constitution of India emphasises the principle of equality as basic to our Constitution. In *Kesavananda Bharati v. State of Kerala* [(1973) 4 SCC 225 : 1973 Supp SCR 1] it was ruled that even constitutional amendments which offended the basic structure of the Constitution would be ultra vires the basic structure. Sikri, C.J. laid stress on the basic features enumerated in the preamble to the Constitution and said that there were other basic features too which could be gathered from the constitutional scheme (para 506-A of SCC). Equality was one of the basic features referred to in the preamble to our Constitution. Shelat and Grover, JJ. also referred to the basic rights referred to in the preamble. They specifically referred to equality (paras 520 and 535-A of SCC). Hegde & Shelat, JJ. also referred to the preamble (paras 648, 652). Ray, J. (as he then was) also did so (para 886). Jaganmohan Reddy, J. too referred to the preamble and the equality doctrine (para 1159). Khanna, J. accepted this position (para 1471). Mathew, J. referred to equality as a basic feature (para 1621). Dwivedi, J. (paras 1882, 1883) and Chandrachud, J. (as he then was) (see para 2086) accepted this position.

65. What we mean to say is that Parliament and the legislature in this country cannot transgress the basic feature of the Constitution, namely, the principle of equality enshrined in Article 14 of which Article 16(1) is a facet."

He has further placed reliance upon the decision of the Supreme Court in **Indian Drugs & Pharmaceuticals Ltd. vs. Workmen, (2007) 1 SCC 408 : (2007) 1 SCC (L&S) 270,** where it has been held thus:

"40. The courts must, therefore, exercise judicial restraint, and not encroach into the executive or legislative domain. Orders for creation of posts, appointment on these posts, regularisation, fixing pay scales, continuation in service, promotions, etc. are all executive or legislative functions, and it is highly improper for Judges to step into this sphere, except in a rare and exceptional case. The relevant case-law and philosophy of judicial restraint has been laid down by the Madras High Court in great detail in *Rama Muthuramalingam v. Dy. Supdt. of Police* [AIR 2005 Mad 1] and we fully agree with the views expressed therein.

47. We are of the opinion that if the court/tribunal directs that a daily-rated or ad hoc or casual employee should be continued in service till the date of superannuation, it is impliedly regularising such an employee, which cannot be done as held by this Court in Secy., *State of Karnataka v. Umadevi (3)* [(2006) 4 SCC 1 : 2006 SCC (L&S) 753] and other decisions of this Court.

48. In view of the above discussion, we are of the opinion that the orders of the Labour Court as well as the

High Court were wholly unjustified and cannot be sustained for the reasons already mentioned above. The appeal is, therefore, allowed. The impugned judgments of the High Court and the Labour Court are set aside and the reference made to the Labour Court is answered in the negative. There shall be no order as to costs."

Sri Nigam, learned Senior Advocate has buttressed his contention further by referring to a decision of the Supreme Court in Executive Engineer, **ZP Engg. Divn. v. Digambara Rao, (2004) 8 SCC 262 : 2004 SCC (L&S) 1097,** where it has been held:

"20. It may not be out of place to mention that completion of 240 days of continuous service in a year may not by itself be a ground for directing an order of regularisation. It is also not the case of the respondents that they were appointed in accordance with the extant rules. No direction for regularisation of their services, therefore, could be issued. (See *A. Umarani v. Registrar, Coop. Societies* [(2004) 7 SCC 112 : (2004) 6 Scale 350] and *Pankaj Gupta v. State of J&K* [(2004) 8 SCC 353 : (2004) 7 Scale 682] .) Submission of Mr Maruthi Rao to the effect that keeping in view the fact that the respondents are diploma-holders and they have crossed the age of 40 by now, this Court should not interfere with the impugned judgment is stated to be rejected."

Further reliance has been placed upon an authority of their Lordships of the Supreme Court in **BSNL v. Bhurumal, (2014) 7 SCC 177 : 2014 (140) FLR 901 : (2014) 2 SCC (L&S) 373,** where it has been held:

"34. The reasons for denying the relief of reinstatement in such cases are obvious. It is trite law that when the termination is found to be illegal because of non-payment of retrenchment compensation and notice pay as mandatorily required under Section 25-F of the Industrial Disputes Act, even after reinstatement, it is always open to the management to terminate the services of that employee by paying him the retrenchment compensation. Since such a workman was working on daily-wage basis and even after he is reinstated, he has no right to seek regularisation [see *State of Karnataka v. Umadevi (3)* [(2006) 4 SCC 1 : 2006 SCC (L&S) 753]]. Thus when he cannot claim regularisation and he has no right to continue even as a daily-wage worker, no useful purpose is going to be served in reinstating such a workman and he can be given monetary compensation by the Court itself inasmuch as if he is terminated again after reinstatement, he would receive monetary compensation only in the form of retrenchment compensation and notice pay. In such a situation, giving the relief of reinstatement, that too after a long gap, would not serve any purpose.

36. Applying the aforesaid principles, let us discuss the present case. We find that the respondent was working as a daily-wager. Moreover, the termination took place more than 11 years ago. No doubt, as per the respondent he had worked for 15 years. However, the fact remains that no direct evidence for working 15 years has been furnished by the respondent and most of his documents are relatable to two years i.e. 2001 and 2002. Therefore, this fact becomes relevant when it comes to giving the relief. Judicial notice can also be taken of the fact that the need of linemen in the Telephone Department has been drastically reduced after the advancement of technology. For all these reasons, we are of the view that ends of justice would be met by granting compensation in lieu of reinstatement.

37. In *Man Singh [BSNL v. Man Singh*, (2012) 1 SCC 558 : (2012) 1 SCC (L&S) 207] which was also a case of BSNL, this Court had granted compensation of Rs 2 lakhs to each of the workmen when they had worked for merely 240 days. Since the respondent herein worked for longer period, we are of the view that he should be paid a compensation of Rs 3 lakhs. This compensation should be paid within 2 months failing which the respondent shall also be entitled to interest at the rate of 12% per annum from the date of this judgment. The award of CGIT is modified to this extent. The appeal is disposed of in the above terms. The respondent shall also be entitled to the costs of Rs 15,000 (Rupees fifteen thousand only) in this appeal."

Sri Nigam has also reposed faith in the decision of the Supreme Court in **State of Uttaranchal vs. Prantiya Sinchai Avam Bandh Yogana Shramik Mahaparishad, (2007) 12 SCC 483 : (2008) 2 SCC (L&S) 504 : 2008 (116) FLR 987**. This decision and the others referred to hereinabove, are all in support of his submission that the Labour Court could not have ordered the workmen to be treated as seasonal hands, and thus confer upon them the status of a regular employee which is a matter for the Employers to consider on the basis of availability of posts, inter se, seniority of daily-wagers and other relevant factors. Sri Nigam has referred to paragraphs 9 and 11 of the report in **State of Uttaranchal vs. Prantiya Sinchai Avam Bandh Yogana Shramik Mahaparishad** (*supra*), where it is held thus:

"9. In *Umadevi (3) case* [(2006) 4 SCC 1 : 2006 SCC (L&S) 753] the issue relating to regularisation was examined at length. It was essentially held that there was no question of any automatic regularisation.

11. It is not in dispute that some of the workmen concerned have been regularised. Before any direction for regularisation can be given, the factual position has to be noted as to whether there was any sanctioned post. Apparently, in the present case, these factual details have not been discussed by either the Labour Court or the High Court. We, therefore, remit the matter to the Tribunal to consider the factual background and to decide the matter afresh in the light of what has been stated in *Umadevi (3) case* [(2006) 4 SCC 1 : 2006 SCC (L&S) 753] and *Hindustan Aeronautics case* [(2007) 6 SCC 207 : (2007) 2 SCC (L&S) 441]."

Again to the same end, Sri Nigam has invoked the authority of their Lordships of the Supreme Court in **Chandra Shekhar Azad Krishi Evam Prodyogiki Vishwavidyalaya vs. United Trades Congress, (2008) 2 SCC 552 : (2008) 1 SCC (L&S) 504.** In the said decision, it has been held by their Lordships:

"12. A feeble attempt, however, was made by the learned counsel appearing on behalf of Respondent 2 to state that he had been appointed against a permanent vacancy. In his written statement, he did not raise any such contention. It does not also appear from the records that any offer of appointment was given to him. It is inconceivable that an employee appointed on a regular basis would not be given an offer of appointment or shall not be placed on a scale of pay. We, therefore, have no hesitation in proceeding on the premise that Respondent 2 was appointed on daily wages. The Industrial Court in passing the impugned award proceeded on the premise that Respondent 2 had been working for

more than 240 days continuously from the date of his engagement. It is now trite that the same by itself does not confer any right upon a workman to be regularised in service. Working for more than 240 days in a year was relevant only for the purpose of application of Section 6-N of the U.P. Industrial Disputes Act, 1947 providing for conditions precedent to retrench the workmen. It does not speak of acquisition of a right by the workman to be regularised in service.

17. The Industrial Court, therefore, in our opinion, committed a serious error in passing the impugned award. The High Court unfortunately did not pose unto itself a right question. It referred to a large number of decisions. Although most of the decisions referred to by the High Court should have been applied for upholding the contention of the appellant herein, without any deliberation thereupon, the learned Judge has proceeded to determine the question posed before it on a wholly wrong premise. As noticed hereinbefore, it relied upon *Mahendra L. Jain* [(2005) 1 SCC 639 : 2005 SCC (L&S) 154] which in no manner assists Respondent 2.

18. What was necessary to be considered was the nature of work undertaken by the University. It undertakes projects. For the said purpose, it may have to employ a large number of persons. Their services had to be temporary in nature. Even for that the provisions of Articles 14 and 16 are required to be complied with. In the event, the constitutional and statutory requirements are not complied with, the contract of employment would be rendered illegal."

Sri Nigam has also referred to the guidance of their Lordships of the Supreme Court in **Deputy Executive Engineer vs. Kuberbhai Kanjibhai, (2019) 4 SCC 307 : 2019 (160) FLR 651,** where following the authority in BSNL v. Bhurumal (*supra*), it was held that the workman who had put in hardly a few years as a daily-wager, or a muster roll employee in the R & B Department of the State, had no right to claim regularization. It was held that one relevant factor further was that the dispute has been raised almost 15 years after his termination from service. The decision modified the award of the Labour Court ordering the workman to be reinstated without back-wages to one awarding a sum of Rs.1 lakh in lieu of relief of reinstatement, and also his claim to back-wages.

30. Learned Counsel for the workmen, Sri Lalloo Singh, on the other hand submits that the workmen have been working for the past 6 - 7 years, antedating their illegal termination of services pending this writ petition as Centrifugal Machine Men in each crushing season, but the Management by resort to unfair labour practice, treated them as daily-wage workers. He has contended that the workmen in order to support and establish their case of regular work done during the entire crushing seasons 1980-81 to 1986-87 sought to summon the Attendance Register, the Cashbook, the Ledger and Salary Payment Vouchers for this period from the Employers. He points out that these documents could not have been in the workmen's custody, or a copy of it with them, particularly, in the background of the Employers resorting to unfair labour practice. This prayer to summon these records was objected to by the Employers, for no good reason assigned. Learned Counsel has taken the Court through the evidence of the Employers' witnesses, which he says is conspicuous about a

determined effort by the Employers not to refer to any documentary record of the work done by the workmen - even that record which the Employers would have maintained showing them to be temporary hands on daily-wages. He submits that those documents would show that by the regularity of engagement during the period of each crushing season and the payment records, the workmen's case under the Standing Orders to a seasonal status would be indubitably established. Withholding of these documents and evasive answers during evidence by the Employers' witnesses about non-production and non-reference to the records, which the workmen sought to summon, furnish good reason to the Labour Court to draw those adverse inferences that it has done against the Employers.

31. Learned Counsel for the workmen has urged that the conclusions, therefore, drawn by the Labour Court are based on oral evidence led by parties, appreciated in the context of an adverse inference and presumption, besides the overall facts, circumstances and conduct of parties. Findings of the Labour Court are pure findings of fact based on appreciation of evidence. These findings in the submission of the learned Counsel for the workmen are in no way without jurisdiction, manifestly illegal, based on irrelevant evidence or ones recorded ignoring relevant evidence. The findings also, in his submission, cannot be impeached as perverse as they are plausible conclusions drawn from the evidence on record. He submits that it is not open to this Court to interfere with such findings of fact in the absence of any demonstrable manifest illegality, lack of jurisdiction or perversity of approach. These findings, in the submission of the learned Counsel for the workmen, cannot be disturbed by this Court in exercise of its jurisdiction under Article 226 of the Constitution. In support of his contention, learned Counsel for the workmen has relied upon a decision of the Supreme Court in **Harjinder Singh v. Punjab State Warehousing Corporation, AIR 2010 SC 1116** where the principle that this Court cannot interfere with pure findings of fact unless there is an error apparent vitiating the award of the Labour Court or some lack of jurisdiction or some manifest illegality, has been expounded. He has referred to paragraph 10 of the report in **Harjinder Singh** (*supra*), where it has been held:

"10. We have considered the respective submissions. In our opinion, the impugned order is liable to be set aside only on the ground that while interfering with the award of the Labour Court, the learned Single Judge did not keep in view the parameters laid down by this Court for exercise of jurisdiction by the High Court under Articles 226 and/or 227 of the Constitution -- *Syed Yakoob v. K.S. Radhakrishnan* [AIR 1964 SC 477] and *Surya Dev Rai v. Ram Chander Rai* [(2003) 6 SCC 675] .

In *Syed Yakoob case* [AIR 1964 SC 477] , this Court delineated the scope of the writ of certiorari in the following words: (AIR pp. 479-80, paras 7-8)

"7. The question about the limits of the jurisdiction of High Courts in issuing a writ of certiorari under Article 226 has been frequently considered by this Court and the true legal position in that behalf is no longer in doubt. A writ of certiorari can be issued for correcting errors of jurisdiction committed by inferior courts or tribunals: these are cases where orders are passed by inferior courts or

tribunals without jurisdiction, or is in excess of it, or as a result of failure to exercise jurisdiction. A writ can similarly be issued where in exercise of jurisdiction conferred on it, the court or tribunal acts illegally or improperly, as for instance, it decides a question without giving an opportunity to be heard to the party affected by the order, or where the procedure adopted in dealing with the dispute is opposed to principles of natural justice. There is, however, no doubt that the jurisdiction to issue a writ of certiorari is a supervisory jurisdiction and the court exercising it is not entitled to act as an appellate court. This limitation necessarily means that findings of fact reached by the inferior court or tribunal as result of the appreciation of evidence cannot be reopened or questioned in writ proceedings. An error of law which is apparent on the face of the record can be corrected by a writ, but not an error of fact, however grave it may appear to be. In regard to a finding of fact recorded by the tribunal, a writ of certiorari can be issued if it is shown that in recording the said finding, the tribunal had erroneously refused to admit admissible and material evidence, or had erroneously admitted inadmissible evidence which has influenced the impugned finding. Similarly, if a finding of fact is based on no evidence, that would be regarded as an error of law which can be corrected by a writ of certiorari. In dealing with this category of cases, however, we must always bear in mind that a finding of fact recorded by the tribunal cannot be challenged in proceedings for a writ of certiorari on the ground that the relevant and material evidence adduced before the tribunal was insufficient or inadequate to sustain the impugned finding. The adequacy or sufficiency of evidence led on a point and the inference of fact to be drawn from the said finding are within the exclusive jurisdiction of the tribunal, and the said points cannot be agitated before a writ court. It is within these limits that the jurisdiction conferred on the High Courts under Article 226 to issue a writ of certiorari can be legitimately exercised (vide *Hari Vishnu Kamath v. Ahmad Ishaque* [AIR 1955 SC 233 : (1955) 1 SCR 1104] , *Nagendra Nath Bora v. Commr. of Hills Division* [AIR 1958 SC 398 : 1958 SCR 1240] and *Kaushalya Devi v. Bachittar Singh* [AIR 1960 SC 1168]).

8. It is, of course, not easy to define or adequately describe what an error of law apparent on the face of the record means. What can be corrected by a writ has to be an error of law; but it must be such an error of law as can be regarded as one which is apparent on the face of the record. Where it is manifest or clear that the conclusion of law recorded by an inferior court or tribunal is based on an obvious misinterpretation of the relevant statutory provision, or sometimes in ignorance of it, or may be, even in disregard of it, or is expressly founded on reasons which are wrong in law, the said conclusion can be corrected by a writ of certiorari. In all these cases, the impugned conclusion should be so plainly inconsistent with the relevant statutory provision that no difficulty is experienced by the High Court in holding that the said error of law is apparent on the face of the record. It may also be that in some cases, the impugned error of law may not be obvious or patent on the face of the record as such and the court may need an argument to discover the said error; but there can be no doubt that what can be corrected by a writ of certiorari is an error of law and the said error must, on the

whole, be of such a character as would satisfy the test that it is an error of law apparent on the face of the record. If a statutory provision is reasonably capable of two constructions and one construction has been adopted by the inferior court or tribunal, its conclusion may not necessarily or always be open to correction by a writ of certiorari. In our opinion, it is neither possible nor desirable to attempt either to define or to describe adequately all cases of errors which can be appropriately described as errors of law apparent on the face of the record. Whether or not an impugned error is an error of law and an error of law which is apparent on the face of the record, must always depend upon the facts and circumstances of each case and upon the nature and scope of the legal provision which is alleged to have been misconstrued or contravened."

32. Learned Counsel for the workmen, Sri Lalloo Singh has further argued that the Labour Court has not committed any error of law or jurisdiction in passing the award which is based on the Standing Orders. Learned Counsel in support of his contention has placed reliance upon the decision of the Supreme Court in **Bihar SRTC v. State of Bihar, AIR 1970 SC 1217 : (1970) 1 SCC 490.** He has also placed reliance upon the decision of a Division Bench of this Court in **Swadeshi Cotton Mills Co. Ltd. vs. Labour Court (II), 1979 All LJ 532 : (1979) 38 FLR 470.** Further reliance has been placed by the learned Counsel for the workmen upon the decision of a learned Single Judge of this Court in **Basti Sugar Mills Company Ltd. vs. Prem Chand, (1999) 81 FLR 312.** In support of this proposition, learned Counsel for the workmen has again relied on the principles laid down by their Lordships in **Harjinder Singh** (*supra*). Support is also sought to be drawn by the learned Counsel for the workmen in aid of his contention now under consideration from the guidance of their Lordships of the Supreme Court in **Devinder Singh vs. Municipal Council, Sanaur, (2011) 6 SCC 584 : AIR 2011 SC 2532.**

33. Learned Counsel for the workmen has pointed out in answer to the assertion on behalf of the Employers that their Unit at Munderwa, Basti, besides others, have been closed down in the year 1999 that the said fact, though not incorrect, does not mention a supervening event that would countervail the effect of closure upon the parties' rights. He submits that in consequence of a letter no. P.C./SCC/ Pipari - Munderwa/ 855, dated 09.10.2017 written by the Managing Director, U.P. State Sugar Corporation Limited, Lucknow to the Government of U.P., the Principal Secretary to the Government in the Department of Industries has issued a memo no.1684/46-2-17-40/ 17, dated 11th January, 2018 conveying the decision of the Government to revive the closed Sugar Unit at Munderwa, Basti. Learned Counsel for the workmen, therefore, submits that the plea of closure urged for the first time before this Court, based on an event post award made by the Labour Court, would have to be considered in the changed perspective of revival of the closed unit of the Employers. A copy of the order dated 11.01.2018 issued by the Principal Secretary, Government of U.P. addressed to the Managing Director, U.P. State Sugar Corporation Limited, Lucknow is on record as Annexure SA-1 to the supplementary affidavit, dated 25th January, 2019, filed by the Employers in

compliance with an order of this Court, dated 10.01.2019.

34. This Court has thoughtfully considered the very elaborate submissions advanced on behalf of both parties.

35. Under the Standing Orders, there are different categories of workmen contemplated under Clause B-1 (1) to (6). It would be profitable to refer to the definition under Clause B of the Standing Orders of three categories of these workmen, who are relevant for the purpose of adjudication of the controversy here, to wit, seasonal, temporary and probationer. A seasonal workman and the manner in which he acquires that status is defined under Clause B-1(2) of the Standing Orders:

"B. **Classification of workmen**

1. Workmen shall be classed as:

(1) x x

(2) A "Seasonal Workman" is one who is engaged only for the crushing season and has completed his probationary period, if any."

36. A temporary workman and a probationer are defined under Clause B. 1 (3) and (4) thus:

"(3) A "Temporary Workman" is one who is engaged for meeting a temporary or casual requirement.

(4) A "Probationer" is one who is provisionally employed for a period specified by the management at the time of employment to fill a permanent/seasonal vacancy or a new post of permanent/seasonal nature & who may be confirmed at the completion of that period if his services are found satisfactory. The probationary period shall be six months in the case of permanent workmen & the one month or half of the season whichever is less in the case of seasonal workmen.

Provided that if no period of probation is specified by the management at the time of employment, the period of probation shall be deemed to be six months in the case of permanent workmen & one month or half of the season whichever is less, in the case of seasonal workmen.

Provided further that if after the expiry of probationary period, no orders are passed by the management the probationers shall be deemed to have been confirmed automatically."

37. The special conditions governing appointment of seasonal workman, or so to speak, acquisition of that status by a workman, are governed by Clause K (sub-Clauses 1, 2 and 3 of the Standing Orders). Sub-Clause 4 of Clause K is not relevant to the issue in hand. Sub-Clauses 1, 2 and 3 of Clause K of the Standing Orders are extracted below:

"1. A seasonal workman who has worked or, but for illness or any other unavoidable cause, would have worked under a factory during the whole of the second half or the last preceding season shall be employed by the factory in the current season and shall be entitled to get retaining allowance provided he joins the current season and works for at least one month. The payment of retaining allowance shall be made within two months of the date of commencement of the season.

Explanation-Unauthorised absence during the second of the last preceding season of a workman who has not been validly dismissed under these

Standing Orders and of a workman who has been re-employed by the management in the current season, shall be deemed to have been condoned by the management.

2. Every seasonal workman who worked during the last season shall be put on his old job whether he was in the "R" shift or in any of the usual shifts.

However, if the exigencies of work so require, the management may transfer a workman from one job to another or from one shift to another including 'R' shift so however, that the number of workmen so transferred does not exceed five percent of total number of the employees of the factory and that the wages and status of such workman is not affected in any way.

3. A seasonal workman, who is a retainer shall be liable to be called on duty at any time in the off season and if he does not report for duty within 10 days, he shall lose his retaining allowance for the period for which he was called for duty."

38. The first submission urged on behalf of the Employers is that the workmen have been declared seasonal by the impugned award who were otherwise casual hands and would fall in the category of temporary workmen under the Standing Orders. This limb of the submission has been set out in all its detail, in the earlier part of this judgment. The thrust of the submission is that temporary hands could not be declared seasonal by the Labour Court in the absence of existing posts in that category, and further that doing so is to grant promotion to the workmen which is essentially a managerial function.

39. To the understanding of this Court what the Employers wish to say is that by its award the Labour Court has thrust upon the Employers and introduced into their establishment casual hands as regular employees, may be seasonal. It is true that seasonal workmen under the Standing Orders would be part of the regular establishment who are called in to cater to work of a seasonal character with a right to continue during successive seasons. The impugned award would, thus, certainly have the effect of regularizing the workmen in the Employers' establishment, which the workmen claim to be their right under the Standing Orders. Reliance has been placed by Sri S.S. Nigam, learned Senior Advocate upon the decisions of their Lordships of the Supreme Court in Secretary, **State of Karnataka vs. *Umadevi (3)*** (*supra*), **Indian Drugs & Pharmaceuticals Ltd.** (*supra*), **Executive Engineer, ZP Engg. Divn. v. Digambara Rao** (*supra*), **State of Uttaranchal vs. Prantiya Sinchai Avam Bandh Yogana Shramik Mahaparishad** (*supra*), **Chandra Shekhar Azad Krishi Evam Prodyogiki Vishwavidyalaya** (*supra*) and **Deputy Executive Engineer vs. Kuberbhai Kanjibhai** (*supra*), in support of his contention that in view of these consistent authorities, it is not open to the Courts to order regularization of a daily-wager or a temporary hand, not part of the regular establishment as that is the function of the Employers. Also, these authorities hold that regularization to a post under the State or the Union, cannot be done without following rules regarding recruitment involving advertisement, inviting applications from the Employment Exchange and other eligible candidates, and then a selection through the prescribed mode of test, interview etc. Any other course would violate the guarantee to all citizens of equality of opportunity in matters of employment under the State, enshrined in Article 16 of the Constitution.

The decision of their Lordships in **Indian Drugs & Pharmaceuticals Ltd.** (*supra*) has been much emphasized by Sri Nigam on this point to submit that the Courts must exercise judicial restraint and not transgress into the executive or legislative domain, as held there. He has laid much emphasis on the principle exposited in the aforesaid authority which says that "Orders for creation of posts, appointment on these posts, regularisation, fixing pay scales, continuation in service, promotions, etc. are all executive or legislative functions, and it is highly improper for Judges to step into this sphere, except in a rare and exceptional case."

40. It would be well to remember that the decision in **Secretary, State of Karnataka vs. *Umadevi (3)*** (*supra*), which appears to have been followed by their Lordships in **Indian Drugs & Pharmaceuticals Ltd.** (*supra*) and **State of Uttaranchal vs. Prantiya Sinchai Avam Bandh Yogana Shramik Mahaparishad** (*supra*), as also in **Chandra Shekhar Azad Krishi Evam Prodyogiki Vishwavidyalaya** (*supra*), lays down a principle which in its application to labour and industrial disputes determined by the Labour Court or the Industrial Tribunal, has been differentiated from service disputes, that are suited before the High Court under Article 226 of the Constitution, or before their Lordships of the Supreme Court under Article 32.

41. This distinction has been drawn by their Lordships of the Supreme Court in a later decision in **Maharashtra SRTC v. Casteribe Rajya Parivahan Karmchari Sanghatana, (2009) 8 SCC 556 : (2009) 2 SCC (L&S) 513.** In the said decision, their Lordships while considering the power of the Labour Court under the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971, held that the power of the Industrial and Labour Courts to take affirmative action under Section 30(1)(b) of the said Act, in case of unfair labour practice and to order regularization/ permanency, are not affected by the decision of the Constitution Bench in **Secretary, State of Karnataka vs. *Umadevi (3)*** (*supra*). Explaining this distinction, their Lordships in **Maharashtra SRTC v. Casteribe Rajya Parivahan Karmchari Sanghatana** (*supra*) have held:

"33. The provisions of the MRTU and PULP Act and the powers of the Industrial and Labour Courts provided therein were not at all under consideration in *Umadevi (3)* [(2006) 4 SCC 1 : 2006 SCC (L&S) 753] . As a matter of fact, the issue like the present one pertaining to unfair labour practice was not at all referred to, considered or decided in *Umadevi (3)* [(2006) 4 SCC 1 : 2006 SCC (L&S) 753] . *Unfair labour practice* on the part of the employer in engaging employees as badlis, casuals or temporaries and to continue them as such for years with the object of depriving them of the status and privileges of permanent employees as provided in Item 6 of Schedule IV and the power of the Industrial and Labour Courts under Section 30 of the Act did not fall for adjudication or consideration before the Constitution Bench.

34. It is true that *Dharwad Distt. PWD Literate Daily Wages Employees' Assn.* [(1990) 2 SCC 396 : 1990 SCC (L&S) 274 : (1990) 12 ATC 902] arising out of industrial adjudication has been

considered in *Umadevi (3)* [(2006) 4 SCC 1 : 2006 SCC (L&S) 753] and that decision has been held to be not laying down the correct law but a careful and complete reading of the decision in *Umadevi (3)* [(2006) 4 SCC 1 : 2006 SCC (L&S) 753] leaves no manner of doubt that what this Court was concerned in *Umadevi (3)* [(2006) 4 SCC 1 : 2006 SCC (L&S) 753] was the exercise of power by the High Courts under Article 226 and this Court under Article 32 of the Constitution of India in the matters of public employment where the employees have been engaged as contractual, temporary or casual workers not based on proper selection as recognised by the rules or procedure and yet orders of their regularisation and conferring them status of permanency have been passed.

35. *Umadevi (3)* [(2006) 4 SCC 1 : 2006 SCC (L&S) 753] is an authoritative pronouncement for the proposition that the Supreme Court (Article 32) and the High Courts (Article 226) should not issue directions of absorption, regularisation or permanent continuance of temporary, contractual, casual, daily wage or ad hoc employees unless the recruitment itself was made regularly in terms of the constitutional scheme.

36. *Umadevi (3)* [(2006) 4 SCC 1 : 2006 SCC (L&S) 753] does not denude the Industrial and Labour Courts of their statutory power under Section 30 read with Section 32 of the MRTU and PULP Act to order permanency of the workers who have been victims of unfair labour practice on the part of the employer under Item 6 of Schedule IV where the posts on which they have been working exist. *Umadevi (3)* [(2006) 4 SCC 1 : 2006 SCC (L&S) 753] cannot be held to have overridden the powers of the Industrial and Labour Courts in passing appropriate order under Section 30 of the MRTU and PULP Act, once unfair labour practice on the part of the employer under Item 6 of Schedule IV is established."

42. In the part of their Lordships' decision in **Maharashtra SRTC v. Casteribe Rajya Parivahan Karmchari Sanghatana** (*supra*), that follows the above adumbrated principles, the decisions of the Supreme Court in **Indian Drugs & Pharmaceuticals Ltd.** (*supra*), **Mahatma Phule Agricultural University vs. Nasik Zilla Sheth Kamgar Union, (2001) 7 SCC 346** and **State of Maharashtra vs. R.S. Bhonde, (2005) 6 SCC 751** and **Aravali Golf Club vs. Chander Hass, (2008) 1 SCC 683** have been considered and followed to hold that it is a trite principle that Courts cannot direct creation of posts which is an executive function, and further that permanency cannot be granted by Courts to an employee, where no post is in existence. Creation of permanent posts and appointment to them has been acknowledged to be an executive function. Thus, there appears to be no quarrel with the proposition that even a Labour Court cannot direct creation of a permanent post in an Employers' establishment, State or private. But, the Labour Court certainly would have power to direct regularization or confer regular status where the relevant Labour Act or Rules, either provide for that right, or under the said Act or Rules it is a case of unfair labour practice, which the Labour Court or Industrial Tribunal is empowered to undo.

43. The present case is not one where the Labour Court has directed creation of any permanent post or ordered the workmen to be appointed on a permanent

basis, or conferred upon them permanency. All that the Labour Court has done is to direct that the workmen have to be treated as seasonal and not temporary hands. It is in this sense that the Labour Court has regularized the workmen. To invoke this power, the Labour Court has relied upon the Standing Orders, that have been framed by the State Government in exercise of powers under Clause (b) of Section 3 of the Act. The Standing Orders certainly have statutory force. Under Clause B-1 (2), a seasonal workman has been defined as one who is engaged only for the crushing season and has completed his probationary period, if any. The definition of a probationer indicates the probationary period, whether specified or unspecified, to be one month or half of the season, whichever is less, in the case of a seasonal workman. This stipulation is carried in Clause B-1(4) of the Standing Orders, read with its first proviso. The second proviso indicates that upon expiry of the probationary period where no orders are made either way, confirming or discharging a probationer, the probationer shall be deemed to be confirmed automatically.

44. The Labour Court on the evidence led before it and the adverse inferences it has drawn due to non-production of records by the Employers despite an application by the workmen in that behalf, could possibly have held that the workmen have worked with the Employers for the whole of the crushing seasons 1980-81 to 1986-87, and completed the probationary period, entitling them to the status of seasonal workmen. But, that specific finding has not been recorded. In the absence of a finding to the effect that the workmen have worked for the crushing seasons 1980-81 to 1986-87, in accordance with their case, and have completed their probationary period envisaged under Clause B-1(4) of the Standing Orders - at least a finding that all the workmen or one or more of them have been engaged for a certain crushing season and completed his/ their probationary period - the Labour Court could not have granted seasonal status to the workmen under the Standing Orders. In the absence of that finding, the impugned award is rendered manifestly illegal.

45. Since the essential finding entitling the Labour Court to pass the impugned award has not been recorded, this Court looking to the long lapse of time that parties have been litigating, with a very heavy heart, is constrained to remand the matter to the Labour Court with a direction to decide the matter afresh recording necessary findings, amongst others, on the basis of which the claimed status of the workmen as seasonal hands can alone be determined under Clause B-1(4) of the Standing Orders. This Court says that it is constrained to remand the matter for the lack of that one essential finding because it is not open to this Court, in the exercise of its jurisdiction under Article 226 of the Constitution to record that finding, which is essentially one of fact, and still more, one that has to be recorded on the basis of appreciation of facts and evidence on record.

46. It is made open to both parties to lead such further evidence, particularly, documentary in support of their respective cases as may be advised. The Labour Court shall consider all evidence before it, including any further evidence, if led, as directed hereby, before making a fresh award. It is also made clear that all

submissions advanced before this Court would remain open to the parties to urge before the Labour Court, except the one relating to lack of jurisdiction with the Labour Court to pronounce upon the workmen's case that they are seasonal workmen, and not temporary. It is also clarified that the possibility of one inference that the Labour Court could have drawn from the evidence in favour of the workmen mentioned hereinabove, shall in no way be construed as an expression of opinion on this issue. The Labour Court shall be absolutely free to draw its own conclusions on the issue, whether the workmen on the evidence on record are entitled to the status of seasonal workmen under the Standing Orders.

47. So far as Writ - C No.20684 of 2001 is concerned, the genesis of proceedings and the award there set out hereinbefore shows that it is founded on the foot of a claim by the workmen that their services were illegally terminated pending decision of Adjudication Case no.103 of 1987, in violation of Section 6-F of the Act. A perusal of the impugned award passed in this case, whereby termination of services of the workmen pending Adjudication Case no.103 of 1987 has been declared illegal and the workmen ordered to the reinstated with back-wages, is an award that proceeds on the edifice of findings and the award made in Adjudication Case no.103 of 1987, that holds the workmen to be seasonal. This award holds the workmen's services to have been terminated in violation of Clause L of the Standing Orders which require 15 days notice to be given by the Employers to the workmen who are seasonal. The findings have proceeded on the premise that the workmen are seasonal, and that premise is in turn founded on the award made the same day as the impugned award, declaring the workmen to be seasonal. Since the award passed in Adjudication Case no.103 of 1987 has been quashed by this Court with a remand of the matter to the Labour Court to record findings afresh, the impugned award is also required to be quashed with a direction to the Labour Court to determine this case afresh, which it will do bearing in mind its findings and conclusions recorded in Adjudication Case no.103 of 1987. It goes without saying that the Labour Court will hear and decide together upon this remand Misc. Case no.404 of 1987 and Misc. Case no.90 of 1991 together with Adjudication Case no.103 of 1987, all of which would be decided within a period of four months of receipt of this order by the Presiding Officer, Labour Court, U.P., Gorakhpur or its successor Court, if re-constituted.

48. In Writ - C No.4976 of 2001 upon issue of notice to the Employers and the Union on behalf of the twenty-five workmen, both sides put in their pleadings. The Union acting on behalf of the workmen filed their written statement dated 13.05.1987 whereas the Employers filed their written statement dated 05.07.1987. The Employers filed a rejoinder statement dated 22.08.1987 whereas a rejoinder statement was filed by the Union, on behalf of the workmen, dated 22.09.1987.

49. The case of the workmen before the Labour Court was that all the twenty-five workmen had been in regular engagement of the Employers as seasonal hands on the Boilers for the past 6 - 7 years. They were working regularly during each successive season. It was further pleaded that the twenty-five workmen

shown in the schedule appended to the order of reference, were illegally shown in their papers by the Employers as temporary hands, engaged on daily-wages. The aforesaid character of the workmen's engagement was shown by the Employers through manipulation of their record. It was further pleaded that the workmen had their attendance marked in the Attendance Register, but salary was paid to them through vouchers, whereon endorsements were made arbitrarily. It was the workmen' further case that in accordance with their entitlement as seasonal hands, they had to be paid salary and other benefits as determined by the Wage Board, of which they were unlawfully deprived by the Employers, again by a manipulation of their record. It was specifically also pleaded that the Employers establishment has four Boilers, that have three shifts of hands to work them. Taking into account the number of men required at a time and their relief for the next shift, a total of 63 men were required to work the Boilers. The Employers had 35 - 40 men shown as seasonal hands. The other vacancies are filled in by the workmen who have in reality a seasonal engagement, but are shown as temporary hands, retained on daily-wages. The further case urged was that the work of a labourer assigned to the Boiler was regular, but seasonal in nature, and that the act of the Employers in retaining the workmen showing them to be temporary hands was clearly indicative of an unfair labour practice.

50. It was also averred in the workmen's pleading before the Labour Court that they were paid salary worked out on the basis of Rs.7.50 per day, and the Employers doing a manipulation of record by showing part of the salary paid to them expended towards other outgoings, the workmen's attendance is short counted. The workmen claimed declaration of their status as seasonal workmen with effect from the crushing season 1985-86, along with consequential benefits.

51. The Employers disputed the workmen's case and urged that no cause of action arose to them to seek this reference, and that they made no prior demand. It was pleaded that the workmen were not members of the Union and no resolution was passed so as to give rise to a valid industrial dispute at the behest of the Union, acting for their member-workmen. The Employers pleaded in paragraph 3 of the written statement that the workmen were not at all on the rolls of the Corporation at the time of its takeover on 28.01.1984. They were temporary hands with the erstwhile Employer. It must be remarked here that this plea was raised in the context of the U.P. State Sugar Corporation Limited being acquired by the State of U.P. under the provisions of the Uttar Pradesh Sugar Undertakings (Acquisition) Act, 1971 with effect from 28.10.1984.

52. It was further pleaded by the Employers that the workmen never worked against any vacancy. They hold no lien on any post. There are breaks in their service. It was also pleaded that their strength of unskilled hands is full and that the Union have raised this industrial dispute on baseless grounds. It was also pleaded that before the Conciliation Officer, the Union were seeking promotion for these workmen from temporary hands to seasonal workmen. Promotion was asserted to be an exclusive right of the Management, with a further plea that casual employees can have no claim to promotion. It is also pleaded that the

workmen were asking for a renewal of their contracts as they were not on the rolls of the Employers when the Union filed conciliation proceedings. It was urged that the question of declaring these workmen seasonal does not arise, and further that the reference had become infructuous.

53. So far as the second issue referred was concerned, it was pleaded to be bad for its vagueness. It was also asserted that unless the strength of the Boiler House is determined, the second issue could not be decided. It was also pleaded that the strength of the Boiler Station in Shifts-A & B during that crushing season is full. It was then pleaded that the Labour Court would have to create a post, judge the suitability and standardize the muster of the Employers so far as the Boiler Section was concerned, if reliefs were to be granted to the workmen. This, the Employers pleaded was beyond the scope of reference. The Employers have asked the reference to be answered in their favour and the workmen's claim rejected.

54. Before the Labour Court, the Union filed an application saying that the Membership Register of the Union does not bear anyone's signatures, there is no cash receipt shown and the cashbook has not been produced. It was also urged in the application that there are entries in the Membership Register from January, 1987 to March, 1987, but not afterwards. It was urged through this application that the documents relied upon in this regard on behalf of the workmen by the Union, ought not to be accepted. The workmen made an application bearing paper no.16D with a prayer that the Attendance Register for the seasonal Boiler Hands from 1984-85 till date be summoned by the Court. A further application bearing paper no. 17D was made on behalf of the workmen that the Unit of the Employers may be inspected as much truth would be revealed before the matter was heard. In answer to this application, a reply paper no.18D was filed on behalf of the Employers. It was said that the work of Boiler Hands that the workmen were discharging is also done by other workmen. It was said in paragraph 11 of this reply that it was admitted to the Employers that these workmen were in their employment. Through an application bearing paper no. 23D, the Employers filed a document annexed as Annexure A, which shows new workmen hired during the period 1984 - 90.

55. In the oral evidence led on behalf of the Employers, an Assistant Engineer, D.R. Sharma was examined as EW-1. He deposed to the effect that there were four Boilers and that on each of these, one man was deputed at the top while two were detailed on the foot of it. According to him, an aggregate of four men were required on the top of all the Boilers combined and eight at the bottom. Thus, in three shifts, twelve men on the top and twenty-four at the foot of the four Boilers were required, making for a total of 36, and further that some of these are half shifts, which do not require a reliever. He then said that a total of 42 men are functioning who are permanent. It was testified that in special circumstances, temporary hands are engaged, some of whom are detailed to Boiler Room duties. He, however, said in his evidence that he could not say whether the twenty-five workmen here were detailed by the Time Office to the Boiler Room or not. This fact can be verified by the Time Office, and that he was not in a position to answer who were the men detailed to Boiler Room

Duty during different shifts, or what their names were.

56. Another witness on behalf of the Employers was one Ramakar Pandey, who testified as EW-2. He proved Ex.6, which is the salary payment chart. He said in his examination that March, 1987 was written incorrectly there instead of April, 1987. Ten out of the twenty-five workmen were on the rolls of the Employers. Crushing season 1986-87 commenced on 21.11.1986 and ended on 28.04.1987. All the workmen were daily-wagers, who did not work the entire season. He proved Ex. E1.

57. On behalf of the workmen, Secretary of the Workmen's Union, Ram Pyarey Pandey, WW-1 was examined. He said in his evidence that after reference of the present industrial dispute was made, the services of the workmen were terminated. Thereupon, an application under Section 6-F of the Act was made. He testified also to the effect that the Employers' establishment had four Boilers. He also said in his deposition that attendance of the workmen was marked on an Attendance Register, which the Employers did not produce despite the workmen's prayer to summon it. The payment sheet alone was produced which shows short attendance.

58. The second witness examined on behalf of the workmen was Ram Nau, WW-2. He stated on oath that he had been working for a particular number of years (the figure about the number of years is illegible in the certified copy of the award). The other workmen who are party to the case had worked with him. The requirement was of 70 men, whereas there were only 30-35 on the establishment. He would be asked to sign on a paper, and was not paid any retaining allowance. According to this witness, services of 18 men were terminated.

59. The third witness examined on behalf of the workmen is one Paltu. He testified as WW-3. He asserted that he was one of the twenty-five workmen who are parties to this industrial dispute. He repeated almost the same facts as the other workmen about the number of Boilers, the requirement about the strength of men, the marking of attendance on a Register and payment of wages where signatures of workmen were secured on a loose paper with a Revenue Stamp. He further asserted that when they were not given benefits and salary as per entitlement, this case was brought by the Union. It is further said that without service of any notice or payment of retrenchment compensation, his services were dispensed with.

60. The Labour Court on an evaluation of documentary and oral evidence led on behalf of parties, particularly, the Employers, and drawing an adverse inference against the Employers on account of non-production of the Attendance Register and other records required to be maintained under the Standing Orders, answered the reference in favour of the workmen and held that all the twenty-five workmen whose names are detailed in the Schedule appended to the order of reference are entitled to be declared seasonal hands in the Employers' establishment, entitled to receive salary as per determination of the Wage Board together with other benefits, with effect from the season 1985-86.

61. Sri S.S. Nigam, learned Senior Counsel on behalf of the Employers has

raised the same contentions in assail of the impugned order as those advanced in Writ - C No.4975 of 2001. Sri Lalloo Singh, learned Counsel on behalf of the workmen has defended the award, also on the similar submissions as those in the above mentioned writ petition. Learned Counsel for both sides have depended upon the same authorities as those relied in support of their various submissions in writ petition last mentioned.

62. This Court has considered the rival submissions and perused the impugned award. So far as the issue that in law it is not at all within the domain or jurisdiction of the Labour Court to have declared the workmen seasonal, the same is decided in favour of the workmen, and against the Employers for all the reasons detailed earlier in this judgment with reference to the same contention advanced in Writ - C No.4975 of 2001. It is held that it is competent for the Labour Court on evaluation of evidence before it to pronounce upon the status of the workmen as seasonal hands, if they be entitled to it under the Standing Orders.

63. In order to judge the entitlement of the workmen to be declared seasonal under the Standing Orders, the Labour Court was required to examine whether on the evidence before it, the workmen or one or more of them fulfill the requirements of being seasonal hand(s) as defined under Clause B-1(2) of the Standing Orders. It would also have to be determined whether the requirement of probation envisaged under Clause B-1(4) are fulfilled on the evidence before the Labour Court in case of each of the workmen, and if all of them were entitled to the status of seasonal employees. These Clauses of the Standing Orders have been referred to about the same issue in this judgment while deciding that issue in Writ - C No.4975 of 2001. As such, a mention of the requirements of those Standing Orders in greater detail here, or their reproduction is not needed.

64. The Labour Court on the evidence led before it and the adverse inferences it has drawn due to non-production of records by the Employers, despite an application by the workmen in that behalf, could possibly have held that the workmen have worked with the Employers for the whole of the crushing seasons 1985-86 and 1986-87, and completed the probationary period, entitling them to the status of seasonal workmen. But, that specific finding has not been recorded. In the absence of a finding to the effect that the workmen have worked for the crushing seasons 1985-86 to 1986-87 in accordance with their case, and have completed their probationary period envisaged under Clause B-1(4) of the Standing Orders - at least a finding that all the workmen or one or more of them have been engaged for a certain crushing season and completed his/ their probationary period - the Labour Court could not have granted seasonal status to the workmen under the Standing Orders. In the absence of that finding, the impugned award is rendered manifestly illegal.

65. So far as Writ - C No.20683 of 2001 is concerned, the genesis of proceedings and the award there set out hereinbefore shows that it is founded on the foot of a claim by the workmen that their services were illegally terminated pending decision of Adjudication Case no.118 of 1987, in violation of Section 6-F of the Act. The Labour Court has awarded that the act of the Employers in

terminating the services of the workmen is illegal and improper, and that by way of relief the workmen were entitled to be reinstated to the same post, on which they were working along with all consequential benefits. This relief has been granted to the workmen by the Labour Court on ground of violation of the provisions of Section 6-E(1) and (2) of the Act, inasmuch as, the Labour Court has found that services of the workmen have been terminated during the pendency of the industrial dispute before it, without Employers seeking its permission under the proviso to Section 6-E(2)(b). A reading of the provisions of Section 6-E and F of the Act shows that prima facie the Labour Court is right in holding the termination to be bad in consequence of violation of Section 6-E. However, even if the award were to be upheld or modified, much would depend about the relief to be granted to the workmen on the decision of the issue whether the workmen are entitled to be declared seasonal or they are ultimately held to be temporary hands. The said issue is to be determined after remand, by the Labour Court afresh, in view of the judgment and order of date passed in Writ - C No.4976 of 2001. It would, therefore, be appropriate that this matter may come up after the Labour Court makes its award, in compliance with the order of remand passed in Writ - C No.4976 of 2001.

66. Writ - C No.20683 of 2001 shall be listed after the Labour Court makes its award afresh in Adjudication Case no.118 of 1987.

67. In the result, Writ - C No.4975 of 2001 is **allowed in part** and the impugned award dated 11.08.1999 passed by the Presiding Officer, Labour Court, U.P., Gorakhpur, in Adjudication Case no.103 of 1987 is hereby **quashed.** The said Adjudication Case shall stand restored to the file of the Presiding Officer, Labour Court, U.P., Gorakhpur, or whichever Labour Court is now competent to deal with this Adjudication Case, with a direction that the Labour Court concerned shall decide the Adjudication Case afresh within a period of four months of receipt of this order by the Presiding Officer, Labour Court, U.P., Gorakhpur, or its successor Court, if reconstituted. In making its fresh award, the Labour Court shall bear in mind what has been held by this Court in this judgment in so far as it relates to Writ - C No.4975 of 2001.

68. Writ - C No.20684 of 2001 is **allowed in part** and the impugned award dated 13.08.1999 passed in Misc. Case no.404 of 1987 and Misc. Case no.90 of 1991 (relating to Adjudication Case no.103 of 1987) is hereby **quashed** with a remand of the matter to the Presiding Officer, Labour Court, U.P., Gorakhpur or its successor Court, if reconstituted to hear and decide Misc. Case no.404 of 1987 and Misc. Case no.90 of 1991, together with Adjudication Case no.103 of 1987, which it shall do bearing in mind its findings and conclusions recorded in Adjudication Case no.103 of 1987 within the same period of time as directed in Writ - C No.4975 of 2001.

69. Writ - C No.4976 of 2001 is **allowed in part** and the impugned award dated 11.08.1999 passed in Adjudication Case no.118 of 1987 passed by the Presiding Officer, Labour Court, U.P., Gorakhpur, is hereby quashed. The said Adjudication Case shall stand restored to the file of the Presiding Officer, Labour Court, U.P., Gorakhpur, or whichever Labour Court is now competent to deal

with this Adjudication Case, with a direction that the Labour Court concerned shall decide the Adjudication Case afresh within a period of four months of receipt of this order by the Presiding Officer, Labour Court, U.P., Gorakhpur, or its successor Court, if reconstituted. In making its fresh award, the Labour Court shall bear in mind what has been held by this Court in this judgment in so far as it relates to Writ - C No.4975 of 2001.

70. Writ - C No.20683 of 2001 shall be listed before the appropriate Bench after the decision of Adjudication Case no.118 of 1987 afresh, in terms of the judgment and order passed today in Writ - C No.4976 of 2001.

71. There shall be no order as to costs in any of writ petitions decided today.

(2020)02ILR A224

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 03.01.2020

BEFORE
THE HON'BLE J.J. MUNIR, J.

Writ C No. 6562 of 2002

M/S Gangeshwar Ltd. ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Bharati Sapru, Sri Diptiman Singh, Sri S.D. Singh

Counsel for the Respondents:
C.S.C., Sri Suman Sirohi, Sumati Rani Gupta

Labour Court's impugned order-based on evidence on record-no illegality to invite interference under Article 226 of the Constitution-impugned order reinstated the workman and other admissible benefits-held-cannot be reinstated after 21 years as a seasonal hand-a lump-sum of Rs. 5 Lakhs within two months be paid-order modified to the extent. W.P. partly allowed.

Cases cited:

1. Bhogpur Coop. Sugar Mills Ltd. vs. Harmesh Kumar, (2006) 13 SCC 28

2. Ganga Kisan Sahkari Chini Mills Ltd. vs. Jai Veer Singh, (2007) 7 SCC 748.

3. M/s 7 Triveni Engineering & Industries Ltd. vs. State Of U.P. And Others, Writ – C No. - 19918 of 2009, decided on 07.01.2010

4. Batala Coop. Sugar Mills Ltd. v. Sowaran Singh, (2005) 8 SCC 481

5. Rohtas Sugar Ltd vs. Mazdoor Seva Sangh, AIR 1960 SC 671

6. Jaswant Sugar Mills Ltd. vs. Badri Prasad, AIR 1967 SC 513 : (1961) 1 LLJ 649

7. Managing Director, Chalthan Vibhag Sahakari Khand Udyog vs. Govt. Labour Officer, (1981) 2 SCC 147.

(Delivered by Hon'ble J.J. Munir, J.)

1. The pith and substance of the controversy, that has given rise to this Writ Petition, centers around two questions, to wit, (1) Whether in a reference made to the Labour Court regarding the validity of termination of services of the respondent-workman, could the Labour Court pronounce upon his status as a temporary or seasonal workman, in the absence of a specific reference to that effect?, (2) Whether the respondent-workman is seasonal or temporary within the meaning of Clause B. 1(2) or (3) of the Standing Orders Covering the Condition of Employment of Workmen in Vacuum Pan Sugar Factories in U.P.?

2. The facts giving rise to this Writ Petition are that the petitioners are a sugar mill, owned by a company incorporated under the Indian Companies Act, 1956, known as M/s. Gangeshwar Limited, Deoband, Saharanpur. The said company has its registered office at Deoband, District Saharanpur. It is the petitioner's case that the company has been rechristened as "Triveni Engineering and Industries Limited, Deoband, Saharanpur'. The petitioners are engaged in the manufacture of crystal sugar through the vacuum pan process. It is the petitioner's case that the nature of the industry is seasonal. Business commences in the month of November and ends in April, invariably. Looking to the nature of the petitioner's business, engagement of employees in the petitioner's sugar mill is of varied terms and tenure. Some workmen are retained as temporary hands, others as seasonal ones, and some on a permanent basis. This variation of the terms and tenure of employment depends on the nature of the job that a particular workman discharges in the sugar factory. It is the petitioner's case that they are a seasonal industry as already said, and that conditions of services of their workman are governed by "Standing Orders Covering the Condition of Employment of Workmen in Vacuum Pan Sugar Factories in U.P.' (for short, the Standing Orders) issued under Section 3(b) of the U.P. Industrial Disputes Act, 1947 (for short, the Act). Under the Standing Orders, workmen may be employed on various kinds of tenure, that are spelt out in Clause B-1 (1) to (6). These are:

"B. Classification of Workmen-
1. Workmen shall be classed as-
(1) Permanent,
(2) Seasonal,
(3)Temporary,
(4) Probationers,
(5) Apprentices, and
(6) Substitutes."

3. It is the petitioner's further case that varied nature of work assigned to the above referred categories of workmen, is done as provided in the Standing Orders. It is stated by the petitioner for a fact that the raw material, on which the petitioner's industry runs, is sugarcane, and, therefore, the business of a sugar mill is entirely dependent on sugarcane production and its availability. The petitioner has also pleaded that availability of sugarcane fluctuates during different years, and in proportion to that, the requirement of hands to run the petitioner's sugar mill. It has been averred categorically in paragraph 9 of the Writ Petition that during years that there is excess production of sugarcane, the sugar mill per necessity requires a stronger work force in order to cope with increased business. A *fortiori* in years during which the production of sugarcane goes down, or the supply is otherwise short, the requirement of services of workmen also dwindles.

4. The cause of action leading to this petition appears to have arisen with Punjab Singh son of Dharmpal Singh, respondent no.3 to this petition, alleging that he was retained by the petitioners as a Cane Weighment Clerk during the entire crushing seasons 1994-95, 1995-96, 1996-97 and 1997-98. He regularly discharged his duties as such, at the various sugarcane procurement centres during all these seasons. It was claimed by the third respondent that during the crushing season 1998-99 also, he was retained on the post of a Cane Weighment Clerk, but on 06.01.1999 his services were dispensed

with without prior notice. In short, he asserted his status to be a seasonal employee with the petitioners, and a cause of action arising in his favour on account of illegal termination of his services without notice as required by law. An industrial dispute was, accordingly, raised under Section 4-K of the Act between the petitioner-employers and respondent no.3, their workman, through a reference dated 09.09.1999 made by the Deputy Labour Commissioner, Saharanpur Region in the following terms (translated into English from Hindi vernacular):

"Whether the act of the employers in terminating the services of their workman, Sri Punjab Singh son of Dharmpal Singh, Cane Weighment Clerk, w.e.f. 06.01.1999, is lawful and proper? If no, what relief the concerned workman is entitled to?"

5. On the basis of the said reference, Adjudication Case no.323 of 1999 was registered before the Labour Commissioner, U.P., Dehradun, the said Labour Court at the relevant time being the jurisdictional Labour Court for the district of Saharanpur, before reorganization of the State of Uttar Pradesh vide Act no.29 of 2000. Notice on the aforesaid case was issued to the employer and the workman. The respondent-workman filed his written statement on 24.01.2000 setting up a case that he was a seasonal Weighment Clerk, and that his services have been illegally terminated during the crushing season 1998-99, w.e.f. 06.01.1999. The petitioners filed their written statement dated 20.12.1999 taking a case that the respondent-workman had never been engaged in the regular establishment of the petitioners in any of the specified classifications of employees mentioned in the Standing Orders, and that the industrial dispute has been raised with an ulterior motive to seek employment by exerting pressure upon the petitioner-employers to absorb the workman in their service. It has been specifically averred in paragraph no.7 of the written statement filed by the petitioners that since the workman had never remained in their employment, the question of terminating his services does not arise. In substance, thus, the employers disowned the factum of the third respondent being ever employed in their establishment. The respondent-workman and the petitioner-employers, both filed their rejoinder statements dated 24.01.2000 and 25.05.2000, respectively.

6. The workman as part of his evidence filed thirteen documents through a list numbered as 7-B(II). In addition, the workman entered the witness box and testified in support of his case before the Labour Court as WW-1. The Employers on the other hand examined two witnesses in support of their case, to wit, Randeep Singh, Cane Supervisor and another Ravindra Singh, *Mukhya Samaypal*. It is recorded for a fact by the Labour Court that no documentary evidence was filed on behalf of the employers.

7. The Labour Court upon appreciation of the evidence on record returned a finding that the workman was employed during more than one crushing season. He held, therefore, that the workman fulfilled the requirement of a seasonal workman, who had a right to be engaged during the following crushing seasons and to receive emoluments therefor, until his services were determined in accordance with the Standing Orders. This Court proposes to

scrutinize a little later the manner in which the Labour Court has considered the evidence in order to arrive at its conclusions, within the limited parameters of this Court's jurisdiction under Article 226 of the Constitution. On the basis of the findings hereinbefore referred to, the Labour Court proceeded to pass an award that the workman was unlawfully denied work w.e.f. 06.01.1999. It was further awarded that the workman be reinstated during the current crushing season, and be given other admissible benefits, to which he was entitled. It was still further awarded that for the denial to retain during the previous crushing seasons, the workman be paid compensation in the sum of Rs.5000/-. Cost of Rs.1000/- was also ordered in favour of the workman, and against the employers.

8. Assailing the aforesaid award, dated 31.10.2000 (published on 29.09.2001) made in Adjudication Case no.323/1999, the present writ petition has been filed.

9. The employer has assailed the award on grounds, amongst others, that no finding has been returned in terms of Clause 2K of the Standing Orders, where the various categories of workmen have been classified.

10. Dilating on the submissions, learned counsel for the petitioner, Sri Diptiman Singh has urged that the reference order did not proceed on the assumption that the workman was seasonal. According to the learned counsel, therefore, it was imperative for the Labour Court to return a finding in accordance with Clause 2K of the Standing Orders, based on relevant evidence to the effect that the workman was retained on a seasonal tenure. He points out that the said finding returned by the Labour Court is sketchy in its terms and not based on relevant evidence postulated under the Standing Orders. The conclusion, therefore, that the workman was retained on a seasonal basis is vitiated. In further elucidation of that submission, it is urged by Sri Diptiman Singh that no finding has been recorded by the Labour Court regarding the specific number of days during which the workman has worked, or is there any finding that he worked during the second half of the preceding crushing season. It is urged with much emphasis that in the absence of a clear finding that the workman was retained during the second half of the preceding crushing season, it is absolutely unlawful to conclude that the third respondent was a seasonal workman.

11. Learned counsel for the petitioner has placed reliance upon a decision of the Supreme Court in **Bhogpur Coop. Sugar Mills Ltd. vs. Harmesh Kumar, (2006) 13 SCC 28** in support of his contention that where the order of reference was to the effect whether the termination of services of the workman was lawful, the Labour Court could not have gone into the question whether the employer was bound to re-engage the workman in all subsequent seasons. Learned counsel for the petitioner has drawn the attention of the Court to paragraphs 7 and 8 of the report in **Bhogpur Coop. Sugar Mills Ltd.** *(supra)*, where it is held:

"7. The Labour Court derived its jurisdiction from the terms in reference. It ought to have exercised its jurisdiction within the four corners thereof.

8. The principal question which was referred by the State Government was as to whether the termination of services of the respondent was justified. The Labour Court was, therefore, not required to go into the question as to whether the appellant was bound to take the services of the respondent in all subsequent seasons or not."

12. Sri Diptiman Singh has further placed reliance upon a decision of the Supreme Court in **Ganga Kisan Sahkari Chini Mills Ltd. vs. Jai Veer Singh, (2007) 7 SCC 748.** He submits that in the said decision that arose out of a reference whether the services of the workman were lawfully terminated, their Lordships did not approve of the Labour Court and the High Court going into the nature of appointment of the workman on this kind of a reference, holding him entitled to be absorbed on permanent basis and reinstating him with back-wages. He has invited the attention of the Court to paragraph 8 of the Report in **Ganga Kisan Sahkari Chini Mills Ltd.** *(supra)*, where it is held:

"8. In support of the appeals, learned counsel for the appellant submitted that approach of the High Court is factually and legally wrong. Even if it is accepted that the period is 120 days, the workmen were not entitled to any relief. They admittedly worked for 109 days. The nature of appointment was not the subject-matter of reference and, therefore, the conclusion of the Labour Court, as affirmed by the High Court that the workmen were entitled to be absorbed on permanent basis and reinstated with back wages, was clearly erroneous."

13. The learned counsel for the petitioner has further invited attention of the Court to an unreported decision of this Court in **M/s Triveni Engineering & Industries Ltd. vs. State Of U.P. And Others, Writ - C No. - 19918 of 2009, decided on 07.01.2010.** In the said case too, the services of a Weighment Clerk were terminated by the employer, Sugar Factory. A reference was made to the Labour Court as to whether the action of the employer terminating the services of their workman from the start of the crushing season 1998 - 99 was just and valid or not. The workman had come up with a case that he was engaged as a Weighment Clerk in the crushing season 1992 - 93 and worked as such for four crushing seasons, the last being 1997 - 98. The employer on the other hand came up with a case that the workman was never engaged by them. The Court proceeded much on basis of the requirement that the right to engagement of a seasonal workman or to assail his termination during a particular crushing season, depended upon an answer to the issue whether during the later half of the last crushing season he had been engaged, or he had worked for the complete period of time, envisaged under Clause 2K(1) of the Standing Orders. The Court proceeded to hold that no specific evidence was referred to by the Labour Court in order to record a finding that the workman did work in the later half of the crushing season 1997 - 98, and that he was engaged for the complete half period of the last season. It was also held that most of the documents produced by the workman relate to the period only 1996 - 97. No document for the relevant season 1997-98 were produced, except the authority letter, claimed to have been issued by the employer. The period for which the authorization is granted is not mentioned. It has also been held by this Court in **M/s Triveni Engineering & Industries Ltd.** *(supra)* that all other

documents relied upon by the workman relate to a period of time prior to the last crushing season. It was also, in particular, noticed by this Court that it was averred in para 10 of the written statement filed on behalf of the employer that the workman was not called at all for the crushing season 1998 - 99. This Court then also noticed that the industrial dispute was raised with a delay of about three and a half years that went against the workman. In these circumstances, the award of the Labour Court was quashed. It must be remarked here that this decision is not about the issue that in a reference about the legality of termination of a workman, the question whether he was a temporary hand or a seasonal employee, could not have been gone into by the Labour Court. Rather, it is related to the allied issues raised by the learned counsel for the petitioner that the Labour Court has wrongly answered the reference, inasmuch as, no finding in accordance with Clause 2K(1) of the Standing Orders has been recorded to the effect that the workman has rendered work for the required number of days, in the last crushing season. The decision has also turned much on the fact that there is no evidence considered by the Labour Court to hold that in the later half of the crushing season 1997 - 98, the workman was engaged for the complete half period. The absence of an appointment letter or engagement documents for the past four crushing seasons have also weighed with the Court. This decision may have some bearing on the question of the validity of the impugned judgment, in case it were to be held by this Court here that the Labour Court had jurisdiction on facts, that emerge in this case to determine the question that the workman held on seasonal terms. In case it were held that answering the question regarding nature of the workman's tenure was beyond the scope of reference, the question whether the reference was correctly answered on the basis of facts and evidence on record, would be superfluous. Thus, the effect of the decision of this Court in **M/s Triveni Engineering & Industries Ltd.** *(supra)* would be considered, a little later, depending upon the outcome of the answer to the principal question raised about the competence of the Labour Court to decide in the manner that it has done, within the terms of the reference made.

14. There are two other decisions relied upon by Sri Diptiman Singh in support of his case that he canvasses here. One is the decision of this Court in **M/s Gangeshwar Ltd., Deoband, Saharan-pur vs. State Of U.P. & Others, decided on 12.04.2017,** and the other is a decision of their Lordships of the Supreme Court in **Batala Coop. Sugar Mills Ltd. v. Sowaran Singh, (2005) 8 SCC 481.** A consideration of these decisions would also come about during the course of this judgment, once the principal issue, above noticed, is answered.

15. In answer to the proposition that the Labour Court could not have gone into the question of the workman being employed on a seasonal tenure contemplated under Clause B-1(2) of the Standing Orders, entitling him to the benefits of Clause 2-K, Ms. Sumati Rani Gupta has urged that in order to ascertain whether a workman held on a seasonal tenure, he has to demonstrate that he was employed in the last crushing season as per Clause 2-K of the Standing Orders, so far as the employers are concerned. She submits that the employers are a Sugar Factory in U.P., to whom the Standing

Orders apply. They are a seasonal industry, and, therefore, a seasonal workman has to bring his case within the four corners of Clause 2-K of the Standing Orders. He has nothing more to establish, in order to prove that he is a seasonal workman. She has further argued that payment of retaining allowance demonstrates that the workman had put in a minimum period of actual working days, which in the least has to be a period of two months. This submission of Ms. Gupta has been advanced in the context of a strong suggestion by the learned counsel for the petitioner that a seasonal workman has to prove that he is in receipt of a retaining allowance, and since there is no evidence about such receipt by the workman, he cannot be regarded as a seasonal employee. To entertain these kinds of submissions would appear to be a bit out of context here, where the question examined is whether the Labour Court could go into the question on the terms of the reference made that the workman held on seasonal terms. The thrust of Ms. Gupta's submission is that considering the reference order admittedly relates to the post of a Weighment Clerk held by the workman, it is inherent in the nature of that work that retention is as a seasonal workman. Learned Counsel for the workman has, therefore, termed as completely specious the basis of the employers' case that the Labour Court has travelled beyond the reference, inasmuch as, the work of a Weighment Clerk relates to a crushing season alone in a Sugar Factory.

16. It is argued by the learned counsel for the workman that as per Clause 2-K of the Standing Orders, a seasonal clerk has a right to be called for the next crushing season, if he has worked during the previous crushing season, which normally lasts 180 days. She submits that the period of 240 days would not be applicable to a seasonal workman, unless he is a retainer. She has further submitted that the concept of retaining allowance is not a concomitant of seasonal employment; there could be a seasonal workman with no right to receipt of a retaining allowance. As such, in the submission of the learned counsel for the workman, it is not imperative for the workman to establish that he is in receipt of retaining allowance before he can claim to be a seasonal workman. She has pointed out that the concept of retaining allowance dates back to disputes and conflicts that erupted between the employers and the workman during the years 1955 to 1960 when certain class of workmen were paid retaining allowance. The conflict resulted in the formation of a Wage Board and various categories of workmen were directed to raise their grievances about the right to receive a retaining allowance also, before the Wage Board. In this connection, she has referred to the decision of their Lordships of the Supreme Court in **Rohtas Sugar Ltd vs. Mazdoor Seva Sangh, AIR 1960 SC 671,** where it has been held:

"8. Nor is it clear from the materials on the record that unskilled workmen employed in a particular factory consider themselves attached to that factory. It appears to be clear that once the season is over the unskilled workmen cease to have any contractual relations with the employers and may rejoin on the commencement of the season or may not rejoin at their sweet will. As regards the observations of the Tribunal that "the seasonal employees are entitled to the benefit of provident fund, gratuity and also bonus which shows that in fact their

connection with the employers is not broken" the materials on the record are too scanty for arriving at any definite conclusion.

9. In consideration of the nature and extent of the materials on the record we are of opinion that for alleviating the distress of unskilled workmen in these sugar factories, with whom we are concerned in the present appeals a much better course will be to raise the wage structure with an eye to this fact that for a part of the off season at least when (sic) they remain unemployed than to pay a retaining allowance for the entire off season.

10. The appellant's counsel readily agrees that the fact that these unskilled workmen find employment in the sugar factories only for a few months and are in comparative difficulty in the matter of finding employment during the remaining months, should be taken into consideration in fixing their wages. We are informed that a Wage Board entrusted with the task of fixing the wages of the workmen concerned in these disputes is sitting at the present time. The interests of both the employers and labour will, we think be best served if instead of confirming the order made by the Appellate Tribunal as regards the retaining allowance the workmen will raise this question of raising their wages in view of the seasonal nature of their employment before this Wage Board. We have no doubt that such a claim will be sympathetically considered by the Wage Board, especially as the employers have through their counsel, recognized before us the reasonableness of their claim. The appellants have through their counsel also undertaken that they will not claim restitution of the amounts already paid as retaining allowance and further that they will continue to pay the retaining allowance for the next season-half at the commencement of the season and the other half midway during the season-till the wages have been fixed by the Wage Board. Accordingly we allow the appeals and set aside the order passed by the Labour Appellate Tribunal of India, Dhanbad, as regards retaining allowance to unskilled workmen and also its order as regards payment of halting allowance and travelling allowance and wages to workmen attending proceedings of necessity of the Industrial Tribunal. But as has been mentioned earlier the appellants have undertaken not to seek restitution as regards the halting or retaining allowance already paid and further that they will continue to pay retaining allowance for the next season-half at the commencement of the season and the other half mid-way during the season-till the wages are fixed by the Wage Board."

17. Learned counsel for the workman has further urged that the nature of a workman's job whether it is permanent, seasonal or temporary, depends upon the nature of the work and the purpose of his engagement. This submission, the learned counsel for the workman has stressed looking to the nature of the work of a Weighment Clerk in a Sugar Factory, that is admittedly the workman's assignment. The submission is advanced in aid of the proposition that a Weighment Clerk in a Sugar Factory, as already said hereinbefore, can be nothing, but a seasonal workman. A *fortiori*, according to the learned counsel for the workman, there was nothing wrong about the Labour Court proceeding on basis that the nature of the workman's engagement was seasonal. In order to substantiate the distinction between a permanent, seasonal and a

temporary workman, learned counsel for the workman has placed reliance upon the decision of the Supreme Court in **Jaswant Sugar Mills Ltd. vs. Badri Prasad, AIR 1967 SC 513 : (1961) 1 LLJ 649.** The said appeal before their Lordships arose out of a reference to the Labour Court in terms "Whether the employers should be required to designate their fifteen workmen mentioned in the annexure as permanent workmen. If so, with what details?" In **Jaswant Sugar Mills Ltd.** *(supra)*, it was held thus:

"3. The main question for our consideration in the present appeal by the employer by special leave is the proper construction of the definition of a permanent workman. In deciding on the proper meaning to be attached to the words and phrases used in the definition it will be proper to consider the question in the background of the definition in the Standing Order of two other kinds of workmen, viz., Seasonal Workmen and Temporary Workmen. A Seasonal Workman is defined as one who is engaged for the crushing season only and/or may also be employed for the period necessary for cleaning and overhauling either before or after the season and is discharged after the work is finished. A Temporary Workman is defined as one who is engaged in the work of a temporary and casual nature or to fill in a temporary need of extra hands on permanent or temporary jobs.

4. Reading the three definitions together it is abundantly dear that while a seasonal workman is engaged in a job which lasts during the crushing season only, a temporary workman may be engaged either for work of a temporary or casual nature or work of a permanent nature; but a permanent workman is one who is engaged on a permanent nature of work only. The distinction between a permanent workman engaged on work of a permanent nature and a temporary workman engaged on work of a permanent nature is in the fact that a temporary workman is engaged to fill in a temporary need of extra hands of permanent jobs. In this background it becomes clear that the words engaged on a permanent nature of work throughout the year" were intended to mean "engaged on a permanent nature of work lasting throughout the year" and not "engaged throughout the year on a permanent nature of work." When a workman is engaged on a work of permanent nature which lasts throughout the year it is legitimate to expect that he would continue there permanently unless he has been engaged to fill in a temporary need. It will be unreasonable to think that the Standing Orders left a loop-hole for the employer to prevent a person engaged on a work of permanent nature which lasts throughout the year, from becoming permanent by the device of discharging him from time to time. By such a device it would be possible for the employer to prevent any workman from becoming permanent, even though the work on which he is engaged lasts throughout the year and is in its nature permanent. That could not have been the intention when the Standing Orders were framed. It stands much more to reason that in speaking of a workman being engaged on a permanent nature of work throughout the year, those who framed the Standing Orders proceeded on the assumption that if the work of a permanent nature lasts throughout the year a workman who has completed his probationary period, if any, will continue to be engaged in that work. We are, therefore, of opinion that the Appellate Tribunal was right in thinking

that to be a permanent workman within the definition it is not necessary that the workman should be engaged throughout the year. What is necessary is that the work on which he is engaged is of a permanent nature and lasts throughout the year."

18. At this stage, one submission put forward by Sri Diptiman Singh, learned counsel for the petitioner, to which some allusion has already been made hereinbefore, urged from the contrary perspective must be noticed. It is argued that payment of retaining allowance is a necessary incident of seasonal engagement. In the absence of proof of the fact that the workman was in receipt of retaining allowance, there can be no case of seasonal engagement. It is emphasized that there is no finding by the Labour Court that retaining allowance was paid to the workman. In this context, reliance has been placed by the learned counsel for the employers upon a decision of the Supreme Court in **Managing Director, Chalthan Vibhag Sahakari Khand Udyog vs. Govt. Labour Officer, (1981) 2 SCC 147.** Learned counsel for the petitioner has invited attention of the Court to paragraph 6 of the Report in **Managing Director, Chalthan Vibhag Sahakari Khand Udyog** *(supra)*:

"6. There can be no doubt that the retaining allowance paid to the workmen during the off-season falls within the substantive part of the definition of the expression "salary or wage". It undoubtedly is remuneration which would, if the terms of employment, express or implied, were fulfilled, be payable to any employee in respect of his employment. The retaining allowance is a remuneration on a lower scale which is paid to the workmen by the management during the off-season for their forced idleness. The payment of such allowance by the management to its workmen during the off-season when there is no work and when the factory is not working, is indicative of the fact that it wants to retain their services for the next crushing season. The very fact that retaining allowance is paid to the workmen clearly shows that their services are retained and, therefore, the jural relationship of employer and the employee continues. It is true that a workman may not return to work and may take up some other job or employment. In that event, he forfeits the right of payment of the retaining allowance. But when the workman returns to work when the next crushing season starts, the payment of retaining allowance during the off-season, partakes of the nature of basic wage on a diminished scale. The definition of the expression "salary or wage" given in Section 2(21) of the Act is wide enough to cover the payment of retaining allowance to the workmen. It is nothing but remuneration correlated to service and it would be a misnomer to call it an allowance. The retaining allowance does not fall within the purview of clause (i) of the exclusionary clause of Section 2(21), but comes within the substantive part of the definition of "salary or wage" in Section 2(21) of the Act. The retaining allowance cannot be construed to be any other allowance which the employee is, for the time being, entitled. The High Court was, therefore, justified in holding that the retaining allowance paid to the seasonal employees was a part of their "salary or wage" within the meaning of Section 2(21) of the Act and, therefore, must be taken into account for the purpose of calculation of bonus payable under the Payment of Bonus Act, 1965."

19. To determine what a seasonal workman connotes, a brief survey of the definition of a 'seasonal workman' and conditions governing employment of seasonal workmen under the Standing Orders, must be undertaken. Clause B.1.(2) of the Standing Orders defines a seasonal workman thus:

"B. **Classification of workmen**

1. Workmen shall be classed as:

(1) x x

(2) A "Seasonal Workman" is one who is engaged only for the crushing season and has completed his probationary period, if any."

20. Likewise, a temporary workman, and a probationer who are two other classes of workmen, of the total six hereinbefore detailed, are defined under Clause B. 1 (3) and (4) as under:

"(3) A "Temporary Workman" is one who is engaged for meeting a temporary or casual requirement.

(4) A "Probationer" is one who is provisionally employed for a period specified by the management at the time of employment to fill a permanent/seasonal vacancy or a new post of permanent/seasonal nature & who may be confirmed at the completion of that period if his services are found satisfactory. The probationary period shall be six months in the case of permanent workmen & the one month or half of the season whichever is less in the case of seasonal workmen.

Provided that if no period of probation is specified by the management at the time of employment, the period of probation shall be deemed to be six months in the case of permanent workmen & one month or half of the season whichever is less, in the case of seasonal workmen.

Provided further that if after the expiry of probationary period, no orders are passed by the management the probationers shall be deemed to have been confirmed automatically."

21. So far as the special condition governing employment of seasonal workman are concerned, these are governed by Clause K, 1, 2 and 3 of the Standing Orders. Sub clause 4 of Clause K is not relevant and is, therefore, not being referred to. Clause K. 1, 2 and 3 of the Standing Orders read thus:

"1. A seasonal workman who has worked or, but for illness or any other unavoidable cause, would have worked under a factory during the whole of the second half or the last preceding season shall be employed by the factory in the current season and shall be entitled to get retaining allowance provided he joins the current season and works for at least one month. The payment of retaining allowance shall be made within two months of the date of commencement of the season.

Explanation-Unauthorised absence during the second of the last preceding season of a workman who has not been validly dismissed under these Standing Orders and of a workman who has been re-employed by the management in the current season, shall be deemed to have been condoned by the management.

2. Every seasonal workman who worked during the last season shall be put on his old job whether he was in the "R" shift or in any of the usual shifts.

However, if the exigencies of work so require, the management may transfer a workman from one job to

another or from one shift to another including 'R' shift so however, that the number of workmen so transferred does not exceed five percent of total number of the employees of the factory and that the wages and status of such workman is not affected in any way.

3. A seasonal workman, who is a retainer shall be liable to be called on duty at any time in the off season and if he does not report for duty within 10 days, he shall lose his retaining allowance for the period for which he was called for duty."

22. So far as the termination of services of a workman is concerned, the same are governed by Clause L of the Standing Orders, whereas termination/dismissal on ground of misconduct is governed by Clause M.

23. This Court has considered the rival submissions advanced on behalf of both parties, vis-a-vis, the question whether in a reference relating to validity of termination of services of the respondent-workman, the Labour Court can pronounce upon his status as a temporary or seasonal hand, in the absence of those specific terms referred. The proposition that the Labour Court could not hold the workman to be a seasonal employee, draws support from the decision of their Lordships of the Supreme Court in **Bhogpur Coop. Sugar Mills Ltd.** *(supra)*. In the aforesaid decision, the question arose in the context of facts that the workman was engaged by the employers, a Sugar Mill at the beginning of the crushing season along with others. The workmen were recruited at the commencement of the season and retrenched at the end of it. The respondent, no doubt, was appointed as a seasonal workman as the facts of the case would show. It also figures from the facts there, that he was retained on daily-wage basis. The workman appears to have raised an industrial dispute against the termination of his services at the end of the crushing season, which apparently came to an end with end of the season. A reference was made in the following terms [extracted from the Report in **Bhogpur Coop. Sugar Mills Ltd.** *(supra)*]:

"Whether termination of services of Shri Harmesh Kumar workman is justified and in order? If not, to what relief/exact amount of compensation is he entitled?"

24. The Labour Court held that the workman had not been able to establish that he had worked for 240 days, but further held that the employers having not called the workman in the subsequent crushing season, whereas his juniors were invited to join, constituted a violation of Section 25-G of the Industrial Disputes Act. In accord with the finding, an award was made directing the employers to re-employ the workman from the season in which juniors to him were called, but the workman was not. It was also awarded that the workman shall be paid back-wages etc. with other allied and monetary benefits, that his juniors had received on joining duties when the workman was denied re-engagement.

25. The High Court, on a Writ Petition being filed, approved the award of the Labour Court, recording the following finding [extracted verbatim from the report *in re* **Bhogpur Coop. Sugar Mills Ltd.** *(supra)*]:

"We, however, find no merit in this argument for the reason that a positive

finding has been recorded by the Tribunal that persons junior to the workman had been retained and it is also admitted by the management that they had not offered any appointment to the respondent on account of pendency of the dispute in the court. We are of the opinion that had it been the case of the management that the exigencies of services did not warrant his re-employment, something could be said in its favour but this is not the case of the management. No offer was made to the workman on account of the pendency of the proceedings before the Labour Court."

26. It was in the context of the aforesaid facts that their Lordships held that both the High Court and the Labour Court fell in error in going into the question whether the employers were obliged to reinstate the workman in all subsequent seasons, and ordering them to do so with consequential benefits. It was also in that context that it was held that all that the Labour Court was required to see was whether the termination of services of the workman, that was subject matter of the reference, was lawful or not.

27. In the present case, the facts show that the workman's case is that he was retained as a Weighment Clerk during the crushing seasons 1994 - 95, 1995 - 96, 1997 - 98, and again during the crushing season 1998 - 99. It is the workman's specific case that during the crushing season 1998 - 99, which commenced in October, 1998, he was called back to work, but without cause or reason, his services were dispensed with on 06.01.1999. He has claimed to have worked during the crushing season 1998 - 99 from October, 1998 until 06.01.1999, which is a period of a little over two months. In the context of the aforesaid facts, there appears to be little doubt that the workman was engaged as a seasonal employee by the petitioner-employers, the post of Weighment Clerk in a Sugar Factory being essentially one associated with the crushing season.There is documentary evidence also, about the engagement of the workman during the four crushing seasons, led on the side of the workman whereas there is none, except bald oral evidence on behalf of the Employer in denial of the workman's rights. More about the proof of each side's case by the evidence led, would be said later. At this stage, suffice it to say that on the facts obtaining, the case of parties and the evidence on record, the Labour Court committed no error in proceeding on the basis that the petitioner was a seasonal hand. The decision in **Bhogpur Coop. Sugar Mills Ltd.** *(supra)* relied upon by the Employers is not at all attracted here. It was a cause of action based on the right to re-engagement after end of one season.

28. So far as the decision in **Ganga Kisan Sahkari Chini Mills Ltd.** *(Supra)* is concerned, the proposition there is still farther off. In **Ganga Kisan Sahkari Chini Mills** *(Supra)*, the case before their Lordships of the Supreme Court involved the validity of a decision where the Labour Court had awarded that the workman be absorbed on a permanent basis, together with back wages whereas the reference was in terms, whether the services of the workman were lawfully terminated. It was in that context that their Lordships held that the nature of appointment was not the subject matter of reference and, therefore, disapproved the decision of the Labour Court as affirmed by the High Court. The present case almost proceeds on facts that speak of a seasonal engagement going by the nature of duties of a Weighment Clerk

in a Sugar Mill. This case seen in the background of documentary evidence that establishes a case of engagement by the Employers, led on the workman's side with nothing in rebuttal offered by the Employer, clearly makes it to be one where the Labour Court did not commit any manifest error of law in proceeding on the assumption that the engagement was seasonal.

29. The contention advanced on behalf of the Employers by Sri Diptiman Singh to the effect that the absence of evidence and discussion by the Labour Court regarding payment of retaining allowance *ex facie* excludes a case of seasonal engagement, is not *prima facie* tenable. This is not to say that the contention does not require further evaluation, while answering the question about the status of the workman being a temporary or a seasonal hand. All that this Court may remark for the present is that the absence of evidence regarding payment of retaining allowance or a finding about it recorded by the Labour Court, does not essentially exclude a case of seasonal engagement that with other evidence about it on record, may preclude the Labour Court from proceeding on the basis that the engagement was seasonal. There is no such principle inferable from the decision of their Lordships in **Managing Director, Chalthan Vibhag Sahakari Khand Udyog** *(supra)* relied upon by the learned counsel for the petitioner.

30. To examine a little further the evidence offered by each side in respect of their respective cases, it is apparent from the impugned award that the workman filed licences issued in his favour for the crushing seasons 1995-96, 1996-97 and 1997-98 by the District Magistrate in accordance with Rule 87 of the U.P. Sugarcane (Regulation of Supply & Purchase) Rules 1954 read with Order 16(d) of the U.P. Sugarcane Supply and Purchase Order, 1954, authorizing him to act as a Weighment Clerk in a Sugar Mill. These licences bear signatures and seal of the occupier acting on behalf of the Employer (Sugar Mill). The occupier has attested the photograph of the workman. The signatures of the occupier were not identified by Randeep Singh, Cane Supervisor, a witness appearing for the Employer, but he has admitted the fact that during these crushing seasons, Sri S.K. Tanwar was the Vice President and the occupier (of the Sugar Mill).

31. The Labour Court has looked into the evidence of one Subhash Chandra led on behalf of the Employers in Adjudication Cases Nos.143 of 1999 and 72 of 2000, relating to the same Employer, but other workmen. In those Adjudication Cases, the witness appearing for the Sugar Mill has acknowledged the signatures of Sri S.K. Tanwar on the Letter of Authority appointing Sri Prabhat Gaud as the Authorized Representative to appear in those Adjudication Cases. The Labour Court has compared the signatures of the occupier on the three licenses for the three successive crushing seasons relied upon by the workman with those of the occupier on the Letters of Authority in Adjudication Cases Nos.143 of 1999 and 72 of 2000, that are admitted specimen of the occupier's signatures. The Labour Court has recorded on a comparison a positive finding that the signatures of the occupier, Sri Tanwar, that are admitted, and those on the licences issued to the workman for the three crushing seasons are similar. The Labour Court has also taken into

consideration for the three successive crushing seasons' application made by the workman to the Collector for the issue of Weighment Clerk Licence. Each application bears a photograph of the workman attested by the occupier of the Employer (Sugar Mill). There is also an inspection report noticed by the Labour Court relating to the month of March, 1997, during which the workman was reported to be on duty at the Purchase Centre of the Employers functioning as Weighment Clerk.

32. In the face of all this evidence led by the workman and a mid season termination of engagement during the crushing season 1998-99 on 6th January, which going by the commencement of the season in the month of October, 1998, would make for a period of little over two months, the approach of the Labour Court cannot be said to be manifestly illegal in accepting the workman's case of seasonal engagement. This is particularly so as the Labour Court has remarked that the Employers, except for the two witnesses whose oral evidence has been led on their behalf, did not bring on record any document to rebut the workman's case, such as the Attendance Register or the Pay Roll.

33. There is one feature about the case which renders the case of the Employer, howsoever finely put to assail the impugned award unbelievable. It is the unfairness of the Employers' stand. The Employer has throughout pleaded a case that the workman was never employed with them. The workman has brought on record sufficient evidence to show that the workman was indeed engaged by the Employer as a Weighment Clerk during the crushing seasons 1995-96, 1996-97 and 1997-98. The occupier's signatures on the Weighment Clerk's licence of the workman attesting his photograph, and also on the application made each year by the workman to the District Magistrate for the issue of that licence also attesting his photograph is no mean proof of the workman's engagement during those crushing seasons. The Employers after taking the stand that the workman had nothing to do with their establishment, were certainly obliged to lead documentary evidence to establish their case of non-association with the workman or to establish at least a case that the workman's engagement was not seasonal. It is further held that the workman is a seasonal hand within the meaning of Clause B. 1(2) or (3) of the Standing Orders, covering the conditions of employment of workman in Vacuum Pan Sugar Factories in U.P.

34. Now, this being the conclusion on the questions, it must be held that the impugned award passed by the Labour Court is based on a plausible view of the evidence on record and does not suffer from any such manifest illegality or patent error as to invite interference by this Court under Article 226 of the Constitution insofar as the Labour Court's conclusion and findings are concerned.

35. Turning to the question of relief that the Labour Court has granted, it has been ordered that the workman be reinstated in service from the current season (current at the time when the impugned award was made) and that he be given other admissible benefits. It has further been order that for deprivation of engagement during the past crushing seasons, a sum of Rs.5000/- be paid in compensation and Rs.1000/- in costs

towards litigation. The impugned award was made on 31.10.2000 and this petition was admitted to hearing on 14.02.2002, when the operation of the said award was ordered to remain stayed till further orders. The impugned award has remained inoperative ever-since. A perusal of the counter affidavit filed on behalf of the workman, dated 28.08.2002 shows that he was aged 39 years in the February of the year 2002. Reckoning the workman's age by the passage of time, he would be aged about 57 years. The workman has been out of employment since January, 1999, which reckons his period of disassociation with the work to which he has been ordered to be reinstated as 21 years. At this distance of time and the workman's age, it would not be feasible to order the Employers to reinstate him as a seasonal hand in their establishment. But, the termination of the workman's engagement being found to be unlawful and improper, ends of justice would be met by ordering the petitioner-Employers to pay the workman a lump sum of Rs.5 lakhs within two months of the date of this judgment. Any delayed payment of this money in lump sum, in lieu of reinstatement, will carry interest at Bank Rate from the expiry of two months of this judgment, till realization in accordance with law.

36. The writ petition is **partly allowed** and the impugned award of the Labour Court stands modified accordingly. There shall be no order as to costs.

(2020)02ILR A239

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.10.2019

BEFORE
THE HON'BLE RAMESH SINHA, J.

THE HON'BLE AJIT KUMAR, J.

Writ C No. 7159 of 2019

Uma Shankar Beriya ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Shashi Nandan, Sri Udayan Nandan, Sri Rakesh Kumar Mishra

Counsel for the Respondents:
C.S.C., Sri Pramod Kumar Singh, Sri Rakesh Pande

A. Civil Law-Uttar Pradesh Panchayat Raj (Removal of Pradhans, Up-Pradhans and Members) Enquiry Rules, 1997 – Rule 4 and 5 – Validity of second time Preliminary Enquiry – There is no provision of law whereunder District Magistrate is authorized to exercise discretion to hold enquiry for the second time in the face of fact that earlier preliminary enquiry report was pending consideration – Also there is no any provision whereby the District Magistrate has been authorized to appoint a committee to conduct enquiry – Second enquiry report, therefore, not being as contemplated under the enquiry rules but got ordered by the District Magistrate without any sanction/ request from the State, the order was void, and so the report would also be void and non est and deserves rejection. (Para 23 and 27)

B. Interpretation of Statute – When something is required under the Act or Rules framed therein to be done in a particular manner, then such thing should be done in that very manner only. (Para 15)

C. Constitution of India – Article 14 – Procedure – Testing before upholding any action – It is not the ultimate result which is of vital importance but procedure that has been adopted in achieving the end result is of equal importance – The procedural aspect of the matter acquires more significance while testing an ultimate action on a testing anvil of Article 14 of the Constitution in order to uphold such an action. (Para 18)

Writ Petition allowed. (E-1)

List of cases cited :-

1. State of Kerala v. Kerala Rare Earth and Minerals Ltd. (2016) 6 SCC 323

2. CIT v. Anjum M.H. Ghoswala (2002) 1 SCC 633

3. State of Andhra Pradesh v. Visvanadula Chetti Babu (2010) 15 SCC 103

4. Dipak Babaria v. State of Gujarat (2014) 3 SCC 502

5. NGEF Ltd. v. Chandra Developers Pvt. Ltd. & Others (2005) 8 SCC 219

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

1. Heard Sri Shashi Nandan, learned Senior Advocate assisted by Sri Udayan Nandan, learned counsel for the petitioner, Sri M.C. Chaturvedi, learned Additional Advocate General for the State and Sri Rakesh Pandey, learned Senior Advocate holding brief of Sri Pramod Kumar Singh, learned counsel for the intervener.

2. The petitioner before this Court is an elected Pramukh of Kshetra Panchayat, Haseran, district Kannauj. While discharging his duties as such, as many as eight members, namely, Sri Pushpendra Singh @ Firu Singh, Sri Yogendra Singh, Sri Firu Singh, Smt. Santosh, Smt. Soni, Sri Ranjit, Sri Ram Vilas and Sri Suresh Chandra of the Kshetra Panchayat concerned made same complaint to the Additional Chief Secretary of the Panchyati Raj Department, U.P. Lucknow on 2nd February, 2018 supported by their individual affidavits regarding financial irregularities and favoritism and nepotism in acceptance of a tender for the development work. Considering the said complaint, the Special Secretary, Government of U.P. Lucknow exercising power so vested in the State Government under the Uttar Pradesh Panchayat Raj (Removal of Pradhans, Up-Pradhans and Members) Enquiry Rules, 1997 (hereinafter referred to as rules), directed for preliminary enquiry by the State Government under Rule 4 of the said rules vide order dated 7th March, 2018. The District Magistrate, consequently, issued a direction on 17th March, 2018 appointing Additional District Magistrate (Finance and Revenue), Kannauj to hold enquiry and submit report within seven days so that report may be submitted to the State Government within 15 days as per Rules. The Additional District Magistrate (Finance and Revenue) Kannauj proceeded to hold preliminary enquiry and fixed 28th March, 2018 directing Block Development Officer to inform all the persons concerned who had made complaint to appear before him at 4:00 pm. Notices were separately issued also by the Additional District Magistrate to all the 8 complainants to appear before him at 4:00 pm in his office. There is document available on record dated 28th March, 2018, in which Sub Divisional Magistrate has intimated the Additional District Magistrate about due service of notice upon the complainant in the matter. As per schedule, enquiry officer held his enquiry on 28th March, 2018 and the complainants did appear and filed their statements.

3. From the perusal of the original records, it also transpires that on the date fixed before Additional District Magistrate as many as 16 members besides the complainant had also appeared and made their respective statements as well as filed notary affidavits in writing. It is after holding meeting as per schedule, the Additional District Magistrate concluded

preliminary enquiry and submitted a report to the District Magistrate on 7th April, 2018 recording findings to the effect that from the perusal of the documents and enquiry conducted and the scrutiny of complaints made by Pushpendra Singh and other complainants, he did not find any substantial evidence in support of complaints nor, the complainants were able to produce any substantial evidence in support of their complaints.

4. The operative portion of the report dated 7.4.2018 which is in devnagari script is reproduced hereunder:

"उपरोक्त सम्पूर्ण जांच एवं अभिलेखीय साक्ष्यों से स्पष्ट होता है कि श्री पुष्पेन्द्र सिंह आदि क्षेत्र पंचायत सदस्य आदि द्वारा की गयी शिकायती प्रार्थना पत्र में लगाये गये आरोपों के सम्बन्ध में शिकायतकर्तागण कोई ऐसे ठोस साक्ष्य/ तथ्य उपलब्ध नही करा पाये जिससे शिकायत का बल मिलता हो । जांच आख्या उपरोक्तनुसार सेवा में प्रेषित है ।"

5. It also transpires from the record that some complaint was made by Yogendra Singh and Pushpendra Singh and members of Kshetra Panchayat separately on 2nd April, 2018 in which they requested the District Magistrate that there was undue influence exercised by the petitioner upon the members of the Kshetra Panchayat and, therefore, affidavits were submitted in terrarum by the members and so the fresh enquiry should be conducted by joint team consisting of Rural Development Authority and Public Works Department to verify the facts.

6. It appears that District Magistrate, instead of forwarding report dated 7th April, 2018, proceeded to issue a fresh direction on 16.4.2018 to get the enquiry held afresh by a team consisting of three officials each of Public Works Department, P.M.G.S.Y, Kannauj and, Finance and Accounts Officer of Secondary Educational Department, Kannauj. However, on the same day the District Magistrate passed another order on 16th April, 2018 directing constitution of four member committee and this time it included an additional member of (District Rural Development Authority (DRDA) and Executive Engineer of P.M.G.S.Y, Kannauj. This four member Committee proceeded to hold enqiry and submitted a report on 6th July, 2018. The Additional District Magistrate taking into account the report of the four member committee further proceeded to prepare another report in the name of preliminary enquiry and submitted this report on 16th August, 2018 and it is this report that was forwarded by the District Magistrate to the Special Secretary U.P. Panchayati Raj Department, Lucknow.

7. The operative portion of the finding of preliminary enquiry report is also reproduced hereunder:

"अतः पूरे प्रकरण के अवलोकन में पाया गया है कि श्री पुष्पेन्द्र व फीरू सिंह को छोडकर अन्य श्रीमती सोनी, श्रीमती सन्तोष, श्री योगेन्द्र कुमार, श्री रंजीत, श्री रामविलास, तथा श्री सुरेशचन्द्र क्षेत्र पंचायत सदस्यों/ शिकायतकर्ताओ द्वारा प्रस्तुत शपथ पत्रों के खण्डन करते हुए यह कहा गया है कि उनके द्वारा आर0डी0 बनावाने तथा कार्य दिलवाने के बहाने उनसे कोरे स्टाम्प पर हस्ताक्षर श्री पुष्पेन्द्र सिंह क्षेत्र पंचायत सदस्य द्वारा कराये गये हैं, तथा उक्त शपथ पत्रों को ब्लाक प्रमुख श्री उमांशंकर बेरिया को हटाने के लिए उपयोग किया गया है, जिसका उन्होंने प्रार्थना पत्र, शपथ पत्र तथा बनयान अंकित कराकर खण्डन किया गया है । यह भी कहा गया है कि श्री उमाशंकर बेरिया द्वारा गये कार्य सन्तोषजनक है । गठित टीम द्वारा जांच के सम्बन्ध में भी क्षेत्र पंचायत सदस्यों व निर्माण समिति के अध्यक्ष द्वारा बयानों में कहा है कि उक्त चारो कार्यों के नमूना किसके सामने लिये गये तथा किस प्रयोगशाला से जांच करायी गयी है । पूर्व में उक्त कार्यो के नमूने लेकर चारों निर्माण कार्य में प्रयुक्त इण्टरलॉकिंग ईंटों का क्वालिटी कन्ट्रोलर प्रयोगशाला मैनपुरी द्वारा जांच कराकर ही भुगतान दिया गया है । उक्त चारों मार्गों की जांच ग्राम विकास विभाग के कार्यों हेतु गठित टी0ए0सी0 के द्वारा भी जांच की जा चुकी है । जबकि जांच टीम द्वारा अपनी आख्या में

उक्त कार्यों में प्रयुक्त निर्माण सामग्री अधोमानक पायी गयी है ।

जांच आख्या महोदय की सेवा में उचित कार्यवाही हेतु प्रेषित है ।"

8. The State Government issued a show cause notice on 23rd October, 2018 to the petitioner to submit his reply/explanation within 15 days, failing which appropriate action shall be taken taking recourse to the powers under the Act of 1961. The petitioner before submitting the reply demanded certain papers/documents which were not legible and were part of the compilation consisting of 213 pages, vide letter dated 3rd December, 2018 and made reminder on 29.12.2018, however, it is submitted that those letters of the petitioner remained unanswered and ultimately vide order dated 8th February, 2019 passed by respondent no. 1, final enquiry has been directed as per 1997 Enquiry Rules, but at the same time taking recourse to the proviso , the financial and administrative powers of the petitioner have also been seized. Hence this petition.

9. Assailing the order, learned counsel for the petitioner has raised three fold arguments:

(a). Once preliminary enquiry was conducted by the Additional District Magistrate pursuant to the order passed by the District Magistrate in compliance of the direction issued by the State Government under Rule 4 and enquiry report was submitted on 7.4.2018, it was not open for the Additional District Magistrate to have directed for enquiry afresh for the second time without prior sanction from the State Government;

(b). The District Magistrate did not himself hold 2nd preliminary enquiry and illegally appointed a sub- committee nor, do the rules contemplate for any such exercise of power by the District Magistrate; and

(c). The District Magistrate was not justified in withholding the report dated 7.4.2018 and further the State Government was not justified in not submitting legible copies of the documents which were required by the petitioner and upon which much reliance was placed by the State Government recording *prima facie* opinion regarding financial and other irregularities at the end of the petitioner to denude him immediately of the financial and administrative power under Section 16 of the Act, 1961.

10. Before we proceed to consider the arguments advanced by learned counsel for the petitioner we would like to put the record straight. At the time when petition was initially argued and we made a pointed querry to the learned Standing Counsel as to whether there was any such preliminary enquiry report dated 7.4.2018 was already available with District Magistrate, it was argued by learned Standing Counsel that no such report was available nor, any order was passed for holding enquiry prior to 16.4.2018, the order that was passed for holding enquiry by the Additional District Magistrate and the enquiry report that was submitted by Additional District Magistrate on 16th April, 2018, it was in compliance thereof.

11. In order to verify this above statement made by learned Standing Counsel we summoned the original records in sealed cover and yesterday original records were produced in sealed cover was opened and was taken into Court's custody and matter was placed today for final argument and today the record has been thoroughly perused by us.

12. In the initial narration of the facts in this order, we have stated how enquiry was directed by the State Government under the order dated 7th March, 2018 and Additional District Magistrate was directed by the District Magistrate vide order dated 17th March, 2018 to submit report within 7 days and thereafter Additional District Magistrate proceeded to issue notice to the complainants and held meeting with them on 20th March, 2018 and finally submitted a report on 7th April, 2018. This preliminary enquiry report dated 7th April, 2018 is very much available in the original record and, therefore, statement made by learned Standing Counsel on the earlier occasion that no such report was available, turns out to be false one.

13. Now, Shri M.C. Chaturvedi, learned Additional Advocate General while defending the State action, has very fairly admitted that earlier enquiry report dated 07.04.2018 is very much available in record and also that the District Magistrate vide his order dated 17.03.2018 had nominated Additional District Magistrate to conduct fact finding preliminary enquiry and he submitted the report.

14. However, he has argued that since final enquiry has been ordered in the matter, it should be permitted to be brought to its logical end and as there are serious charges of the financial irregularities and acceptance of tender which is vitiated for nepotism and bias, the Court may not interfere with the order denuding the petitioner from its financial and administrative power. He submits that where public money and its misuse by abuse of position is in issue, Court would be reluctant in allowing such person to retain such power pending final enquiry.

15. Before we proceed to examine this above argument raised by learned Additional Advocate General, we are reminded of a settled legal principle that when something is required under the Act or Rules framed therein to be done in a particular manner, then such thing should be done in that very manner only. We are resided of the judgment of the Apex Court **[(2016) 6 SCC 323 State of Kerala v. Kerala Rare Earth and Minerals Ltd.]** wherein the derptive *"Quando Aliquid Prohibetur Ex Directo, Prohibetur Et Per Obliquum"* was taken into account and the Court held that *it is well settled that if law requires a particular thing to be done in a particular manner, then, in order to be valid the act must be done in the prescribed manner only.* The Court relied upon another judgment in the case of **CIT v. Anjum M.H. Ghoswala (2002) 1 SCC 633**, wherein specially for the bench Hegde 'J' observed *"it is a normal rule of construction that when a statute vests certain power in an authority to be exercised in a particular manner then the said authority has to exercise it only in the manner provided therein...".*

16. In the matter of investigation the Apex Court in the case of **State of Andhra Pradesh v. Visvanadula Chetti Babu (2010) 15 SCC 103** has taken the same view. In this case the question under consideration was that the authority to investigate under the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Rules, 1995. Rule 7 of Rules provided for investigation by a police officer not below the rank of a Deputy Superintendent of Police. Vide para 4 the Apex Court held thus:

"We are, therefore, of the opinion that in view of the clear mandate

of the Rules, it was only a specified Deputy Superintendent of Police who could investigate an offence under the Act. An investigation done by any officer below that rank and not specified as per Rule 7 would not be entitled to investigate any such offence. In the present matter the investigation has been made by an officer of the rank of an Assistant Sub-Inspector of Police. This was not permissible. We endorse the judgment of the High Court in this respect."

17. And again in the case of **Dipak Babaria v. State of Gujarat (2014) 3 SCC 502,** vide para 61 has held thus:

"61. It is well settled that where the statute provides for a thing to be done in a particular manner, then it has to be done in that manner and in no other manner. This proposition of law laid down in Taylor Vs. Taylor (1875) 1 Ch D 426,431 was first adopted by the Judicial Committee in Nazir Ahmed Vs. King Emperor reported in AIR 1936 PC 253 and then followed by a bench of three Judges of this Court in Rao Shiv Bahadur Singh Vs. State of Vindhya Pradesh reported in AIR 1954 SC 322. This proposition was further explained in paragraph 8 of State of U.P. Vs. Singhara Singh by a bench of three Judges reported in AIR 1964 SC 358 in the following words:-

"8. The rule adopted in Taylor v. Taylor is well recognised and is founded on sound principle. Its result is that if a statute has conferred a power to do an act and has laid down the method in which that power has to be exercised, it necessarily prohibits the doing of the act in any other manner than that which has been prescribed. The principle behind the rule is that if this were not so, the statutory provision might as well not have been enacted...."

This proposition has been later on reiterated in Chandra Kishore Jha Vs. Mahavir Prasad reported in 1999 (8) SCC 266, Dhananjaya Reddy Vs. State of Karnataka reported in 2001 (4) SCC 9 and Gujarat Urja Vikas Nigam Limited vs. Essar Power Limited reported in 2008 (4) SCC 755.

18. Thus, it is not the ultimate result which is of vital importance but procedure that has been adopted in achieving the end result is of equal importance. The procedural aspect of the matter acquires more significance while testing an ultimate action on a testing anvil of Article 14 of the Constitution in order to uphold such an action.

19. In so far as the controversy in question is concerned, the source of power as has come to be exercised in the present case is the U.P. Kshettra Panchayats and Zila Panchayats (Removal of Pramukhs and Up-Pramukhs, Adhyakshas and Updhyakshas) Enquiry Rules, 1997, (In short Enquiry Rules). The procedure relating to the complaints has been prescribed for under Rule 3 of the Enquiry Rules whereas Rule 4 provides for the preliminary enquiry that the State Government may on receiving of the complaints, so order in order to get finding to the effect that *prima facie* case for formal enquiry is involved in the matter of complaint. Rule 5 provides for power to the State Government for holding a formal enquiry, if in the opinion of the State Government, it is imperative in view of the report submitted under Sub-Rule 2 of the Rule 4 and then Rule 6 lays down the procedure for the formal enquiry. For the purpose of the controversy involved in the

present case. Rules 4 and 5 are relevant and, therefore, are reproduced hereunder in their entirety:

*4. **Preliminary Enquiry--(1)** The State Government may, on the receipt of complaint referred to in Rule 3 or otherwise appoint an officer not below the rank of an Additional District Magistrate in the case of Pramukh or Up-Pramukh and District Magistrate in the case of an Adhyaksha or Upadhyaksha to conduct a preliminary enquiry with a view to finding out if there is a prima facie case for a formal enquiry in the matter.*

(2) The Officer appointed under sub-rule (1) shall conduct the preliminary enquiry as expeditiously as possible and submit his report to the State Government within a fortnight of his having been so appointed.

*5. **Enquiry Officer-** Where the State Government is of the opinion, on the basis of the report referred to in sub-rule (2) of Rule 4 that an enquiry should be held against a Pramukh or Up-Pramukha under Section 16 or gainst an Adhyaksha or Upadhyaksha under Section 29, it shall, by an order, appoint an officer to hold the enquiry, who shall not be below the rank of the District Magistrate in the case of an enquiry under Section 16, and not below the rank of a Commissioner in the case of an enquiry under Section 29.*

(Emphasis added)

20. From bare reading of Rule 4, it is clear that after complaint is received as per procedure prescribed under Rule 3 or even *suo motu*, the State Government can exercise power for holding preliminary enquiry into the conduct of Pramukhs or Up-Pramukhs, Adhyakshas or Upadhyakshas by appointing officer not below the rank of Additional District Magistrate and District Magistrate respectively. Sub-rule 2 provides for such enquiry officer conducting preliminary enquiry, to accomplish the task quite expeditiously and submit report within a fortnight of his appointment as enquiry officer.

21. Examining the case in hand in the light of provisions contained under Rule 4, we find that after complaints were received under the signatures of as many as 8 members, the State Government through its Secretary, vide order dated 17th March, 2018 directed the District Magistrate to hold preliminary enquiry. Vide letter dated 17th March, 2018, the District Magistrate authorized the Additional District Magistrate to hold enquiry and submit the fact finding report within 7 days, so that report may be submitted to the State Government within 15 days as per Enquiry Rules.

22. The records produced before us contain the documents to the effect that Additional District Magistrate proceeded to hold preliminary enquiry fixing dated 28th March, 2019 and directed the Sub Divisional Magistrate to inform all the complainants to appear before him at 4:00 pm. Sub Divisional Magistrate also intimated the Additional District Magistrate on 28th March, 2018 that the notices got duly served and so also records disclose that preliminary enquiry as ordered was held on 28th March, 2018 and complainants did appear and filed their statements. The Additional District Magistrate thereafter submitted report on 7th April, 2018 recording finding to the effect that from the perusal of the documents and enquiry conducted no substantial evidence was found in support of the complaints.

23. Thus, as far as procedure for holding preliminary enquriy as prescribed for under Rule 4 is concerned, it stood complied with and to that extent the task stood accomplished by 7th April, 2018 but records reveal that the District Magistrate instead of fowarding the report dated 7th April, 2018, directed the enquiry to be held afresh by a team consisting of 3 officials and then enlarged the team with four members on same day i.e. 16.4.2018. As far as this 2nd part of the procedure adopted by the District Magistrate vide order dated 16.4.2018 is concerned , we do not find any such provision of law whereunder District Magistrate is authorized to exercise discretion to hold enquiry for the second time in the face of fact that earlier preliminary enquiry report was pending consideration. We do find any provision whereby the District Magistrate has been authorized to appoint a committee to conduct enquiry. The Rule is worded like this *"officer not below the rank of Additional District Magistrate and officer shall himself authorized a person to hold enquiry by the District Magistrate or the Additional District Magistrate"* and so under the said Rule he is not authorized to sub-delegate the power by constituting a committee. Rule 4 can not in any manner be interpreted to hold that it contemplates the constitution of any such committee as has come to be formed in the present case and, therefore, we have no hesitation in holding that the order dated 16.4.2018 passed by the Additional District Magistrate appointing committee to hold enquiry was beyond scope of power vested with him under Rule 4 of the Enquiry Rules. The doctrine *delegatus non potest delegare* in the case of **NGEF Ltd. v. Chandra Developers Pvt. Ltd. & Others (2005) 8 SCC 219** has come to be discussed by the Apex Court and vide para 69 the Court has held thus:

"69. BIFR admittedly had the power to sell the assets of the Company but the High Court until a winding-up order is issued does not have the same. BIFR in its order dated 02.08.2002 might have made an observation to the effect that the Company may approach the High Court in case it intended to dispose of its property by private negotiation but the same would not mean that BIFR could delegate its power in favour of the High Court. BIFR being a statutory authority in absence of any provision empowering it to delegate its power in favour of any other authority had no jurisdiction to do so. 'Delegatus non potest delegare' is a well-known maxim which means unless expressly authorized a delegatee cannot sub-delegate its power. Moreover, the said observations of BIFR would only mean that the Company Court could exercise its power in accordance with law and not dehors it. If the Company Court had no jurisdiction to pass the impugned order, it could not derive any jurisdiction only because BIFR said so."

24. Coming to the 2nd aspect of the matter which is relating to Rule 5, we find that in the impugned order the Secretary while directing for formal enquriy has placed reliance only upon the report of preliminary enquiry dated 6th July, 2018 submitted by the committee and then consequential report dated 16th August, 2018 forwarded by the District Magistrate as his report to the Special Secretary U.P Panchayat Raj Department Lucknow.

25. We see that the records produced before us clearly reveal that report dated 7th April, 2018 was also available on record and yet the said report did not find any consideration in the order of Joint Secretary dated 18th February, 2019

impugned in the present writ petition. All that is referred to is the report of the District Magistrate dated 16.8.2018. The fact finding enquiry report of the committee constituted by the District Magistrate under the order dated 16.4.2018 and the contents as have come up in his re-commendatory report dated 16.8.2018 are the same. The District Magistrate, it is proved beyond doubt, virtually did not hold himself any enquiry, instead, submitted a report of the sub committee as his report incorporating the same in his re-commendatory enquiry report dated 16.8.2018.

26. Rule 5 of the enquiry rules provide for *'opinion of the Government'*. An opinion would naturally be formed upon the report submitted under Rule 4. So when two reports are submitted to the State Government and one was in compliance of the initial letter issued by the State Government as preliminary enquiry report which was to be submitted within three weeks, there is no justification as to why the Secretary would not refer to that report and would not consider the said report submitted well within time.

27. As the records reveal, the District Magistrate proceeded to hold an enquiry second time on the basis of some complaint made by certain members, but such enquiry would not come within the scope of his authority as prescribed for under Rule 4. Second enquiry report, therefore, not being as contemplated under the enquiry rules but got ordered by the District Magistrate without any sanction/ request from the State, the order was *void*, and so the report would also be *void and non est* and deserves rejection. The procedure which has been laid down under Rule 4 as we have discussed above in this judgment it is very clear that Additional District Magistrate and District Magistrate are the only officers or the officers of their rank who can hold enquiry.

28. Under the circumstances, the report which should have been relied upon by the Secretary and yet if he has passed the order for formal enquiry ignoring that report, earlier submitted by the competent authority within time as contemplated under Rule 4, such an opinion formed by the authority can only be termed to be biased one. The two reports were available and there are no justifiable reasons for not considering the first report while passing order impugned. Thus the order impugned directing for formal enquiry, therefore, deserves to be quashed and is accordingly hereby quashed.

29. The writ petition succeeds and is allowed in above terms with cost.

(2020)02ILR A247

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 21.01.2020

BEFORE

THE HON'BLE J.J. MUNIR, J.

Writ C No. 9616 of 1991

Executive Engineer, Electricity Distribution Division, Farrukhabad
...Petitioner
Versus
Presiding Officer, Kanpur & Anr.
...Respondents

Counsel for the Petitioner:
Sri B. Dayal, Sri A.K. Mehrotra, Sri P.N. Rai, Sri Sandeep Kumar Srivastava, Ms. Usha Kiran

Counsel for the Respondents:
C.S.C., Sri J.S. Audichya, Sri A.K. Gupta, Sri A.K. Misra, Sri H.D. Singh, Sri Indra Sen Singh Vatsa, Sri J.N. Mishra, Sri Pankaj Mishra, Sri Prakash Chandra Shakya, S.C., Sri U.K. Misra

A. Adjudication Case - Industrial Dispute between Workman and Employer - Benefit of the Workman - Claim for Designation as Routine Grade Clerk and grant of the pay scale - Labour Court passed Impugned award in favour of workman - Parole Evidence entirely based on the workman certificate only without any corroboration by evidence aliunde of the employer - Decision remaining ex parte and perverse.

Held, it is quite reflective while writing the impugned award the Labour Court has completely ignored from consideration which was raised as a plea before it on behalf of the Employers. This part of theLabour Court's finding is manifestly illegal inasmuch as the Employersbeing ex parte, they certainly had no avenue to lead evidence that theLabour Court closed for them; and that too, in error, in the consideredopinion of this Court. The workman and the petition are defended by his legal heirs and there is no issue about reinstatement. The workman, however, was reinstated in service pendingthis petition. While he was in service, he hadreceived emoluments as a Routine Grade Clerk by dint of the interimorder passed by this Court.The workman has rendered services to the employer, under whatever circumstances, and that fact is not in dispute.

In view of the said circumstances, notwithstanding the fact that the an impugned award cannot be sustained, there is no basis to order recovery from the workman's heirs or so to speak, from the estate of the workman in the hands of his heirs (**para 18 and 24**) In the result, this petition succeeds and is allowed.

Cases Cited:

1. Nedungadi Bank Ltd vs. K.P. Madhavankutty and others, 2002(2) 2 SCC 455

2. Secretary, the State of Karnataka vs. Umadevi (3), 2006 (4) SCC 1

3. A. Umarani vs. Registrar, Coop. Societies, 2004 (7) SCC 112

4. The State of U.P. vs. Neeraj Awasthi, 2006 (1) SCC 667

5. Union Public Service Commission vs. Girish Jayanti Lal Vaghela, 2006 (2) SCC 482

6. Kesavananda Bharti vs. the State of Kerala, 1973 (4) SCC 255

7. Indian Drugs & Pharmaceuticals Ltd. vs. Workmen, 2007 (1) SCC 408

8. BSNL vs. Bhurumal, 2014(7) SCC 177

(Delivered by Hon'ble J.J. Munir, J.)

1. This writ petition has been instituted by the Executive Engineer, U.P. State Electricity Board, Division-1, Farrukhabad and the U.P. State Electricity Board, Lucknow through its Chairman, challenging an award of the Presiding Officer, Labour Court, 2nd, Kanpur dated 23.08.1990 (published on 20.11.1990), made in Adjudication Case No. 56 of 1988 between the two petitioners and their workman, Data Ram, respondent no. 2, now represented by his heirs and legal representatives, respondent Nos. 2/1, 2/2, 2/3.

2. It is common ground between the parties that the U.P. State Electricity Board, Lucknow which was a body corporate during the relevant period of time has since been dissolved and reorganized by virtue of the U.P. Electricity Reforms Act, 1999. Now, the former U.P. State Electricity Board is replaced and renamed as the U.P. Power Corporation Limited and all its officers are now officers of the U.P. Power

Corporation Limited. Accordingly, on an impleadment application made on behalf of the U.P. Power Corporation, the description of the petitioners has been permitted to be made in the manner that petitioner no. 1 has been rearrayed as the Executive Engineer, U.P. Power Corporation Limited, Electricity Division, Farrukhabad and petitioner no. 2 as the U.P. Power Corporation Limited, Lucknow through its Chairman.

3. The two petitioners together are hereinafter referred to as "the Employers whereas respondent Nos. 2/1, 2/2 and 2/3 shall be called 'the workman'. It appears that for the benefit of the workman the Workers' Union, to wit, the Hydro Electric Employees Union, 7 Sarojni Nagar, Lucknow raised an industrial dispute which in due course was referred by the State Government under Section 4K of the U.P. Industrial Disputes Act (for short, 'the Act') to the adjudication of Presiding Officer, Labour Court, 2nd, U.P., Kanpur vide a reference order dated 13.09.1988 in the following terms (translated into English from Hindi vernacular) :

"Whether the Employers are obliged to designate their workman Dataram s/o Sri Jalim Prasad as Routine Grade Clerk with effect from 01.01.1988? If yes, with what particulars?"

4. On the basis of the aforesaid reference, Adjudication Case No. 56 of 1988 was registered on the file of the Labour Court, 2nd, U.P. Kanpur on 01.10.1988 and summonses were issued to the Employers and the workman requiring them to enter appearance and file their written statements, together with documents on 08.11.1988. Both parties appeared before the Labour Court on 28.11.1988 to which the proceedings were adjourned on 08.11.1988, as on the latter date the Presiding Officer was on leave. A written statement dated 03.12.1988 was filed on behalf of the Employers whereas the workman filed his written statement, which is a document dated 15.12.1988. The workman filed a rejoinder statement dated 01.02.1989.

5. The case of the workman pleaded in his written statement, in substance, is to the effect that he is working with the Employers on daily wage basis as a Routine Grade Clerk, but against a sanctioned post since the year 1977. He has been assigned all kinds of duties which a Routine Grade Clerk may discharge. The workman has done his Masters (M.A.) and is the member of a Scheduled Caste. It is pleaded that the Employers had decided that workmen on daily wages, who have been working on the post of a Routine Grade Clerk, would not be retrenched. It is also a plea in the written statement that between the Employers and the Government decisions have been taken from time to time that workmen employed on the muster roll and workmen already in harness of the Employers, ought be accorded priority in the matter of appointment.

6. In this connection, a reference is made to the report of a certain Tandon Committee and further decisions taken by the Employers, and the Government, in consequence of which with effect from 01.01.1988, several hundred workmen have been regularized. It is also pleaded that the Employers had issued an order that reservation quota for the Scheduled Castes may not be filled up by recruitment of outsiders. Instead, the workmen already on muster roll, or those working on an

adhoc basis or part time, including those engaged in leave vacancies, may be considered for recruitment under the said quota. It is also asserted by the workman that the Employers have vacancy in their establishment and on that account too, the workman ought to be designated as a Routine Grade Clerk and paid his salary in the regular scale.

7. The further case of the workman is that he has turned overage and ineligible for employment elsewhere. The workman has rendered regular service for the past many years, putting in more than 240 days in each year. The workman has pleaded that under orders of the Employers a workman who has completed 240 days of services, is entitled to regularization. It is also pleaded that a large number of workmen junior to the workman, and also of comparatively feeble merit, have been appointed Routine Grade Clerks. On the basis of a case to the above effect, the workman has asked to be designated as a Routine Grade Clerk and placed in the regular pay-scale.

8. It must be remarked here that, in substance, the workman has asked for a relief of regularization in service as a Routine Grade Clerk that has been cast in an unfamiliar mould, to say that the workman may be designated as a Routine Grade Clerk, and given that pay-scale. Thus, the industrial dispute that the workman has raised, is, in substance, a claim for regularization.

9. The Employers in the written statement have pleaded that the workman never worked for them after 20.07.1979, and on that basis taken an objection that the industrial dispute is one raised after a long delay of nine years. It is a stale claim and on that ground deserves to be rejected. It is pleaded that the Employers are a State corporate establishment under Section 5 of the Electricity (Supply) Act, 1948. Under Section 79 (c) of the Act, last mentioned, the Employers are empowered to frame service conditions for their employees. The workman was hired from time to time, according to requirement and availability of work by the Electricity Commercial Division, Farrukhabad as a workman borne on the muster roll - engaged against leave vacancies. The contingent requirement of work came to an end on 20.07.1979, whereafter the workman was not engaged. It was also disputed that the workman ever completed 240 days service on the post of a Routine Grade Clerk. It is asserted that appointment on the post of a Routine Grade Clerk is made through a process of selection by the Electricity Services Commission, after due advertisement of vacancies in newspapers. In paragraph no. 8 of the written statement there is a specific plea taken that no employee under the administrative control of the Superintending Engineer, Electricity Distribution Division, Farrukhabad borne on the muster roll has been absorbed in the regular establishment. As such, the workman has no right to ask for designation as a Routine Grade Clerk, with effect from 01.01.1988, which in any case, would not be in accordance with law.

10. In his rejoinder of the statement, the workman has pleaded to the objection regarding the claim being belated, where he has refuted the objection. He has asserted that there is no limitation prescribed for the purpose of raising an industrial dispute under the law. Also, the dispute has been raised after the Employers decided to regularize other workman. It is asserted that the contents of

paragraph no. 3 of the written statement of the Employers are denied and that the workman had all along been functioning against a permanent post. In every year, the workman is claimed to have worked more than 240 days and more. It is also pleaded that the workman claims on the basis of his rights under the Act, where selection by the Electricity Services Commission has no relevance.

11. Again, assertions in paragraph no. 7 of the Employer's written statement have been denied and it is pleaded that it is not a case of direct appointment for the workman, but one of regularization. It must be remarked here that by this pleading in paragraph no. 7 of the rejoinder of the statement, the rather unconservative description of the workman's claim, described as designation for the workman as a Routine Grade Clerk and grant of pay-scale, stands demystified to transparently show by the workman's pleading that it is afterall, a claim for regularization.

12. The workman has filed some 19 documents. Most of these documents are Board Orders, one is a Government Order, still another a Report, one is an Office Memorandum of the Board carrying the report of the Tandon Committee dated 2nd September, 1976. These documents do provide about rights of regularization in service to workmen borne on the muster roll, including Routine Grade Clerks, subject to the Clerks passing the prescribed examinations and typing tests etc. But, most of these do not relate to the workman's record of engagement with the Employers, except for a few of these documents which are relevant. It must also be noticed here that of the documents that are relevant directly to the workman's rights, there is on record a certificate from the Executive Engineer, Electricity Commercial Division, Farrukhabad dated 31.08.1982, indicating the period of the workman's engagement as a Routine Grade Clerk and as a Class IV employee, put together, between 30.09.1977 to 28.02.1979. This document alone has been exhibited by the Labour Court and taken into consideration. About this evidence and its impact on the rights of parties, more would be said later.

13. The workman also examined himself in support of his case and has been cross examined by the Employers. The Employers, on the other hand, have filed four documents through a list bearing Paper No. 17D but they could not lead any evidence as the proceedings were set down *ex parte* on 21.05.1990 and adjourned to 25.06.1990 for address of arguments. On 25.06.1990, an effort was made through an application to set aside the order dated 21.05.1990, ordering the proceedings to go *ex parte* but that application, bearing Paper No. 24D, was rejected by an order of that day. Arguments were heard on 25.06.1990 on behalf of the workman and judgment reserved, permitting the Employers to address the Court within a week, if they so desired.

14. Again, it has to be remarked here that permitting address of arguments to the Employers after reserving judgment formally on the ordersheets, is not only something odd but unlawful by all standards. Still, this Court thinks that in the domain of industrial adjudication which is far more informal than proceedings in Court, the aforesaid matter would remain an oddity that would not vitiate the award.

15. The Labour Court by means of the impugned award has answered the

reference in favour of the workman, and has awarded, that the workman shall be entitled to be designated as a Routine Grade Clerk with effect from 01.01.1988 and the employers shall, accordingly, designate him. It has further been awarded that the workman would be entitled to his salary from the said date. Costs in the sum of Rs. 100/- have also been awarded. This Court, while entertaining this writ petition vide order dated 01.04.1991, issued notice pending admission and by an interim order of the said date, directed that the operation of the impugned award shall remain stayed, subject to the workman being reinstated by the Employers within one month of the order and payment of future wages, regularly. The writ petition was, lateron, admitted to hearing vide order dated 20.04.1992.

16. This Court has carefully perused the impugned award and also the records of the adjudication case, that were summoned from the Labour Court.

17. A perusal of the findings of the Labour Court shows that the Labour Court has concluded from the document filed as Exhibit W-1 that between the years 1977-78 and 1978-79, the workman did not put in 240 days of service in a year, but worked for 367 days, in all. This finding is based on a document issued by the Employers, and cannot, therefore, be possibly disputed by them. But, the other part of the workman's case that after those 367 days of work that he rendered with the Employers, he has been in their engagement as a Routine Grade Clerk, is based entirely on parole evidence of the workman, speaking for himself, without any corroboration by evidence *aliunde*. The Labour Court has concluded from the document which is a certificate by the Employer, marked as Exhibit W-1 and his oral evidence, to the effect that after July, 1979 he is working with the Electricity Distribution Division-1, Fatehgarh and that the workman is in regular employment as a Routine Grade Clerk. This conclusion from the evidence has been drawn by the Labour Court in the face of the Employers being set *ex parte*, where their right to lead evidence was closed, not for a very convincing reason and an application to recall the order, setting down proceedings *ex parte*, too was rejected. Though, the Employers appear to have supplied a number of documents that the workman has filed, on his application to summon those documents, still the Labour Court has held that the Employers have not supplied the required documents that the workman sought, to establish the time period and nature of his engagement. It is not at all clear as to what those documents are, that the Employers have not supplied.

18. The Labour Court has also observed much in error that it was the duty of the Employers to have established their case by producing documents in evidence, which they have not discharged. This part of the Labour Court's finding is manifestly illegal inasmuch as the Employers being *ex parte*, they certainly had no avenue to lead evidence that the Labour Court closed for them; and that too, in error, in the considered opinion of this Court. Moreover, the document that the workman has filed as Exhibit W-1, clearly depicts the Employers' case that the workman has served in broken spells, as a dailywager on muster roll, from 30.07.1977 to 28.02.1979. During all this period of time, the workman has been engaged as a muster roll employee, both as a Routine Grade Clerk and a Class-IV employee (peon). Most of these engagement have

been in leave vacancies, and some to meet other contingencies. There is no independent evidence led by the workman to lend support to his case that until time when reference was made, or even thereafter, he was still retained by the Employers as a Routine Grade Clerk, working at Fatehgarh. A mere self serving testimony in the witness box with no corroborative independent evidence, cannot be held to prove the workman's case which the Labour Court has accepted, even with the Employer remaining *ex parte*. The conclusions drawn by the Labour Court from the evidence on record are perverse.

19. Now, once the workman has been out of employment since 28.02.1979, an industrial dispute raised in the year 1988, nine years after workman's exit from the Employer's establishment, is certainly a stale claim where it cannot be said that there was an industrial dispute still surviving at that distance of time. To raise this kind of a dispute under the circumstances, after nine years, leads to an inference that either the workman, and more likely the sponsoring union have contrived to create a ghost dispute to champertous ends, or it is all utterly ill-advised.

20. An authoritative statement of the law in regard to stale claims under the Industrial Disputes Act is to be found in the guidance of their Lordships of the Supreme Court in **Nedungadi Bank Ltd vs. K.P. Madhavankutty and others, (2002) 2 SCC 455,** where it has been held:

6. Law does not prescribe any time-limit for the appropriate Government to exercise its powers under Section 10 of the Act. It is not that this power can be exercised at any point of time and to revive matters which had since been settled. Power is to be exercised reasonably and in a rational manner. There appears to us to be no rational basis on which the Central Government has exercised powers in this case after a lapse of about seven years of the order dismissing the respondent from service. At the time reference was made no industrial dispute existed or could be even said to have been apprehended. A dispute which is stale could not be the subject-matter of reference under Section 10 of the Act. As to when a dispute can be said to be stale would depend on the facts and circumstances of each case. When the matter has become final, it appears to us to be rather incongruous that the reference be made under Section 10 of the Act in the circumstances like the present one. In fact it could be said that there was no dispute pending at the time when the reference in question was made. The only ground advanced by the respondent was that two other employees who were dismissed from service were reinstated. Under what circumstances they were dismissed and subsequently reinstated is nowhere mentioned. Demand raised by the respondent for raising an industrial dispute was ex facie bad and incompetent.

19. Even otherwise, the post of a Routine Grade Clerk was required to be filled up in accordance with Regulation 5(d) of the U.P. State Electricity Board Ministerial Establishment (Offices of the Chief Engineer and Other Subordinate Offices) Regulations, 1970 which mandates direct recruitment to be made on the basis of a competitive examination, conducted by the Electricity Services Commission. There is thus no other channel envisaged for the recruitment of

Routine Grade Clerks in the service of the U.P. State Electricity Board. There is no way the statute would permit regularization of a casual hand on a post that is to be strictly filled up in accordance with statutory rules through a competitive examination.

20. In matters of the appointment under the State, after the decision of the Constitution Bench of their Lordships of the Supreme Court in Secretary, State of Karnataka vs. Umadevi (3), (2006) 4 SCC 1, there is absolutely no space, consistent with the requirements of Articles 14 and 16 of the Constitution to secure through the mechanism of regularization, appointment as the one here, to a post under the State, borne on the public exchequer. It has been held in Umadevi (supra) thus:

"**34.** In *A. Umarani v. Registrar, Coop. Societies* [(2004) 7 SCC 112 : 2004 SCC (L&S) 918] a three-Judge Bench made a survey of the authorities and held that when appointments were made in contravention of mandatory provisions of the Act and statutory rules framed thereunder and by ignoring essential qualifications, the appointments would be illegal and cannot be regularised by the State. The State could not invoke its power under Article 162 of the Constitution to regularise such appointments. This Court also held that regularisation is not and cannot be a mode of recruitment by any State within the meaning of Article 12 of the Constitution or any body or authority governed by a statutory Act or the rules framed thereunder. Regularisation furthermore cannot give permanence to an employee whose services are ad hoc in nature. It was also held that the fact that some persons had been working for a long time would not mean that they had acquired a right for regularisation.

37. It is not necessary to multiply authorities on this aspect. It is only necessary to refer to one or two of the recent decisions in this context. In *State of U.P. v. Neeraj Awasthi* [(2006) 1 SCC 667 : 2006 SCC (L&S) 190] this Court after referring to a number of prior decisions held that there was no power in the State under Article 162 of the Constitution to make appointments and even if there was any such power, no appointment could be made in contravention of statutory rules. This Court also held that past alleged regularisation or appointment does not connote entitlement to further regularisation or appointment. It was further held that the High Court has no jurisdiction to frame a scheme by itself or direct the framing of a scheme for regularisation. This view was reiterated in *State of Karnataka v. KGSD Canteen Employees' Welfare Assn.* [(2006) 1 SCC 567 : 2006 SCC (L&S) 158 : JT (2006) 1 SC 84]

38. In *Union Public Service Commission v. Girish Jayanti Lal Vaghela* [(2006) 2 SCC 482 : 2006 SCC (L&S) 339 : (2006) 2 Scale 115] this Court answered the question, who was a government servant and stated: (SCC p. 490, para 12)

"12. Article 16 which finds place in Part III of the Constitution relating to fundamental rights provides that there shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State. The main object of Article 16 is to create a constitutional right to equality of opportunity and employment in public offices. The words "employment' or "appointment' cover not merely the initial appointment but also other attributes of service like promotion and age of

superannuation, etc. The appointment to any post under the State can only be made after a proper advertisement has been made inviting applications from eligible candidates and holding of selection by a body of experts or a specially constituted committee whose members are fair and impartial through a written examination or interview or some other rational criteria for judging the inter se merit of candidates who have applied in response to the advertisement made. A regular appointment to a post under the State or Union cannot be made without issuing advertisement in the prescribed manner which may in some cases include inviting applications from the employment exchange where eligible candidates get their names registered. Any regular appointment made on a post under the State or Union without issuing advertisement inviting applications from eligible candidates and without holding a proper selection where all eligible candidates get a fair chance to compete would violate the guarantee enshrined under Article 16 of the Constitution (see *B.S. Minhas v. Indian Statistical Institute* [(1983) 4 SCC 582 : 1984 SCC (L&S) 26 : AIR 1984 SC 363])."

40. At this stage, it is relevant to notice two aspects. In *Kesavananda Bharati v. State of Kerala* [(1973) 4 SCC 225 : 1973 Supp SCR 1] this Court held that Article 14, and Article 16, which was described as a facet of Article 14, is part of the basic structure of the Constitution. The position emerging from *Kesavananda Bharati* [(1973) 4 SCC 225 : 1973 Supp SCR 1] was summed up by Jagannadha Rao, J. speaking for a Bench of three Judges in *Indra Sawhney v. Union of India* [(2000) 1 SCC 168 : 2000 SCC (L&S) 1 : 1999 Supp (5) SCR 229] . That decision also reiterated how neither Parliament nor the legislature could transgress the basic feature of the Constitution, namely, the principle of equality enshrined in Article 14 of which Article 16(1) is a facet. This Court stated: (*Indra Sawhney case* [(2000) 1 SCC 168 : 2000 SCC (L&S) 1 : 1999 Supp (5) SCR 229], SCC p. 202, paras 64-65)

"64. The preamble to the Constitution of India emphasises the principle of equality as basic to our Constitution. In *Kesavananda Bharati v. State of Kerala* [(1973) 4 SCC 225 : 1973 Supp SCR 1] it was ruled that even constitutional amendments which offended the basic structure of the Constitution would be ultra vires the basic structure. Sikri, C.J. laid stress on the basic features enumerated in the preamble to the Constitution and said that there were other basic features too which could be gathered from the constitutional scheme (para 506-A of SCC). Equality was one of the basic features referred to in the preamble to our Constitution. Shelat and Grover, JJ. also referred to the basic rights referred to in the preamble. They specifically referred to equality (paras 520 and 535-A of SCC). Hegde & Shelat, JJ. also referred to the preamble (paras 648, 652). Ray, J. (as he then was) also did so (para 886). Jaganmohan Reddy, J. too referred to the preamble and the equality doctrine (para 1159). Khanna, J. accepted this position (para 1471). Mathew, J. referred to equality as a basic feature (para 1621). Dwivedi, J. (paras 1882, 1883) and Chandrachud, J. (as he then was) (see para 2086) accepted this position.

65. What we mean to say is that Parliament and the legislature in this country cannot transgress the basic feature of the Constitution, namely, the principle of equality enshrined in Article 14 of which Article 16(1) is a facet."

21. The Supreme Court in **Indian Drugs & Pharmaceuticals Ltd. vs. Workmen, (2007) 1 SCC 408** again dealing with the regularization of services of daily rated ad hoc or casual employees, on posts under the State or one of its instrumentalities have spoken for judicial restraint in such matter matters and held:

"40. The courts must, therefore, exercise judicial restraint, and not encroach into the executive or legislative domain. Orders for creation of posts, appointment on these posts, regularisation, fixing pay scales, continuation in service, promotions, etc. are all executive or legislative functions, and it is highly improper for Judges to step into this sphere, except in a rare and exceptional case. The relevant case-law and philosophy of judicial restraint has been laid down by the Madras High Court in great detail in *Rama Muthuramalingam v. Dy. Supdt. of Police* [AIR 2005 Mad 1] and we fully agree with the views expressed therein.

47. We are of the opinion that if the court/tribunal directs that a daily-rated or ad hoc or casual employee should be continued in service till the date of superannuation, it is impliedly regularising such an employee, which cannot be done as held by this Court in *Secy., State of Karnataka v. Umadevi (3)* [(2006) 4 SCC 1 : 2006 SCC (L&S) 753] and other decisions of this Court.

48. In view of the above discussion, we are of the opinion that the orders of the Labour Court as well as the High Court were wholly unjustified and cannot be sustained for the reasons already mentioned above. The appeal is, therefore, allowed. The impugned judgments of the High Court and the Labour Court are set aside and the reference made to the Labour Court is answered in the negative. There shall be no order as to costs."

22. Again in a consistent vain, in a matter arising under the Labour Law, it has been held by the Supreme Court in **BSNL v. Bhurumal, (2014) 7 SCC 177:**

"34. The reasons for denying the relief of reinstatement in such cases are obvious. It is trite law that when the termination is found to be illegal because of non-payment of retrenchment compensation and notice pay as mandatorily required under Section 25-F of the Industrial Disputes Act, even after reinstatement, it is always open to the management to terminate the services of that employee by paying him the retrenchment compensation. Since such a workman was working on daily-wage basis and even after he is reinstated, he has no right to seek regularisation [see *State of Karnataka v. Umadevi (3)* [(2006) 4 SCC 1 : 2006 SCC (L&S) 753]]. Thus when he cannot claim regularisation and he has no right to continue even as a daily-wage worker, no useful purpose is going to be served in reinstating such a workman and he can be given monetary compensation by the Court itself inasmuch as if he is terminated again after reinstatement, he would receive monetary compensation only in the form of retrenchment compensation and notice pay. In such a situation, giving the relief of reinstatement, that too after a long gap, would not serve any purpose.

23. To the same effect are other decisions of their Lordships of the Supreme Court in **Chandra Shekhar Azad Krishi Evam Prodyogiki Vishwavidyalaya vs. United Trades Congress, (2008) 2 SCC 552** and **Deputy**

Executive Engineer vs. Kuberbhai Kanjibhai, (2019) 4 SCC 307.

24. The Labour Court, while writing the impugned award has completely ignored from consideration this very pertinent aspect of the matter, though it was raised as a plea before it on behalf of the Employers. Now, the workman is no more and this petition, directed as it is against the impugned award is defended by his legal heirs. There is no issue about reinstatement. The workman, however, was reinstated in service pending this petition, in consequence of the conditional stay order passed by this Court on 01.04.1991. He served in the respondent's establishment from 29.10.1991 until his death on 26.04.2010. While he was in service, he had received emoluments as a Routine Grade Clerk by dint of the interim order passed by this Court. The workman has rendered services to the Employer, under whatever circumstances, and that fact is not in dispute. In view of the said circumstances, notwithstanding the fact that the impugned award cannot be sustained, there is no basis to order recovery from the workman's heirs, or so to speak, from the estate of the workman in the hands of his heirs.

25. It goes without saying also that recovery proceedings initiated by the workman through an application made on 28.01.2010 under Section 6H of the Act (incorrectly described as Section 33 (C) in the record of proceedings) before the Presiding Officer, Labour Court-II, U.P. Kanpur, would fall with the impugned award.

26. In the result, this petition succeeds and is **allowed**. The impugned award dated 23.08.1990 passed by the Presiding Officer-II, U.P. Kanpur in Adjudication Case No. 56 of 1988, published on 20.11.1990, is hereby **quashed**. Costs shall go easy.

27. The Office is directed to return the Labour Court records forthwith to the Presiding Officer, Labour Court-II, U.P., Kanpur Nagar.

28. Let a copy of this order shall also be certified to the Presiding Officer, Labour Court-II, U.P., Kanpur forthwith.

(2020)02ILR A257

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 09.01.2020

BEFORE
THE HON'BLE DR. YOGENDRA KUMAR SRIVASTAVA, J.

Writ C No. 18035 of 2007

Surajmal ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri O.P. Rai

Counsel for the Respondents:
C.S.C.

A. Constitution of India – Preamble – Part IV – Schedule IX – Land reform – In a primarily agrarian economy where land continues to be the pivotal to both income and employment around which socio-economic privileges and deprivations revolve land reforms are seen as one of the principal instruments for creation of an egalitarian rural society in tune with the socialistic spirit, as provided in the Preamble and under Part IV of the Constitution.

B. Civil Law-U.P. Zamindari Abolition and Land Reforms Act, 1950 – Object – It was

enacted to provide for abolition of the zamindari system which involved intermediaries between the tiller of the soil and the State and for acquisition of their rights, title and interests and to reform the law relating to land tenure – The enforcement of the ZA & LR Act was with a view to simplify land tenure (Para 18)

C. Civil Law-U.P.Z.A.L.R. Act, 1950 – Sections 157-A and 157-AA – Distinction clarified – The restriction on a scheduled caste with regard to the transfer of land in favour of a person who does not belong to a scheduled caste under Section 157AA is absolute and such transfer is not permissible in any contingency – The restriction herein is more stringent since the land in question is a lease land. (Para 14)

D. Civil Law-U.P.Z.A.L.R. Act, 1950 – Sections 157-AA (1) and (5) – Validity of Transfer by a person of Scheduled Caste – Limitation of period of 10 years – No further transfer is permissible by a transferee of a land under subsection (1) before the expiry of a period of ten years from the date of transfer in his favour. (Para 36)

E. Civil Law-U.P.Z.A.L.R. Act, 1950 – Sections 157-AA (1) and (4) – Prior approval – Order of Preference – Validity of Transfer by a person of Scheduled Caste – The prior approval of the Assistant Collector as required under subsection (4) is thus contemplated so as to ensure that the permission which is sought is in accord with the scheme of the provision under the Section 157AA and as per the order of preference provided under subsection (1). (Para 38 and 40)

F. Interpretation of Statute – Object – Purposive construction – The object is to ascertain the meaning of the legislature and to ensure that the provisions are interpreted so as to subserve that intent. There is a general presumption that an enactment has to be given a purposive construction with a construction that best gives effect to the purpose of the enactment – In construing a remedial statute like the one above, courts are required to give the terms of the statute the widest amplitude which its language would permit. (Para 25 and 30)

Writ Petition dismissed. (E-1)

List of cases cited :-

1. Man Singh Vs. Commissioner, Bareilly Mandal & Ors. 2008 (2) AWC 1998 (All)

2. R (on the application of Quintavalle) Vs. Secretary of State for Health (2003) UKHL 13, (2003) 2 AC 687, (2003) 2 All ER 113 (UK House of Lords)

3. Stock Vs. Frank Jones (Tipton) Ltd. (1978) 1 WLR 231 (UK House of Lords)

4. Allahabad Bank & Anr. Vs. All India Allahabad Bank Retired Employees Association (2010) 2 SCC 44

5. Bharat Singh Vs. Management of New Delhi Tuberculosis Centre, New Delhi & Ors. (1986) 2 SCC 614

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

1. The present petition has been filed seeking to challenge the order dated 13.04.2004 passed by the Additional District Magistrate, Ghaziabad whereby the application filed by the petitioner seeking permission for transfer of certain land parcels had been turned down and also the order dated 11.10.2006 whereby the revision filed against the said order has also been rejected by the Additional Commissioner, Meerut Division, Meerut.

2. Contention on behalf of the petitioner is that permission had been sought under Section 157-A of the U.P. Zamindari Abolition and Land Reforms Act, 19501 for the purposes of transfer of

land by the petitioner who belongs to a scheduled caste, to a person not belonging to a scheduled caste.

3. It is stated that the land held by the petitioner on the date of the application was 2.656 hectares, and even after the proposed transfer for which permission was being sought the land remaining with the petitioner would be 1.698 hectares. It is further submitted that the land in question having not been received by the petitioner by way of lease or by virtue of the provisions contained under Section 122-B (4-F) of the ZA & LR Act the orders impugned rejecting his application for permission are erroneous and are legally unsustainable.

4. *Per contra*, learned Standing Counsel appearing for the State-respondents has submitted that the plots in question bearing *khasra* no.412/1, area 0.266 hectares and *khasra* no.512, area 0.487 hectares were originally recorded in the names of Nanak Chand, Jai Singh, Jaipal and Kanwarpal, respectively, as *bhumidhars* with non-transferable rights.

5. It has been pointed out that these persons had been declared to be *bhumidhars* with transferable rights in terms of an order dated 29.12.1997 and they in turn had transferred the land parcels in favour of the petitioner and accordingly in view of the bar contained under sub-section (5) of Section 157-AA of the ZA & LR Act the petitioner had no further right to transfer the land before the expiry of a period of ten years from the date of transfer in his favour, and for the said reason the permission sought by the petitioner had been declined. It is contended that the orders impugned do not suffer from any illegality and the petition is liable to be dismissed.

6. Counsel for the parties have been heard.

7. The question which falls for consideration in the present case is with regard to the nature of the rights of a transferee under sub-section (1) of Section 157-AA to further transfer the land by way of sale or otherwise and the restrictions thereon.

8. In order to appreciate the controversy the relevant statutory provisions may be referred to.

9. Section 131-B, as inserted by U.P. Zamindari Abolition and Land Reforms (Amendment) Act, 19952 with effect from January 14, 1995, was brought in with the main object to confer transferable rights on persons who were *bhumidhars* with non-transferable rights immediately before commencement of the aforementioned Amendment Act, 1995 and had been such bhumidhar for a period of ten years or more. Section 131-B referred to above is being extracted below:-

"131-B. Bhumidhar with non-transferable rights to become bhumidhar with transferable rights after ten years.--(1) Every person who was a bhumidhar with non-transferable rights immediately before the commencement of the Uttar Pradesh Zamindari Abolition and Land Reforms (Amendment) Act, 1995 and had been such bhumidhar for a period of ten years or more, shall become a bhumidhar with transferable rights on such commencement.

(2) Every person who is a bhumidhar with non-transferable rights on the commencement referred to in sub-section (1) or becomes a bhumidhar with non-transferable rights after such commencement, shall become bhumidhar with transferable rights on the expiry of period of ten years from his becoming a bhumidhar with non-transferable rights.

(3) Notwithstanding anything contained in any other provision of this Act, if a person, after becoming a bhumidhar with transferable rights under sub-section (1) or sub-section (2), transfers the land by way of sale, he shall become ineligible for a lease of any land vested in Gaon Sabha or the State Government or of surplus land as defined in the Uttar Pradesh Imposition of Ceiling on Land Holdings Act, 1960."

10. Section 157-A provides for certain restrictions on transfer of land by members of scheduled castes. It provides that a *bhumidhar or Asami* belonging to a scheduled caste shall have no right to transfer any land by sale, gift, mortgage or lease to a person who does not belong to such a caste except with the previous approval of the Collector. The restrictions imposed on the *bhumidhar or Asami* belonging to a scheduled caste shall be without prejudice to the restrictions contained in Sections 153 to 157 of the Act.

11. Section 157-AA was inserted in terms of the U.P. Zamindari Abolition and Land Reforms (Amendment) Act, 1997 (U.P. Act No.9 of 1997) with effect from May 23, 1997 providing for restrictions on transfer by members of scheduled castes becoming *bhumidhar* under Section 131-B.

12. Section 157-AA as inserted by the aforementioned Amending Act, is being reproduced below:-

"157-AA. Restrictions on transfer by member of Scheduled Castes becoming Bhumidhar under Section 131-B.--(1) Notwithstanding anything contained in Section 157-A, and without prejudice to the restrictions contained in Sections 153 to 157, no person belonging to Scheduled Caste having become a Bhumidhar with transferable rights under Section 131-B shall have the right to transfer the land by way of sale, gift, mortgage or lease to a person other than a person belonging to a Scheduled Caste and such transfer, if any, shall be in the following order of preference :--

(a) landless agricultural labourer;

(b) marginal farmer;

(c) small farmer; and

(d) a person other than a person referred to in clauses (a), (b) and (c).

(2) A transfer in favour of a person referred to in clause (a) of sub-section (1) shall be made in order of preference given below. If a person referred to in clause (a) is not available then transfer may be made to a person referred to in clause (b) of the said sub-section and if a person referred to in clause (b) is also not available then to a person referred to in clause (c) of the said sub-section and if a person referred to in clause (c) is also not available then to a person referred to in clause (d) of the said sub-section in the same order of preference :--

(a) first, to the resident of the village where the land is situate;

(b) secondly, if no person referred to in clause (a) is available, to the resident of any other village within the Panchayat area comprising the village where the land is situate;

(c) thirdly, if no person referred to in clauses (a) and (b) is available, to the resident of a village adjoining the

Panchayat area comprising the village where the land is situate.

(3) If no person referred to in sub-section (1) belonging to a Scheduled Caste is available, the land may be transferred to a person belonging to a Scheduled Tribe in the order of preference given in sub-sections (1) and (2).

(4) No transfer under this sections shall be made except with the previous approval of the Assistant Collector concerned.

(5) A transferee of land under sub-section (1) shall have no right to transfer the land by way of sale, gift, mortgage or lease before the expiry of a period of ten years from the date of transfer in his favour."

13. Section 157-AA provides that no person belonging to scheduled caste having become a *bhumidhar* with transferable rights under Section 131-B shall have the right to transfer the land by way of sale, gift, mortgage or lease to a person other than a person belonging to a scheduled caste and the same shall be in the order of preference as contained sub-section (1) of the said section.

14. The provisions contained under Section 157-A and Section 157-AA both provide for restrictions on transfer of land by members of scheduled castes, but with a clear distinction. In terms of Section 157-A no *bhumidhar or Asami* belonging to a scheduled caste can transfer the land to a person not belonging to a scheduled caste except with the previous approval of the Collector whereas under Section 157-AA the restriction is to the effect that a person belonging to a scheduled caste having become a *bhumidhar* with transferable rights under Section 131-B shall have no right to transfer the land by sale or otherwise to any person other than a person belonging to a scheduled caste. The transfer under Section 157-AA would be permissible only to persons belonging to scheduled castes in the order of preference as prescribed under sub-section (1). The restriction on a scheduled caste with regard to the transfer of land in favour of a person who does not belong to a scheduled caste under Section 157-AA is thus absolute and such transfer is not permissible in any contingency. The restriction herein is more stringent since the land in question is a lease land and grant of agricultural lease contemplated under the ZA & LR Act is for specified object and purpose.

15. The language of sub-section (1) of Section 157-AA is such that even in case of a member of a scheduled caste acquiring transferable rights of a *bhumidhar* under Section 131-B who is desirous to transfer such land to another person belonging to the scheduled caste by way of sale, gift, mortgage or lease the right to transfer is not absolute and the transfer is permissible only in accordance with the preferences specified therein.

16. Sub-section (4) provides for a restraint whereunder no transfer under Section 157-AA is permissible without the previous approval of the Assistant Collector concerned. The language of sub-section (4) is expressed in wide terms and it covers all transfers which are contemplated under Section 157-AA, including a transfer which is to be made by a scheduled caste in favour of a scheduled caste also.

17. The restrictions provided for under Section 157-AA were made subject to a further condition with the insertion of

sub-section (5), in Section 157-AA of the ZA & LR Act in terms of the Uttar Pradesh Zamindari Abolition and Land Reforms (Amendment) Act, 2002 (U.P. Act No.11 of 2002) with effect from June 21, 2002. Sub-section (5), referred to above, is being extracted below:-

"(5) A transferee of land under sub-section (1) shall have no right to transfer the land by way of sale, gift, mortgage or lease before the expiry of a period of ten years from the date of transfer in his favour."

18. This Court may take notice of the fact that the ZA & LR Act was enacted to provide for abolition of the zamindari system which involved intermediaries between the tiller of the soil and the State and for acquisition of their rights, title and interests and to reform the law relating to land tenure. The enforcement of the ZA & LR Act was with a view to simplify land tenure and bring about other consequent reforms to fulfill the needs of an egalitarian society. The abolition of the system of intermediaries between the State and the cultivators and the simplification of land tenure was aimed at paving way for distribution of land to the weaker sections of society according to the mandate of the Constitution of India3.

19. In a primarily agrarian economy where land continues to be the pivotal to both income and employment around which socio-economic privileges and deprivations revolve land reforms are seen as one of the principal instruments for creation of an egalitarian rural society in tune with the socialistic spirit, as provided in the Preamble and under Part IV of the Constitution. It has also been included in the Ninth Schedule so as to ensure speedy and unhindered implementation of various legislative measures.

20. The restrictions provided for the transfer of land by scheduled castes under Section 157-AA have been introduced in order to address the difficulties faced by members of scheduled castes and to protect their rights with regard to the use and control of land through land reforms by taking appropriate legislative measures.

21. The restrictions provided under Section 157-AA are founded on a reasonable basis inasmuch as these restrictions are in respect of a person belonging to a scheduled caste who has become a *bhumidhar* with transferable rights in terms of the provisions contained under Section 131-B. It is for the purpose of protecting the rights of members of the scheduled castes that the transfer under Section 157-AA is permissible only to a person belonging to a scheduled caste and that too in the order of preference as prescribed under sub-section (1) thereof whereunder the said transfer is to be in an order of preference being made firstly to a landless agricultural labourer, thereafter to a marginal farmer, a small farmer and only subsequent thereto to others. The aforementioned preferential order of transfer is further subject to the conditions under sub-section (2).

22. Sub-section (4) which is couched in a mandatory form provides an injunction against any transfer without the previous approval of the Assistant Collector. The language of sub-section (4) is in wide terms and it encompasses all transfers under Section 157-AA including a transfer by a member of scheduled caste in favour of another member of scheduled caste also.

23. The issue as to whether a transfer made by a leaseholder who belongs to a scheduled caste in favour of a person who also belongs to a scheduled caste would require the permission of the Assistant Collector fell for consideration in the case of **Man Singh Vs. Commissioner, Bareilly Mandal & Ors.** and upon considering the provisions contained under Section 157-AA it was stated as follows:-

"5. ...Section 157-AA contains a clear restriction that a person belonging to Scheduled Caste who have become bhumidhar with transferable rights under Section 131-B shall have no right to transfer to any person other than person belonging to Scheduled Caste. The transfer under Section 157-AA is permissible only to a person belonging to Scheduled Castes in the order of preference as prescribed in Sub-section (1). Thus, Scheduled Caste cannot transfer the land in favour of a person not belonging to Scheduled Caste in any contingency. Further, this restriction is on reasonable basis since land which has been contemplated under Section 157-AA is a land which is allotted to a person belonging to Scheduled Caste. The restriction is more stringent in this sub-section since the land is lease land and grant of agricultural lease is contemplated under the Act for the specified object and purpose. Much emphasis has been laid down by learned Counsel for the petitioner that Sub-section (1) of Section 157-AA will not apply when transfer is in favour of Scheduled Caste. Sub-section (4) of Section 157-AA contains an injunction to the effect that no transfer under this section shall be made except with the previous approval of the Assistant Collector concerned. Sub-section (4) is in a very wide terms when it refers to "transfer under this section". This clearly means that it embraces itself all the transfers which are contemplated in Section 157-AA. Thus, even if the transfer is by a Scheduled Caste in favour of a Scheduled Caste, it is fully covered by the restrictions contained under Sub-section (4) of Section 157-AA. In case, the interpretation as put by learned Counsel for the petitioner to Sub-section (4) of Section 157-AA is accepted, then the restrictions put under this Sub-section will be meaningless and redundant. There is valid reason for requiring previous permission of the Assistant Collector. The reason which is deciphered from the scheme of section is, that even the transfer by a Bhumidhar belonging to Scheduled Caste to a person belonging to Scheduled Caste shall be in accordance with the preference mentioned in Sub-section (1). A Scheduled Caste who is bhumidhar with transferable right under Section 131-B has no free choice of transfer to any Scheduled Caste of his own choice. The order of preference given under Sub-section (1) has its own object and purpose. The object obviously is that if transfer is made, the said transfer shall first go to landless agricultural labourer and thereafter to marginal farmer. The reason obviously is that the land being a lease land, the rights of a lessee have to be regulated in a manner which may advance the object and purpose of the Act. Thus, the prior approval of the Assistant Collector is contemplated which is obviously to consider and decide as to whether permission can be accorded and the transfer which is sought, is in accordance with the Scheme of Sub-section (1) of Section 157-AA. If no permission is required for a land to be transferred by Scheduled Caste to another Scheduled Caste, then there will be no stage of inquiry whether the transfer is in

accordance with the preference given in Sub-section (1).

6. In view of the foregoing discussions, I am of the considered view that permission is also required when a transfer is made by a person belonging to Scheduled Caste who has become bhumidhar with transferable right under Section 131-B in favour of a person belonging to Scheduled Caste. In the present case, the transfer was made without any such permission and the courts below have rightly taken the view that transfer is void and consequences under Section 167 of the Act shall follow..."

24. The purpose and object of the provision being to protect and promote the rights of the scheduled castes with regard to the control and use of land by bringing about land reforms through legislative measures, the provisions under Section 157-AA have to be read so as to subserve the intent and purpose of the enactment.

25. It is beyond question the duty of courts, in construing statutes to give effect to the intent of the law making power and to seek for that intent in every way. The object and interpretation of construction of statutes is to ascertain the meaning of the legislature and to ensure that the provisions are interpreted so as to subserve that intent. There is a general presumption that an enactment has to be given a purposive construction with a construction that best gives effect to the purpose of the enactment.

26. Reference may be had to the judgment in **R (on the application of Quintavalle) Vs. Secretary of State for Health**, for the proposition that in construing an enactment effort should be made to give effect to the legislative purpose. The observations made in the judgment are as follows:-

"8. The basic task of the Court is to ascertain and give effect to the true meaning of what Parliament has said in the enactment to be construed. ... Every statute other than a pure consolidating statute is, after all, enacted to make some change, or address some problem, or remove some blemish, or effect some improvement in the national life. The Court's task, within the permissible bounds of interpretation, is to give effect to Parliament's purpose. So the controversial provisions should be read in the context of the statute as a whole, and the statute as a whole should be read in the historical context of the situation which led to its enactment."

27. Similar observations were made in **Stock Vs. Frank Jones (Tipton) Ltd**., wherein it was held as follows:-

"Words and phrases of the English language have an extraordinary range of meaning. This has been a rich resource in English poetry (which makes fruitful use of the resonances, overtones and ambiguities), but it has a concomitant disadvantage in English law (which seeks unambiguous precision, with the aim that every citizen shall know, as exactly as possible, where he stands under the law). The first way says Lord Blackburn, of eliminating legally irrelevant meanings is to look to the statutory objective. This is the well-known canon of construction . . . which goes by the name of "the rule in Heydon's Case" (1584) 3 Co. Rep. 7b. (Nowadays we speak of the "purposive" or "functional" construction of a statute.)"

28. The Court's function, in view of the foregoing discussion, would thus be to

construe the words used in an enactment, so far as possible, in a way which best gives effect to the purpose of the enactment.

29. The ZA & LR Act having been enacted with the objective of bringing about reforms in the law relating to land tenure, and the provisions contained under Section 157-AA having been inserted with a view to ensure protection of the rights of the scheduled castes in consonance with creation of an egalitarian rural society which would be in tune with the socialistic spirit of the Constitution the provisions contained therein have to be interpreted in a beneficent way so as to subserve the object of the enactment rather than to negate it.

30. In construing a remedial statute like the one above, courts are required to give the terms of the statute the widest amplitude which its language would permit.

31. The principle of applying a liberal construction to a remedial legislation has been emphasised in the **Construction of Statues by Crawford** in the following terms:-

"...Remedial statutes, that is, those which supply defects, and abridge superfluities, in the former law, should be given a liberal construction, in order to effectuate the purposes of the legislature, or to advance the remedy intended, or to accomplish the object sought, and all matters fairly within the scope of such a statute be included, even though outside the letter, if within its spirit or reason."

32. To a similar effect is the observation made by Blackstone in Construction and Interpretation of Laws8, which is as under:-

"It may also be stated generally that the courts are more disposed to relax the severity of this rule (which is really a rule of strict construction) in the case of statutes obviously remedial in their nature or designed to effect a beneficent purpose."

33. In the context of beneficial construction as a principle of interpretation, it has been observed in **Maxwell on The Interpretation of Statutes** as follows:-

"...where they are faced with a choice between a wide meaning which caries out what appears to have been the object of the legislature more fully, and a narrow meaning which carries it out less fully or not at all, they will often choose the former. Beneficial construction is a tendency, rather than a rule."

34. The principle of applying a liberal construction to a beneficial legislation having a social welfare purpose was reiterated in the case of **Allahabad Bank & Anr. Vs. All India Allahabad Bank Retired Employees Association**, and it was observed as follows:-

"16. ...Remedial statutes, in contradistinction to penal statutes, are known as welfare, beneficent or social justice oriented legislations. Such welfare statutes always receive a liberal construction. They are required to be so construed so as to secure the relief contemplated by the statute. It is well settled and needs no restatement at our hands that labour and welfare legislation have to be broadly and liberally construed

having due regard to the Directive Principles of State Policy. The Act with which we are concerned for the present is undoubtedly one such welfare oriented legislation meant to confer certain benefits upon the employees working in various establishments in the country."

35. Reference may also be had to the case of **Bharat Singh Vs. Management of New Delhi Tuberculosis Centre, New Delhi & Ors.**, where purposive interpretation safeguarding the rights of have-nots was preferred to a literal construction in interpreting a welfare legislation, and it was held as follows:-

"11. ...the court has to evolve the concept of purposive interpretation which has found acceptance whenever a progressive social beneficial legislation is under review. We share the view that where the words of a statute are plain and unambiguous effect must be given to them. Plain words have to be accepted as such but where the intention of the legislature is not clear from the words or where two constructions are possible, it is the court's duty to discern the intention in the context of the background in which a particular Section is enacted. Once such an intention is ascertained the courts have necessarily to give the statute a purposeful or a functional interpretation. Now, it is trite to say that acts aimed at social amelioration giving benefits for the have-nots should receive liberal construction. It is always the duty of the court to give such a construction to a statute as would promote the purpose or object of the Act. A construction that promotes the purpose of the legislation should be preferred to a literal construction. A construction which would defeat the rights of the have-nots and the underdog and which would lead to injustice should always be avoided..."

36. In the case at hand, the petitioner being a transferee of land having received the same by way of a sale from persons who had become *bhumidhars* with transferable rights under Section 131-B the restrictions contained under Section 157-AA would be fully attracted as also the provision contained in terms of sub-section (5) thereof whereunder no further transfer is permissible by a transferee of a land under sub-section (1) before the expiry of a period of ten years from the date of transfer in his favour.

37. Contention of the learned counsel for the petitioner that the land having been purchased by sale-deeds from the original tenure holders there was no requirement for complying with the provisions under Section 157-AA, is thus wholly without basis and cannot be accepted.

38. The rationale behind requiring the previous approval of the Assistant Collector for any transfer under Section 157-AA is not difficult to decipher since as per the terms of the scheme of the provision, even a transfer by a *bhumidhar* belonging to a scheduled caste to a person also belonging to a scheduled caste is to be in accord with the order of preference under sub-section (1).

39. It therefore follows that a member of a scheduled caste who has

obtained the status of a bhumidhar with transferable rights under Section 131-B also does not have a free choice to transfer the land to any member of the scheduled caste. The transfer which is permissible is to be as per the preferences prescribed. The order of preference under sub-section (1) and sub-section (2) are clearly to subserve the purpose of the legislative enactment which is for furtherance of the objective of land reforms and to protect the vulnerable section of the society from injustice and exploitation.

40. The prior approval of the Assistant Collector as required under sub-section (4) is thus contemplated so as to ensure that the permission which is sought is in accord with the scheme of the provision under the Section 157-AA and as per the order of preference provided under sub-section (1).

41. The application of the petitioner seeking permission for transfer of the land parcels having been turned down for the reason that the permission sought was hit by sub-section (5) which creates a bar on a transferee of land under sub-section (1) to further transfer the land by way of sale or otherwise before the expiry of a period of ten years from the date of transfer in his favour, the orders impugned cannot be faulted with and the challenge sought to be raised in the present petition is legally unsustainable.

42. Counsel for the petitioner has not been able to dispute the aforementioned legal position with regard to the restrictions contained under Section 157-AA and in particular the restriction with regard to a transfer by a transferee within a period of ten years from the date of transfer in his favour.

43. No other ground was urged.

44. The writ petition thus lacks merit and is accordingly dismissed.

(2020)02ILR A267

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 02.12.2019

BEFORE

THE HON'BLE AJAY BHANOT, J.

Writ C No. 22848 of 2019

Piyush Yadav ...Petitioner
Versus
Union of India & Ors. ...Respondents

Counsel for the Petitioner:
Sri Gaurav Pundir

Counsel for the Respondents:
A.S.G.I., Sri Krishna Raj Singh Jadaun, Sri Om Prakash Yadav, Sri Rijwan Ali Akhtar, Sri Vikram D. Chauhan, Sri Ajit Kumar Singh

A. Constitution of India – Fundamental Rights – Nature – The text of the Constitution, is a conceptual philosophy of fundamental rights, and not an exhaustive guide to fundamental rights – The text of the Constitution is fixed, fundamental rights are always evolving. This is the essence of constitutional law jurisprudence – Evolution of constitutional law rights are guided and controlled by the text of the constitution, long settled judicial principles of interpretation of the constitution, and judicial precedents in point – The march of law is also assisted by consensus of values, in the comity of civilized nations. (Para 40 and 41)

B. Constitution of India – Article 21 – Human dignity – Means and Scope – Human dignity made a decisive contribution in the development of the rights of life and

liberty, in jurisprudential systems of free societies across the world – Consistent and high authority have thus entrenched human dignity as fundamental to right to life, which flows from Article 21 of the Constitution of India. (Para 78, 107)

C. Constitution of India – Article 21 – Validity of Punishment – Imposed on delinquent student – Punishment has to be effective to serve its purpose; however, it cannot be purblind to human dignity, if it is to retain its constitutionality – Degree of injuries to self esteem, extent of degradation of human worth, depth of humiliation caused by the punishment, are facts to be probed in an enquiry into the validity of the punishment – Punishment for deviant conduct, cannot be so severe as to degrade human life. Every form of punishment should protect the essential sanctity of human life and comport with fundamental norms of decency evolved by a civilized society. (Para 118, 120 and 122)

D. Constitution of India – Article 21 – Rehabilitation and Reformation – Absence of an environment of reform, self development and rehabilitation in a university, denies the opportunity of redeeming one's reputation – The individual is permanently discarded by the institution, and loss of human self worth is total – This system of punishment is destructive of fundamental elements of human dignity, and violative of Article 21 of the Constitution of India – Held, The impugned action taken by the university, against the petitioner is violative of the fundamental right of human dignity of the petitioner, guaranteed under Article 21 of the Constitution of India, as it fails to consider his susceptibility to reform. (Para 123 and 135)

E. University – Its role and contribution – Preservation of Constitutional values – University is a paternal institution – It is a microcosm of the Society – There are no other institutions of equal standing, to engage with the youth, deal with the discontent or aberration, and channelize youthful energies – The role of the University does not end in punishing perpetrators of violence. It begins with the identification of the causes of violence, communal hatred, and other forms of deviant conduct – Thereafter the responsibility to achieve behavioral change commences – The universities have the responsibility, to preserve this heritage, and the obligation to nurture these constitutional values. (Para 148, 149, 152 and 160)

F. Nudge – Methodology – Behavioral Change – Importance of Yoga, Meditation and Vipassana – The methodology of 'nudges', in creating behavioral change has been gaining acceptability. The organization 'Nudge' in Lebanon, has done noteworthy work with refugee children, and on environmental protection – The Behavioral Insights Teams sometimes called 'Nudge Units', are also existing in many nations including Australia, Canada, Germany, Qatar, the United Arab Emirates, Japan, the United States, and the United Kingdom – Ancient branches of knowledge and wellness like yoga, meditation, vipassana and so on may prove to be rich resources to benefit from. (Para 175, 176 and 177)

G. Therapeutic Approach – Significance – To solve Social Problem – Under the therapeutic method, however, an individual's happiness depends on his or her self-esteem, and self-esteem is a by-product of public recognition – With the rise of therapeutic approaches by mid century, they were increasingly seen as social pathologies that needed to be treated through counseling and psychiatric intervention – Therapeutic solutions to social problems, are being increasingly recognized by social scientists, medical experts, psychologists, and jurists alike. (Para 139 and 180)

Writ Petition disposed of. (E-1)

List of cases cited :-

1. Vishaka Vs. State of Rajasthan, reported at 1997 (6) SCC 241

2. Rattan Chand Hira Chand v. Askar Nawaz Jung, (1991) 3 SCC 67

3. Sajjan Singh v. State of Rajasthan, AIR 1965 SC 845.

4. Kesavananda Bharati v. State of Kerala (1973) 4 SCC 225

5. Maneka Gandhi v. Union of India, (1978) 1 SCC 248)

6. Olga Tellis v. Bombay Municipal Corpn (1985) 3 SCC 545).

7. Prem Shankar Shukla v. UT of Delhi (1980) 3 SCC 526

8. Francis Coralie Mullin v. UT of Delhi (1981) 1 SCC 608

9. Bandhua Mukti Morcha v. Union of India (1984) 3 SCC 161

10. Khedat Mazdoor Chetna Sangath v. State of M.P. (1994) 6 SCC 260

11. M.Nagaraj v. Union of India (2006) 8 SCC 212

12. Shabnam v. Union of India (2015) 6 SCC 702

13. Jeeja Ghosh v. Union of India (2016) 7 SCC 761

14. Mehmood Nayyar Azam v. State of Chhattisgarh (2012) 8 SCC 1

15. National Legal Services Authority v. Union of India (2014) 5 SCC 438

16. Maharasthra University of Health Sciences v. Satchikitsa Prasarak Mandal (2010) 3 SCC 786

17. Selvi v. State of Karnataka (2010) 7 SCC 263

18. Sunil Batra (II) Vs. Delhi Administration 1980 (3) SCC 488)

19. T.K. Gopal v. State of Karnataka (2000) 6 SCC 168

20. Asfaq v. State of Rajasthan and Others (2017) 15 SCC 55

21. K.S. Puttaswamy v. Union of India (2017) 10 SCC 1

22. Rosenblatt v. P Baer 1966 SCC OnLine US SC 22 : 383 US 75 (1966)

23. Armoniene v. Lithuania (2009) EMLR 7

24. Procunier, Corrections Director, ET AL. Vs. Martinez ET AL. 416 U.S. 396 (1974)

25. Trop Vs. Dulles 356 US 86 (1958)

26. Bijoe Emmanuel and others vs. State of Kerala and others (1986) 3 SCC 615

27. Avinash Nagra Vs. Navodaya Vidyalaya Samiti and Others (1997) 2 SCC 534

28. Devarsh Nath Gupta Vs. State of U.P. and Others, 2019(6) ADJ 296 (DB)

(Delivered by Hon'ble Ajay Bhanot, J.)

1. This judgment has been structured by dividing it into various sections to facilitate analysis and for easy read. They are:

A.	Reliefs sought
B.	Arguments of learned counsels for the parties
C.	Facts
D.	Legal Issues common in all writ petitions
E.	Stands of various respondents on affidavits (i).Response of IIT BHU (ii).Response of AMU (iii).Response of BHU (iv).Response of UGC (v).Response of UoI
F.	Evolution of Fundamental Rights by courts (i) Legislative lag, executive inertia and fundamental rights
G.	Process of law and the courts : Current State & Contemporary Challenges
H.	Education (i). Importance and scope (ii). Role and obligation of universities
I.	Discipline in Universities: Concept, Need & Challenges (i). Violence, intimidation and moral turpitude (ii). Communal disturbances in universities (iii). Discipline in universities (iv). Statutory approach to maintaining discipline
J.	Statutory Regime of Punishments in light of Article 21 & Doctrine of Proportionality
K.	Punishments & Article 21 (i). Right to human dignity (ii). Supreme Court on human dignity

	(iii). Comparative International Jurisprudence (iv). Constitutionality of punishments under the statutes (v). Systemic responses : Responsibilities of the State and the universities
L.	Reform, Self Development & Rehabilitation: (i). Role of universities in achieving behavioural change (ii). Imbibing constitutional values and purging communal hatred (iii). Present discontents of students and solutions (iv). Creation of reform/self development/rehabilitation programmes (v). Concerns of universities regarding discipline, & restraints during the reformation, self development & rehabilitation programme
M.	Conclusions & Reliefs
N.	Appendix

A. *Reliefs sought*

2. The petitioner has instituted the instant writ petition with a prayer to direct the respondents to decide the mercy appeal filed by him against the order dated 31.05.2019, passed by the Registrar, Indian Institute of Technology, Banaras Hindu University, Varanasi, within a stipulated period of time.

3. The only prayer made by Sri Gaurav Pundir, learned counsel for the petitioner is that the petitioner may be permitted to continue his studies along with the reform, self development and rehabilitation programme. The petitioner undertakes to unconditionally join and diligently pursue the reform, self development and rehabilitation programme, as may be created by the University but he may be permitted to pursue his studies.

4. The relief was moulded by the learned counsel for the petitioner, at the time of the arguments. In the interest of justice and expeditious disposal and in the light of submissions of the parties, the formal amendment to the relief clause is dispensed with.

B. *Arguments of the learned counsels for parties*

5. Sri R.K.Ojha, learned Senior Counsel assisted by Sri Ratnakar Upadhyay, learned counsel for the petitioner submits that the impugned order was passed in violation of the statutes of the university. The punishment imposed upon the petitioner is disproportionate. There is no provision for reform and rehabilitation of delinquent students in the statutes, which has resulted in violation of the fundamental right of the petitioner guaranteed under Article 21 of the Constitution of India.

6. Sri Anish Kumar, Sri Pankaj Misra and Sri Gaurav Pundir, learned counsels for the petitioner in connected writ petitions adopt the aforesaid arguments of the learned Senior Counsel, apart from raising factual issues peculiar to the respective writ petitions in which they appear.

7. Sri V. K. Upadhyaya, learned Senior Counsel assisted by Sri V.D. Chauhan, learned counsel for the BHU submits that the BHU has taken action as per law.

8. The learned Senior Counsel relied on the affidavits filed by the B.H.U., on creation of a reform and rehabilitation programme for delinquent students.

9. Sri Ajit Kumar Singh, learned Senior Counsel assisted by Sri V. D. Chauhan, learned counsel for the IIT BHU, contends that the IIT BHU, as a matter of policy accepts and is willing to

adopt a professionally designed reform and rehabilitation programme for delinquent students. However, good order and discipline have to be maintained in the university, at all costs. In fact IIT BHU is currently even running a reform programme. He fairly conceded that the programme is not fully developed, and does not have a supporting statutory/legal frame work.

10. Sri Shashank Shekhar Singh, learned counsel for the respondent-AMU, submits that the AMU fully accepts the idea of a reform and rehabilitation programme for delinquent students on an institutional basis. He however contends that no compromise with the good order, discipline, and the stability of the academic atmosphere can be made in any manner.

11. Sri Rizwan Akhtar, learned counsel for the UGC, Sri Rakesh Srivastava, and Sri Abrar Ahmed, learned counsels for the Union of India, have also been heard.

C. *Facts*

12. The petitioner is a student of B.Tech (Mechanical Engineering) in the IIT BHU. The petitioner is currently studying in the final year of the B.Tech(Mechanical Enginnering) course. It is stated in the writ petition that the petitioner has passed seven semesters successfully.

13. The order dated 31.05.2019, records that an incident of physical assault and manhandling between two groups of students happened in the University campus on 18.04.2019. The petitioner was found to be involved in the incident.

14. The enquiry committee found that the petitioner tried to influence the aggrieved students and threatened them from disclosing his name before the enquiry committee. The enquiry committee noted, that the petitioner along with some outsiders, are notorious for disturbing the atmosphere of the campus. The petitioner had created an atmosphere of fear, in the fellow students.

D. *Legal Issues common in all writ petitions*

15. Absence of any reform and rehabilitative measures, in the administrative and legal frameworks of the universities, has serious legal and constitutional implications.

16. The impugned action and the statutory regime, of imposing punishments, will also be judged in such constitutional and legal perspectives. The discussion on these issues, shall be common in all the companion writ petitions.

17. Calling attention to the statutes of the universities namely, BHU, IIT BHU and AMU, the learned counsels for the petitioners; contended that the said statutes do not contain provisions for reform and rehabilitation of delinquent students. The action against delinquent students, is governed and regulated, solely by the penal provisions, of the statutes of the respective universities. The punitive scheme is a common thread, in the statutes of all the three universities.

18. In response, all the counsels for the various respondents universities', in fact conceded, that as on date no structured and professionally designed programmes

for reform, self development and rehabilitation of delinquent students, backed by a proper legal frame work, exist in the respective universities.

19. Accordingly, various orders were passed by this Court, from time to time, requiring the respective universities namely, Banaras Hindu University, Indian Institute of Technology Banaras Hindu University, and Aligarh Muslim University, as well as the University Grants Commission and the Union of India through the Ministry of Human Resource Development, New Delhi, to submit their responses in regard to creation of a reform and rehabilitation frame work, for delinquent students in universities and institutions of higher learning. The respondents were also required to indicate, whether they had any opposition or even reservation, in regard to the creation of the reform and rehabilitative programme for delinquent students in the universities.

20. All the respondents namely Banaras Hindu University (hereinafter referred to as BHU), Indian Institute of Technology, Banaras Hindu University (hereinafter referred to as IIT BHU), Aligarh Muslim University (hereinafter referred to as the AMU) as well as Union of India through Ministry of HRD and University Grants Commission (hereinafter referred to as UGC) have submitted their responses to the aforesaid issues.

E. *Stands of respective respondents on affidavits*

(i) Response of IIT BHU

21. The IIT BHU in its affidavit has recorded its full agreement with a reform oriented approach, to deal with deviant behaviour in students. Thus IIT, B.H.U., has made a ringing endorsement, of the need to adopt a reform and rehabilitation programme for delinquent students. However, it has also underscored the need for punitive action, to maintain a peaceful environment in the campus. The relevant paras of the affidavit are quoted hereinunder:

"2. That the present affidavit is being filed in compliance of the order dated 19.9.2019 passed by this Hon'ble Court.

4. That the Institute as indicated in the foregoing paragraph, is in full agreement with a reform oriented approach. However, in cases where reformative steps do not yield the desired corrections in behavior and actions of erring students, the Institute has to resort to punitive action in order to maintain the peaceful environment in the campus."

22. By categorically stating its commitment to reform of delinquent students, the IIT BHU has been true to its founding principles, and has faithfully discharged its obligations, under law and to the society.

(ii) Response of AMU

23. Upon orders being passed by this Court, the AMU to its credit, constituted an expert committee. The report of the expert committee has been submitted, and is made part of the record of the Court. The relevant parts of the Committee Report are extracted hereinbelow:

"In the light of the above the committee observes as under:

1. *Our criminal justice system envisages two type of laws: one for*

Juveniles and second for other than Juveniles. There is a separate law for Juveniles known as Juvenile Justice Act, 2015 whereas others are covered under Code of Criminal Procedure, 1. 1976 and Indian Penal Code, 1860. The application of AMU Discipline and Conduct Rules, 1985 does not come primarily under the definition of Juvenile therefore the protection available to Juveniles are not available to the Students of the university in general. It becomes more relevant in view of the fact that at the time of admission every the disciplinary jurisdiction of the Vice Chancellor and the other authorities of the University is required to sign a declaration to the effect that he submits himself to the disciplinary jurisdiction of the Vice Chancellor and the other authorities of the University.

2. *That it is also pertinent to mention here that Aligarh Muslim University is primarily a RESIDENTIAL UNIVERSITY and there are approximately 36,665 Students [22.593 University Students and departments/courses/Schools in the Aligarh Muslim University. Among these students 12,158 students reside in 56 Hostels (22 for girls) in the campus within the radius of 10 KM. Therefore, the future career of thousands of the students cannot be allowed to be jeopardized for the sake of handful of students who are involved in the indiscipline act and are destroying the whole atmosphere of the University.*

3. *In principle that criminal activity has no role to play in our education system therefore the students who are involved in the criminal activity have also no role to play in our education system. The students who are indulged in the criminal activity have different mind-set and have nothing to do with their studies. They are not at all interested to pursue their studies and their presence only hampers the study of the other students who are interested to pursue their study. It is the duty of the University to marginalize such type of students so that the students at large, who are more interested to pursue their studies, may pursue their studies in cordial and peaceful/ atmosphere.*

4. *That as per existing rules of the University, there is no compulsory/ mandated counselling available to students against whom the discipline and conduct rules are invoked. These rules are also not invoked in a routine way but being a residential University there are day-today interactions/counselling with the Wardens, Provost Tutors, Teachers and Senior Students holding positions of Senior Hall/Food etc.*

5. *That the extreme punishments as provided in the 1985 rules are invoked when there is an extreme situation and continuance/presence of the students became a threat to the academic environment and campus life of the University.*

6. *At the same time the observations of the Hon'ble Mr. Justice Ajay Bhanot in this matter are highly appreciable in the context to infuse a reformative approach that the solution lies in engaging with the students, and harnessing their energies creatively. Errant behavior has to be reformed and not condemned. Erring students have to be transformed and not judged. The purpose of education is to unlock the immense potentiality in the human resource of the nation. This is possible by bringing about a conceptual shift in the concept of enforcing discipline, in the portals of the University. Indiscipline unchecked is indiscipline unleashed. But it is equally true. that expelling students from the University is a short term, if not a myopic*

view of the issue. A balance has to be drawn by the University authorities. The University has to create an ecosystem, with qualified staff and detailed programs of engaging with such students, with a view to give them an opportunity to reform themselves. Expulsion of students would abandon them to their own devices, close the doors of reformation to them, and shut them out from the redeeming light of knowledge. Leaving children accused of misconduct or deviant behavior, to fend for themselves would create issues for the society at large. In case Universities decline to shoulder the responsibilities of bringing such children back to the correct path, and do not provide the frame work for mainstreaming this class of students, the consequences would be detrimental to the society at large. There is no better institution in our democratic frame work, to embrace the young and questing spirits who have strayed from their path of morally upright and correct conduct. The Universities are uniquely equipped to deal with the challenge on an institutional basis. The Universities are repositories of knowledge, resources and experience to meet the challenge at hand. What is at stake, is not merely the future of an individual, but stability of the society The concerns of the society have to be handled by the University. The magnitude of the challenge is large, but it is imperative for the Universities to accept it and provide the adequate response.

After detailed deliberations and in the backdrop of above the committee proposes that:

1. Structural reformative approach may be included in the AMU Students Conduct and Discipline Rules of 1985 as this committee has identified some areas (not all inclusive) for counselling by a psychologist as enumerated above.

2. As the misconduct offences/crimes related to internet and cyberspace were not available when the Discipline Rules were framed, the same needs to be identified and appropriately included in the AMU Students Conduct and Discipline Rules of 1985 as it is growing among young and youth.

3. Outside campuses were not established when these rules were framed, hence, there is also need to amend these rules to include a structure for those centres.

The committee therefore recommends to the Vice-Chancellor as follows:

AMU Students Conduct and Discipline Rules 1985 were framed almost 30 years back and in the light of the observations given above, a detailed and exhaustive exercise may be undertaken by a committee to be appointed by the Vice-Chancellor under the convenorship of the Proctor of the University to formulate and propose a draft of revised AMU Students Conduct and Discipline Rules, inclusive of reformative approach, after exploring similar rules already enforced by sister universities and institutions in India and abroad for further consideration of the Vice-Chancellor and Academic Council of the University."

24. The AMU has thus in principle, recognized the need for a reform and rehabilitation programme for delinquent students in some areas in the University. The AMU too has accorded top priority to the maintenance of discipline in the campus and is rightly unwilling to compromise with the same.

(iii) Response of BHU

25. The initial affidavit filed by the BHU, in regard to their stand on a reformative and rehabilitation programme for delinquent students, stated in effect that the reformation of the students indulging deviant behaviour is achieved, by providing for various categories of punishments, depending upon the nature of indiscipline. It further asserted, that in the name of reformation, the University cannot give a "go by", to the objectives of the university. The relevant paras 17 and 18 of the affidavit dated 17.09.2019 are extracted hereunder:

"17. In the present case no such conditions exist and as such the continuance of the order of suspension of the petitioner from the privileges of the University and Hostel is in accordance with law. That 17. it is the University humbly that submitted administration and the Vice-Chancellor in particular is the custodian of the interests of all the students involved in various academic pursuits in the University. In the case of Banaras Hindu University the number of all the students at various levels runs into more than 30 thousand. For the smooth functioning of the University and maintenance of an environment conducive to academic pursuits the interest of an individual student must give way to the larger interests of all the students as a whole. This is not only in the interest of the students themselves but also in public interest. In the of reformation of the students the University name administration cannot give a go by to the objectives of the University nor can it take an action which may have the potential of destroying the smooth functioning of the University embroiling the University in large scale unrest both in the student as well as in the teaching community. If the University such situation is brought about a administration would be failing in its duty. The fact that Banaras Hindu University is the largest residential University in the country if not the world cannot be lost sight of. Even small spark has the potential of turning into a conflagration which may become difficult to contain.

18. That the facility and provisions aimed at reformation of the erring students found indulging in deviant behavior is inherent in the Ordinances of the University dealing with students' indiscipline by providing for various categories of punishments depending upon the nature of indiscipline."

26. However, subsequently, the BHU filed an affidavit on 26th September, 2019, easing its reservations, against a reform and rehabilitation programme. The affidavit exhibited a shift in stand, indicating a willingness to consider a reformative approach. The para 7 of the affidavit is extracted hereunder:

"7. That all the aforesaid mechanisms and provisions exist in the University for creation and preservation of an academic ambience conducive to teaching and learning and vibrant and peaceful community life. However, there exist no provision in the Rules of the University for any formal reformative mechanism or process for such students as are found involved in an offence involving moral turpitude or heinous crime and hence are suspended from the privileges of the University. However, the University is not averse to considering this aspect, if it is found appropriate by the University through Constitution of a Committee of stakeholders which may look into as to whether such a mechanism is desirable in

principle in the context of maintenance of academic ambience of the University or it may be detrimental to it, particularly, to the interest of larger group of the students, teachers and employees."

27. In substance the BHU was open to the concept of a structured reformative programme. It has however, desisted from taking a categorical position, on this most critical issue. While openness to new ideas is appreciated, failure to take a specific stand is also noticed. The Court will go no further.

(iv) Response of UGC

28. Sri Rizwan Ali Akhtar, learned counsel for the UGC has relied on the affidavit filed by the UGC. The UGC in its affidavit, stated that the universities are autonomous institutions. The academic and administrative decisions, are to be taken by the universities concerned, as per law. It was also stated that "the UGC has no role to play on day to day function of the Central Universities".

(v) Response of UoI

29. The Ministry of Human Resource Development, Government of India has chosen not to file any affidavit, despite orders passed by the Court and opportunities granted by the Court. The Court has to proceed, with the hearing in the interests of justice.

30. It was informed that the Ministry of Human Resource Development, Government of India, on its part had sent communications to the AMU and BHU, to protect its interests. The Court finds that the interests of the Union of India, are in no manner adversely affected. In these cases the interests of the Union of India, are not converse to the universities.

"The best lack all conviction."
~WB Yeats

31. Present discontents cannot be addressed by rote responses. Contemporary problems cannot be resolved by jejune formulae.

32. The universities cannot avoid a stand at the decision point. By prevarication at the decision point, the university may postpone the reckoning, but cannot escape responsibility.

33. Law has to hold institutions accountable to their obligations, to the founding purposes, to the students and to the society at large.

34. Universities of eminence cannot justify present inertia on the foot of past glory. Universities have to be aware of the risks, of basking in the reflected glory of the past. Eminence is achieved by past glory, however, reputation is retained by present endeavours.

35. Universities at certain critical decision points, would be true to their founding purposes and extant obligations by making clear and creative interventions. The universities as well as other authorities cannot show ineptitude in the face of crises, and equivocation in the face of solutions. In these critical situations the universities as well as other authorities, have to stand up and intervene and not stand by and equivocate.

F. *Evolution of Fundamental Rights by courts*

36. The fundamental rights of citizens are stated in Part III of the Constitution of India. But as in all cases, text of the rights can never be the exhaustive description of all rights. Rights have to be interpreted from the text of the Constitution. The process of interpretation of the text, often results in the evolution of rights. The Constitution is the textual origin of fundamental rights. Constitutional law defines the substance of fundamental rights.

(i) Legislative lag, executive inertia and fundamental rights

37. The fast pace of life in modern times often, outstrips the capacity of the legislature, to cope with the consequences of social change. There is a limit to human foresight, but the possibilities of life are limitless. The limits of legislation are the constraints of human foresight. The legislative process is complex and even time taking. Human affairs do not wait on the legislative process. These facts frequently create a legislative lag. It is almost inevitable in the nature of things.

38. The first intersection of life with law, at times happens in courts, even before the legislature grapples with the problems. The courts are often seized, of various emerging issues in social and individual lives, before the legislatures are cognizant of them.

39. A legislative hiatus or executive lethargy, cannot cause a constitutional stasis. The enforcement of fundamental rights, cannot be forestalled by a legislative lag or executive inertia. Constitutional guarantees and Fundamental Rights, have to be enforced on demand. Constitutional overhang is perpetual. Law is always in motion, and never on a holiday.

40. The text of the Constitution, is a conceptual philosophy of fundamental rights, and not an exhaustive guide to fundamental rights. The text of the Constitution is fixed, fundamental rights are always evolving. This is the essence of constitutional law jurisprudence. There is a method in the evolution of constitutional law jurisprudence.

41. Evolution of constitutional law rights are guided and controlled by the text of the constitution, long settled judicial principles of interpretation of the constitution, and judicial precedents in point. The march of law is also assisted by consensus of values, in the comity of civilized nations. These universal values are often manifested in International Conventions and Treaties. Another source of such values is comparative international jurisprudence. The felt needs of the times are also factored in by the courts. Development of constitutional law happens on these sure foundations. Constitutional rights are distilled from this process. In this process, the courts discharge their constitutional obligations. This is not judicial activism by courts. It is judging.

42. The Hon'ble Supreme Court in the case of ***Vishaka Vs. State of Rajasthan,*** reported at ***1997 (6) SCC 241,*** issued various guidelines for the safety of women at working places. The guidelines held the field, till the Parliament enacted the legislation in that regard. Judicial directions in that case preceded, the legislative enactment. Infact the legislature

was alerted, to the need of a legislation to cover the field, by the judgment of the Hon'ble Supreme Court.

43. This narrative will profit from the observations of the Hon'ble Supreme Court, in the case of ***Rattan Chand Hira Chand v. Askar Nawaz Jung,*** reported at ***(1991) 3 SCC 67:***

"The legislature often fails to keep pace with the changing needs and values nor is it realistic to expect that it will have provided for all contingencies and eventualities. It is, therefore, not only necessary but obligatory on the courts to step in to fill the lacuna. When courts perform this function undoubtedly they legislate judicially. But that is a kind of legislation which stands implicitly delegated to them to further the object of the legislation and to promote the goals of the society. Or to put it negatively, to prevent the frustration of the legislation or perversion of the goals and values of the society. So long as the courts keep themselves tethered to the ethos of the society and do not travel off its course, so long as they attempt to furnish the felt necessities of the time and do not refurbish them, their role in this respect has to be welcomed.

All courts have at one time or the other felt the need to bridge the gap between what is and what is intended to be. The courts cannot in such circumstances shirk from their duty and refuse to fill the gap. In performing this duty they do not foist upon the society their value judgments. They respect and accept the prevailing values, and do what is expected of them. The courts will, on the other hand, fail in their duty if they do not rise to the occasion but approve helplessly of an interpretation of a statute or a document or of an action of an individual which is certain to subvert the societal goals and endanger the public good."

G. *Process of law and the courts : Current State & Contemporary Challenges*

44. The pace of technological, social and economic developments, often pose a challenge to the courts. Courts of today often have to deal with complex issues ranging from science, technology, economics, archaeology, medicine, social sciences and across other fields of highly specialized knowledge.

45. Lawyers on occasions lack the expertise, to grasp and simplify issues of varying complexity, from fields unrelated to law. Judges do not fare any better. Parties have their interests to protect.

46. The intellectual capital created by traditional resources of the judicial process, may not be adequate to manage such contemporary challenges. The judicial process would have to evolve, to meet the felt needs of the time. The rising tides of human knowledge, cannot pass the courts by. This shall require change in procedures, and development of infrastructure.

47. The intellectual resource base has to be widened. The debate has to be broadbased, to include direct inputs from experts as well. This would also entail well equipped libraries, which are staffed by qualified personnel and research assistants, and may be even experts. Institutional arrangements for interface of the courts with experts, have to be in place to ensure procedural propriety.

48. Debate on these issues will pave the way for the most important change, i.e. change in mindset. For the process to be credible and efficacious, a change has to come from within the judicial system. But change is inevitable, if judicial adjudication is to be just and remain relevant. In this regard, the High Court has a responsibility to fulfill, if not an obligation to discharge.

H. *Education*

(i) Importance and scope

"Where the mind is without fear
and the head is held high,
Where knowledge is free".

~Tagore

49. In education mankind discovered the message of unquenchable optimism, that humans could be separated from the cycle of repetitive thought and action. Learning was the key to the uninterrupted progress of any society. Knowledge instilled the belief that human life could be improved. Through knowledge alone, the hope is realized that humans can be reformed, and humanity can be transformed. Education is the supreme act of nation building, which essentially means nurturing of constitutional values, realization of constitutional goals, and strengthening the rule of law.

50. The idea of the Indian nation is founded, on the ideals of the Indian civilization. Many of these ideals are manifested in the Constitution, and find expression in constitutional law.

51. The quest for knowledge defines the Indian civilization. A salient feature in the search for learning, distinguishes the Indian civilization. Knowledge in Hellenic civilization was founded on reason. The human thirst for knowledge was also quenched by revelation. The distinctive feature of learning in Indian civilization, is that India's search for knowledge, while always embracing reason as a method and never denying revelation as a source, insists on realization as its goal.

52. The diversity of thought is reflected in the plurality of discourse in India. The enduring values which define India, have been preserved and propagated by the tradition of civilized debate. The unity of our nation is protected by respect and affirmation of a multi hued cultural heritage and embracement of varied traditions of thought.

(ii) Role and obligation of universities

"Where the mind is led forward by thee
Into ever widening thought and action."

~Tagore

53. The universities are the custodians of the old values, even as they ceaselessly push the boundaries of modern knowledge.

54. In universities students of diverse backgrounds, and different beliefs, congregate in a common pursuit of knowledge. Through knowledge they will learn, that humanity unites more than diversity differentiates. With learning they will understand, that diversity enriches human life, and does not divide humankind. University experience will help them, cultivate constitutional values, and transcend violent and other aberrational tendencies.

55. Universities are not teaching shops, nor are they mere examining bodies. Universities nurture the intellect and develop the character of the young citizens in a wholesome manner. Students gain knowledge and imbibe values in universities. These dual pursuits constitute the founding purpose of a university, in fact its raison detre.

56. A unifocal approach promoting scholastic achievements, to the exclusion of character building, would undermine the founding principles of a university. A failure of character or deficit of values in students, may impel action against the delinquent student, but should also cause introspection in university authorities.

57. University education is not an arm's length transaction, between the teachers and the taught. Nor is university education an exact contractual relation, in the likeness of a consumer and a service provider.

I. *Discipline in Universities: Concept, Need & Challenges*

(i) Violence, intimidation and moral turpitude

"Where the clear stream of reason has not lost its way into the dreary desert sand of dead habit"

~Rabindranath Tagore

58. Violence degrades human life. Intimidation stifles human thought. Moral turpitude is the low ebb of human conduct. These are the scourges and yet inescapable facts of human life. Our society faces these issues, and our varsities grapple with them.

59. Violence, intimidation, and acts of moral turpitude, are not conducive to the academic atmosphere of a varsity, and pose a mortal threat to the values of a university. They retard the growth of free thought and reasoned debate. These evils have no place in our universities. The universities can prosper only when such evils are got rid of.

(ii) Communal disturbances in universities

"Where the world has not been broken up into fragments by narrow domestic walls".

~Rabindranath Tagore

60. In Writ C No. 32955 of 2019, (Ajay Singh Vs. Union of India and Others), the petitioner is charged with disturbing the communal harmony in the university.

61. Stoking communal hatred not only disrupts peace and order in a university, but can roil the foundations of law and harmony in our society. The problem cannot be tackled as a "discipline" issue alone. A composite and a conceptual approach has to be adopted. The roots of communal hate have to be analyzed and addressed. Communal hatred is a narrative, which stands in direct opposition, to our civilizational ethos and constitutional values. Communal hatred holds a threat, to the rule of law. Communal hatred cannot be countenanced in our universities, nor can be given any space in our society.

(iii) Discipline in universities

62. Discipline is the bedrock of any organization. In a university, discipline does not mean conformity of thought, or creation of a regimented class of people. In

a varsity discipline is not the residue, after dissent is stifled and dissenters purged.

63. Discipline in a university is the consensus among all stakeholders, to live by the universal values which define the academic world. Discipline in a varsity is common allegiance and unshakable adherence, to values which nurture free thought, respect dissentient opinions, and create an environment of unimpeded academic pursuits. Hate and true debate cannot co-exist. Violence and true learning cannot cohabit.

64. Discipline has to be preserved at all costs, if the raison detre of the University is to be protected at all times. Indiscipline unchecked is indiscipline unleashed. However in our constitutional scheme, the means of ensuring discipline, is as important as the end of keeping discipline.

(iv) Statutory approach to maintaining discipline

65. The universities have created legal frameworks, to deal with acts of indiscipline, and to maintain discipline and order.

66. The power to take disciplinary action, and impose punishment upon delinquent students, is vested in the competent authorities, by the statutes of the concerned university. The following statutes govern and regulate, the process of initiating disciplinary action against delinquent students, and imposition of penalty for misconduct.

BHU -The Banaras Hindu University Act No. XVI of 1915 {Section 60}

ii. Chapter VIII, Ordinances Governing Maintenance of Discipline and Grievances Procedure.

iii. Notification, New Delhi, 31st July, 2017, BHU

AMU- The Aligarh Muslim University (Act No. XL of 1920), [Amendment] Act, 1981 (62 of 1981)

ii. Section 35 (5) of the AMU

iii. The Statutes of the University (as adapted under Section 28 of the Act) amended upto December, 2012).

IIT BHU - i. The Institutes of Technology Act, 1961

ii. The Institutes of Technology Amendment Act, 2012.

iii. Section 17(2) of the Act, 1961 (already quoted)

(The relevant extracts of the statutes are appended as appendix 1 to the writ petition.)

J. Statutory Regime of Punishments in light of Article 21 & Doctrine of Proportionality

67. The statutes of all the three universities contemplate only penal action, to deal with all forms of indiscipline or deviant conduct. The penal action may lead to suspension, and can even extend to expulsion and debarment.

68. The punitive provisions of the Statutes of the respective universities, manifest the deterrent intent of the law. A reformist approach to the problem is absent in the statutes. The makers of statutes have solely adopted a punitive or deterrent approach to the exclusion of other methods of dealing with issues of indiscipline or deviant conduct.

69. The aforesaid ordinances of the universities and the affidavits of the

respondents have been perused. Submissions of the learned counsel for the universities have been considered. This Court finds that there is no structured, professionally designed reform, self development and rehabilitation programme, or therapeutic support system backed by a legal frame work, to deal with the delinquent students and like issues in the universities.

70. The statutory monopoly of a punitive approach, to deviant behaviour, and the exclusion of all other responses, often creates a lack of balance in the actions of the concerned University. In such cases, the punishment becomes disproportionate, not because the decision maker was incapable of measured action, but because the ordinances/statutes preclude a proportional response.

71. It is clarified, that the requirement of punitive provisions in the statutes is a given. The need to empower the authority, to take disciplinary action in law is undisputed. There is no infirmity in the statutory provisions. The inadequacy is in the reach of the statutory provisions.

72. The decision maker is constrained in his choices, by the absolute dominance of punitive provisions, and complete omission of reformative measures in the ordinances.

73. The impact of absence of reformative provisions and the presence of a statutory bias in favour of a punitive approach on the fundamental rights of the petitioners, shall also be assessed in the next part of the judgment.

K. *Punishments and Article 21*
(i) Right to human dignity

74. A life without dignity is robbed of its meaning. Absent self worth, life is devoid of content.

75. Human dignity as a concept, was created by an international consensus, on universal human values. "Human dignity" and "self worth" are used, in close proxmity in international instruments, reflecting the affinity between the concepts.

76. The comity of nations, first pledged commitment to protecting the "dignity and worth" of the human person, in the charter of the United Nations. These eternal values were reiterated, in subsequent international instruments and conventions including the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others (1951); the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (1956); the Convention on the Elimination of All Forms of Discrimination against Women (1979); the Convention on the Rights of the Child (1989); and the Convention on the Rights of Persons with Disabilities (2006).

77. Human dignity and self worth, were increasingly incorporated in the jurisprudence of all liberty loving nations in the post World War II era.

78. The complexity of the concept of human dignity, never diluted the usefulness of the theory of human dignity in enhancing the worth of the human person. Human dignity made a decisive contribution in the development of the rights of life and liberty, in jurisprudential systems of free societies across the world.

79. However, the Court would do well to observe the caution, that a sweeping judicial definition of human dignity, would make an abstract theory, unintelligible. An unduly wide judicial construct of human dignity, would create unworkable judicial tests.

80. Likewise if the courts adopt too narrow a view of human dignity, a concept which has made stellar contribution to the advancement of human rights will be lost.

81. Keeping these pitfalls in mind, a balance has to be maintained, between attempting too much and recoiling from the task altogether.

82. The applicability of human dignity, would be determined in this case, by evolving a workable test or construct of human dignity and self worth applicable to these cases.

83. Human dignity is not inserted in the text of the fundamental rights under the Constitution of India. Human dignity occurs in the Preamble to the Constitution of India.

84. The Preamble to the Constitution, reflects the resolve of the People of India, to secure to all its citizens

"Justice social, economic and political;
Liberty of thought, expression, belief, faith and worship;
Equality of status and of opportunity;
and to promote among them all and
Fraternity assuring the dignity of the individual and the unity of the Nation."

The Preamble to the Constitution is not analogous, to a preamble to any legislative enactment.

85. The unique place of the Preamble, in the Constitution came to be noticed very early, in ***Sajjan Singh v. State of Rajasthan,*** reported at ***AIR 1965 SC 845.*** The Hon'ble Supreme Court found that the Preamble to our Constitution is "not of the common run". Further the Preamble bore the "stamp of deep deliberation" and precision.

86. This feature shines light on the special significance, attached to the Preamble by the framers of the Constitution. The Preamble was held to be a part of the Constitution, by the Hon'ble Supreme Court in ***Kesavananda Bharati v. State of Kerala,*** reported at ***(1973) 4 SCC 225.***

87. The words 'life, law and liberty' in Article 21 of the Constitution of India, were freed from the confines of narrow and literal interpretation by the Courts. (See ***Maneka Gandhi v. Union of India, (1978) 1 SCC 248***)

88. A defining moment came when the Hon'ble Supreme Court, liberated "life" from the fetters of mere physical existence. (see ***Olga Tellis v. Bombay Municipal Corpn. Reported at (1985) 3 SCC 545***).

89. Over the years human dignity, has been read into the meaning of life and liberty, under Article 21 of the Constitution of India, by consistent pronouncements of the courts.

90. A broad overview of some of the leading pronouncements of the Hon'ble Supreme Court, elevating human dignity to the status of a fundamental right, are discussed in the succeeding paragraphs.

(ii) Supreme Court on human dignity

91. The concept of human dignity forming a part of Article 21, was introduced in ***Prem Shankar Shukla v. UT of Delhi,*** reported at ***(1980) 3 SCC 526.*** While construing the constitutional rights of prisoners, in ***Prem Shankar Shukla (supra),*** Krishna Iyer, J. speaking for a three-Judge Bench of the Hon'ble Supreme Court held:

"1. ... the guarantee of human dignity, which forms part of our constitutional culture, and the positive provisions of Articles 14, 19 and 21 spring into action when we realise that to manacle man is more than to mortify him; it is to dehumanise him and, therefore, to violate his very personhood, too often using the mask of "dangerousness" and security.

21. The Preamble sets the humane tone and temper of the Founding Document and highlights justice, equality and the dignity of the individual."

92. Undermining the human dignity of a detenue, under the Conservation of Foreign Exchange and Prevention of Smuggling Activities (COFEPOSA) Act, 1974 was not countenanced by the Hon'ble Supreme Court in ***Francis Coralie Mullin v. UT of Delhi,*** reported at ***(1981) 1 SCC 608*** by ruling thus:

"6. ... The fundamental right to life which is the most precious human right and which forms the ark of all other rights must therefore be interpreted in a broad and expansive spirit so as to invest it with significance and vitality which may endure for years to come and enhance the dignity of the individual and the worth of the human person.

7. ... the right to life enshrined in Article 21 cannot be restricted to mere animal existence. It means something much more than just physical survival."

93. The right to live with human dignity flowing from Article 21, was employed by the Hon'ble Supreme Court to unlock the fetters of those living in bondage and setting them free in ***Bandhua Mukti Morcha v. Union of India,*** reported at ***(1984) 3 SCC 161.*** The Hon'ble Supreme Court in ***Bandhua Mukti Morcha (supra)*** observed that:

"10. ...This right to live with human dignity enshrined in Article 21 derives its life breath from the directive principles of State policy and particularly clauses (e) and (f) of Article 39 and Articles 41 and 42 and at the least, therefore, it must include protection of the health and strength of the workers, men and women, and of the tender age of children against abuse, opportunities and facilities for children to develop in a healthy manner and in conditions of freedom and dignity, educational facilities, just and humane conditions of work and maternity relief. These are the minimum requirements which must exist in order to enable a person to live with human dignity, and no State -- neither the Central Government nor any State Government -- has the right to take any action which will deprive a person of the enjoyment of these basic essentials."

94. Dehumanizing treatment given to the arrested activists of an organization by the police authorities was called out by the Hon'ble Supreme court, in ***Khedat Mazdoor Chetna Sangath v. State of***

M.P., reported at ***(1994) 6 SCC 260,*** wherein it was recognized:

"10. ... It is, therefore, absolutely essential in the interest of justice, human dignity and democracy that this Court must intervene; order an investigation, determine the correct facts and take strongest possible action against the respondents who are responsible for these atrocities."

95. The right of human dignity was also construed by the Hon'ble Supreme Court in ***M.Nagaraj v. Union of India,*** reported at ***(2006) 8 SCC 212.*** In that case the right was held to be intrinsic to and inseparable from human existence:

"26. ... The rights, liberties and freedoms of the individual are not only to be protected against the State, they should be facilitated by it. ... It is the duty of the State not only to protect the human dignity but to facilitate it by taking positive steps in that direction. No exact definition of human dignity exists. It refers to the intrinsic value of every human being, which is to be respected. It cannot be taken away. It cannot give (sic be given). It simply is. Every human being has dignity by virtue of his existence.

42. India is constituted into a sovereign, democratic republic to secure to all its citizens, fraternity assuring the dignity of the individual and the unity of the nation. The sovereign, democratic republic exists to promote fraternity and the dignity of the individual citizen and to secure to the citizens certain rights. This is because the objectives of the State can be realised only in and through the individuals. Therefore, rights conferred on citizens and non-citizens are not merely individual or personal rights. They have a large social and political content, because the objectives of the Constitution cannot be otherwise realised."

96. The Hon'ble Supreme Court in ***Shabnam v. Union of India,*** reported at ***(2015) 6 SCC 702*** elaborated the following elements of the human dignity;

"14. This right to human dignity has many elements. First and foremost, human dignity is the dignity of each human being "as a human being". Another element, which needs to be highlighted, in the context of the present case, is that human dignity is infringed if a person's life, physical or mental welfare is harmed. It is in this sense torture, humiliation, forced labour, etc. all infringe on human dignity. It is in this context many rights of the accused derive from his dignity as a human being."

(emphasis in original)

97. Aharon Barak (former Chief Justice of the Supreme Court of Israel), discussed the constitutional value of human dignity, in the following celebrated passage:

"The constitutional value of human dignity has a central normative role. Human dignity as a constitutional value is the factor that unites the human rights into one whole. It ensures the normative unity of human rights. This normative unity is expressed in the three ways: first, the value of human dignity serves as a normative basis for constitutional rights set out in the constitution; second, it serves as an interpretative principle for determining the scope of constitutional rights, including the right to human dignity; third, the value of human dignity has an important role in

determining the proportionality of a statute limiting a constitutional right. "

98. The views of the Judge Aharon Barak, were approved and incorporated in the corpus of human dignity jurisprudence, in our country by the Hon'ble Supreme court in ***Jeeja Ghosh v. Union of India,*** reported at ***(2016) 7 SCC 761.***

99. The consequences of loss of human dignity in an individual's life, were noted by the Hon'ble Supreme Court in ***Mehmood Nayyar Azam v. State of Chhattisgarh,*** reported at ***(2012) 8 SCC 1.***

100. Similar sentiments were expressed on human dignity, by the Hon'ble Supreme Court in ***National Legal Services Authority v. Union of India,*** reported at ***(2014) 5 SCC 438.***

101. In ***Maharasthra University of Health Sciences v. Satchikitsa Prasarak Mandal*** reported at ***(2010) 3 SCC 786,*** the Hon'ble Supreme court upon consideration of good authority, reiterated the dignity of the individual as a core constitutional concept.

102. While in ***Selvi v. State of Karnataka*** reported at ***(2010) 7 SCC 263,*** the Hon'ble Supreme Court ruled thus:

"244.....we must recognize that a forcible intrusion into a person's mental processes is also an affront to human dignity and liberty, often with grave and long-lasting consequences."

103. Even prisoners have been found entitled to the fundamental rights while in custody by the Hon'ble Supreme Court (see ***Sunil Batra (II) Vs. Delhi Administration,*** reported at ***1980 (3) SCC 488***).

104. The importance of therapeutic approach in dealing with the criminal tendencies of prisoners and the necessity for reform, was considered by the Hon'ble Supreme Court in ***T.K. Gopal v. State of Karnataka,*** reported at ***(2000) 6 SCC 168,*** by holding that:

"15. The therapeutic approach aims at curing the criminal tendencies which were the product of a diseased psychology. There may be many factors, including family problems. We are not concerned with those factors as therapeutic approach has since been treated as an effective method of punishment which not only satisfies the requirements of law that a criminal should be punished and the punishment prescribed must be meted out to him, but also reforms the criminal through various processes, the most fundamental of which is that in spite of having committed a crime, maybe a heinous crime, he should be treated as a human being entitled to all the basic human rights, human dignity and human sympathy. It was under this theory that this Court in a stream of decisions, projected the need for prison reforms, the need to acknowledge the vital fact that the prisoner, after being lodged in jail, does not lose his fundamental rights or basic human rights and that he must be treated with compassion and sympathy."

105. In ***Asfaq v. State of Rajasthan and Others,*** reported at ***(2017) 15 SCC 55,*** the Hon'ble Supreme Court emphasizing the need for reform of a convict held that "redemption and rehabilitation of such prisoners for good of societies must

receive due wightage while they are undergoing sentence of imprisonment."

106. The judicial authorities can be multiplied, reiterating the above holdings. However, the same will add volume, but not value to the narrative.

107. Consistent and high authority have thus entrenched human dignity as fundamental to right to life, which flows from Article 21 of the Constitution of India.

108. The narrative would not be complete without reference to the most authoritative pronouncement, of the Hon'ble Supreme Court in the case of ***K.S. Puttaswamy v. Union of India*** reported at ***(2017) 10 SCC 1***

109. Dr. D. Y. Chandrachud, J. speaking for the Constitution Bench, firmly and irrevocably, reiterated that human dignity is a fundamental right under Article 21 of the Indian Constitution, with customary eloquence, in ***K.S. Puttaswamy (supra).*** Dr. D. Y. Chandrachud, J., upon consideration of the judicial precedents in point distilled the concept of human dignity and its place in part III of the Constitution:

"Jurisprudence on dignity

"108. Over the last four decades, our constitutional jurisprudence has recognised the inseparable relationship between protection of life and liberty with dignity. Dignity as a constitutional value finds expression in the Preamble. The constitutional vision seeks the realisation of justice (social, economic and political); liberty (of thought, expression, belief, faith and worship); equality (as a guarantee against arbitrary treatment of individuals) and fraternity (which assures a life of dignity to every individual). These constitutional precepts exist in unity to facilitate a humane and compassionate society. The individual is the focal point of the Constitution because it is in the realisation of individual rights that the collective well-being of the community is determined. Human dignity is an integral part of the Constitution. Reflections of dignity are found in the guarantee against arbitrariness (Article 14), the lamps of freedom (Article 19) and in the right to life and personal liberty (Article 21).

118. Life is precious intself. But life is worth living because of the freedoms which enable each individual to live life as it should be lived. The best decisions on how life should be lived are entrusted to the individual. They are continuously shaped by the social milieu in which individuals exist. The duty of the State is to safeguard the ability to take decisions. "Life" within the meaning of Article 21 is not confined to the integrity of the physical body. The right comprehends one's being in its fullest sense. That which facilitates the fulfillment of life is as much within the protection of the guarantee of life.

119. To live is to live with dignity. The draftsmen of the Constitution defined their vision of the society in which constitutional values would be attained by emphasising, among other freedoms, liberty and dignity. So fundamental is dignity that it permeates the core of the rights guaranteed to the individual by Part III. Dignity is the core which unites the fundamental rights because the fundamental rights seek to achieve for each individual the dignity of existence. Privacy with its attendant values assures dignity to the individual and it is only when life can be enjoyed with dignity can liberty be of true substance. Privacy

ensures the fulfilment of dignity and is a core value which the protection of life and liberty is intended to achieve."

(iii) Comparative International Jurisprudence

110. A survey of comparative international jurisprudence, on the point of human dignity and the rights flowing therefrom, shows convergence in the values of human dignity across the free world.

111. The foreign authorities can be cited to show that human dignity is an accepted universal value in the comity of nations.

112. In ***Rosenblatt v. P Baer,*** reported at ***1966 SCC OnLine US SC 22 : 383 US 75 (1966),*** the US Supreme Court found that "The essential dignity and worth of every human being" was at the root of any system of "ordered liberty".

"The right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being- a concept at the root of any decent system of ordered liberty."

113. In the case of ***Armoniene v. Lithuania,*** reported at ***(2009) EMLR 7,*** the European Court of Human Rights set its face against an act of disclosure of a person's state of health, causing "exclusion from social life", and found it violative of the right to privacy by holding thus:

"The Court takes particular note of the fact that the family lived not in a city but in a village, which increased the impact of the publication on the possibility that the husband's illness would be known by his neighbours and his immediate family, thereby causing public humiliation and exclusion from village social life."

114. The human dignity rights of prisoners included rehabilitation, in the opinion of the US Supreme Court in ***Procunier, Corrections Director, ET AL. Vs. Martinez ET AL.*** reported at ***416 U.S. 396 (1974***):

"The Court today agrees that "the weight of professional opinion seems to be that inmate freedom to correspond with outsiders advances rather than retards the goal of rehabilitation."

Balanced against the State's asserted interests are the values that are generally associated with freedom of speech in a free society - values which "do not turn to dross in an unfree one." Sostre v. McGinnis, supra, at 199. First Amendment guarantees protect the free and uninterrupted interchange of ideas upon which a democratic society thrives. Perhaps the most obvious victim of the indirect censorship effected by a policy of allowing prison authorities to read inmate mail is criticism of prison administration. The threat of identification and reprisal inherent in allowing correctional authorities to read prisoner mail is not lost on inmates who might otherwise criticize their jailors. The mails are one of the few vehicles prisoners have for informing the community about their existence and, in these days of strife in our correctional institutions, the plight of prisoners is a matter of urgent public concern. To sustain a policy which chills the communication necessary to inform the public on this issue is at odds with the

most basic tenets of the guarantee of freedom of speech.

The First Amendment serves not only the needs of the polity but also those of the human spirit - a spirit that demands self-expression. Such expression is an integral part of the development of ideas and a sense of identity. To suppress expression is to reject the basic human desire for recognition and affront the individual's worth and dignity. 14 Cf. Stanley v. Georgia, 394 U.S. [416 U.S. 396, 428]557 (1969). Such restraint may be "the greatest displeasure and indignity to a free and knowing spirit that can be put upon him." J. Milton, Aeropagitica 21 (Everyman's ed. 1927). When the prison gates slam behind an inmate, he does not lose his human quality; his mind does not become closed to ideas; his intellect does not cease to feed on a free and open interchange of opinions; his yearning for self-respect does not end; nor is his quest for self-realization concluded. If anything, the needs for identity and self-respect are more compelling in the dehumanizing prison environment. Whether an O. Henry writing his short stories in a jail cell or a frightened young inmate writing his family, a prisoner needs a medium for self-expression. It is the role of the First Amendment and this Court to protect those precious personal rights by which we satisfy such basic yearnings of the human spirit."

115. The validity of a punishment causing loss of nationality, for an act of desertion in military service, was in issue before the US Supreme Court, in ***Trop Vs. Dulles,*** reported at ***356 US 86 (1958).*** The US Supreme Court in **Trop (supra)** reiterated the importance and role of rehabilitation in a penal system, while dealing with the validity of the punishment. The principle holding of the US Supreme Court on these points is as under:

"Expatriation, in this respect, constitutes an especially demoralizing sanction. The uncertainty, and the consequent psychological hurt, which must accompany one who becomes an outcast in his own land must be reckoned a substantial factor in the ultimate judgment.

The novelty of expatriation as punishment does not alone demonstrate its inefficiency. In recent years we have seen such devices as indeterminate sentences and parole added to the traditional term of imprisonment. Such penal methods seek to achieve the end, at once more humane and effective, that society should make every effort to rehabilitate the offender and restore him as a useful member of that society as society's own best protection. Of course, rehabilitation is but one of the several purposes of the penal law. Among other purposes are deterrents of the wrongful act by the threat of punishment and insulation of society from dangerous individuals by imprisonment or execution. What then is the relationship of the punishment of expatriation to these ends of the penal law? It is perfectly obvious that it constitutes the very antithesis of rehabilitation, for instead of guiding the offender back into the useful paths of society it excommunicates him and makes him, literally, an outcast. I can think of no more certain way in which to make a man in whom, perhaps, rest the seeds of serious antisocial behavior more likely to pursue further a career of unlawful activity than to place on him the stigma of the derelict, uncertain of many of his basic rights. Similarly, it must be questioned whether expatriation can really achieve the other effects sought by society in punitive

devices. Certainly it will not insulate society from the deserter, for unless coupled with banishment the sanction leaves the offender at large. And as a deterrent device this sanction would appear of little effect, for the offender, if not deterred by thought of the specific penalties of long imprisonment or even death, is not very likely to be swayed from his course by the prospect of expatriation. However insidious and demoralizing may be the actual experience of statelessness, its contemplation in advance seems unlikely to invoke serious misgiving, for none of us yet knows its ramifications."

(iv) Constitutionality of punishments under the statutes

"Universities are made by love, love of beauty and learning."

~ Annie Besant

116. The engagement of human dignity and Article 21 will now be examined in the context of punishment, imposed on a delinquent student.

117. The statutory scheme of enforcing discipline by imposition of punishments and suspension has a salutary purpose, but it needs to be compliant with the requirements of fundamental rights.

118. Punishment has to be effective to serve its purpose; however, it cannot be purblind to human dignity, if it is to retain its constitutionality.

119. Severity of a punishment is not sufficient basis for holding it unconstitutional. The enquiry into the constitutionality of a punishment, will examine the relationship between the punishment and its purpose, and whether the penalty can achieve the purpose. The enquiry will also determine whether the punishment degrades the human person, and whether it devalues human dignity against established norms of decency, or has a dehumanizing effect.

120. Degree of injuries to self esteem, extent of degradation of human worth, depth of humiliation caused by the punishment, are facts to be probed in an enquiry into the validity of the punishment.

121. Experience teaches the fact of human fallibility, but knowledge holds the hope of human redemption. If error is part of human nature, reform is an element of human spirit. The capacity of human beings to introspect on erring ways and the power of human will to reform deviant conduct are building blocks of the concept of human dignity. "Every sinner has a future, many a saint had a past."

122. Punishment for deviant conduct, cannot be so severe as to degrade human life. Every form of punishment should protect the essential sanctity of human life and comport with fundamental norms of decency evolved by a civilized society. Any act which dehumanizes life cannot be countenanced by societies and courts which value life and liberty. The degrading or dehumanizing elements of the punishment have to be eliminated to bring it in conformity with requirement of human dignity, contemplated by Article 21 of the Constitution of India.

123. Failure to consider susceptibility to reform, while denying the right to access privileges and activities of the university, negates the possibility of rehabilitation. Absence of an environment

of reform, self development and rehabilitation in a university, denies the opportunity of redeeming one's reputation. Termination of dialogue with the delinquent student, without offering an opportunity to reform, makes him an outcaste. The individual is permanently discarded by the institution, and loss of human self worth is total. This system of punishment is destructive of fundamental elements of human dignity, and violative of Article 21 of the Constitution of India.

124. Another aspect of the punishment which needs consideration, is the consequence exclusion from higher education.

125. Education is a most credible and effective mode of restoring self esteem and enhancing self worth. By denying opportunities of education to a delinquent student, without looking at the possibility of reform, the power to redeem one's errors and enhance self worth is taken away from an individual. In these cases, closure of avenues of education, extinguishes the hope for a better tomorrow. Loss of hope and its sequitor perpetual condemnation are fatal blows to the human spirit and self esteem.

126. Acts of deviant conduct, violence or intimidation, do not cease the need for social engagement or knowledge. Such needs are more acutely felt and require satisfaction in these cases.

127. Order may be enforced by punishments. Causes of deviant conduct can be addressed only by engagement. Punishments deal with the offence, reform deals with the offender.

128. Public interest however demands that the claim for further education, and engagement with delinquent students, should be guided and controlled by the authorities.

129. Statutory regimes in universities, dealing with delinquent behaviour and university environments, which are bereft of therapeutic and reform based support systems, are incompatible with the constitutional mandate to uphold human dignity. The violations of human dignity, in such cases, are summed up hereinunder:

130. Dignity violations occur when a punishment meted out to a student, does not consider his susceptibility to reform, and degrades his person by exclusion to the point where his diminished self worth cannot be reinstated due to systemic inadequacies or institutional shortcomings.

131. By denying further education, and neglecting to create an institutional system of reform, self development and rehabilitation, the university in effect tells the delinquent student, that it does not recognize the student's need to re-establish his self esteem. In other words, the student is not only impervious to reform, but incapable of enhancing his self esteem.

132. Dignity of an individual/student is injured, when it is found that the punishment precludes reform by rehabilitative measures, and prevents self enhancement by further education.

133. The punitive consequences of the action, cannot go beyond the requirements of the case. In this case they do.

An institutional reform, self development and rehabilitation programme, will enable a delinquent student to introspect on errors, express remorse and correct course.

134. Neglect by the universities to create an institutional reform, self development and rehabilitation programme thus places substantial obstacles in the enjoyment of the fundamental right of human dignity under Article 21.

135. The result of the preceding narrative is as follows:-

(i) The impugned action taken by the university, against the petitioner is violative of the fundamental right of human dignity of the petitioner, guaranteed under Article 21 of the Constitution of India, as it fails to consider his susceptibility to reform, and does not enable the petitioner to undergo a reform and self development process to redeem himself.

(ii) The statutory omission of reform measures, is an inadequacy which renders the university incapable of rectifying the violation made by it. The systemic fault-line is contrary to the mandate of Article 21 of the Constitution of India.

(v) Systemic responses : Responsibilities of the State and universities

136. Exercise of judicial power is the prerogative of the courts; but upholding the Constitution is not the monopoly of the courts.

137. To realize the fundamental rights guaranteed under the Constitution and to achieve the goals contemplated under the Preamble, all stakeholders have to play their part and all organs of governance have to perform their obligations. Constitutional ideals will become meaningful only if constitutional values animate the functioning of all institutions of governance. Universities have a special role to play.

138. The State and in this case the universities too, have the obligation to create an ***enabling environment,*** *(emphasis supplied)* where life and life enhancing attributes under Article 21 of the Constitution of India flourish and where constitutional ideals become a reality.

139. The importance of "therapeutic approach" in solving social dysfunctions, the growth in role of the State to give away public recognition in the way they treat their citizens, the evolution of law on the subject, and the contribution of universities were analyzed by **Francis Fukuyama** in his book "**Identity**". Some of the instructive passages are extracted below:

"The therapeutic turn in the popular culture of advanced liberal democracies such as the United States was inevitably reflected in its politics, and in an evolving understanding of the role of the state. In the classical liberalism of the nineteenth century, the state was held responsible for protecting basic rights such as freedom speech and association, for upholding a rule of law, and for providing essential public services such as police, roads, and education. The government "recognized" its citizens by granting them individual rights, but the state was not seen as responsible for making each individual feel better about himself or herself."

"Under the therapeutic method, however, an individual's happiness depends on his or her self-esteem, and self-esteem is a by-product of public recognition. Governments are readily able to give away public recognition in the way

that they talk about and treat their citizens, so modern liberal societies naturally and perhaps inevitably began to take on the responsibility for raising the self-esteem of each and every one of their citizens".

"Therapeutic services came to be deeply embedded in social policy, not just in California but throughout the United States and in other liberal democracies. States began to offer psychological counseling and other mental health services, and schools began to incorporate therapeutic insights into the way that they taught children."

"In the early twentieth century, social dysfunctions such as delinquency or teen pregnancy were seen as deviant behaviour that needed to be dealt with punitively, often through the criminal justice system".

"But with the rise of therapeutic approaches by mid century, they were increasingly seen as social pathologies that needed to be treated through counseling and psychiatric intervention".

"The 1956 amendments to the Social Security Act allowed for federal reimbursements of a range of therapeutic services to strengthen family life and self-support."

"The therapeutic state metastasized across a wide number of institutions, including a large non-profit sector that by the 1990s had become the delivery vehicle for state-funded social services".

"Universities found themselves at the forefront of the therapeutic revolution."

(emphasis supplied)

140. These special needs of citizens have to be addressed by State action, and also through judicial interventions in a nuanced manner, and in a larger perspective. Exclusive reliance on coercive powers of the law, shall be inadequate and an unsatisfactory way of dealing with the problem. The therapeutic jurisprudence draws heavily from concept of human dignity and self worth for its philosophical underpinning.

141. Disciplinary action should also be supported by reformative philosophy. Reformative philosophy does not undermine the deterrent approach.

142. The statutory regime imposes punishment for delinquent acts. The reform programme will address the cause of delinquency itself. Framing the approach to discipline as a choice between punishment or reform is misleading. A just corrective system needs both. Both approaches complement each other and can be pursued simultaneously. Deterrent aspect may also be reinforced, by making grant of the degree contingent upon successful completion of the reform programme.

143. The ordinances providing for punishments for deviant conduct need to be duly supported by a legal framework for structured reform, self development and rehabilitation programmes. This environment will accord social recognition to the need for reform of delinquent students. The degrading effect of punishment will be ameliorated. Dialogue will end isolation, reform will reinstate self worth and education will enhance self esteem.

144. Structured reform, self development and rehabilitation programmes and therapeutic support, within a legal framework, will create an ***enabling environment*** *(emphasis*

supplied) in the universities, to realize the fundamental right of human dignity, flowing from Article 21 of the Constitution of India.

L. *Reform, Self Development & Rehabilitation*

(i) Role of universities in achieving behavioral change

"You must be the change you wish to see in the world"

~Mahatma Gandhi

145. Non violence as a philosophy of thought, and a creed of conduct, was developed in India on a scale wider than elsewhere. From the Buddha to Ashoka and the Mahatma, behavioral change in adopting non violence as a way of life, at the national scale was greatly accomplished in India.

146. The response of the Indian civilization, to the challenges of communal hatred and communal otherness, was profound and without parallel. The unique response of the Indian society was fashioned by the universal philosophy of the Indian civilization; of affirming the unity of the human race, of embracing diversity, of respecting dissent, and creating a harmonious dialogue of faiths. The lives and teachings of saints and thinkers like Guru Nanak, Kabir, Vivekananda, Tagore and Mahatma Gandhi, bear testimony to this composite culture.

147. For each generation to produce such individuals of excellence is an exorbitant demand. Today behavioral change is achieved in a different manner, albeit more incrementally and less dramatically. Institutions like universities have a critical role to play. Universities have an obligation to the society and the individual. The universities have an irrevocable compact, and an organic connect with the society.

148. University is a paternal institution. By the act of suspension or debarment of a delinquent student, the university abandons its ward. The university has solved its problem, but the society has one at its hands. The downstream effects of the punishments, have not been considered by the respondents. Clearly there are direct costs to the society as well. There are no other institutions of equal standing, to engage with the youth, deal with the discontent or aberration, and channelize youthful energies.

149. The role of the University does not end in punishing perpetrators of violence. It begins with the identification of the causes of violence, communal hatred, and other forms of deviant conduct. Thereafter the responsibility to achieve behavioral change commences. The fruit of knowledge imparted by the universities lies in the manifestation of human values in the human personality and expression of humanity in human conduct. Knowledge which does not change human behaviour in this manner is futile.

(ii) Imbibing Constitutional values and purging communal hatred

150. The Indian civilizational ethos and the Indian constitutional values are congruent. The Supreme Court distilled the essence of Indian values, when it emphasised "our tradition teaches tolerance, our philosophy preaches tolerance and our Constitution practises

tolerance; let us not dilute it" while upholding the religious rights of ***Jehovah's witnesses in Bijoe Emmanuel and others vs. State of Kerala and others,*** reported at ***(1986) 3 SCC 615.***

151. Universities have to protect the space for open dialogue, respectful engagement and reasoned debate. Universities need to ensure that the space for constitutional values, is not encroached by communal hatred.

152. The universities have the responsibility, to preserve this heritage, and the obligation to nurture these constitutional values. University experience has to inculcate these values in the students.

153. The universities may consider holding seminars, workshops, heritage festivals, cultural festivals, literature festivals, and encourage other activities to achieve this end. This has to be a part of the larger programme of value creation and self development.

(iii) Present discontents of students and solutions

154. The preceding discussion shows how a reform, self development and rehabilitation programme, will create an enabling environment, for realization of the fundamental rights of the individual under Article 21. How such programme, will yield tangible benefits for the society, will now be examined.

155. The paradox of the digital age is a plethora of devices and a dilution of dialogue, the substitution of conversation by chatter. There is the ever present danger of growth of knowledge and diminution of thought. The young are empowered by technology, but made restless by the void in values, and lack of direction.

156. The dilemmas of the digital age were acutely summed up by Yuval Noah Harari in his profound and acclaimed work "Homo Deus":

"Today our knowledge is increasing at breakneck speed, and theoretically we should understand the world better and better. But the very opposite is happening. Our new-found knowledge leads to faster economic, social and political changes; in an attempt to understand what is happening, we accelerate the accumulation of knowledge, which leads only to faster and greater upheavals. Consequently we are less and less able to make sense of the present or forecast the future."

157. In this situation lack of avenues of engagement, absence of a structured reform, self development and therapeutic support system, leaves the students with little options. The choices available in the society, to satisfy their need for belonging, to recover self esteem, and to channelize youthful energies are not very encouraging.

158. Re-establishing meaningful dialogue, recreating an environment of fruitful conversation, and making empathetic engagement are some of the present challenges. The responsibility of reaching out and engaging with the students, and increasing quality interface with them, lies with the universities and the teachers.

159. These obligations can be accomplished by a meticulously created

reform/self development programme and high quality of academic leadership within a comprehensive legal framework.

160. Universities are a microcosm of the society. They are laboratories of social change, and also agents of social transformation.

161. The manner in which the universities deal, with aberrations of violence other forms of deviant conduct, and deficit of values in students, has repercussions for the society at large. The divergent pulls of primordial instincts of hate and violence, against a citizen's duties in a nation ruled by law can best be managed by universities.

162. The universities are uniquely placed to deal with these issues. The universities have the intellectual capital, institutional framework and moral leadership, which puts them in the front rank of institutions to effect such change. The environment in the University should encourage and engender reflective actions instead of automatic choices.

163. The reform/self development and rehabilitation programme, will give an individual student correct direction in life, and prevent one from drifting away. The student will be anchored in constitutional values, and will not be led astray by social evils. The support and aid by the university will give one a sense of ownership and belonging. No harvest is richer for a nation, than citizens empowered by a constitutional value system.

164. The high pedestal at which teachers are placed in Indian traditions and thoughts, was recalled to explain the current role of teachers in Indian society, by the Hon'ble Supreme Court in the case of ***Avinash Nagra Vs. Navodaya Vidyalaya Samiti and Others,*** reported at ***(1997) 2 SCC 534.*** The relevant extracts were succinctly summed up by a Division Bench of this Court, in the case of ***Devarsh Nath Gupta Vs. State of U.P. and Others,*** reported at ***2019(6) ADJ 296 (DB):***

"22. Special status of teacher has been reminded by Court in Avinash Nagra vs. Navodaya Vidyalaya Samiti and others (1997) 2 SCC 534. Quoting Father of the Nation, Court said that a teacher cannot be without character. If he lacks it, he will be like salt without its savour. A teacher must touch the hearts of his students. Boys imbibe more from the teacher's own life than they do from books. If teachers impart all the knowledge in the world to their students but do not inculcate truth and purity amongst them, they will have betrayed them. Quoting Shri Aurobindo, Court said that it is the teacher's province to hold aloft the torch, to insist at all times and at all places that this nation of ours was founded on idealism and that whatever may be the prevailing tendencies of the times, our children shall learn to live among the sun-lit peaks. Court also referred Dr. S. Radhakrishanan saying that we, in our country, look upon teacher as gurus or, as acharyas. An Acharya is one whose achar or conduct is exemplary. He must be an example of Sadachar or good conduct. He must inspire the pupils who are entrusted to his care with love of virtue and goodness. The ideal of a true teacher is "andhakaraniridhata gurur itya bhidhiyate" (Andhakar is not merely intellectual ignorance, but is also spiritual blindness). He, who is able to remove that

kind of spiritual blindness, is called a 'guru'. Swami Vivekananda was also quoted saying that student should live from his very boyhood with one whose character is a blazing fire and should have before him a living example of the highest teaching. In our country, the imparting of knowledge has always been through men of renunciation. The charge of imparting knowledge should again fall upon the shoulder of Tyagis."

165. In ***Avinash Nagra (supra),*** the obligations of teachers to transform students into responsible citizens, and inculcate the value system of the Indian Constitution, was stated thus:

"...The State has taken care of service conditions of the teacher and he owed dual fundamental duties to himself and to the society. As a member of the noble teaching profession and a citizen of India he should always be willing, self-disciplined, dedicated with integrity to remain ever a learner of knowledge, intelligently to articulate and communicate and imbibe in his students, as social duty, to impart education, to bring them up with discipline, inculcate to abjure violence and to develop scientific temper with a spirit of enquiry and reform constantly to rise to higher levels in any walk of life nurturing Constitutional ideals enshrined in Article 51A so as to make the students responsible citizens of the country. Thus the teacher either individually or collectively as a community of teachers, should regenerate this dedication with a bent of spiritualism in broader perspective of the Constitutionalism with secular ideologies enshrined in the Constitution as an arm of the State to establish egalitarian social order under the rule of law. Therefore, when the society has given such a pedestal, the conduct, character, ability and disposition of a teacher should be to transform the student into a disciplined citizen, inquisitive to learn, intellectual to pursue in any walk of life with dedication, discipline and devotion with an inquiring mind but not with blind customary beliefs....."

166. The students entering universities embark on a new phase in their lives. Many are often removed from their comfort zone, and the secure environment of their homes, to face the challenges of independent life. At times these new challenges can be intimidating, and the uncertainties can create apprehensions, in the minds of the young adults.

167. Some students are unmoored in this trying phase of life and change of circumstances. Ragging of juniors in institutions of higher learning and other evils make the situations worse for freshers. Such students especially girls students in our country, need full institutional support to face these challenges.

168. It is the responsibility of the universities and the institutions of higher learning to create requisite environment of sensitizing the senior students and supporting the freshers in every possible manner.

169. A programme for self development implemented in a proactive manner shall foster constitutional values among students. Students need to realize the value of dissent in a democracy, but

also have to understand the manner of dissent in a society ruled by law.

170. This process also requires initiation of engagement with the students and improving the quality of interface between the teachers and the taught. Educating the educators in this regard has to be a part of any such programme. Workshops have to be held and other methods have to be explored, to cultivate constitutional values in students and achieve behavioral change.

171. These are the preventive measures to address the issues of indiscipline, deficit in values and deviant behaviour in all institutions of higher learning.

172. The preventive measures preclude the occurrence of deviant behaviour. The post facto rehabilitation measures prevent recurrence of deviant behaviour. Both have to be integrated into one conjoint system of value creation, in the universities and institutions of higher learning.

173. Structured reform/self development programmes run by universities, can be catalysts for inducing behavioral change, and inculcating a constitutional value system in students. A successful reform, self development and rehabilitation programme, can convert a possible danger into a real asset for the society.

(iv) Creation of reform, self development & rehabilitation programmes

174. Many branches of knowledge in modern times are devoted to the study of human psychology, social behaviour and behavioural change. Psychology, Psychiatry, Sociology, Anthropology and Behavioral Economics, are some fields dedicated to gaining insights into human behaviour and inducing behavioural change.

175. Works of the Nobel prize winning economist Richard Thaler deserve special mention. The methodology of "nudges", in creating behavioral change has been gaining acceptability. The organization "Nudge" in Lebanon, has done noteworthy work with refugee children, and on environmental protection.

176. The Behavioral Insights Teams sometimes called "Nudge Units", are also existing in many nations including Australia, Canada, Germany, Qatar, the United Arab Emirates, Japan, the United States, and the United Kingdom. The Economic Survey released by India's Finance Ministry in July, 2019 has concluded with the clear recommendations that "the proposal to set up a behavioral economics unit in the NITI Ayog must be immediately activated". The report further noticed that the unit should work with State Governments, helping them to make their programme more effective, and informing them of the potential value of Behavioural Insights.

177. Ancient branches of knowledge and wellness like yoga, meditation, vipassana and so on may prove to be rich resources to benefit from.

178. Many scientific researches have confirmed the efficacy of these ancient systems of human wellness. These branches of knowledge have to be approached with a scientific and an open

academic mindset. Personal beliefs have to be respected at all times. There can be no imposition of any system, which is resisted on grounds of faith or beliefs; in which cases other options may be given.

179. Socially useful work like planting and taking care of trees, and flora may be a part of the programme. Sports and sporting activities also go a long way in creating integrating social values, and enhancing emotional intelligence. Teaching needy children, serving the sick, and other forms of service to the society are options which may be explored. Counselling sessions with experts and psychologists could prove useful.

180. Therapeutic solutions to social problems, are being increasingly recognized by social scientists, medical experts, psychologists, and jurists alike.

181. Creation of course content of the reform or self development programme, and manner of its implementation has to be decided by the respondents. This requires wide consultations, deliberations and workshops with academia, varsities, institutions of research, student counsellors, psychologists, psychiatrists, students and other stakeholders.

182. The UGC is a statutory body, and cannot abdicate its responsibilities in this scenario. The functions of the UGC are enumerated in the University Grants Commission Act, 1956. The UGC will play an important role, in the creation and standardization of the course, for reformation and self development, and aid its implementation on an institutional basis.

183. The Government of India in particular, the Ministry of Human Resource Development, also has a contribution to make in the process. The Ministry of Human Resource Development, Government of India, New Delhi, has to provide the necessary support to the University as may be required under law to create and implement the reform, self development and rehabilitation programme. This support would include the creation of necessary infrastructure for implementing the programmes.

184. Both the University Grants Commission and the Ministry of Human Resource Development, Government of India, are required to support the universities in their endeavours to create and implement the programmes of reform, self development and rehabilitation.

185. Law enforcement agencies the world over are engaging with the youth, to draw them away from the appeal of extreme ideologies.

186. The prestige enjoyed by universities and the teachers in society, will make the programme credible to concerned individuals, and acceptable to the student community. The key to the efficacy of any structured reform programme, is empathetic engagement and a supportive environment.

187. An impersonal approach and institutional prejudice, can make the programme a non starter. Due sensitization

of all stakeholders is required, before implementing the programme.

188. The founding purpose of universities to supply intellectual and moral leadership to the society, and to be at the vanguard of social transformation, will be eminently achieved by effective reformation/therapeutic/self development programmes.

(v) Concerns of universities regarding discipline & restraints during the reformation, self development & rehabilitation programme

189. The Court is cognizant of concerns of the universities, that a reform programme should not derail university administration, nor should it have a detrimental effect on discipline and good order in the campus. A reform and rehabilitation programme, is not intended to allow a wrongdoer to escape justice.

190. Apprehensions of the universities need to be addressed. The reform programme has to be created and structured and implemented in a manner that it does not adversely impact the good order and discipline in the university campus.

191. The start of reform programme does not inevitably mean a free access to, or unconditional reinstatement of a delinquent student into the University campus. In cases of indiscipline where presence of individuals poses a threat of breakdown of order in the University campus, a decision can be made only by the University. Even when such students undergo a reform programme, and the students are pursuing their academic studies, the University may impose restraints it deems fit.

192. To obviate possibilities of disruption in the academic atmosphere, various measures of graduated restrictions may be imposed on a case to case basis. These restraints may include minute monitoring of movements in campus, restricting movements and contact, an employee escort till the student is in the campus, alteration of class schedules and timings. Such lighter restrictions could continue, while undergoing reform programmes along with the academic course.

193. More stringent measures in aggravated cases, may include a campus ban, with on-line classes and home schooling. Transfer to constituent colleges or other universities from a pool of universities, or setting up separate premises are among the options. In these cases entry to the specific University campus may be barred, even as the reform programme is underway, and the student is prosecuting his academic course.

194. These are some illustrative instances, of restraints which may be imposed by the universities.

M. *Proportionality & Punishment*

195. The controversy has to be seen from another critical legal perspective. The doctrine of proportionality is an established ground of judicial review in the Indian Constitutional jurisprudence.

196. Aharon Barak, former President of Supreme Court of Israel in his book

"Proportionality" thus defines the rules of the doctrine of proportionality, "According to the four components of proportionality a limitation of constitutional right will be permissible if, (1) It is designated for a proper purpose, (2) The measures undertaken to effectuate such a limitation are rationally connected to the fulfillment of that purpose, (3) The measures undertaken are necessary and in that there are alternative measures that may similarly achieve that same purpose with a lesser degree of limitation and finally; (4) Their needs to be a proper relation "proportionality strict senso and balance" between the importance of achieving the proper purpose and social importance of preventing the limitation on the constitutional right."

197. The concept of proportionality essentially visualizes, a graduated response to the nature of the misconduct by a delinquent student. The purpose of the institution, its role in the society and its obligations to the nation, provide the setting for adjudication of the issue of proportionality.

198. Proportionality first came to be applied in the context of punishments imposed for misconduct in service jurisprudence. The necessity of proportional punishment, in cases of misconduct by students is more strongly needed. Hence action of the respondent-University, is liable to be tested on the anvil of disproportionality.

199. The "doctrine of proportionality" was introduced, and embedded in the administrative law of our country, by the Hon'ble Supreme Court in the case of ***Ranjit Thakur Versus Union of India,*** reported at ***(1987) 4 SCC 611.*** The Hon'ble Supreme Court in Ranjit Thakur held thus:

"Judicial review generally speaking, is not directed against a decision, but is directed against the "decision making process". The question of the choice and quantum of punishment is within the jurisdiction and discretion of the Court-Martial. But the sentence has to suit the offence and the offender. It should not be vindictive or unduly harsh. It should not be so disproportionate to the offence as to shock the conscience and amount in itself to conclusive evidence of bias. The doctrine of proportionality, as part of the concept of judicial review, would ensure that even on an aspect which is, otherwise, within the exclusive province of the Court-Martial, if the decision of the Court even as to sentence is an outrageous defiance of logic, then the sentence would not be immune from correction. Irrationality and perversity are recognised grounds of judicial review. "

200. The essence of proportionality is that, the competent authority while imposing a punishment upon a delinquent student, has to co-relate and balance the imperatives of institutional discipline with the demands of individual rights. Too light a punishment will not be conducive to institutional discipline. Too harsh a punishment will not be consistent with norms of justice.

201. The enquiry into the four components of proportionality, as elucidated by Justice Aharon Barak in his book "Proportionality" has been made in the preceding part of the judgment. The purpose and obligations of universities, have also received consideration, in the earlier part of the narrative.

202. The measures undertaken against the petitioner, are not rationally connected to the fulfillment of the purpose sought to be achieved. The proper and designated purpose of a punishment in a University, has to include reform of the student, not mere imposition of penalty. Clearly there are alternative reformative measures, that can achieve the same purpose, with a lesser degree of curtailment of the students rights.

203. The action taken against the petitioner, does not achieve the purpose, and social importance of the reform and rehabilitation of the delinquent student. These aspects need consideration by the respondents.

N. *Conclusions and Reliefs*

204. It was contended on behalf of the University that the petitioner was given an opportunity to be a part of the reform, self development and rehabilitation programme being run by the University. The petitioner did not avail the aforesaid opportunity. However, learned counsel for the petitioner submits that the petitioner would like to submit his contrite apology and undertakes to adhere to reform, self development and rehabilitation programme which may be framed for him by the University, if he is allowed to pursue his academic programme simultaneously.

205. The petitioner is also willing to observe restraints imposed upon him by the University inside the campus while pursuing his B.Tech (Mechanical Engineering) course along with reform, self development and rehabilitation programme.

206. In view of the aforesaid stands taken by the learned counsel for the petitioner, the respondent University does not have any serious objections to reinstate the petitioner subject to the fulfillment of the conditions mentioned during the course of argument.

207. In the facts of the case, in the material before the Court, the acts of omission and commission, ascribed to the petitioner are acts of youthful folly. These acts cannot be permitted to go unnoticed nor unpunished by the University. Such acts undoubtedly disturb the academic atmosphere of the University campus, and smear the reputation of IIT Banaras Hindu University.

208. However, it is equally true that considering the age of the petitioner and nature of the misconduct attributed to him, he has to be provided an opportunity to atone for his faults and needs to be given the correct guidance and direction in life.

209. The petitioner has shown willingness to reform himself, and transform into a law abiding citizen of the country, before this Court. The University is supportive of the aforesaid quest of the petitioner.

210. In this situation, it is the responsibility of the University to provide necessary institutional support for a reform programme. The petitioner shall be permitted to pursue his studies alongside the reform and rehabilitation programme to be designed by the University. The University may impose any restraints upon the petitioner, it deems necessary while he undergoes the reform programme and pursue his studies.

211. It shall be compulsory for the petitioner to attend the reform, self development and rehabilitation programme along with his academic course.

212. The University authorities shall draw up a report of attendance and his progress in the reform course, along with his academic programme.

213. A formal reform programme has not been created by the University till date. The petitioner has to be reinstated urgently. In these circumstances, the University in interregnum shall create a provisional reform, self development and rehabilitation programme. The University shall consider including the following activities in the interregnum reform programme for the petitioner along with the academic schedule of the B.E. (Mechanical):

I. Yoga and Meditation;

II. Physical exercise regime;

III. Planting and taking care of trees and Flora in the University campus;

IV. Social service including teaching under privileged students;

V. Counselling with expert psychiatrists/ psychologists;

VI. Attendance in the aforesaid programme shall be duly recorded along with the progress report;

VII. An undertaking of good conduct by the petitioner, and apology on affidavit shall be given to the university forthwith.

VIII. The petitioner shall continue with the reform, self development and rehabilitation programme till the end of B.Tech (Mechanical Engineering) degree course.

IX. While reinstating the petitioner, the University may impose any restrictions or restraints upon the petitioner while he is in the campus. The petitioner shall adhere to the aforesaid restraints without demur. This restraints shall be imposed by the University to ensure that the academic atmosphere of the University is not vitiated in any manner and other students are not harassed or threatened or adversely affected by the conduct of the petitioner.

X. The University may ease the restraints or impose more stringent restrictions depending upon the conduct of the petitioner and others relevant subsequent development including those which happen during the course of the reform, self development and rehabilitation programme.

XI. This exercise of creating reform, self development and rehabilitation programme in the interregnum and reinstatement of the petitioner, shall be implemented within a period of two weeks from the date of receipt of a certified copy of this order. While reinstating the petitioner, the University may impose appropriate restrictions on the petitioner regarding his activities in the campus;

XII. The mercy appeal of the petitioner shall be decided in light of the above directions, within a period of two weeks from the date of receipt of a certified copy of this order.

214. The issue relating to creation of reform, self development and rehabilitation programmes in the University was heard as a common issue in various writ petitions. The Secretary, Ministry of Human Resource

Development, Union of India, New Delhi and the Chairman, University Grants Commission, New Delhi, were also parties in the leading two writ petitions, namely, Writ C No. 13214 of 2019 (Anant Narayan Mishra Vs. The Union of India and Others) and Writ C No. 26755 of 2019 (Mohammad Ghayas Vs. State of U.P. and Others). All connected writ petitions were heard together.

215. The directions issued to the Secretary, Ministry of Human Resource Development, Union of India, New Delhi and the Chairman, University Grants Commission, New Delhi, in the leading two writ petitions, namely, Writ C No. 13214 of 2019 (Anant Narayan Mishra Vs. The Union of India and Others) and Writ C No. 26755 of 2019 (Mohammad Ghayas Vs. State of U.P. and Others), being of a general nature, shall be part of all connected writ petitions including the instant writ petition.

216. The necessity of creating a full fledged and well thought out reform, self development and rehabilitation programme is not obviated and it still exists in the University. Consequently, **a writ in the nature of mandamus is issued to the respondents to execute the following directions:**

I. The University shall create a reform, self development and rehabilitation programme for students accused of misconduct and against whom disciplinary action or any action to deny facilities of the University is proposed or taken;

II. The reform, self development and rehabilitation programme should be created after wide consultations and workshops with institutions of higher learning and research, universities, experts, student counsellors/psychologists, psychiatrists, students and other stakeholders;

III. University Grants Commission will aid the above process by providing the necessary support to the University to create, standardize and effectuate the reform, self development and rehabilitation programme in the University.

IV. The Secretary, Ministry of Human Resource Development, Government of India, New Delhi, shall also provide the necessary support to create infrastructure in the University to effectuate the reform, self development and rehabilitation programme in the University, in light of this judgment and as per law.

V. The reform, self development and rehabilitation programmes shall be processed as per law and integrated into the existing legal/statutory framework of the University dealing with deviant conduct and punishments.

VI. The exercise shall be completed, preferably, within six months, but not later than 12 months. At all times the respondents keeping in mind the best interests of the students and the society, shall make all efforts to expedite the compliance of the directions.

VII. It shall be open to the respondents to create a scheme for reform, self development and rehabilitation for convicts in criminal cases who wish to pursue further higher studies in the respondent University.

VIII. The counsels for the petitioner as well as the respondents shall provide certified copy of this judgment along with a copy of the judgment of this Court rendered in Writ C No. 13214 of 2019 (Anant Narayan Mishra Vs. The

Union of India and Others), to the Director, Indian Institute of Technology, Banaras Hindu University, Varanasi; the Secretary, Ministry of Human Resource Development, Union of India, New Delhi and the Chairman, University Grants Commission, New Delhi, for necessary compliances.

217. The writ petition is finally disposed of.

(2020)02ILR A305

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 26.09.2019

BEFORE
THE HON'BLE RAMESH SINHA, J.
THE HON'BLE AJIT KUMAR, J.

Writ C No. 24628 of 2019

Sururul Hasan ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Firoz Haider, Sri Rajesh Kumar

Counsel for the Respondents:
C.S.C., Sri Vidya Kant Tripathi

A. Civil Law-Fishery Right in respect of pond – Allotment – Validity of Auction process – Government Order dated 27.08.2018 – Clause 6 – In the first round of tender process only fisheries cooperative societies of the village panchayat or any of the village panchayat of development block in which territory of reservoir extends can only apply – Admittedly the respondent as an individual neither belongs to the village nor, development block in question nor, the cooperative society is confined to the village or development block having stretches of reservoir (pond) in question – Respondent does not fulfill criterion, hence he could not have participated in the first round of tender process. (Para 10, 14 and 15)

B. Civil Law-Allotment process of Fishery Rights – Mandatory nature of Rider for different round – Government Order dated 27.08.2018 – Clause 6 and 12 – Clause 12 of the manual carves out an exception to Clause 6 but with the rider that there has to be decision by the Chairman of the Auction Committee – While applications for different round of tender process falling in different category, can be invited and admitted at the same time irrespective of the rounds advertised and license can be given to the highest bidder following preferences of the category but in that regard a decision has to be taken by the Chairman of the Auction Committee – The rider given thereunder is mandatory. (Para 17)

C. Civil Law-Allotment process of Fishery Rights – Process of Tender Application – By Cooperative Society – Clause 28 of G.O. dated 27.08.2018 – Mandatory requirement of Pass book and Balance amount – It is condition precedent in a sense that a pre-requisite for tender application is that it should be submitted alongwith photocopy of the passbook which should show balance amount at par with reserved price fixed in the notice inviting tender – It means that it included balance amount should be there on the date of submission of tender application – The bidding process has been held quite contrary to the procedure prescribed. (Para 22 and 27)

Writ Petition allowed. (E-1)

List of cases cited :-

1. Civil Appeal No. 20854 of 2017; Deputy Commissioner of Income Tax, Circle 11 (1), Bangalore v. M/s Ace Multi Axes Systems Ltd. decided on 05.12.2017 by the Supreme Court

(Delivered by Hon'ble Ramesh Sinha, J. & Hon'ble Ajit Kumar, J.)

1. Heard Sri Firoz Haider, learned counsel for the petitioner, Sri Vidya Kant Tripathi, learned counsel for respondent

nos. 5 and Dr. D.K.Tiwari, learned Additional Chief Standing Counsel for the State respondents.

2. Invoking extra ordinary jurisdiction of this Court under Article 226 of the Constitution, the petitioner has challenged the entire auction preceding pursuant to notice inviting tender dated 25.06.2019 for allotment of fisheries rights and consequential order dated 11.07.2019 in favour of respondent no. 4. The petitioner since was not in possession of the allotment order so he did not annex the copy thereof but allotment order has been brought on record in the counter affidavit filed by respondent nos. 2,3 and 4 as annexure 3 and the Court takes judicial notice of the same.

3. Briefly stated facts of the case are that Deputy Director Fisheries of Chitrakoot Division issued notice inviting tender for allotment of fisheries rights vide publication dated 25th June, 2019 in respect of six ponds of the categories, 2,3 and 4. The controversy in the present petition pertains to the auction proceedings in respect of reservoir (pond) in category 4 situate at village Manikpur district Chitrakoot. As per the advertisement total area of the pond is 76.00 hectares and reserved price for the auction fixed in the advertisement was Rs. 1,45,000/-. In the advertisement, it is categorically provided that in case if the requisite tender applications are not received or sufficient price is not bidded in first round of proceedings scheduled on 11th July, 2019, second round of proceedings would take place on 18th July, 2019 inviting fresh tenders and if the second round proceedings met the same fate, third round of proceedings would take place on 22nd July, 2019 and then finally on 22nd July, 2019. According to the petitioner in the very first round of the proceedings when bid was opened on 11th July, 2019 it stood granted on same day in favour of respondent no. 5 which is a society consisting of members not confined to the village or development block but of villages at Tehsil level forming cooperative society having area of operation at Tehsil level and which according to the petitioner could not have been permitted in the first round of bidding process. According to the learned counsel for the petitioner, therefore, the allotment of fisheries rights in respect of pond in question awarded in favour of respondent no. 5 is illegal.

4. The argument of learned counsel for the petitioner questioning the auction proceedings and consequential allotment of the fisheries rights can be summarized as under;

(a). As per the Fisheries Manual, application to the auction proceedings relating to the fisheries rights, the first preference has to be given to the cooperative societies consisting of the villagers only of the gram panchayat where the reservoir situates in the first round and in case if applications are not received from the cooperative societies of the villagers or in case reserved price is not met by the bidding societies the second and third round of tender proceedings will be held. The issue thus raised is that respondent no. 5 being a cooperative society having the area of operation beyond limits of development block in question and consisting of persons belonging to other blocks, respondent no. 5 could not have participated in the first round of tender proceedings, and his tender application was liable to be renderd

unqualified/ineligible and thus was to be rejected;

(b) The respondents could not have justified accepting applications of the bidders who could have been admitted only in 2nd and 3rd round of the biddings at the same time i.e. initially in the absence of any order/direction to that effect by the Chairman of the Auction Committee. He submits that as per manual there has to be an order in writing inviting all the bidders eligible in several other stages like in 2nd, 3rd and 4th round, to apply their tender in the very first round; and

(c) As per the manual, participants societies must have requisite fund in its account equivalent to the reserved price shown in the advertisement on the date of application of tender and since respondent no. 5 did not have requisite fund in its bank account, its tender application was therefore not submitted with requisite document, the same ought to have been rejected at the very threshold.

5. *Per contra* the arguments advanced by learned Additional Chief Standing Counsel representing respondent nos. 1 to 4 as well as counsel for the respondent no. 5 are that procedure as prescribed for under the manual as well as Government order issued in that regard dated 27th August, 2018 has been duly complied with. He further argues, relying upon the same very manual that relevant clause 12 of the manual clearly stipulates that applications of all the stages can be invited in the very first stage. He submits that complete transparency has been adopted in allotment of fisheries rights and authorities have not committed any illegality much less a substantial one, as alleged, so as to render the proceedings vitiated in law.

6. Learned counsel for respondent no. 5 has also placed reliance upon Clause 12 of the manual and submits that if application was not invited in the very first round by the respondents and petitioner had submitted duly filled up tender application, there was no fault on its part. He further submits that since agreement has been executed by means of the allotment order, the petitioner, if has any grievance, he can approach for common law remedy instead of preferring present writ petition.

7. Rival submissions fall for consideration.

8. In order to put records straight, we refer to our initial order dated 5.08.2019, in which we had noticed the allegations made in the writ petition regarding illegal proceedings and accordingly directed the learned Standing Counsel to have instructions in the matter and matter was fixed for 14.8.2019. However on 14th August, 2019, the matter could not be heard as lawyers were abstaining from the work and, consequently, 21st August, 2019 was next date fixed and on 21.08.2019, respondent no. 3, Sub Director of Fisheries Department, district Jhansi Sri Gyanendra Singh, himself appeared before the Court and it was stated that on 08th August, 2019 an agreement had been executed in favour of respondent no. 5. Since respondent no. 5 himself was present in Court on that day, we directed the respondent no. 5 to engage counsel and accordingly, adjourned the matter for 29th August, 2019. On 29th August, 2019 since lawyers were again abstaining from work and officers summoned in the case were present but it was informed by them that pursuant to the agreement, no consequential actions have been taken, so

therefore, we directed the parties to maintain status quo fixing 5th September, 2019. On 5th September, 2019, since original records were brought before this Court, personal appearance of the officers were dispensed giving them liberty to file their response in the matter and fixed the date for 16th September, 2019. On 16th September, 2019 since counter was filed, the petitioner was granted time to file rejoinder and that is why the case is fixed for today and matter is heard.

9. Now coming to the first argument advanced by learned counsel for the petitioner that respondent no. 5 could not have been applicant in first round of bidding process in response to the notice inviting tender dated 25th June, 2019. we consider it necessary first to refer the relevant clause of manual that prescribes for the procedure to be followed in the matter of allotment of fisheries rights in respect of a reservoir falling in 4th category. We may notice also that 4th category of reservoir is a pond of an area of more than 5 hectares. Clause 6 of the provisions is reproduced "hereunder:"

"6. निविदा के प्रथम चक्र में सम्बन्धित जलाशय के भौगोलिक क्षेत्र में पड़ने वाली गांवसभा/गांव सभाओं तथा सम्बन्धित विकास खण्ड की पंजीकृत मत्स्य जीवी सहकारी समितियां एवं स्वंय सहायता समूह ही भाग लेंगी।"

English Translation by this Court:

"In the first round of the tender proceedings the registered fisheries cooperative societies and cooperative groups can participate who belong to the Gaon Sabha/Gaon Sabhas of concerned development block falling in the area where territory of the pond falls."

10. It has been admitted and is undisputed that water reservoir in question is in village Manikpur and respondent no. 5 as an individual neither belongs to the village nor, development block in question nor, the cooperative society is confined to the village or development block having stretches of reservoir (pond) in question.

11. In paragraph 10 of the writ petition categorical averment has been made which is reproduced hereunder:

" That it is evidence on record that the respondent is not belong to the village or Block of the fisheries lease reservoir (pond), therefore, the respondent is not entitled to appear in the allotment proceeding of fisheries lease reservoir (pond) of Hela Reservoir and Manikpur Reservoir (pond) under the government Order.

The true copy of the registration Certificate of the respondent as well as the Government orders dated 16.01.2006 and 08.01.2019 are being filed herewith and marked as Annexure-4 to this writ petition. "

12. In reply to paragraph 10 of the writ petition, respondent no. 5, the main contesting party has averred as under in paragraph 21:

" That the contents of paragraph numbers 10 of the writ petition as stated is incorrect hence denied. It is further submitted that from the village/Block in which the aforesaid reservoir situate only one tender application of the petitioner was existing. To generate the better revenue against the allotment of the aforesaid reservoir the competition was required hence the second round tendering was opened in which more than one tender

application was found. Amongst these 3, the tender amount of the respondent no. 5 was highest and accordingly the allotment has been made in his favour. In paragraph no. 12 of the Manual Nivida Prapatra it has been explained that the tender application of all rounds may be opened simulatneously."

13. Thus there is no specific denial that respondent no. 5 does not belong to the village or the territories with stretches of pond/reservoir in question and, therefore, all the averments made in paragraph 10 of the writ petition stand admitted.

14. However, we also made a pointed query from learned counsel for the respondent no. 5 as to whether respondent no. 5 belongs to the village or the development block or in other words his society confined to the village Panchayat or any of the village Panchyats in the development block in question, he fairly made an admission at the bar that respondent no. 5 does not belong to the village nor, development block nor, it is society confined in its area of operation to the village panchayat or development block only.

15. From perusal of clause 6 (*supra*) it is clearly revealed that in the first round of tender process only fisheries cooperative societies of the village panchayat or any of the village panchayat of development block in which territory of reservoir extends can only apply. Since respondent no. 5 does not belong to or fulfills such a criterion, he could not have participated in the first round of tender process.

16. Learned Additional Chief Standing Counsel, however, has vehemently urged that in view of Clause 12 of the manual, respondent no. 5 after applied in the first round, his application was not liable to be rejected. He further submits that even after bid was accepted in the very first round of a cooperative society who could have participated in the 2nd and 3rd round, there was no substantial error in view of Clause 14. In order to appreciate the argument of learned Additional Chief Standing Counsel Clause 12 of the manual is reproduced as under:

"12. श्रेणी–4 जलाशयों के सम्बन्ध में चकों/पात्रता की निविदाएं एक साथ या अलग–अलग प्राप्त करने व खोलने की कार्यवाही एक ही तिथि या अलग–अलग तिथियों में की जा सकती है। इस सम्बन्ध में अध्यक्ष नीलाम समिति द्वारा निर्णय लिया जायेगा। शासनादेश दिनांक 16.01.2006 में निर्धारित पात्रता के क्रम में ई–निविदाएं खोली जायेगी एवं वरीयता क्रम में जिस चक्र में निर्धारित न्यूनतम मूल्य से अधिक निविदा मूल्य प्राप्त हो जायेगा उसके पक्ष में निविदा स्वीकृत की जायेगी।"

English Translation:

"In respect of 4th category reservoir, the applications of various stages/rounds as per the eligibility can be conducted at the same time in one single round and can be opened on one date or it can be opened on different dates. In this regard, the Chairman of the Auction Committee shall take decision as per the Government Order dated 16th January, 2006 which prescribes for eligibility. The technical bids will be opened in order of preference in which round they fall and in the event of highest bid being proposed such application would be granted."

17. Thus from bare reading of the provision, it is clearly borne out that while applications for different round of tender process falling in different category, can be invited and admitted at the same time irrespective of the rounds advertised and then final opening of the same can be done simultaneously at one time and can of-

course, be opened on the very first round and license can be given to the highest bidder following preferences of the category but in that regard a decision has to be taken by the Chairman of the Auction Committee. Thus Clause-12 of the manual carves out an exception to Clause 6 but with the rider that there has to be decision by the Chairman of the Auction Committee. As Clause 12 stands as exception to the general rule of procedure prescribed for under Clause 6 the rider given thereunder is mandatory to make it happen . In none of the paragraphs of the counter affidavit, it has been stated that any such decision was taken by the Chairman of the Auction Committee nor, do we find anything from the records which have been duly verified by the learned Additional Chief Standing Counsel, any such order is available which may demonstrate that Chairman Auction Committee had taken decision to invite all applications meant for different stages, at one point of time.

18. In such view of the matter, therefore, merely because decision has been taken in favour of respondent no. 5, it cannot be presumed that Chairman of the Auction Committee might have taken such decision. Neither provision provides any deeming clause for the purpose of raising such a presumption nor, do we find any reason for the same because Clause 12 stands only an exception to Clause 6 . Any interpretation as suggested by the Additional Chief Standing Counsel would be doing violence to the spirit of Clause 6 and would amount also eroding the principles of transparency which is not only of paramount importance in matters of public auction but is *sine qua non* in matters of procedure to be followed in public tender process.

19. Learned counsel appearing on behalf of respondent no. 5 supporting the argument of Additional Chief Standing Counsel has drawn our attention to the document annexed as annexure CA-6 and submits that item no. 1, and item no. 7 were the only societies belonging to the village or the Gram Panchayat whereas rest of the societies where of Tehsil level who participated in the first round of bidding. He further submits that since minimum three applications should have been there and only two societies were applicants, the Auction Committee was left with no other option but to proceed to consider all the tender applications that would have been ordinarily submitted in the 2nd round and onwards. So, according to him there was no error much less a substantial one to hold the allotment and selection of the respondent no. 5 being highest bidder, to be bad. This, argument advanced by learned Additional Chief Standing Counsel does not impress us either. If there were only two cooperative societies in the very first round, there was all the more reason to hold 2nd round of tender process afresh as contemplated both in the advertisement as well as fisheries rights allotment manual.

20. Since, we have already held that there was no order in writing of the Chairman of the Auction Committee to invite applications at the same time, considerations of applications of various societies from serial no. 2 to 6 could not have been done in the first round held on 11th July, 2019. We are not considering the case of item no. 8 in annexure 6 to the counter affidavit of respondent no. 5 because that society did not participate and absented. However, its absence could have been caused only because there was further procedure prescribed for 2nd, 3rd

and 4th round of bidding process and it could have been under the impression that 2nd round would be held. We may not justify the action and procedure followed by respondent on the ground that Chairman did not pass the order for the exercise that was undertaken at the very first round, but we may also observe that the other fisheries cooperative societies could not have requisite knowledge of such procedure being followed and, therefore, even others might have been denied the chance. This procedural flaw therefore, goes to the root of the matter and we are constrained to hold that there was no such transparency as is expected from the government functionaries, at least in the procedure to be adopted in a public tender process. Thus, so far as 1st and 2nd arguments advanced by learned counsel for the petitioner are concerned, they hold merit.

21. Coming to the 3rd argument advanced by learned counsel for the petitioner that respondent no. 5 did not have requisite fund in its account to match at-least minimum reserved price in the auction of the fisheries rights in respect of the reservoir in question. Learned counsel for the petitioner has drawn our attention to Clause 28 of the manual. Clause 28 of the manual runs as under:

" मत्स्य जीवी सहकारी समितियों को निविदा प्रस्तुत करने हेतु प्रबंध समिति से पारित प्रस्ताव एवं बैंक पास बुक में प्रथम वर्ष के निविदा मूल्य के सापेक्ष धनराशि जमा की पुष्टि के लिये फोटो कापी भी प्रस्तुत करनी होगी । निविदा प्रस्तुत करने हेतु समिति के सचिव ही अधिकृत है अन्य के द्वारा प्रस्तुत निविदा निरस्त कर दी जायेगी । "

English Translation:

For the purpose of submitting tender application, it is necessary for the fisheries cooperative societies to have resolution passed from its committee of management for the said purpose and the bank photocopy of the passbook of the order of the tender must show balance amount matching reserved price. For the purpose of filing tender application, Secretaries are also authorized any other tender application by any other persons was rejected.

22. Thus, it is condition precedent in a sense that a pre-requisite for tender application is that it should be submitted alongwith photocopy of the passbook which should show balance amount at par with reserved price fixed in the notice inviting tender. It means that it included balance amount should be there on the date of submission of tender application.

23. Learned counsel for the petitioner has drawn our attention to the statement of the bank account of respondent no. 5 which has been annexed alongwith rejoinder affidavit and which shows that till 11th July, 2019, respondent no. 5 had only Rs. 5,870/- in its account. Rs. 4, 40,000/- were deposited only on 12th July, 2019 which is admittedly, a date after acceptance of tender application of respondent no. 5 and consequential allotment of fisheries rights that took place on 11th July, 2019 itself.

24. Learned counsel for the respondent does not dispute this fact but only reiterate that requisite money got deposited well in time before agreement entered with fisheries department on 08th August, 2019. The legal position is absolutely clear. Every tender has to be in incomplete form with all requisites documents on the date of application of tender, no amendment or supplementary to correct the tender application is

permissible unless the rule of procedure or advertisement provided for that and this is not a case where any such amendment in the tender application was permissible. However, condition is that there should be cooperative societies and the cooperative societies should have resolution passed in its favour for the purpose of applying for tender, by its Committee of Management and that tender application is accompanied by the photocopy of the passbook showing minimum balance at par with minimum reserved price under the advertisement. These conditions in our view are quite mandatory in nature and if these documents are not filed in support of the tender application, tender application would be liable to be rejected. So on this count also, the tender application of the respondent no. 5 could not have been entertain and so allotment order dated 11th July, 2019 cannot be sustained in law.

25. The law is well settled that when a thing is required to be done in a particular manner under the Rules should be done in that very manner in case of **Deputy Commissioner of Income Tax, Circle 11 (1), Bangalore v. M/s Ace Multi Axes Systems Ltd, in Civil Appeal No. 20854 of 2017 decided on 5th December, 2017. Vide paragraph 21,** the Apex Court has held thus:

"26. Whenever the statute prescribes that a particular act is to be done in a particular manner and also lays down that failure to comply with the said requirement leads to severe consequences, such requirement would be mandatory. It is the cardinal rule of interpretation that where a statute provides that a particular thing should be done, it should be done in the manner prescribed and not in any other way. It is also settled rule of interpretation that where a statute is penal in character, it must be strictly construed and followed. Since the requirement, in the instant case, of obtaining prior permission is mandatory, therefore, non-compliance with the same must result in cancelling the concession made in favour of the grantee, the respondent herein."

26. Although, the Apex Court has been dealing with statutory rules in the said case but even in matters where no statutory rules have been framed the Government Orders, manual containing rules, circulars, directives or guidelines if framed for the said purpose, in our opinion are equally binding and the authorities dealing with matters should abide by the procedure prescribed for under such manual, government Orders or directives or circulars.

27. In this case a specific provision as contained in the fisheries manual framed for the purpose of carrying out auction proceedings for fisheries rights, provided detail procedure , it was not open for the Auction Committee to have bypassed the same or mould the same to suit its convenience. An authority that enjoys power or has source of power from such rules, does not enjoy the authority to change rules or mould the rules according to its convenience. Thus, in our opinion in the present case tender proceedings in question have been conducted and the bidding process has been held quite contrary to the procedure prescribed for under the manual providing procedure for auction proceedings *qua* fisheries rights.

28. In view of above, the entire tender proceedings conducted by respondent pursuant to the advertisement dated 25th July, 2019 in respect of

Manikpur category 4 reservoir, district Chitrakoot and the consequential allotment order date 11.07.2019 in favour of respondent no. 5 brought on record vide annexure 1 to the counter affidavit filed on behalf of respondent nos. 1 to 4 are hereby quashed.

29. Respondents are directed to initiate proceedings to float tender afresh for the purpose of allotment of fisheries rights in respect of reservoir in question within four weeks from the date of production of certified copy of this order. It is made clear that this time the procedure will be strictly followed as per the manual and the relevant Government Order and all the eligible persons including petitioner and respondent no. 5 shall be entitled to participate in the tender process as per their own rights of preference.

30. Writ petition thus stands allowed with above observations and directions.

(2020)02ILR A313

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 24.09.2019

BEFORE

THE HON'BLE RAMESH SINHA, J.
THE HON'BLE AJIT KUMAR, J.

Writ C No. 29087 of 2019

Anil Kumar Singh ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Tarun Agrawal, Sri Prakhar Srivastava

Counsel for the Respondents:
C.S.C., Sri Rahul Sahai, Sri Mayank Srivastava

A. Civil Law-UP Kshettra Panchayat and Zila Panchayat Act, 1961 – Section 15(2) and 15(3) – Notice of no confidence – Limitation – Intention to make motion – There is a clear mandate by the legislature that no meeting can be convened for discussing a no confidence motion beyond a period of 30 days – The explanation that has been appended to the relevant provision only saves a situation where a notice of confidence motion has been put to challenge and there is some stay order operating in that respect –Once a notice is given convening a meeting, the meeting is a must on the scheduled date. (Para 12)

B. Constitution of India – Article 226 – Suspension of Notice – Effect of Vacation of Stay Order – If Court finds notice to be legal and dismisses the writ petition vacating the stay order, the suspended animation gets over and natural legal effect would be the rescheduling of the meeting as if notice was already there – Court's order suspending any notice, otherwise legal, is like an eclipse that overshadows the time schedule provided under the Act, for a while and then goes away. (Para 13)

C. Interpretation of Statute – Golden rule of interpretation – Literal interpretation – A limitation if prescribed by legislature, it cannot be extended – The golden rule of interpretation is to go by literal interpretation to a provision of law – The explanation added to the Section not only shows intendment of the legislature in saving a particular situation so that by an act of Court a proceeding otherwise legal, does not get frustrated, the principle being '*actus curiae neminem gravabit*' which means act of Court shall prejudice no man. (Para 15)

D. Constitution of India – Article 226 – Scope – Court exercising its power under Article 226, cannot pass a direction which would not only carry out a new exception to the general law but in substance would amount to an exercise, quite legislative in nature, which is clearly not permissible. (Para 16)

Writ Petition dismissed. (E-1)

List of cases cited :-

1. Jones vs. Smart, 99 ER 963

2. Union of India vs. Rajiv Kumar (2003) 6 SCC 516

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

1. Heard Sri Tarun Agrawal, learned counsel for the petitioner, Sri Devendra Kumar Tiwari, learned Addl. Chief Standing Counsel for respondent nos.1 and 2 and Sri Rahul Sahai, learned counsel appearing for respondent no.3. Perused the record.

2. By means of this petition under Article 226 of the Constitution, the petitioner has questioned the correctness of the order dated 31.8.2019 passed by the District Magistrate whereby he has turned down the notice of no confidence motion moved by the petitioner and other members of Zila Panchayat on the ground that it was only signed by five members, though, it has been acknowledged in the order itself that there were 37 affidavits filed in support of the notice of no confidence motion.

3. We summoned the original records for the purposes of due verification as to the reason assigned in the order impugned by the District Magistrate. From the perusal of the original records, we find that the notice, though on the first page, is signed by five members but it has also an appended list of 37 members including those five members, titled as "Signatures of the members on a format in support of the notice of no confidence motion."

4. Having thus perused the original records, atleast this much is clear that there was a notice having a due appendix of the format which contained signatures of 37 members who intended to move a notice of no confidence motion against respondent no.3.

5. An argument has been advanced by learned counsel for the petitioner also relying upon a judgment of Division Bench of this Court in the case of Smt. Shashi Yadav vs. State of U.P. and others wherein in identical facts and circumstances the notice of motion carried alongwith affidavits of members who intended to move the no confidence motion. The Court held in its ultimate paragraph nos.38, 39 and 40 thus:

"38. We hold the provision regarding the form of written notice of intention to make the motion required to be submitted to the Collector on behalf of the members signing the notice under Section 15(2) is to be directory in nature. A substantial compliance of the provisions would implement the requirements of law. A substantial compliance is done when the purpose of the notice is achieved. The purpose of the notice of intent to make the motion, is to furnish to the Collector the material on which he has to found his satisfaction before convening the meeting. Such material should demonstrate full compliance of mandatory provisions of 15(2) of the Act. In particular, the notice should be in writing. It should manifest the clear intention of the members to make a motion expressing want of confidence in the Pramukh. It should be signed by at least half of the elected members. The copy of the no confidence motion should be attached thereto.

39. In fact, if a strict compliance of the said mandatory parts of Section

15(2) is done, then the substantial compliance of directory provisions of the aforesaid of Section 15(2) would be automatically deemed to have been done.

40. If such facts or material can be distilled from the notice to make a motion expressing want of confidence irrespective of its form, it substantially complies with the mandate of law. As has been held, these prerequisites are fulfilled in the instant case. "

6. It is thus argued that the order passed by the District Magistrate cannot be sustained.

7. *Per contra,* an argument advanced by learned counsel appearing for the State respondents as well as the respondent no. 3 is that as per the provisions contained under Section 15 (3) (i), the District Magistrate is under an obligation to convene a meeting of Kshetra Panchayat for consideration of motion and which should be scheduled not later than 30 days from the date on which the notice under Sub-Section 2 was delivered to him. He further argues that as per the provision the only saving in terms extension in prescribed period is under those circumstances where there is some stay order operating in a case against the notice of no confidence motion under challenge. Therefore, he submits that since the notice admittedly was delivered on 16.8.2019, a period of 30 days has already expired so the writ petition is rendered infructuous and no effective relief can be granted. Moreover, he argues that there was no interim order or stay order operating in the present case as defined in the explanation.

8. Countering the above submissions advanced, learned counsel for the petitioner argues that in such situation interim order would not be where notice itself has come to be rejected by the District Magistrate and rejection order is under challenge. He argues that the District Magistrate has not duly applied his mind and the order is absolutely illegal in the light of the *ratio* of the judgment of the Division Bench. He argues that the order if is bad and is set aside, this Court exercising extraordinary power under Article 226 of the Constitution, can even warrant for further period for convening the meeting of no confidence motion by providing extended time as prescribed for under the Act, 1961.

9. Rival submissions fall for consideration.

10. Coming to the first argument advanced by learned counsel for the petitioner that the order passed by the District Magistrate is not sustainable as the law laid down is to the effect that even if the notice of no confidence motion is accompanied by affidavit of members forming requisite number i.e. more than half of total members to move a no confidence motion.

11. In our considered opinion, as the law stands today and the statement has been made at the bar that the judgment in Smt. Shashi Yadav (supra) still holds the field as the said judgment has not been challenged in the Apex Court, the ratio laid down in the judgment is fully attracted and the order of District Magistrate cannot be sustained. It is accordingly held bad being legally not sustainable. However, the question is that even if the order is quashed today what would be consequential effect thereof.

12. The argument as advanced by learned counsel for the respondents if

tested upon the relevant provision of the Act, 1961, we find that there is a clear mandate by the legislature under the provision that no meeting can be convened for discussing a no confidence motion beyond a period of 30 days. The explanation that has been appended to the relevant provision only saves a situation where a notice of confidence motion has been put to challenge and there is some stay order operating in that respect.

13. We find justification for such a saving clause for the simple reason that once a notice is given convening a meeting, the meeting is a must on the scheduled date but for the Court's intervention. So, in case if Court finds notice to be legal and dismisses the writ petition vacating the stay order, the suspended animation gets over and natural legal effect would be the rescheduling of the meeting as if notice was already there. So, Court's order suspending any notice, otherwise legal, is like an eclipse that overshadows the time schedule provided under the Act, for a while and then goes away.

14. In the present case, we find that the District Magistrate has rejected the notice on certain grounds on 31.8.2019. A challenge to the rejection order would have resulted in a positive action, in case, if it is quashed and a period prescribed under substantive provision to convene the meeting is still there.

15. A limitation if prescribed by legislature, it cannot be extended. The golden rule of interpretation is to go by literal interpretation to a provision of law. The explanation added to the Section not only shows intendment of the legislature in saving a particular situation so that by an act of Court a proceeding otherwise legal, does not get frustrated, the principle being *'actus curiae neminem gravabit'* which means act of Court shall prejudice no man.

16. In view of the legislative intent behind the provision, this Court exercising its power under Article 226, cannot pass a direction which would not only carry out a new exception to the general law but in substance would amount to an exercise, quite legislative in nature, which is clearly not permissible. The law is very clear that a ***casus omissus can in no case be supplied by a Court of Law, for that would be to make laws*** (per Buller J. in Jones vs. Smart, 99 ER 963), except in some case of ***absolute necessity.*** The settled legal position as a rule of interpretation is that ***the Court cannot read anything into a statutory provision or rewrite a provision which is plain and unambiguous. A statute is an edict of the legislature. The language employed in a statute or any statutory provision is the determinative factor of legislative intent of policy makers.*** *[Union of India vs. Rajiv Kumar(2003) 6 SCC 516].*

17. As here in this case Sub-Section 12 of Section 28 of the Act, 1961, would not be attracted and it is always open for the members to bring fresh notice qua no confidence motion against the respondent no.3, it is not a case of such an absolute necessity that if Court did apply the principle of *'casus omissus'*, miscarriage of justice would take place resulting in any irreparable loss.

18. Learned counsel appearing for the petitioner has not been able to cite any judgment to the contrary.

19. With the aforesaid observations, the petition stands consigned to records.

(2020)02ILR A317

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 02.12.2019

BEFORE

THE HON'BLE AJAY BHANOT, J.

Writ C No. 29363 of 2019

Shahbaz Ali Khan ...Petitioner
Versus
Union of India & Ors. ...Respondents

Counsel for the Petitioner:
Sri Kumar Anish

Counsel for the Respondents:
A.S.G.I., Sri Rijwan Ali Akbar, Sri Shashank Shekhar Singh

A. Constitution of India – Fundamental Rights – Nature – The text of the Constitution, is a conceptual philosophy of fundamental rights, and not an exhaustive guide to fundamental rights – The text of the Constitution is fixed, fundamental rights are always evolving. This is the essence of constitutional law jurisprudence – Evolution of constitutional law rights are guided and controlled by the text of the constitution, long settled judicial principles of interpretation of the constitution, and judicial precedents in point – The march of law is also assisted by consensus of values, in the comity of civilized nations. (Para 40 and 41)

B. Constitution of India – Article 21 – Human dignity – Means and Scope – Human dignity made a decisive contribution in the development of the rights of life and liberty, in jurisprudential systems of free societies across the world – Consistent and high authority have thus entrenched human dignity as fundamental to right to life, which flows from Article 21 of the Constitution of India. (Para 78, 107)

C. Constitution of India – Article 21 – Validity of Punishment – Imposed on delinquent student – Punishment has to be effective to serve its purpose; however, it cannot be purblind to human dignity, if it is to retain its constitutionality – Degree of injuries to self esteem, extent of degradation of human worth, depth of humiliation caused by the punishment, are facts to be probed in an enquiry into the validity of the punishment – Punishment for deviant conduct, cannot be so severe as to degrade human life. Every form of punishment should protect the essential sanctity of human life and comport with fundamental norms of decency evolved by a civilized society. (Para 118, 120 and 122)

D. Constitution of India – Article 21 – Rehabilitation and Reformation – Absence of an environment of reform, self development and rehabilitation in a university, denies the opportunity of redeeming one's reputation – The individual is permanently discarded by the institution, and loss of human self worth is total – This system of punishment is destructive of fundamental elements of human dignity, and violative of Article 21 of the Constitution of India – Held, The impugned action taken by the university, against the petitioner is violative of the fundamental right of human dignity of the petitioner, guaranteed under Article 21 of the Constitution of India, as it fails to consider his susceptibility to reform. (Para 123 and 136)

E. Civil Law– Its role and contribution – Preservation of Constitutional values – University is a paternal institution – It is a microcosm of the Society – There are no other institutions of equal standing, to engage with the youth, deal with the discontent or aberration, and channelize youthful energies – The role of the University does not end in punishing perpetrators of violence. It begins with the identification of the causes of violence, communal hatred, and other forms of deviant conduct – Thereafter the responsibility to achieve behavioral change commences – The universities have the responsibility, to preserve this heritage, and the obligation to nurture these constitutional values. (Para 149, 150, 153 and 161)

F. Nudge – Methodology – Behavioral Change – Importance of Yoga, Meditation and Vipassana – The methodology of 'nudges', in

creating behavioral change has been gaining acceptability. The organization 'Nudge' in Lebanon, has done noteworthy work with refugee children, and on environmental protection – The Behavioral Insights Teams sometimes called 'Nudge Units', are also existing in many nations including Australia, Canada, Germany, Qatar, the United Arab Emirates, Japan, the United States, and the United Kingdom – Ancient branches of knowledge and wellness like yoga, meditation, vipassana and so on may prove to be rich resources to benefit from. (Para 176, 177 and 178)

G. Therapeutic Approach – Significance – To solve Social Problem – Under the therapeutic method, however, an individual's happiness depends on his or her self-esteem, and self-esteem is a by-product of public recognition – With the rise of therapeutic approaches by mid century, they were increasingly seen as social pathologies that needed to be treated through counseling and psychiatric intervention – Therapeutic solutions to social problems, are being increasingly recognized by social scientists, medical experts, psychologists, and jurists alike. (Para 140 and 181)

Writ Petition disposed of. (E-1)

List of cases cited :-

1. Vishaka Vs. State of Rajasthan, reported at 1997 (6) SCC 241

2. Rattan Chand Hira Chand v. Askar Nawaz Jung, (1991) 3 SCC 67

3. Sajjan Singh v. State of Rajasthan, AIR 1965 SC 845.

4. Kesavananda Bharati v. State of Kerala (1973) 4 SCC 225

5. Maneka Gandhi v. Union of India, (1978) 1 SCC 248)

6. Olga Tellis v. Bombay Municipal Corpn (1985) 3 SCC 545).

7. Prem Shankar Shukla v. UT of Delhi (1980) 3 SCC 526

8. Francis Coralie Mullin v. UT of Delhi (1981) 1 SCC 608

9. Bandhua Mukti Morcha v. Union of India (1984) 3 SCC 161

10. Khedat Mazdoor Chetna Sangath v. State of M.P. (1994) 6 SCC 260

11. M.Nagaraj v. Union of India (2006) 8 SCC 212

12. Shabnam v. Union of India (2015) 6 SCC 702

13. Jeeja Ghosh v. Union of India (2016) 7 SCC 761

14. Mehmood Nayyar Azam v. State of Chhattisgarh (2012) 8 SCC 1

15. National Legal Services Authority v. Union of India (2014) 5 SCC 438

16. Maharasthra University of Health Sciences v. Satchikitsa Prasarak Mandal (2010) 3 SCC 786

17. Selvi v. State of Karnataka (2010) 7 SCC 263

18. Sunil Batra (II) Vs. Delhi Administration 1980 (3) SCC 488)

19. T.K. Gopal v. State of Karnataka (2000) 6 SCC 168

20. Asfaq v. State of Rajasthan and Others (2017) 15 SCC 55

21. K.S. Puttaswamy v. Union of India (2017) 10 SCC 1

22. Rosenblatt v. P Baer 1966 SCC OnLine US SC 22 : 383 US 75 (1966)

23. Armoniene v. Lithuania (2009) EMLR 7

24. Procunier, Corrections Director, ET AL. Vs. Martinez ET AL. 416 U.S. 396 (1974)

25. Trop Vs. Dulles 356 US 86 (1958)

26. Bijoe Emmanuel and others vs. State of Kerala and others (1986) 3 SCC 615

27. Avinash Nagra Vs. Navodaya Vidyalaya Samiti and Others (1997) 2 SCC 534

28. Devarsh Nath Gupta Vs. State of U.P. and Others, 2019(6) ADJ 296 (DB)

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(Delivered by Hon'ble Ajay Bhanot, J.)

1. This judgment has been structured by dividing it into various sections to facilitate analysis and for easy read. They are:

A.	Reliefs sought
B.	Arguments of learned counsels for the parties
C.	Facts
D.	Legal Issues common in all writ petitions
E.	Stands of various respondents on affidavits (i).Response of IIT BHU (ii).Response of AMU (iii).Response of BHU (iv).Response of UGC (v).Response of UoI
F.	Evolution of Fundamental Rights by courts (i) Legislative lag, executive inertia and fundamental rights
G.	Process of law and the courts : Current State & Contemporary Challenges
H.	Education (i). Importance and scope (ii). Role and obligation of universities
I.	Discipline in Universities: Concept, Need & Challenges (i). Violence, intimidation and moral turpitude (ii). Communal disturbances in universities (iii). Discipline in universities (iv). Statutory approach to maintaining discipline
J.	Statutory Regime of Punishments in light of Article 21 & Doctrine of Proportionality
K.	Punishments & Article 21 (i). Right to human dignity (ii). Supreme Court on human dignity (iii). Comparative International Jurisprudence (iv). Constitutionality of punishments under the statutes (v). Systemic responses : Responsibilities of the State and the universities
L.	Reform, Self Development & Rehabilitation: (i). Role of universities in achieving behavioural change (ii). Imbibing constitutional values and purging communal hatred (iii). Present discontents of students and solutions (iv). Creation of reform/self development/rehabilitation programmes (v). Concerns of universities regarding discipline, & restraints during the reformation, self development & rehabilitation programme
M.	Conclusions & Reliefs
N.	Appendix

A. *Reliefs sought*

2. The prayer made by Sri Kumar Anish, learned counsel for the petitioner is that the appeal of the petitioner may be decided within a stipulated period of time and his case may be considered for pursuing his studies as part of the reform, self development and rehabilitation programme which is proposed to be created in the University.

3. The second prayer made by Sri Kumar Anish, learned counsel for the petitioner is that the petitioner may be permitted to continue his studies as part of reform, self development and rehabilitation programme. The petitioner undertakes to unconditionally join and diligently pursue the reform, self development and rehabilitation programme as may be created by the University, but he may be permitted to pursue his studies.

4. The second relief was moulded by the learned counsel for the petitioner, at the time of the arguments. In the interest of justice and expeditious disposal and in the light of submissions of the parties, the formal amendment to the relief clause is dispensed with.

B. *Arguments of the learned counsel for parties*

5. Sri R.K.Ojha, learned Senior Counsel assisted by Sri Ratnakar Upadhyay, learned counsel for the petitioner submits that the impugned order was passed in violation of the statutes of the university. The punishment imposed upon the petitioner, is disproportionate. There is no provision for any reform and rehabilitation of delinquent students in the statutes, which results in violation of the fundamental right, of the petitioner guaranteed under Article 21 of the Constitution of India.

6. Sri Anish Kumar, and Sri Pankaj Misra and Sri Gaurav Pundir, learned counsels for the petitioner in connected writ petitions, adopt the aforesaid arguments of the learned Senior Counsel, apart from raising factual issues and peculiar to the respective writ petitions in which they appear.

7. Sri V.K. Upadhyaya, learned Senior Counsel assisted by Sri V.D. Chauhan, learned counsel for the BHU, submits that the BHU has taken action as per law.

8. The learned Senior Counsel, relied on the affidavits filed by the B.H.U., on creation of a reform and rehabilitation programme, for delinquent students.

9. Sri Ajit Kumar Singh, learned Senior Counsel assisted by Sri V. D. Chauhan, learned counsel for the IIT BHU, contends that the IIT BHU, as a matter of policy accepts and is willing to adopt a professionally designed, reform and rehabilitation programme for delinquent students. However, the good order and discipline have to be maintained in the university at all costs. In fact IIT BHU, is currently even running a reform programme. However, he fairly conceded that the programme is not fully developed, and does not have the necessary statutory/legal frame work.

10. Sri Shashank Shekhar Singh, learned counsel for the respondent-AMU submits that the AMU fully accepts the idea of a reform and rehabilitation programme for delinquent students on an institutional basis. He, however, contends that no compromise with the good order and discipline, and the stability of the academic atmosphere, can be made in any manner.

11. Sri Rakesh Srivastava, learned counsel for the Union of India as well as Sri Abrar Ahmed, learned counsels for the for the Union of India and Sri Rizwan Akhtar, learned counsel for the UGC have also been heard.

C. *Facts*

12. The petitioner is a student, who was pursuing a diploma course in Civil Engineering from the respondent University. The petitioner was charged with threatening a Professor of the University, and pressurizing him to allot marks, in the practical examination, wherein he had infact not appeared.

13. When the professor declined to to so, the petitioner and his brother, misbehaved with professor. Subsequently the petitioner and his brother, came to the Survey Lab of the University Polytechnic, and assaulted the professor; further the petitioner opened fire at the professor with intention of killing him. The Professor, however, managed to save his life. The incident happened in the presence of the staff of the University.

14. The disciplinary enquiry into the incident indicted the petitioner. The petitioner was thereafter expelled from the University by order dated 28.03.2019 for a period of 5 years. The petitioner has preferred an appeal before the University authority.

D. *Legal Issues common in all writ petitions*

15. Absence of any reform and rehabilitative measures, in the administrative and legal frameworks of the universities, has serious legal and constitutional implications.

16. The impugned action and the statutory regime, of imposing punishments, will also be judged in such constitutional and legal perspectives. The discussion on these issues, shall be common in all the companion writ petitions.

17. Calling attention to the statutes of the universities namely, BHU, IIT BHU and AMU, the learned counsels for the petitioners; contended that the said statutes do not contain provisions for reform and rehabilitation of delinquent students. The action against delinquent students, is governed and regulated, solely by the penal provisions, of the statutes of the respective universities. The punitive scheme is a common thread, in the statutes of all the three universities.

18. In response, all the counsels for the various respondents universities', in fact conceded, that as on date no structured and professionally designed programmes for reform, self development and rehabilitation of delinquent students, backed by a proper legal frame work, exist in the respective universities.

19. Accordingly, various orders were passed by this Court, from time to time, requiring the respective universities namely, Banaras Hindu University, Indian Institute of Technology Banaras Hindu University, and Aligarh Muslim University, as well as the University Grants Commission and the Union of India through the Ministry of Human Resource Development, New Delhi, to submit their responses in regard to creation of a reform and rehabilitation frame work, for delinquent students in universities and institutions of higher learning. The respondents were also required to indicate, whether they had any opposition or even reservation, in regard to the creation of the reform and rehabilitative programme for delinquent students in the universities.

20. All the respondents namely Banaras Hindu University (hereinafter referred to as BHU), Indian Institute of Technology, Banaras Hindu University (hereinafter referred to as IIT BHU), Aligarh Muslim University (hereinafter referred to as the AMU) as well as Union of India through Ministry of HRD and University Grants Commission (hereinafter referred to as UGC) have submitted their responses to the aforesaid issues.

E. *Stands of respective respondents on affidavits*

(i) *Response of IIT BHU*

21. The IIT BHU in its affidavit has recorded its full agreement with a reform oriented approach, to deal with deviant behaviour in students. Thus IIT, B.H.U., has made a ringing endorsement, of the need to adopt a reform and rehabilitation programme for delinquent students. However, it has also underscored the need

for punitive action, to maintain a peaceful environment in the campus. The relevant paras of the affidavit are quoted hereinunder:

"2. That the present affidavit is being filed in compliance of the order dated 19.9.2019 passed by this Hon'ble Court.

4. That the Institute as indicated in the foregoing paragraph, is in full agreement with a reform oriented approach. However, in cases where reformative steps do not yield the desired corrections in behavior and actions of erring students, the Institute has to resort to punitive action in order to maintain the peaceful environment in the campus."

22. By categorically stating its commitment to reform of delinquent students, the IIT BHU has been true to its founding principles, and has faithfully discharged its obligations, under law and to the society.

(ii) ***Response of AMU***

23. Upon orders being passed by this Court, the AMU to its credit, constituted an expert committee. The report of the expert committee has been submitted, and is made part of the record of the Court. The relevant parts of the Committee Report are extracted hereinbelow:

"In the light of the above the committee observes as under:

1. Our criminal justice system envisages two type of laws: one for Juveniles and second for other than Juveniles. There is a separate law for Juveniles known as Juvenile Justice Act, 2015 whereas others are covered under Code of Criminal Procedure, 1. 1976 and Indian Penal Code, 1860. The application of AMU Discipline and Conduct Rules, 1985 does not come primarily under the definition of Juvenile therefore the protection available to Juveniles are not available to the Students of the university in general. It becomes more relevant in view of the fact that at the time of admission every the disciplinary jurisdiction of the Vice Chancellor and the other authorities of the University is required to sign a declaration to the effect that he submits himself to the disciplinary jurisdiction of the Vice Chancellor and the other authorities of the University.

2. That it is also pertinent to mention here that Aligarh Muslim University is primarily a RESIDENTIAL UNIVERSITY and there are approximately 36,665 Students [22.593 University Students and departments/courses/Schools in the Aligarh Muslim University. Among these students 12,158 students reside in 56 Hostels (22 for girls) in the campus within the radius of 10 KM. Therefore, the future career of thousands of the students cannot be allowed to be jeopardized for the sake of handful of students who are involved in the indiscipline act and are destroying the whole atmosphere of the University.

3. In principle that criminal activity has no role to play in our education system therefore the students who are involved in the criminal activity have also no role to play in our education system. The students who are indulged in the criminal activity have different mind-set and have nothing to do with their studies. They are not at all interested to pursue their studies and their presence only hampers the study of the other students who are interested to pursue their study. It is the duty of the University to marginalize such type of students so that the students at large, who are more

interested to pursue their studies, may pursue their studies in cordial and peaceful/ atmosphere.

4. That as per existing rules of the University, there is no compulsory/ mandated counselling available to students against whom the discipline and conduct rules are invoked. These rules are also not invoked in a routine way but being a residential University there are day-today interactions/counselling with the Wardens, Provost Tutors, Teachers and Senior Students holding positions of Senior Hall/Food etc.

5. That the extreme punishments as provided in the 1985 rules are invoked when there is an extreme situation and continuance/presence of the students became a threat to the academic environment and campus life of the University.

6. At the same time the observations of the Hon'ble Mr. Justice Ajay Bhanot in this matter are highly appreciable in the context to infuse a reformative approach that the solution lies in engaging with the students, and harnessing their energies creatively. Errant behavior has to be reformed and not condemned. Erring students have to be transformed and not judged. The purpose of education is to unlock the immense potentiality in the human resource of the nation. This is possible by bringing about a conceptual shift in the concept of enforcing discipline, in the portals of the University. Indiscipline unchecked is indiscipline unleashed. But it is equally true. that expelling students from the University is a short term, if not a myopic view of the issue. A balance has to be drawn by the University authorities. The University has to create an ecosystem, with qualified staff and detailed programs of engaging with such students, with a view to give them an opportunity to reform themselves. Expulsion of students would abandon them to their own devices, close the doors of reformation to them, and shut them out from the redeeming light of knowledge. Leaving children accused of misconduct or deviant behavior, to fend for themselves would create issues for the society at large. In case Universities decline to shoulder the responsibilities of bringing such children back to the correct path, and do not provide the frame work for mainstreaming this class of students, the consequences would be detrimental to the society at large. There is no better institution in our democratic frame work, to embrace the young and questing spirits who have strayed from their path of morally upright and correct conduct. The Universities are uniquely equipped to deal with the challenge on an institutional basis. The Universities are repositories of knowledge, resources and experience to meet the challenge at hand. What is at stake, is not merely the future of an individual, but stability of the society The concerns of the society have to be handled by the University. The magnitude of the challenge is large, but it is imperative for the Universities to accept it and provide the adequate response.

After detailed deliberations and in the backdrop of above the committee proposes that:

1. Structural reformative approach may be included in the AMU Students Conduct and Discipline Rules of 1985 as this committee has identified some areas (not all inclusive) for counselling by a psychologist as enumerated above.

2. As the misconduct offences/crimes related to internet and cyberspace were not available when the Discipline Rules were framed, the same needs to be identified and appropriately

included in the AMU Students Conduct and Discipline Rules of 1985 as it is growing among young and youth.

3. Outside campuses were not established when these rules were framed, hence, there is also need to amend these rules to include a structure for those centres.

The committee therefore recommends to the Vice-Chancellor as follows:

AMU Students Conduct and Discipline Rules 1985 were framed almost 30 years back and in the light of the observations given above, a detailed and exhaustive exercise may be undertaken by a committee to be appointed by the Vice-Chancellor under the convenorship of the Proctor of the University to formulate and propose a draft of revised AMU Students Conduct and Discipline Rules, inclusive of reformative approach, after exploring similar rules already enforced by sister universities and institutions in India and abroad for further consideration of the Vice-Chancellor and Academic Council of the University."

24. The AMU has thus in principle, recognized the need for a reform and rehabilitation programme for delinquent students in some areas in the university. The AMU too has accorded top priority, to the maintenance of discipline in the campus, and is rightly unwilling to compromise with the same.

(iii) Response of BHU

25. The initial affidavit filed by the BHU, in regard to their stand on a reformative and rehabilitation programme for delinquent students, stated in effect that the reformation of the students indulging deviant behaviour is achieved, by providing for various categories of punishments, depending upon the nature of indiscipline. It further asserted, that in the name of reformation, the University cannot give a "go by", to the objectives of the university. The relevant paras 17 and 18 of the affidavit dated 17.09.2019 are extracted hereunder:

"17. In the present case no such conditions exist and as such the continuance of the order of suspension of the petitioner from the privileges of the University and Hostel is in accordance with law. That 17. it is the University humbly that submitted administration and the Vice-Chancellor in particular is the custodian of the interests of all the students involved in various academic pursuits in the University. In the case of Banaras Hindu University the number of all the students at various levels runs into more than 30 thousand. For the smooth functioning of the University and maintenance of an environment conducive to academic pursuits the interest of an individual student must give way to the larger interests of all the students as a whole. This is not only in the interest of the students themselves but also in public interest. In the of reformation of the students the University name administration cannot give a go by to the objectives of the University nor can it take an action which may have the potential of destroying the smooth functioning of the University embroiling the University in large scale unrest both in the student as well as in the teaching community. If the University such situation is brought about a administration would be failing in its duty. The fact that Banaras Hindu University is the largest residential University in the country if not the world cannot be lost sight of. Even small spark

has the potential of turning into a conflagration which may become difficult to contain.

18. That the facility and provisions aimed at reformation of the erring students found indulging in deviant behavior is inherent in the Ordinances of the University dealing with students' indiscipline by providing for various categories of punishments depending upon the nature of indiscipline."

26. However, subsequently, the BHU filed an affidavit on 26th September, 2019, easing its reservations, against a reform and rehabilitation programme. The affidavit exhibited a shift in stand, indicating a willingness to consider a reformative approach. The para 7 of the affidavit is extracted hereunder:

"7. That all the aforesaid mechanisms and provisions exist in the University for creation and preservation of an academic ambience conducive to teaching and learning and vibrant and peaceful community life. However, there exist no provision in the Rules of the University for any formal reformative mechanism or process for such students as are found involved in an offence involving moral turpitude or heinous crime and hence are suspended from the privileges of the University. However, the University is not averse to considering this aspect, if it is found appropriate by the University through Constitution of a Committee of stakeholders which may look into as to whether such a mechanism is desirable in principle in the context of maintenance of academic ambience of the University or it may be detrimental to it, particularly, to the interest of larger group of the students, teachers and employees."

27. In substance the BHU was open to the concept of a structured reformative programme. It has however, desisted from taking a categorical position, on this most critical issue. While openness to new ideas is appreciated, failure to take a specific stand is also noticed. The Court will go no further.

(iv) Response of UGC

28. Sri Rizwan Ali Akhtar, learned counsel for the UGC has relied on the affidavit filed by the UGC. The UGC in its affidavit, stated that the universities are autonomous institutions. The academic and administrative decisions, are to be taken by the universities concerned, as per law. It was also stated that "the UGC has no role to play on day to day function of the Central Universities".

(v) Response of UoI

29. The Ministry of Human Resource Development, Government of India has chosen not to file any affidavit, despite orders passed by the Court and opportunities granted by the Court. The Court has to proceed, with the hearing in the interests of justice.

30. It was informed that the Ministry of Human Resource Development, Government of India, on its part had sent communications to the AMU and BHU, to protect its interests. The Court finds that the interests of the Union of India, are in no manner adversely affected. In these cases the interests of the Union of India, are not converse to the universities.

"The best lack all conviction."

~WB Yeats

31. Present discontents cannot be addressed by rote responses. Contemporary problems cannot be resolved by jejune formulae.

32. The universities cannot avoid a stand at the decision point. By prevarication at the decision point, the university may postpone the reckoning, but cannot escape responsibility.

33. Law has to hold institutions accountable to their obligations, to the founding purposes, to the students and to the society at large.

34. Universities of eminence cannot justify present inertia on the foot of past glory. Universities have to be aware of the risks, of basking in the reflected glory of the past. Eminence is achieved by past glory, however, reputation is retained by present endeavours.

35. Universities at certain critical decision points, would be true to their founding purposes and extant obligations by making clear and creative interventions. The universities as well as other authorities cannot show ineptitude in the face of crises, and equivocation in the face of solutions. In these critical situations the universities as well as other authorities, have to stand up and intervene and not stand by and equivocate.

F. *Evolution of Fundamental Rights by courts*

36. The fundamental rights of citizens are stated in Part III of the Constitution of India. But as in all cases, text of the rights can never be the exhaustive description of all rights. Rights have to be interpreted from the text of the Constitution. The process of interpretation of the text, often results in the evolution of rights. The Constitution is the textual origin of fundamental rights. Constitutional law defines the substance of fundamental rights.

(i) Legislative lag, executive inertia and fundamental rights

37. The fast pace of life in modern times often, outstrips the capacity of the legislature, to cope with the consequences of social change. There is a limit to human foresight, but the possibilities of life are limitless. The limits of legislation are the constraints of human foresight. The legislative process is complex and even time taking. Human affairs do not wait on the legislative process. These facts frequently create a legislative lag. It is almost inevitable in the nature of things.

38. The first intersection of life with law, at times happens in courts, even before the legislature grapples with the problems. The courts are often seized, of various emerging issues in social and individual lives, before the legislatures are cognizant of them.

39. A legislative hiatus or executive lethargy, cannot cause a constitutional stasis. The enforcement of fundamental rights, cannot be forestalled by a legislative lag or executive inertia. Constitutional guarantees and Fundamental Rights, have to be enforced on demand. Constitutional overhang is perpetual. Law is always in motion, and never on a holiday.

40. The text of the Constitution, is a conceptual philosophy of fundamental rights, and not an exhaustive guide to

fundamental rights. The text of the Constitution is fixed, fundamental rights are always evolving. This is the essence of constitutional law jurisprudence. There is a method in the evolution of constitutional law jurisprudence.

41. Evolution of constitutional law rights are guided and controlled by the text of the constitution, long settled judicial principles of interpretation of the constitution, and judicial precedents in point. The march of law is also assisted by consensus of values, in the comity of civilized nations. These universal values are often manifested in International Conventions and Treaties. Another source of such values is comparative international jurisprudence. The felt needs of the times are also factored in by the courts. Development of constitutional law happens on these sure foundations. Constitutional rights are distilled from this process. In this process, the courts discharge their constitutional obligations. This is not judicial activism by courts. It is judging.

42. The Hon'ble Supreme Court in the case of ***Vishaka Vs. State of Rajasthan,*** reported at ***1997 (6) SCC 241,*** issued various guidelines for the safety of women at working places. The guidelines held the field, till the Parliament enacted the legislation in that regard. Judicial directions in that case preceded, the legislative enactment. Infact the legislature was alerted, to the need of a legislation to cover the field, by the judgment of the Hon'ble Supreme Court.

43. This narrative will profit from the observations of the Hon'ble Supreme Court, in the case of ***Rattan Chand Hira Chand v. Askar Nawaz Jung,*** reported at ***(1991) 3 SCC 67:***

"The legislature often fails to keep pace with the changing needs and values nor is it realistic to expect that it will have provided for all contingencies and eventualities. It is, therefore, not only necessary but obligatory on the courts to step in to fill the lacuna. When courts perform this function undoubtedly they legislate judicially. But that is a kind of legislation which stands implicitly delegated to them to further the object of the legislation and to promote the goals of the society. Or to put it negatively, to prevent the frustration of the legislation or perversion of the goals and values of the society. So long as the courts keep themselves tethered to the ethos of the society and do not travel off its course, so long as they attempt to furnish the felt necessities of the time and do not refurbish them, their role in this respect has to be welcomed.

All courts have at one time or the other felt the need to bridge the gap between what is and what is intended to be. The courts cannot in such circumstances shirk from their duty and refuse to fill the gap. In performing this duty they do not foist upon the society their value judgments. They respect and accept the prevailing values, and do what is expected of them. The courts will, on the other hand, fail in their duty if they do not rise to the occasion but approve helplessly of an interpretation of a statute or a document or of an action of an individual which is certain to subvert the societal goals and endanger the public good."

G. *Process of law and the courts : Current State & Contemporary Challenges*

44. The pace of technological, social and economic developments, often pose a challenge to the courts. Courts of today often have to deal with complex issues ranging from science, technology, economics, archaeology, medicine, social sciences and across other fields of highly specialized knowledge.

45. Lawyers on occasions lack the expertise, to grasp and simplify issues of varying complexity, from fields unrelated to law. Judges do not fare any better. Parties have their interests to protect.

46. The intellectual capital created by traditional resources of the judicial process, may not be adequate to manage such contemporary challenges. The judicial process would have to evolve, to meet the felt needs of the time. The rising tides of human knowledge, cannot pass the courts by. This shall require change in procedures, and development of infrastructure.

47. The intellectual resource base has to be widened. The debate has to be broadbased, to include direct inputs from experts as well. This would also entail well equipped libraries, which are staffed by qualified personnel and research assistants, and may be even experts. Institutional arrangements for interface of the courts with experts, have to be in place to ensure procedural propriety.

48. Debate on these issues will pave the way for the most important change, i.e. change in mindset. For the process to be credible and efficacious, a change has to come from within the judicial system. But change is inevitable, if judicial adjudication is to be just and remain relevant. In this regard, the High Court has a responsibility to fulfill, if not an obligation to discharge.

H. *Education*

(i) Importance and scope

"Where the mind is without fear
and the head is held high,
Where knowledge is free".

~Tagore

49. In education mankind discovered the message of unquenchable optimism, that humans could be separated from the cycle of repetitive thought and action. Learning was the key to the uninterrupted progress of any society. Knowledge instilled the belief that human life could be improved. Through knowledge alone, the hope is realized that humans can be reformed, and humanity can be transformed. Education is the supreme act of nation building, which essentially means nurturing of constitutional values, realization of constitutional goals, and strengthening the rule of law.

50. The idea of the Indian nation is founded, on the ideals of the Indian civilization. Many of these ideals are manifested in the Constitution, and find expression in constitutional law.

51. The quest for knowledge defines the Indian civilization. A salient feature in the search for learning, distinguishes the Indian civilization. Knowledge in Hellenic civilization was founded on reason. The human thirst for knowledge was also quenched by revelation. The distinctive feature of learning in Indian civilization, is that India's search for knowledge, while always embracing reason as a method and

never denying revelation as a source, insists on realization as its goal.

52. The diversity of thought is reflected in the plurality of discourse in India. The enduring values which define India, have been preserved and propagated by the tradition of civilized debate. The unity of our nation is protected by respect and affirmation of a multi hued cultural heritage and embracement of varied traditions of thought.

(ii) Role and obligation of universities

"Where the mind is led forward by thee
Into ever widening thought and action."
~Tagore

53. The universities are the custodians of the old values, even as they ceaselessly push the boundaries of modern knowledge.

54. In universities students of diverse backgrounds, and different beliefs, congregate in a common pursuit of knowledge. Through knowledge they will learn, that humanity unites more than diversity differentiates. With learning they will understand, that diversity enriches human life, and does not divide humankind. University experience will help them, cultivate constitutional values, and transcend violent and other aberrational tendencies.

55. Universities are not teaching shops, nor are they mere examining bodies. Universities nurture the intellect and develop the character of the young citizens in a wholesome manner. Students gain knowledge and imbibe values in universities. These dual pursuits constitute the founding purpose of a university, in fact its raison detre.

56. A unifocal approach promoting scholastic achievements, to the exclusion of character building, would undermine the founding principles of a university. A failure of character or deficit of values in students, may impel action against the delinquent student, but should also cause introspection in university authorities.

57. University education is not an arm's length transaction, between the teachers and the taught. Nor is university education an exact contractual relation, in the likeness of a consumer and a service provider.

I. *Discipline in Universities: Concept, Need & Challenges*

(i) Violence, intimidation and moral turpitude

"Where the clear stream of reason has not lost its way into the dreary desert sand of dead habit"
~Rabindranath Tagore

58. Violence degrades human life. Intimidation stifles human thought. Moral turpitude is the low ebb of human conduct. These are the scourges and yet inescapable facts of human life. Our society faces these issues, and our varsities grapple with them.

59. Violence, intimidation, and acts of moral turpitude, are not conducive to the academic atmosphere of a varsity, and pose a mortal threat to the values of a university. They retard the growth of free thought and reasoned debate. These evils have no place in our universities. The universities can prosper only when such evils are got rid of.

(ii) Communal disturbances in universities

"Where the world has not been broken up into fragments by narrow domestic walls".

~Rabindranath Tagore

60. In Writ C No. 32955 of 2019, (Ajay Singh Vs. Union of India and Others), the petitioner is charged with disturbing the communal harmony in the university.

61. Stoking communal hatred not only disrupts peace and order in a university, but can roil the foundations of law and harmony in our society. The problem cannot be tackled as a "discipline" issue alone. A composite and a conceptual approach has to be adopted. The roots of communal hate have to be analyzed and addressed. Communal hatred is a narrative, which stands in direct opposition, to our civilizational ethos and constitutional values. Communal hatred holds a threat, to the rule of law. Communal hatred cannot be countenanced in our universities, nor can be given any space in our society.

(iii) Discipline in universities

62. Discipline is the bedrock of any organization. In a university, discipline does not mean conformity of thought, or creation of a regimented class of people. In a varsity discipline is not the residue, after dissent is stifled and dissenters purged.

63. Discipline in a university is the consensus among all stakeholders, to live by the universal values which define the academic world. Discipline in a varsity is common allegiance and unshakable adherence, to values which nurture free thought, respect dissentient opinions, and create an environment of unimpeded academic pursuits. Hate and true debate cannot co-exist. Violence and true learning cannot cohabit.

64. Discipline has to be preserved at all costs, if the raison detre of the University is to be protected at all times. Indiscipline unchecked is indiscipline unleashed. However in our constitutional scheme, the means of ensuring discipline, is as important as the end of keeping discipline.

(iv) Statutory approach to maintaining discipline

65. The universities have created legal frameworks, to deal with acts of indiscipline, and to maintain discipline and order.

66. The power to take disciplinary action, and impose punishment upon delinquent students, is vested in the competent authorities, by the statutes of the concerned university. The following statutes govern and regulate, the process of initiating disciplinary action against delinquent students, and imposition of penalty for misconduct.

BHU -The Banaras Hindu University Act No. XVI of 1915 {Section 60}

ii. Chapter VIII, Ordinances Governing Maintenance of Discipline and Grievances Procedure.

iii. Notification, New Delhi, 31st July, 2017, BHU

AMU- The Aligarh Muslim University (Act No. XL of 1920), [Amendment] Act, 1981 (62 of 1981)

ii. Section 35 (5) of the AMU

iii. The Statutes of the University (as adapted under Section 28 of the Act) amended upto December, 2012).

IIT BHU - i. The Institutes of Technology Act, 1961

ii. The Institutes of Technology Amendment Act, 2012.

iii. Section 17(2) of the Act, 1961 (already quoted)

(The relevant extracts of the statutes are appended as appendix 1 to the writ petition.)

J. *Statutory Regime of Punishments in light of Article 21 & Doctrine of Proportionality*

67. The statutes of all the three universities contemplate only penal action, to deal with all forms of indiscipline or deviant conduct. The penal action may lead to suspension, and can even extend to expulsion and debarment.

68. The punitive provisions of the Statutes of the respective universities, manifest the deterrent intent of the law. A reformist approach to the problem is absent in the statutes. The makers of statutes have solely adopted a punitive or deterrent approach to the exclusion of other methods of dealing with issues of indiscipline or deviant conduct.

69. The aforesaid ordinances of the universities and the affidavits of the respondents have been perused. Submissions of the learned counsel for the universities have been considered. This Court finds that there is no structured, professionally designed reform, self development and rehabilitation programme, or therapeutic support system backed by a legal frame work, to deal with the delinquent students and like issues in the universities.

70. The statutory monopoly of a punitive approach, to deviant behaviour, and the exclusion of all other responses, often creates a lack of balance in the actions of the concerned University. In such cases, the punishment becomes disproportionate, not because the decision maker was incapable of measured action, but because the ordinances/statutes preclude a proportional response.

71. It is clarified, that the requirement of punitive provisions in the statutes is a given. The need to empower the authority, to take disciplinary action in law is undisputed. There is no infirmity in the statutory provisions. The inadequacy is in the reach of the statutory provisions.

72. The decision maker is constrained in his choices, by the absolute dominance of punitive provisions, and complete omission of reformative measures in the ordinances.

73. The impact of absence of reformative provisions and the presence of a statutory bias in favour of a punitive approach, on the fundamental rights of the petitioners, shall also be assessed in the next part of the judgment.

K. *Punishments and Article 21*
(i) Right to human dignity

74. A life without dignity is robbed of its meaning. Absent self worth, life is devoid of content.

75. Human dignity as a concept, was created by an international consensus, on universal human values. "Human dignity" and "self worth" are used, in close proxmity in international instruments, reflecting the affinity between the concepts.

76. The comity of nations, first pledged commitment to protecting the "dignity and worth" of the human person,

in the charter of the United Nations. These eternal values were reiterated, in subsequent international instruments and conventions including the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others (1951); the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (1956); the Convention on the Elimination of All Forms of Discrimination against Women (1979); the Convention on the Rights of the Child (1989); and the Convention on the Rights of Persons with Disabilities (2006).

77. Human dignity and self worth, were increasingly incorporated in the jurisprudence of all liberty loving nations in the post World War II era.

78. The complexity of the concept of human dignity, never diluted the usefulness of the theory of human dignity in enhancing the worth of the human person. Human dignity made a decisive contribution in the development of the rights of life and liberty, in jurisprudential systems of free societies across the world.

79. However, the Court would do well to observe the caution, that a sweeping judicial definition of human dignity, would make an abstract theory, unintelligible. An unduly wide judicial construct of human dignity, would create unworkable judicial tests.

80. Likewise if the courts adopt too narrow a view of human dignity, a concept which has made stellar contribution to the advancement of human rights will be lost.

81. Keeping these pitfalls in mind, a balance has to be maintained, between attempting too much and recoiling from the task altogether.

82. The applicability of human dignity, would be determined in this case, by evolving a workable test or construct of human dignity and self worth applicable to these cases.

83. Human dignity is not inserted in the text of the fundamental rights under the Constitution of India. Human dignity occurs in the Preamble to the Constitution of India.

84. The Preamble to the Constitution, reflects the resolve of the People of India, to secure to all its citizens

"Justice social, economic and political;
Liberty of thought, expression, belief, faith and worship;
Equality of status and of opportunity;
and to promote among them all and
Fraternity assuring the dignity of the individual and the unity of the Nation."

The Preamble to the Constitution is not analogous, to a preamble to any legislative enactment.

85. The unique place of the Preamble, in the Constitution came to be noticed very early, in ***Sajjan Singh v. State of Rajasthan,*** reported at ***AIR 1965 SC 845.*** The Hon'ble Supreme Court found that the Preamble to our Constitution is "not of the common run". Further the Preamble bore the "stamp of deep deliberation" and precision.

86. This feature shines light on the special significance, attached to the Preamble by the framers of the Constitution. The Preamble was held to be a part of the Constitution, by the Hon'ble

Supreme Court in ***Kesavananda Bharati v. State of Kerala,*** reported at ***(1973) 4 SCC 225.***

87. The words 'life, law and liberty' in Article 21 of the Constitution of India, were freed from the confines of narrow and literal interpretation by the Courts. (See ***Maneka Gandhi v. Union of India, (1978) 1 SCC 248***).

88. A defining moment came when the Hon'ble Supreme Court, liberated "life" from the fetters of mere physical existence. (see ***Olga Tellis v. Bombay Municipal Corpn. Reported at (1985) 3 SCC 545***).

89. Over the years human dignity, has been read into the meaning of life and liberty, under Article 21 of the Constitution of India, by consistent pronouncements of the courts.

90. A broad overview of some of the leading pronouncements of the Hon'ble Supreme Court, elevating human dignity to the status of a fundamental right, are discussed in the succeeding paragraphs.

(ii) Supreme Court on human dignity

91. The concept of human dignity forming a part of Article 21, was introduced in ***Prem Shankar Shukla v. UT of Delhi,*** reported at ***(1980) 3 SCC 526.*** While construing the constitutional rights of prisoners, in ***Prem Shankar Shukla (supra),*** Krishna Iyer, J. speaking for a three-Judge Bench of the Hon'ble Supreme Court held:

"1. ... the guarantee of human dignity, which forms part of our constitutional culture, and the positive provisions of Articles 14, 19 and 21 spring into action when we realise that to manacle man is more than to mortify him; it is to dehumanise him and, therefore, to violate his very personhood, too often using the mask of "dangerousness" and security.

21. The Preamble sets the humane tone and temper of the Founding Document and highlights justice, equality and the dignity of the individual."

92. Undermining the human dignity of a detenue, under the Conservation of Foreign Exchange and Prevention of Smuggling Activities (COFEPOSA) Act, 1974 was not countenanced by the Hon'ble Supreme Court in ***Francis Coralie Mullin v. UT of Delhi,*** reported at ***(1981) 1 SCC 608*** by ruling thus:

"6. ... The fundamental right to life which is the most precious human right and which forms the ark of all other rights must therefore be interpreted in a broad and expansive spirit so as to invest it with significance and vitality which may endure for years to come and enhance the dignity of the individual and the worth of the human person.

7. ... the right to life enshrined in Article 21 cannot be restricted to mere animal existence. It means something much more than just physical survival."

93. The right to live with human dignity flowing from Article 21, was employed by the Hon'ble Supreme Court to unlock the fetters of those living in bondage and setting them free in ***Bandhua Mukti Morcha v. Union of India,*** reported at ***(1984) 3 SCC 161.*** The Hon'ble Supreme Court in Bandhua Mukti Morcha (supra) observed that:

"10. ...This right to live with human dignity enshrined in Article 21 derives its life breath from the directive principles of State policy and particularly clauses (e) and (f) of Article 39 and Articles 41 and 42 and at the least, therefore, it must include protection of the health and strength of the workers, men and women, and of the tender age of children against abuse, opportunities and facilities for children to develop in a healthy manner and in conditions of freedom and dignity, educational facilities, just and humane conditions of work and maternity relief. These are the minimum requirements which must exist in order to enable a person to live with human dignity, and no State -- neither the Central Government nor any State Government -- has the right to take any action which will deprive a person of the enjoyment of these basic essentials."

94. Dehumanizing treatment given to the arrested activists of an organization by the police authorities was called out by the Hon'ble Supreme court, in ***Khedat Mazdoor Chetna Sangath v. State of M.P.,*** reported at ***(1994) 6 SCC 260,*** wherein it was recognized:

"10. ... It is, therefore, absolutely essential in the interest of justice, human dignity and democracy that this Court must intervene; order an investigation, determine the correct facts and take strongest possible action against the respondents who are responsible for these atrocities."

95. The right of human dignity was also construed by the Hon'ble Supreme Court in ***M.Nagaraj v. Union of India,*** reported at ***(2006) 8 SCC 212.*** In that case the right was held to be intrinsic to and inseparable from human existence:

"26. ... The rights, liberties and freedoms of the individual are not only to be protected against the State, they should be facilitated by it. ... It is the duty of the State not only to protect the human dignity but to facilitate it by taking positive steps in that direction. No exact definition of human dignity exists. It refers to the intrinsic value of every human being, which is to be respected. It cannot be taken away. It cannot give (sic be given). It simply is. Every human being has dignity by virtue of his existence.

42. India is constituted into a sovereign, democratic republic to secure to all its citizens, fraternity assuring the dignity of the individual and the unity of the nation. The sovereign, democratic republic exists to promote fraternity and the dignity of the individual citizen and to secure to the citizens certain rights. This is because the objectives of the State can be realised only in and through the individuals. Therefore, rights conferred on citizens and non-citizens are not merely individual or personal rights. They have a large social and political content, because the objectives of the Constitution cannot be otherwise realised."

96. The Hon'ble Supreme Court in **Shabnam v. Union of India,** reported at **(2015) 6 SCC 702** elaborated the following elements of the human dignity;

"14. This right to human dignity has many elements. First and foremost, human dignity is the dignity of each human being "as a human being". Another element, which needs to be highlighted, in the context of the present case, is that human dignity is infringed if a person's life, physical or mental welfare is harmed. It is in this sense torture, humiliation, forced labour, etc. all infringe on human

dignity. It is in this context many rights of the accused derive from his dignity as a human being."

(emphasis in original)

97. Aharon Barak (former Chief Justice of the Supreme Court of Israel), discussed the constitutional value of human dignity, in the following celebrated passage:

"The constitutional value of human dignity has a central normative role. Human dignity as a constitutional value is the factor that unites the human rights into one whole. It ensures the normative unity of human rights. This normative unity is expressed in the three ways: first, the value of human dignity serves as a normative basis for constitutional rights set out in the constitution; second, it serves as an interpretative principle for determining the scope of constitutional rights, including the right to human dignity; third, the value of human dignity has an important role in determining the proportionality of a statute limiting a constitutional right. "

98. The views of the Judge Aharon Barak, were approved and incorporated in the corpus of human dignity jurisprudence, in our country by the Hon'ble Supreme court in ***Jeeja Ghosh v. Union of India,*** reported at ***(2016) 7 SCC 761.***

99. The consequences of loss of human dignity in an individual's life, were noted by the Hon'ble Supreme Court in ***Mehmood Nayyar Azam v. State of Chhattisgarh,*** reported at ***(2012) 8 SCC 1.***

100. Similar sentiments were expressed on human dignity, by the Hon'ble Supreme Court in ***National Legal Services Authority v. Union of India,*** reported at ***(2014) 5 SCC 438.***

101. In ***Maharasthra University of Health Sciences v. Satchikitsa Prasarak Mandal*** reported at ***(2010) 3 SCC 786,*** the Hon'ble Supreme court upon consideration of good authority, reiterated the dignity of the individual as a core constitutional concept.

102. While in ***Selvi v. State of Karnataka*** reported at ***(2010) 7 SCC 263,*** the Hon'ble Supreme Court ruled thus:

"244.....we must recognize that a forcible intrusion into a person's mental processes is also an affront to human dignity and liberty, often with grave and long-lasting consequences."

103. Even prisoners have been found entitled to the fundamental rights while in custody by the Hon'ble Supreme Court (see ***Sunil Batra (II) Vs. Delhi Administration,*** reported at ***1980 (3) SCC 488***).

104. The importance of therapeutic approach in dealing with the criminal tendencies of prisoners and the necessity for reform, was considered by the Hon'ble Supreme Court in ***T.K. Gopal v. State of Karnataka,*** reported at ***(2000) 6 SCC 168,*** by holding that:

"15. The therapeutic approach aims at curing the criminal tendencies which were the product of a diseased psychology. There may be many factors, including family problems. We are not concerned with those factors as therapeutic approach has since been treated as an effective method of punishment which not only satisfies the

requirements of law that a criminal should be punished and the punishment prescribed must be meted out to him, but also reforms the criminal through various processes, the most fundamental of which is that in spite of having committed a crime, maybe a heinous crime, he should be treated as a human being entitled to all the basic human rights, human dignity and human sympathy. It was under this theory that this Court in a stream of decisions, projected the need for prison reforms, the need to acknowledge the vital fact that the prisoner, after being lodged in jail, does not lose his fundamental rights or basic human rights and that he must be treated with compassion and sympathy."

105. In ***Asfaq v. State of Rajasthan and Others,*** reported at ***(2017) 15 SCC 55,*** the Hon'ble Supreme Court emphasizing the need for reform of a convict held that "redemption and rehabilitation of such prisoners for good of societies must receive due wightage while they are undergoing sentence of imprisonment."

106. The judicial authorities can be multiplied, reiterating the above holdings. However, the same will add volume, but not value to the narrative.

107. Consistent and high authority have thus entrenched human dignity as fundamental to right to life, which flows from Article 21 of the Constitution of India.

108. The narrative would not be complete without reference to the most authoritative pronouncement, of the Hon'ble Supreme Court in the case of ***K.S. Puttaswamy v. Union of India*** reported at ***(2017) 10 SCC 1***

109. Dr. D. Y. Chandrachud, J. speaking for the Constitution Bench, firmly and irrevocably, reiterated that human dignity is a fundamental right under Article 21 of the Indian Constitution, with customary eloquence, in ***K.S. Puttaswamy (supra)***. Dr. D. Y. Chandrachud, J., upon consideration of the judicial precedents in point distilled the concept of human dignity and its place in part III of the Constitution:

"Jurisprudence on dignity

"108. Over the last four decades, our constitutional jurisprudence has recognised the inseparable relationship between protection of life and liberty with dignity. Dignity as a constitutional value finds expression in the Preamble. The constitutional vision seeks the realisation of justice (social, economic and political); liberty (of thought, expression, belief, faith and worship); equality (as a guarantee against arbitrary treatment of individuals) and fraternity (which assures a life of dignity to every individual). These constitutional precepts exist in unity to facilitate a humane and compassionate society. The individual is the focal point of the Constitution because it is in the realisation of individual rights that the collective well-being of the community is determined. Human dignity is an integral part of the Constitution. Reflections of dignity are found in the guarantee against arbitrariness (Article 14), the lamps of freedom (Article 19) and in the right to life and personal liberty (Article 21).

118. Life is precious intself. But life is worth living because of the freedoms which enable each individual to live life as

it should be lived. The best decisions on how life should be lived are entrusted to the individual. They are continuously shaped by the social milieu in which individuals exist. The duty of the State is to safeguard the ability to take decisions. "Life" within the meaning of Article 21 is not confined to the integrity of the physical body. The right comprehends one's being in its fullest sense. That which facilitates the fulfillment of life is as much within the protection of the guarantee of life.

119. To live is to live with dignity. The draftsmen of the Constitution defined their vision of the society in which constitutional values would be attained by emphasising, among other freedoms, liberty and dignity. So fundamental is dignity that it permeates the core of the rights guaranteed to the individual by Part III. Dignity is the core which unites the fundamental rights because the fundamental rights seek to achieve for each individual the dignity of existence. Privacy with its attendant values assures dignity to the individual and it is only when life can be enjoyed with dignity can liberty be of true substance. Privacy ensures the fulfilment of dignity and is a core value which the protection of life and liberty is intended to achieve."

(iii) Comparative International Jurisprudence

110. A survey of comparative international jurisprudence, on the point of human dignity and the rights flowing therefrom, shows convergence in the values of human dignity across the free world.

111. The foreign authorities can be cited to show that human dignity is an accepted universal value in the comity of nations.

112. In ***Rosenblatt v. P Baer,* reported at 1966 SCC OnLine US SC 22 : 383 US 75 (1966),** the US Supreme Court found that "The essential dignity and worth of every human being" was at the root of any system of "ordered liberty".

"The right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being- a concept at the root of any decent system of ordered liberty."

113. In the case of ***Armoniene v. Lithuania,*** reported at ***(2009) EMLR 7,*** the European Court of Human Rights set its face against an act of disclosure of a person's state of health, causing "exclusion from social life", and found it violative of the right to privacy by holding thus:

"The Court takes particular note of the fact that the family lived not in a city but in a village, which increased the impact of the publication on the possibility that the husband's illness would be known by his neighbours and his immediate family, thereby causing public humiliation and exclusion from village social life."

114. The human dignity rights of prisoners included rehabilitation, in the opinion of the US Supreme Court in ***Procunier, Corrections Director, ET AL. Vs. Martinez ET AL.*** reported at ***416 U.S. 396 (1974):***

"The Court today agrees that "the weight of professional opinion seems to be that inmate freedom to correspond with outsiders advances rather than retards the goal of rehabilitation."

Balanced against the State's asserted interests are the values that are generally associated with freedom of speech in a free society - values which "do not turn to dross in an unfree one." Sostre v. McGinnis, supra, at 199. First Amendment guarantees protect the free and uninterrupted interchange of ideas upon which a democratic society thrives. Perhaps the most obvious victim of the indirect censorship effected by a policy of allowing prison authorities to read inmate mail is criticism of prison administration. The threat of identification and reprisal inherent in allowing correctional authorities to read prisoner mail is not lost on inmates who might otherwise criticize their jailors. The mails are one of the few vehicles prisoners have for informing the community about their existence and, in these days of strife in our correctional institutions, the plight of prisoners is a matter of urgent public concern. To sustain a policy which chills the communication necessary to inform the public on this issue is at odds with the most basic tenets of the guarantee of freedom of speech.

The First Amendment serves not only the needs of the polity but also those of the human spirit - a spirit that demands self-expression. Such expression is an integral part of the development of ideas and a sense of identity. To suppress expression is to reject the basic human desire for recognition and affront the individual's worth and dignity. 14 Cf. Stanley v. Georgia, 394 U.S. [416 U.S. 396, 428]557 (1969). Such restraint may be "the greatest displeasure and indignity to a free and knowing spirit that can be put upon him." J. Milton, Aeropagitica 21 (Everyman's ed. 1927). When the prison gates slam behind an inmate, he does not lose his human quality; his mind does not become closed to ideas; his intellect does not cease to feed on a free and open interchange of opinions; his yearning for self-respect does not end; nor is his quest for self-realization concluded. If anything, the needs for identity and self-respect are more compelling in the dehumanizing prison environment. Whether an O. Henry writing his short stories in a jail cell or a frightened young inmate writing his family, a prisoner needs a medium for self-expression. It is the role of the First Amendment and this Court to protect those precious personal rights by which we satisfy such basic yearnings of the human spirit."

115. The validity of a punishment causing loss of nationality, for an act of desertion in military service, was in issue before the US Supreme Court, in ***Trop Vs. Dulles,*** reported at ***356 US 86 (1958).*** The US Supreme Court in **Trop (supra)** reiterated the importance and role of rehabilitation in a penal system, while dealing with the validity of the punishment. The principle holding of the US Supreme Court on these points is as under:

"Expatriation, in this respect, constitutes an especially demoralizing sanction. The uncertainty, and the consequent psychological hurt, which must accompany one who becomes an outcast in his own land must be reckoned a substantial factor in the ultimate judgment.

The novelty of expatriation as punishment does not alone demonstrate its inefficiency. In recent years we have seen such devices as indeterminate sentences and parole added to the traditional term of imprisonment. Such penal methods seek to achieve the end, at once more humane and effective, that society should make every

effort to rehabilitate the offender and restore him as a useful member of that society as society's own best protection. Of course, rehabilitation is but one of the several purposes of the penal law. Among other purposes are deterrents of the wrongful act by the threat of punishment and insulation of society from dangerous individuals by imprisonment or execution. What then is the relationship of the punishment of expatriation to these ends of the penal law? It is perfectly obvious that it constitutes the very antithesis of rehabilitation, for instead of guiding the offender back into the useful paths of society it excommunicates him and makes him, literally, an outcast. I can think of no more certain way in which to make a man in whom, perhaps, rest the seeds of serious antisocial behavior more likely to pursue further a career of unlawful activity than to place on him the stigma of the derelict, uncertain of many of his basic rights. Similarly, it must be questioned whether expatriation can really achieve the other effects sought by society in punitive devices. Certainly it will not insulate society from the deserter, for unless coupled with banishment the sanction leaves the offender at large. And as a deterrent device this sanction would appear of little effect, for the offender, if not deterred by thought of the specific penalties of long imprisonment or even death, is not very likely to be swayed from his course by the prospect of expatriation. However insidious and demoralizing may be the actual experience of statelessness, its contemplation in advance seems unlikely to invoke serious misgiving, for none of us yet knows its ramifications."

(iv) Constitutionality of punishments under the statutes

"Universities are made by love, love of beauty and learning."

~ Annie Besant

116. The engagement of human dignity and Article 21 will now be examined in the context of punishment, imposed on a delinquent student.

117. The statutory scheme of enforcing discipline by imposition of punishments and suspension has a salutary purpose, but it needs to be compliant with the requirements of fundamental rights.

118. Punishment has to be effective to serve its purpose; however, it cannot be purblind to human dignity, if it is to retain its constitutionality.

119. Severity of a punishment is not sufficient basis for holding it unconstitutional. The enquiry into the constitutionality of a punishment, will examine the relationship between the punishment and its purpose, and whether the penalty can achieve the purpose. The enquiry will also determine whether the punishment degrades the human person, and whether it devalues human dignity against established norms of decency, or has a dehumanizing effect.

120. Degree of injuries to self esteem, extent of degradation of human worth, depth of humiliation caused by the punishment, are facts to be probed in an enquiry into the validity of the punishment.

121. Experience teaches the fact of human fallibility, but knowledge holds the hope of human redemption. If error is part of human nature, reform is an element of human spirit. The capacity of human beings to introspect on erring ways and the power of human will to reform deviant conduct are building blocks of the concept

of human dignity. "Every sinner has a future, many a saint had a past."

122. Punishment for deviant conduct, cannot be so severe as to degrade human life. Every form of punishment should protect the essential sanctity of human life and comport with fundamental norms of decency evolved by a civilized society. Any act which dehumanizes life cannot be countenanced by societies and courts which value life and liberty. The degrading or dehumanizing elements of the punishment have to be eliminated to bring it in conformity with requirement of human dignity, contemplated by Article 21 of the Constitution of India.

123. Failure to consider susceptibility to reform, while denying the right to access privileges and activities of the university, negates the possibility of rehabilitation. Absence of an environment of reform, self development and rehabilitation in a university, denies the opportunity of redeeming one's reputation. Termination of dialogue with the delinquent student, without offering an opportunity to reform, makes him an outcaste. The individual is permanently discarded by the institution, and loss of human self worth is total. This system of punishment is destructive of fundamental elements of human dignity, and violative of Article 21 of the Constitution of India.

124. Another aspect of the punishment which needs consideration, is the consequence exclusion from higher education.

125. Education is a most credible and effective mode of restoring self esteem and enhancing self worth. By denying opportunities of education to a delinquent student, without looking at the possibility of reform, the power to redeem one's errors and enhance self worth is taken away from an individual. In these cases, closure of avenues of education, extinguishes the hope for a better tomorrow. Loss of hope and its sequitor perpetual condemnation are fatal blows to the human spirit and self esteem.

126. Acts of deviant conduct, violence or intimidation, do not cease the need for social engagement or knowledge. Such needs are more acutely felt and require satisfaction in these cases.

127. Order may be enforced by punishments. Causes of deviant conduct can be addressed only by engagement. Punishments deal with the offence, reform deals with the offender.

128. Public interest however demands that the claim for further education, and engagement with delinquent students, should be guided and controlled by the authorities.

129. Statutory regimes in universities, dealing with delinquent behaviour and university environments, which are bereft of therapeutic and reform based support systems, are incompatible with the constitutional mandate to uphold human dignity. The violations of human dignity, in such cases, are summed up hereinunder:

130. Dignity violations occur when a punishment meted out to a student, does not consider his susceptibility to reform, and degrades his person by exclusion to the point where his diminished self worth cannot be reinstated due to systemic inadequacies or institutional shortcomings.

131. By denying further education, and neglecting to create an institutional system of reform, self development and

rehabilitation, the university in effect tells the delinquent student, that it does not recognize the student's need to re-establish his self esteem. In other words, the student is not only impervious to reform, but incapable of enhancing his self esteem.

132. Dignity of an individual/student is injured, when it is found that the punishment precludes reform by rehabilitative measures, and prevents self enhancement by further education.

133. The punitive consequences of the action, cannot go beyond the requirements of the case. In this case they do.

134. An institutional reform, self development and rehabilitation programme, will enable a delinquent student to introspect on errors, express remorse and correct course.

135. Neglect by the universities to create an institutional reform, self development and rehabilitation programme thus places substantial obstacles in the enjoyment of the fundamental right of human dignity under Article 21.

136. The result of the preceding narrative is as follows:-

(i) The impugned action taken by the university, against the petitioner is violative of the fundamental right of human dignity of the petitioner, guaranteed under Article 21 of the Constitution of India, as it fails to consider his susceptibility to reform, and does not enable the petitioner to undergo a reform and self development process to redeem himself.

(ii) The statutory omission of reform measures, is an inadequacy which renders the university incapable of rectifying the violation made by it. The systemic fault-line is contrary to the mandate of Article 21 of the Constitution of India.

(v) Systemic responses : Responsibilities of the State and universities

137. Exercise of judicial power is the prerogative of the courts; but upholding the Constitution is not the monopoly of the courts.

138. To realize the fundamental rights guaranteed under the Constitution and to achieve the goals contemplated under the Preamble, all stakeholders have to play their part and all organs of governance have to perform their obligations. Constitutional ideals will become meaningful only if constitutional values animate the functioning of all institutions of governance. Universities have a special role to play.

139. The State and in this case the universities too, have the obligation to create an ***enabling environment, (emphasis supplied)*** where life and life enhancing attributes under Article 21 of the Constitution of India flourish and where constitutional ideals become a reality.

140. The importance of "therapeutic approach" in solving social dysfunctions, the growth in role of the State to give away public recognition in the way they treat their citizens, the evolution of law on the subject, and the contribution of universities were analyzed by **Francis**

Fukuyama in his book **"Identity".** Some of the instructive passages are extracted below:

"The therapeutic turn in the popular culture of advanced liberal democracies such as the United States was inevitably reflected in its politics, and in an evolving understanding of the role of the state. In the classical liberalism of the nineteenth century, the state was held responsible for protecting basic rights such as freedom speech and association, for upholding a rule of law, and for providing essential public services such as police, roads, and education. The government "recognized" its citizens by granting them individual rights, but the state was not seen as responsible for making each individual feel better about himself or herself."

"Under the therapeutic method, however, an individual's happiness depends on his or her self-esteem, and self-esteem is a by-product of public recognition. Governments are readily able to give away public recognition in the way that they talk about and treat their citizens, so modern liberal societies naturally and perhaps inevitably began to take on the responsibility for raising the self-esteem of each and every one of their citizens".

"Therapeutic services came to be deeply embedded in social policy, not just in California but throughout the United States and in other liberal democracies. States began to offer psychological counseling and other mental health services, and schools began to incorporate therapeutic insights into the way that they taught children."

"In the early twentieth century, social dysfunctions such as delinquency or teen pregnancy were seen as deviant behaviour that needed to be dealt with punitively, often through the criminal justice system".

"But with the rise of therapeutic approaches by mid century, they were increasingly seen as social pathologies that needed to be treated through counseling and psychiatric intervention".

"The 1956 amendments to the Social Security Act allowed for federal reimbursements of a range of therapeutic services to strengthen family life and self-support."

"The therapeutic state metastasized across a wide number of institutions, including a large non-profit sector that by the 1990s had become the delivery vehicle for state-funded social services".

"Universities found themselves at the forefront of the therapeutic revolution."

(emphasis supplied)

141. These special needs of citizens have to be addressed by State action, and also through judicial interventions in a nuanced manner, and in a larger perspective. Exclusive reliance on coercive powers of the law, shall be inadequate and an unsatisfactory way of dealing with the problem. The therapeutic jurisprudence draws heavily from concept of human dignity and self worth for its philosophical underpinning.

142. Disciplinary action should also be supported by reformative philosophy. Reformative philosophy does not undermine the deterrent approach.

143. The statutory regime imposes punishment for delinquent acts. The reform

programme will address the cause of delinquency itself. Framing the approach to discipline as a choice between punishment or reform is misleading. A just corrective system needs both. Both approaches complement each other and can be pursued simultaneously. Deterrent aspect may also be reinforced, by making grant of the degree contingent upon successful completion of the reform programme.

144. The ordinances providing for punishments for deviant conduct need to be duly supported by a legal framework for structured reform, self development and rehabilitation programmes. This environment will accord social recognition to the need for reform of delinquent students. The degrading effect of punishment will be ameliorated. Dialogue will end isolation, reform will reinstate self worth and education will enhance self esteem.

145. Structured reform, self development and rehabilitation programmes and therapeutic support, within a legal framework, will create an ***enabling environment*** *(emphasis supplied)* in the universities, to realize the fundamental right of human dignity, flowing from Article 21 of the Constitution of India.

L. *Reform, Self Development & Rehabilitation*

(i) Role of universities in achieving behavioral change

"You must be the change you wish to see in the world"

~Mahatma Gandhi

146. Non violence as a philosophy of thought, and a creed of conduct, was developed in India on a scale wider than elsewhere. From the Buddha to Ashoka and the Mahatma, behavioral change in adopting non violence as a way of life, at the national scale was greatly accomplished in India.

147. The response of the Indian civilization, to the challenges of communal hatred and communal otherness, was profound and without parallel. The unique response of the Indian society was fashioned by the universal philosophy of the Indian civilization; of affirming the unity of the human race, of embracing diversity, of respecting dissent, and creating a harmonious dialogue of faiths. The lives and teachings of saints and thinkers like Guru Nanak, Kabir, Vivekananda, Tagore and Mahatma Gandhi, bear testimony to this composite culture.

148. For each generation to produce such individuals of excellence is an exorbitant demand. Today behavioral change is achieved in a different manner, albeit more incrementally and less dramatically. Institutions like universities have a critical role to play. Universities have an obligation to the society and the individual. The universities have an irrevocable compact, and an organic connect with the society.

149. University is a paternal institution. By the act of suspension or debarment of a delinquent student, the university abandons its ward. The university has solved its problem, but the society has one at its hands. The downstream effects of the punishments, have not been considered by the respondents. Clearly there are direct costs to the society as well. There are no other institutions of equal standing, to engage with the youth, deal with the discontent or aberration, and channelize youthful energies.

150. The role of the University does not end in punishing perpetrators of violence. It begins with the identification of the causes of violence, communal hatred, and other forms of deviant conduct. Thereafter the responsibility to achieve behavioral change commences. The fruit of knowledge imparted by the universities lies in the manifestation of human values in the human personality and expression of humanity in human conduct. Knowledge which does not change human behaviour in this manner is futile.

(ii) Imbibing Constitutional values and purging communal hatred

151. The Indian civilizational ethos and the Indian constitutional values are congruent. The Supreme Court distilled the essence of Indian values, when it emphasised "our tradition teaches tolerance, our philosophy preaches tolerance and our Constitution practises tolerance; let us not dilute it" while upholding the religious rights of Jehovah's witnesses in ***Bijoe Emmanuel and others vs. State of Kerala and others,*** reported at ***(1986) 3 SCC 615.***

152. Universities have to protect the space for open dialogue, respectful engagement and reasoned debate. Universities need to ensure that the space for constitutional values, is not encroached by communal hatred.

153. The universities have the responsibility, to preserve this heritage, and the obligation to nurture these constitutional values. University experience has to inculcate these values in the students.

154. The universities may consider holding seminars, workshops, heritage festivals, cultural festivals, literature festivals, and encourage other activities to achieve this end. This has to be a part of the larger programme of value creation and self development.

(iii) Present discontents of students and solutions

155. The preceding discussion shows how a reform, self development and rehabilitation programme, will create an enabling environment, for realization of the fundamental rights of the individual under Article 21. How such programme, will yield tangible benefits for the society, will now be examined.

156. The paradox of the digital age is a plethora of devices and a dilution of dialogue, the substitution of conversation by chatter. There is the ever present danger of growth of knowledge and diminution of thought. The young are empowered by technology, but made restless by the void in values, and lack of direction.

157. The dilemmas of the digital age were acutely summed up by Yuval Noah Harari in his profound and acclaimed work "Homo Deus":

> "Today our knowledge is increasing at breakneck speed, and theoretically we should understand the world better and better. But the very opposite is happening. Our new-found knowledge leads to faster economic, social and political changes; in an attempt to understand what is happening, we accelerate the accumulation of knowledge, which leads only to faster and greater upheavals. Consequently we are less and less able to make sense of the present or forecast the future."

158. In this situation lack of avenues of engagement, absence of a structured reform, self development and therapeutic support system, leaves the students with little options. The choices available in the society, to satisfy their need for belonging, to recover self esteem, and to channelize youthful energies are not very encouraging.

159. Re-establishing meaningful dialogue, recreating an environment of fruitful conversation, and making empathetic engagement are some of the present challenges. The responsibility of reaching out and engaging with the students, and increasing quality interface with them, lies with the universities and the teachers.

160. These obligations can be accomplished by a meticulously created reform/self development programme and high quality of academic leadership within a comprehensive legal framework.

161. Universities are a microcosm of the society. They are laboratories of social change, and also agents of social transformation.

162. The manner in which the universities deal, with aberrations of violence other forms of deviant conduct, and deficit of values in students, has repercussions for the society at large. The divergent pulls of primordial instincts of hate and violence, against a citizen's duties in a nation ruled by law can best be managed by universities.

163. The universities are uniquely placed to deal with these issues. The universities have the intellectual capital, institutional framework and moral leadership, which puts them in the front rank of institutions to effect such change. The environment in the University should encourage and engender reflective actions instead of automatic choices.

164. The reform/self development and rehabilitation programme, will give an individual student correct direction in life, and prevent one from drifting away. The student will be anchored in constitutional values, and will not be led astray by social evils. The support and aid by the university will give one a sense of ownership and belonging. No harvest is richer for a nation, than citizens empowered by a constitutional value system.

165. The high pedestal at which teachers are placed in Indian traditions and thoughts, was recalled to explain the current role of teachers in Indian society, by the Hon'ble Supreme Court in the case of **Avinash Nagra Vs. Navodaya Vidyalaya Samiti and Others,** reported at **(1997) 2 SCC 534.** The relevant extracts were succinctly summed up by a Division Bench of this Court, in the case of **Devarsh Nath Gupta Vs. State of U.P. and Others,** reported at **2019(6) ADJ 296 (DB):**

"22. Special status of teacher has been reminded by Court in Avinash Nagra vs. Navodaya Vidyalaya Samiti and others (1997) 2 SCC 534. Quoting Father of the Nation, Court said that a teacher cannot be without character. If he lacks it, he will be like salt without its savour. A teacher must touch the hearts of his students. Boys imbibe more from the teacher's own life than they do from books. If teachers impart all the knowledge in the world to their students but do not inculcate

truth and purity amongst them, they will have betrayed them. Quoting Shri Aurobindo, Court said that it is the teacher's province to hold aloft the torch, to insist at all times and at all places that this nation of ours was founded on idealism and that whatever may be the prevailing tendencies of the times, our children shall learn to live among the sun-lit peaks. Court also referred Dr. S. Radhakrishanan saying that we, in our country, look upon teacher as gurus or, as acharyas. An Acharya is one whose achar or conduct is exemplary. He must be an example of Sadachar or good conduct. He must inspire the pupils who are entrusted to his care with love of virtue and goodness. The ideal of a true teacher is "andhakaraniridhata gurur itya bhidhiyate" (Andhakar is not merely intellectual ignorance, but is also spiritual blindness). He, who is able to remove that kind of spiritual blindness, is called a 'guru'. Swami Vivekananda was also quoted saying that student should live from his very boyhood with one whose character is a blazing fire and should have before him a living example of the highest teaching. In our country, the imparting of knowledge has always been through men of renunciation. The charge of imparting knowledge should again fall upon the shoulder of Tyagis."

166. In ***Avinash Nagra (supra),*** the obligations of teachers to transform students into responsible citizens, and inculcate the value system of the Indian Constitution, was stated thus:

"...The State has taken care of service conditions of the teacher and he owed dual fundamental duties to himself and to the society. As a member of the noble teaching profession and a citizen of India he should always be willing, self-disciplined, dedicated with integrity to remain ever a learner of knowledge, intelligently to articulate and communicate and imbibe in his students, as social duty, to impart education, to bring them up with discipline, inculcate to abjure violence and to develop scientific temper with a spirit of enquiry and reform constantly to rise to higher levels in any walk of life nurturing Constitutional ideals enshrined in Article 51A so as to make the students responsible citizens of the country. Thus the teacher either individually or collectively as a community of teachers, should regenerate this dedication with a bent of spiritualism in broader perspective of the Constitutionalism with secular ideologies enshrined in the Constitution as an arm of the State to establish egalitarian social order under the rule of law. Therefore, when the society has given such a pedestal, the conduct, character, ability and disposition of a teacher should be to transform the student into a disciplined citizen, inquisitive to learn, intellectual to pursue in any walk of life with dedication, discipline and devotion with an inquiring mind but not with blind customary beliefs....."

167. The students entering universities embark on a new phase in their lives. Many are often removed from their comfort zone, and the secure environment of their homes, to face the challenges of independent life. At times these new challenges can be intimidating, and the uncertainties can create apprehensions, in the minds of the young adults.

168. Some students are unmoored in this trying phase of life and change of circumstances. Ragging of juniors in institutions of higher learning and other

evils make the situations worse for freshers. Such students especially girls students in our country, need full institutional support to face these challenges.

169. It is the responsibility of the universities and the institutions of higher learning to create requisite environment of sensitizing the senior students and supporting the freshers in every possible manner.

170. A programme for self development implemented in a proactive manner shall foster constitutional values among students. Students need to realize the value of dissent in a democracy, but also have to understand the manner of dissent in a society ruled by law.

171. This process also requires initiation of engagement with the students and improving the quality of interface between the teachers and the taught. Educating the educators in this regard has to be a part of any such programme. Workshops have to be held and other methods have to be explored, to cultivate constitutional values in students and achieve behavioral change.

172. These are the preventive measures to address the issues of indiscipline, deficit in values and deviant behaviour in all institutions of higher learning.

173. The preventive measures preclude the occurrence of deviant behaviour. The post facto rehabilitation measures prevent recurrence of deviant behaviour. Both have to be integrated into one conjoint system of value creation, in the universities and institutions of higher learning.

174. Structured reform/self development programmes run by universities, can be catalysts for inducing behavioral change, and inculcating a constitutional value system in students. A successful reform, self development and rehabilitation programme, can convert a possible danger into a real asset for the society.

(iv) Creation of reform, self development & rehabilitation programmes

175. Many branches of knowledge in modern times are devoted to the study of human psychology, social behaviour and behavioural change. Psychology, Psychiatry, Sociology, Anthropology and Behavioral Economics, are some fields dedicated to gaining insights into human behaviour and inducing behavioural change.

176. Works of the Nobel prize winning economist Richard Thaler deserve special mention. The methodology of "nudges", in creating behavioral change has been gaining acceptability. The organization "Nudge" in Lebanon, has done noteworthy work with refugee children, and on environmental protection.

177. The Behavioral Insights Teams sometimes called "Nudge Units", are also existing in many nations including Australia, Canada, Germany, Qatar, the United Arab Emirates, Japan, the United States, and the United Kingdom. The Economic Survey released by India's Finance Ministry in July, 2019 has concluded with the clear recommendations

that "the proposal to set up a behavioral economics unit in the NITI Ayog must be immediately activated". The report further noticed that the unit should work with State Governments, helping them to make their programme more effective, and informing them of the potential value of Behavioural Insights.

178. Ancient branches of knowledge and wellness like yoga, meditation, vipassana and so on may prove to be rich resources to benefit from.

179. Many scientific researches have confirmed the efficacy of these ancient systems of human wellness. These branches of knowledge have to be approached with a scientific and an open academic mindset. Personal beliefs have to be respected at all times. There can be no imposition of any system, which is resisted on grounds of faith or beliefs; in which cases other options may be given.

180. Socially useful work like planting and taking care of trees, and flora may be a part of the programme. Sports and sporting activities also go a long way in creating integrating social values, and enhancing emotional intelligence. Teaching needy children, serving the sick, and other forms of service to the society are options which may be explored. Counselling sessions with experts and psychologists could prove useful.

181. Therapeutic solutions to social problems, are being increasingly recognized by social scientists, medical experts, psychologists, and jurists alike.

182. Creation of course content of the reform or self development programme, and manner of its implementation has to be decided by the respondents. This requires wide consultations, deliberations and workshops with academia, varsities, institutions of research, student counsellors, psychologists, psychiatrists, students and other stakeholders.

183. The UGC is a statutory body, and cannot abdicate its responsibilities in this scenario. The functions of the UGC are enumerated in the University Grants Commission Act, 1956. The UGC will play an important role, in the creation and standardization of the course, for reformation and self development, and aid its implementation on an institutional basis.

184. The Government of India in particular, the Ministry of Human Resource Development, also has a contribution to make in the process. The Ministry of Human Resource Development, Government of India, New Delhi, has to provide the necessary support to the University as may be required under law to create and implement the reform, self development and rehabilitation programme. This support would include the creation of necessary infrastructure for implementing the programmes.

185. Both the University Grants Commission and the Ministry of Human Resource Development, Government of India, are required to support the universities in their endeavours to create and implement the programmes of reform, self development and rehabilitation.

186. Law enforcement agencies the world over are engaging with the youth, to draw them away from the appeal of extreme ideologies.

187. The prestige enjoyed by universities and the teachers in society, will make the programme credible to concerned individuals, and acceptable to the student community. The key to the efficacy of any structured reform programme, is empathetic engagement and a supportive environment.

188. An impersonal approach and institutional prejudice, can make the programme a non starter. Due sensitization of all stakeholders is required, before implementing the programme.

189. The founding purpose of universities to supply intellectual and moral leadership to the society, and to be at the vanguard of social transformation, will be eminently achieved by effective reformation/therapeutic/self development programmes.

(v) Concerns of universities regarding discipline & restraints during the reformation, sel01f development & rehabilitation programme:

190. The Court is cognizant of concerns of the universities, that a reform programme should not derail university administration, nor should it have a detrimental effect on discipline and good order in the campus. A reform and rehabilitation programme, is not intended to allow a wrongdoer to escape justice.

191. Apprehensions of the universities need to be addressed. The reform programme has to be created and structured and implemented in a manner that it does not adversely impact the good order and discipline in the university campus.

192. The start of reform programme does not inevitably mean a free access to, or unconditional reinstatement of a delinquent student into the university campus. In cases of indiscipline where presence of individuals poses a threat of breakdown of order in the university campus, a decision can be made only by the university. Even when such students undergo a reform programme, and the students are pursuing their academic studies, the university may impose restraints it deems fit.

193. To obviate possibilities of disruption in the academic atmosphere, various measures of graduated restrictions may be imposed on a case to case basis. These restraints may include minute monitoring of movements in campus, restricting movements and contact, an employee escort till the student is in the campus, alteration of class schedules and timings. Such lighter restrictions could continue, while undergoing reform programmes along with the academic course.

194. More stringent measures in aggravated cases, may include a campus ban, with on-line classes and home schooling. Transfer to constituent colleges or other universities from a pool of universities, or setting up separate premises are among the options. In these cases entry to the specific university campus may be barred, even as the reform programme is underway, and the student is prosecuting his academic course.

195. These are some illustrative instances, of restraints which may be imposed by the universities.

M. *Conclusions and Reliefs*

196. Learned counsel for the petitioner contends that the petitioner wants an opportunity to reform himself (without prejudice to his right of appeal). In the face of the order of expulsion, the

petitioner has no future prospects of self development, and turning into a law abiding citizen.

197. Learned counsel for the petitioner has also adopted the arguments of learned Senior Counsel in the companion writ petition.

198. The petitioner's prayer for being a part of the reform, self development and rehabilitation programme to atone for his erroneous ways (without prejudice to his right of appeal) and to evolve into a responsible, law abiding citizen of the country is liable to be allowed.

199. The issue relating to creation of reform, self development and rehabilitation programmes in the University was heard as a common issue in various writ petitions. The Secretary, Ministry of Human Resource Development, Union of India, New Delhi and the Chairman, University Grants Commission, New Delhi, were also parties in the leading two writ petitions, namely, Writ C No. 13214 of 2019 (Anant Narayan Mishra Vs. The Union of India and Others) and Writ C No. 26755 of 2019 (Mohammad Ghayas Vs. State of U.P. and Others). All connected writ petitions were heard together.

200. The directions issued to the Secretary, Ministry of Human Resource Development, Union of India, New Delhi and the Chairman, University Grants Commission, New Delhi, in the leading two writ petitions, namely, Writ C No. 13214 of 2019 (Anant Narayan Mishra Vs. The Union of India and Others) and Writ C No. 26755 of 2019 (Mohammad Ghayas Vs. State of U.P. and Others), being of a general nature, shall be part of all connected writ petitions including the instant writ petition.

201. The matter is remitted to the respondents.

202. **A writ in the nature of mandamus is issued commanding the respondents to execute the following directions in the light of this judgment:**

I. The appeal of the petitioner shall be decided within six months, without prejudice to the right of the petitioner for consideration for reinstatement under the rehabilitation programme.

II. The University shall create a reform, self development and rehabilitation programme, for students accused of misconduct and against whom disciplinary action or any action to deny facilities of the university is proposed or taken;

III. The reform, self development and rehabilitation programme should be created after wide consultations and workshops with institutions of higher learning and research, universities, experts, student counsellors/psychologists, psychiatrists, students and other stakeholders;

IV. University Grants Commission will aid the above process by providing the necessary support to the University to create, standardize and effectuate the reform, self development and rehabilitation programme in the university.

V. The Secretary, Ministry of Human Resource Development, Government of India, New Delhi, shall also provide the necessary support to create infrastructure in the University to effectuate the reform, self development

and rehabilitation programme in the University, as is deemed appropriate in light of this judgment and as per law.

VI. The reform, self development and rehabilitation programmes shall be processed as per law and integrated into the existing legal/statutory framework of the University dealing with deviant conduct and punishments.

VII. The petitioner shall be given the benefit of the reform, self development and rehabilitation programme. After the creation of the self development and rehabilitation programme, the petitioner shall be reinstated as a student. The petitioner shall be permitted to continue his studies in any course which he is eligible to pursue along with the reform, self development and rehabilitation programme.

VIII. Attendance of the petitioner in the said programme shall be compulsory. An evaluation sheet of the petitioner's performance in the programme shall also be prepared.

IX. It shall be open to the AMU to impose necessary restraints, as it deems fit, upon the petitioner even as he pursues his academic course along with the reform, self development and rehabilitation programme. These restraints may include a campus entry ban upon the petitioner, if the university deems it necessary. It is emphasized that the authority of the University to impose such restraints is open in all cases, especially, in the instant case where the misconduct appears to be of a particularly serious nature. (This observation shall, however, not influence the University while deciding the appeal on its merits). The University shall take an independent decision in that regard.

X. The exercise shall be completed, preferably, within six months, but not later than 12 months. At all times the respondents keeping in mind the best interests of the students and the society, shall make all efforts to expedite the compliance of the directions.

XI. It shall be open to the respondents to create a scheme for reform, self development and rehabilitation for convicts in criminal cases who wish to pursue further higher studies in the respondent University.

XII. The counsels for the respondents shall provide certified copy of this judgment along with Writ C No. 13214 of 2019 (Anant Narayan Mishra Vs. The Union of India and Others) to the Registrar, Aligarh Muslim University, Aligarh; the Secretary, Ministry of Human Resource Development, Union of India, New Delhi and the Chairman, University Grants Commission, New Delhi, for necessary compliances.

203. The writ petition is finally disposed of.

(2020)02ILR A351

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 20.09.2019

BEFORE

THE HON'BLE SUDHIR AGARWAL, J.
THE HON'BLE RAJEEV MISRA, J.

Writ C No. 30228 of 2019

Prakash Chand Gupta ...Petitioner
Versus
Chief Election Officer, U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Vijay Kumar Dwivedi

Counsel for the Respondents:
C.S.C.

A. Constitution of India – Article 226 – Delay and laches – Indian Limitation Act, 1963 – Applicability – Though period of limitation prescribed under Indian Limitation Act, 1963 is not applicable to a writ petition under Article 226 of Constitution of India, but, principle of undue delay and laches are applicable – Writ petition has been filed highly belated without explaining delay and laches – Delay and laches constitute substantial reason for disentitling relief in equitable jurisdiction under Article 226 of the Constitution of India. (Para 13 and 14)

B. Constitution of India – Article 226 – Second Writ – Maintainability – Abuse of process of law – Earlier writ petition dismissed with observation to file Suit – Second Writ Petition after 19 years – No Disclosure of earlier petition – Attempt of petitioner is nothing but gross abuse of process of law. (Para 15 and 16)

C. Constitution of India – Article 226 – Writ – Scope – Entitlement for payment of money pursuant to alleged work – Is an issue which needs evidence, which cannot be decided in a writ petition under Article 226 but can be a subject matter of civil suit – Unfortunately petitioner has allowed the same to become barred by limitation. (Para 17)

Writ Petition dismissed. (E-1)

List of cases cited:-

1. Hindustan Petroleum Corporation Limited and another Vs. Dolly Das 1999 (4) SCC 450

2. Kerala State Electricity Board and another Vs. Kurien E. Kalathil and others 2000 (6) SCC 293

3. M/S Prabhu Construction Company through its Proprietor Vs. State of U.P. and another (Writ C No. 25075 of 2014) decided on 05.05.2014

4. M/s R.S. Associate Vs. State of U.P. and others (Writ-C No. 11544 of 2014) decided on 24.02.2014.

5. Alaska Tech Vs. State of U.P. 2014 (6) ADJ 591

6. M/S Goyal Stationary Mart through its Proprietor State of U.P. (Misc. Bench No. 10971 of 2015) decided on 27.11.2015

7. Budh Gramin Sansthan Vs. State of U.P. 2014 (7) ADJ 29

8. Kaka Advertising Agency Vs. U.P. Technical University and others 2014 (11) ADJ 227

9. M/s A.K. Constructions Vs. State of U.P. and others (Misc. Bench No. 1909 of 2014) decided on 07.03.2014

10. Major Travels through Proprietor Vs. State of U.P. and others (Misc. Bench No. 3472 of 2014) decided on 25.04.2014

11. Uttaranchal Paper Converters and Publishers through Proprietor Vs. State of U.P. and others (Misc. Bench No. 3898 of 2015) decided on 13.05.2014

12. Writ Petition (Writ-C) No. 42697 of 2002 (M/S Jai Goswami Electric Works Alld. Vs. Union Of India through' D.R.M. and Others) decided on 19.05.2016.

13. New Delhi Municipal Council Vs. Pan Singh and others J.T.2007(4) SC 253

14. M/S Lipton India Ltd. And others vs. Union of India and others, J.T. 1994(6) SC 71

15. M.R. Gupta Vs. Union of India and others 1995(5) SCC 628

16. K.V. Rajalakshmiah Setty Vs. State of Mysore, AIR 1961 SC 993

17. State of Orissa Vs. Pyari Mohan Samantaray and others AIR 1976 SC 2617

18. State of Orissa and others Vs. Arun Kumar Patnaik and others 1976(3) SCC 579

19. Shiv Dass Vs. Union of India and others AIR 2007 SC 1330= 2007(1) Supreme 455

20. Chunvad Pandey Vs. State of U.P. and others, 2008(4) ESC 2423

21. Virender Chaudhary Vs. Bharat Petroleum Corporation & Ors., 2009(1) SCC 297

22. S.S. Balu and another Vs. State of Kerala and others, 2009(2) SCC 479

23. Yunus Vs. State of Maharashtra and others, 2009(3) SCC 281

24. Lindsay Petroleum Company Vs. Prosper Armstrong Hurde etc. (1874) 5 PC 239

(Delivered by Hon'ble SudhirAgarwal, J.
Hon'ble Rajeev Misra, J.)

1. Heard Sri Vijay Kumar Dwivedi, learned counsel for petitioner, learned Standing Counsel for respondent and perused the record.

2. Petitioner's claim is that in respect of work performed by him, he is entitled for recovery of Rs.2,29,765.16 but his claim has been rejected by respondent-1 vide order dated 31.7.2000.

3. Basically writ petition is for recovery of money therefore, in effect, it is a suit for recovery of money and since claim of petitioner is not an admitted claim as it has already been rejected by respondent-1 vide order dated 31.7.2000, we do not find that writ petition is maintainable hence petitioner has remedy in common law.

4. It is true that writ petition for enforcement of contractual matter is not absolutely barred but when petitioner seeks recovery of money claiming to have fallen due as a result of performance of a contract and claim is not admitted by respondents, matter requires evidence for adjudication and hence remedy in common law by filing suit for recovery of money must be filed and writ petition under Article 226 of Constitution should not be entertained.

5. The question, whether for the purpose of recovery of money pursuant to contract, writ petition under Article 226 would be maintainable has been considered in Hindustan Petroleum Corporation Limited and another Vs. Dolly Das 1999 (4) SCC 450 wherein Court said that in absence of any constitutional or statutory rights being involved, a writ proceeding would not lie to enforce contractual obligations even if it is sought to be enforced against State or to avoid contractual liability arising thereto. In the absence of any statutory right, Article 226 cannot be availed to claim any money in respect of breach of contract or tort or otherwise.

6. In Kerala State Electricity Board and another Vs. Kurien E. Kalathil and others 2000 (6) SCC 293, Court said that interpretation and implementation of a clause in a contract cannot be subject-matter of a writ petition. Whether a contract envisages actual payment or not is a question of construction of contract. If a term of contract is violated, ordinarily remedy is not the writ petition under Article 226. A contract would not become statutory simply because it is for construction of a public utility and it has been awarded by a statutory body. A statute may expressly or impliedly confer power on a statutory body to enter into contracts in order to enable it to discharge its functions. Disputes arising out of the terms of such contracts or alleged breaches have to be settled by the ordinary principles of law of contract. The fact that one of the parties to the agreement is a

statutory or public body will not by itself affect the principles to be applied. The disputes about the meaning of a covenant in a contract or its enforceability have to be determined according to the usual principles of the Contract Act. Every act of a statutory body need not necessarily involve an exercise of statutory power. Statutory bodies have power to contract or deal with property like private parties. Such activities may not raise any issue of public law. When it is not shown that contract is statutory and parties are within the realm of their authority, contract between the parties is in the realm of private law. The disputes relating to interpretation of terms and conditions of such contract cannot be agitated in a petition under Article 226 of the Constitution. The Court further said:

"That is a matter for adjudication by a civil court or in arbitration if provided for in the contract. Whether any amount is due and if so, how much and refusal of the appellant to pay it is justified or not, are not the matters which could have been agitated and decided in a writ petition."

7. Following the above authorities, a Division Bench of this Court in M/S Prabhu Construction Company through its Proprietor Vs. State of U.P. and another (Writ C No. 25075 of 2014) decided on 05.05.2014 said as under:

"In the present case, there is nothing on the record which may persuade us to hold that the contract is a statutory contract. The remedy of the contractor, if he is aggrieved by non-payment, would be to either file an ordinary civil suit or if there is an arbitration agreement between the parties, to invoke the terms of the agreement."

8. Court also relied on its earlier decision in M/s R.S. Associate Vs. State of U.P. and others (Writ-C No. 11544 of 2014) decided on 24.02.2014.

9. Again in Alaska Tech Vs. State of U.P. 2014 (6) ADJ 591, a Division Bench of this Court observed as under:

"2. We are of the view that, in a matter of this nature which pertains to alleged nonpayment of dues under a contract for supply of goods, it would neither be prudent nor judicious for this Court, in exercise of its jurisdiction under Article 226 of the Constitution, to grant relief, which is in substance, is a prayer for a money decree. These matters, it must be emphasized, are not those relating to statutory contracts but are purely non-statutory contracts. Whether work has been satisfactorily performed, whether the rates which had been quoted are in accordance with the terms of the contract, whether the goods were of a quality as mandated, and above all, whether the claim is within limitation or otherwise, are issues which cannot appropriately be adjudicated upon under Article 226 of the Constitution."

10. The same view has been reiterated in M/S Goyal Stationary Mart through its Proprietor State of U.P. (Misc. Bench No. 10971 of 2015) decided on 27.11.2015, Budh Gramin Sansthan Vs. State of U.P. 2014 (7) ADJ 29, Kaka Advertising Agency Vs. U.P. Technical University and others 2014 (11) ADJ 227, M/s A.K. Constructions Vs. State of U.P. and others (Misc. Bench No. 1909 of 2014) decided on 07.03.2014, Major Travels through Proprietor Vs. State of U.P. and others (Misc. Bench No. 3472 of 2014) decided

on 25.04.2014 and Uttaranchal Paper Converters and Publishers through Proprietor Vs. State of U.P. and others (Misc. Bench No. 3898 of 2015) decided on 13.05.2014.

11. Following the above authorities, a Division Bench of this Court has also taken same view in Writ Petition (Writ-C) No. 42697 of 2002 (M/S Jai Goswami Electric Works Alld. Vs. Union Of India through' D.R.M. and Others) decided on 19.05.2016.

12. Further, it appears that writ petition has been filed in a circuitous way for the reason that the amount, petitioner is claiming, relates to the period of 1998, and his claim was rejected as long back on 31.7.2000 (Annexure 12 to the writ petition). A suit for recovery of the same has become barred by limitation therefore, in order to avoid legal obstruction, this writ petition has been filed since claim has become barred by limitation long back and cannot be claimed by filing a suit.

13. Though period of limitation prescribed under Indian Limitation Act, 1963 (hereinafter referred to as "Act, 1963) as such is not applicable to a writ petition under Article 226 of Constitution of India, but, principle of undue delay and laches are applicable. In the present case, claim relates to the period of 1998 and order rejecting claim was passed in July, 2000, but, this writ petition has been filed in September, 2019 without explaining delay and laches. The only explanation is that petitioner had filed Writ Petition No.8202 of 2000, which was disposed of vide judgment dated 16.02.2000 directing respondents-Competent Authority to pass a reasoned order and thereafter order dated 31.07.2000 was passed. How aforesaid order can give rise to a fresh cause of action of filing writ petition in 2019 without explaining laches is not stated anywhere.

14. Delay and laches constitute substantial reason for disentitling relief in equitable jurisdiction under Article 226 of the Constitution of India. In New Delhi Municipal Council Vs. Pan Singh and others J.T.2007(4) SC 253, the Apex Court observed that after a long time the writ petition should not have been entertained even if the petitioners are similarly situated and discretionary jurisdiction may not be exercised in favour of those who approached the Court after a long time. It was held that delay and laches were relevant factors for exercise of equitable jurisdiction. In M/S Lipton India Ltd. And others vs. Union of India and others, J.T. 1994(6) SC 71 and M.R. Gupta Vs. Union of India and others 1995(5) SCC 628 it was held that though there was no period of limitation provided for filing a petition under Article 226 of Constitution of India, ordinarily a writ petition should be filed within reasonable time. In K.V. Rajalakshmiah Setty Vs. State of Mysore, AIR 1961 SC 993, it was said that representation would not be adequate explanation to take care of delay. Same view was reiterated in State of Orissa Vs. Pyari Mohan Samantaray and others AIR 1976 SC 2617 and State of Orissa and others Vs. Arun Kumar Patnaik and others 1976(3) SCC 579 and the said view has also been followed in Shiv Dass Vs. Union of India and others AIR 2007 SC 1330= 2007(1) Supreme 455 and New Delhi Municipal Council (supra). The aforesaid authorities of the Apex Court has also been followed by this Court in Chunvad Pandey Vs. State of U.P. and others, 2008(4) ESC 2423. This has been

followed in Virender Chaudhary Vs. Bharat Petroleum Corporation & Ors., 2009(1) SCC 297. In S.S. Balu and another Vs. State of Kerala and others, 2009(2) SCC 479 the Apex Court held that it is well settled principle of law that delay defeats equity. It is now a trite law that where the writ petitioners approaches the High Court after a long delay, reliefs prayed for may be denied to them on account of delay and laches irrespective of the fact that they are similarly situated to other candidates who have got the benefit. In Yunus Vs. State of Maharashtra and others, 2009(3) SCC 281 the Court referred to the observations of Sir Barnesdelay Peacock in Lindsay Petroleum Company Vs. Prosper Armstrong Hurde etc. (1874) 5 PC 239 and held as under:

"Now the doctrine of laches in Courts of Equity is not an arbitrary or technical doctrine. Where it would be practically unjust to give a remedy either because the party has, by his conduct done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect he has though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases, lapse of time and delay are most material. . . . . Two circumstances always important in such cases are, the length of the delay and the nature of the acts done during the interval which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy."

15. The third obstruction is that in fact petitioner has already failed, inasmuch as, after order dated 31.07.2000 petitioner filed Writ Petition No.4134 of 2003, and the same was dismissed on 28.08.2008. The order reads as under :

"1. This is a writ petition for direction to respondents to pay the money.
2. We have heard counsel for the petitioner and Standing Counsel for the respondents.
3. Petitioner may if he is so advised file a suit.
4. With this observation the writ petition is dismissed."

16. After dismissal of above writ petition, no writ petition afresh was maintainable still present writ petition has been filed without stating fact of dismissal of writ petition in para 1 of writ petition though for the same claim, writ petition was already dismissed.

17. Last but not the least, obstruction before petitioner is that his claim has been rejected by respondent-1, meaning thereby, claim of payment of petitioner is not an admitted claim. Whether rejection is justified and petitioner is entitled for payment of money pursuant to alleged work performed by him and that too to the satisfaction and in terms of contract, is an issue which needs evidence, which cannot be decided in a writ petition under Article 226 of Constitution but can be a subject matter of civil suit, but, unfortunately petitioner has allowed the same to become barred by limitation.

18. What the petitioner has already lost, cannot be restored or revived by filing fresh writ petition. In fact this attempt of petitioner is nothing but gross abuse of process of law.

19. In view thereof, writ petition is dismissed.

(2020)02ILR A357

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.12.2019

BEFORE
THE HON'BLE ABHINAVA UPADHYA, J.
THE HON'BLE PANKAJ BHATIA, J.

Writ C No. 31081 of 2018

Pankaj Kumar Yadav ...Petitioner
Versus
The State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Radha Kant Ojha, Shivendu Ojha

Counsel for the Respondents:
C.S.C., Sri M.P. Yadav, Sri Mahendra Pratap

A. Constitution of India – Article 226 – Restitutionary Relief – Reshuffle and Allotment of Seat – Arbitrary action of authority – Wherever Court finds that the action of the authorities has been arbitrary and in breach of the rules and regulations or the prospectus affecting the rights of the students and that a candidate is found to be meritorious and such candidate/student has approached the court at the earliest and without any delay – The court can mould the relief and direct the admission to be granted to such a candidate in the next academic year by issuing appropriate directions by directing to increase in the number of seats. (Para 17)

Held –

18. The admission was denied to the petitioner on account of totally arbitrary consideration by the respondent authorities and coupled with the fact that the seats are vacant in the Medical Colleges as are indicated in the chart filed by Sri Mahendra Pratap Singh, we hold that the petitioner being a meritorious student is entitled to a restitutionary relief and entitled to be admitted in the College where the seats are vacant.

Writ Petition allowed. (E-1)

List of cases cited :-

1. S. Krishna Sradha v. The State of Andhra Pradesh & Others decided on 13.12.2019

2. Asha v. Pt. B.D. Sharma UHS; (2012) 7 SCC 389

3. Chandigarh Administration v. Jasmine Kaur; (2014) 10 SCC 521

(Delivered by Hon'ble Pankaj Bhatia, J.)

1. Heard Sri Radha Kant Ojha, learned Senior Advocate assisted by Sri Shivendu Ojha, learned counsel for the petitioner, Sri Mahendra Pratap, learned counsel for the respondent no. 2 and learned Standing Counsel for the State-respondent.

2. In the present petition, it has been alleged that for conducting National Eligibility-cum-Entrance Test (NEET) UG-2018, a brochure was published by the Director General, Medical Health and Training. The petitioner applied and appeared in the NEET UG-2018 and the Roll Number 513812113 was allotted to the petitioner. It is said that in the said test conducted by CBSE, the petitioner's all India ranking was 10092 and the State rank was 1195. It is stated that the petitioner appeared in the first counselling and an allotment letter was issued to the petitioner by the Chairman, counselling Board (Annexure-2 to the petition), whereby the petitioner was kept in the category BCOP and was allotted the Institute Government Medical College, Azamgarh for the course of MBBS. The petitioner in terms of the said letter appeared before the Principal, Government Medical College, Azamgarh on 10.7.2018 and submitted his papers as

well as deposited an amount of Rs. 31,800/- by demand draft no. 409058, which was duly received by the Principal as is perused from the receipt dated 10.7.2018 (Annexure-3 to the petition).

3. The petitioner thereafter sought an NOC to appear in the second counselling only with a view to improve and get a better Institution. The said NOC was given to the petitioner on 10.7.2018. The petitioner appeared in the second round of counselling. In the said second round of counselling, the petitioner was allotted the same Medical College i.e. Government Medical College, Azamgarh. However, in the said second allotment letter his category was mentioned as GNOP, whereas in the first allotment letter the allotted category was mentioned as BCOP. The petitioner, believing that he was allotted the same college reported for admission, but no process was conducted by the College and the petitioner was throughout under the impression that his fees and papers had already been deposited in the College in question, as such no further steps were to be taken. The petitioner, when he approached the respondent no. 3, the College in question, was informed that his admission had been cancelled because the petitioner had appeared in the second counselling and as in terms of the allotment letter issued after the second round of counselling, the petitioner did not report at the allotted College on or before 18.8.2018, as such his admission had been cancelled.

4. The petitioner thereafter moved an application dated 28.8.2018 before the Director General, Medical Education and Training highlighting his plight, however, no action was taken but the petitioner was not allowed to continue his study. As such, the petitioner approached this Court by filing present writ petition on 9th September, 2018.

5. This Court vide order dated 13.9.2018, allowed three days' time to obtain instruction and the matter was directed to be listed on 18th September, 2018. On 18.9.2019, this Court granted time for filing of counter affidavits mainly as an statement was made before this Court that no seat is vacant, on which the petitioner can be accommodated.

6. The matter was heard on 9.12.2019.

7. Sri R.K. Ojha, Senior Advocate assisted by Sri Shivendu Ojha, counsel for the petitioner argued that in terms of the brochure, there is no provision or stipulation that in the event of petitioner appearing in the second round of counselling, his admission granted after the first counselling was to automatically come to an end. He has drawn our attention to the provisions of the brochure specifying for the counselling procedure, which is as under:-

''कांउसिलिंग प्रकिया–:

काउंसिलिंग प्रकिया प्रथम व द्वितीय चक्र में सम्पन्न की जायेगी। **अभ्यर्थी को प्रथम चक्र से आवंटित सीट पर प्रवेश प्राप्त करना होगा, आवंटन के पश्चात प्रवेश न लेने अथवा प्रवेश के पश्चात त्यागपत्र देने की दशा में अभ्यर्थी द्वारा जमा की गयी धरोहर धनराशि (Security Money) जब्त कर ली जायेगी।** ऐसे अभ्यर्थी पुनः धरोहर धनराशि (Security Money) जमा करने के पश्चात ही द्वितीय चक्र की कांउसिलिंग के लिए अर्ह होगे।

प्रथम चक्र की कांउसिलिंग से अनावंटित/प्रवेशित अभ्यर्थी द्वितीय चक्र की कांउसिलिंग में प्रतिभाग कर सकेगे तथा इन्हें पुनः धरोहर धनराशि (Security Money) जमा करने

की आवश्यकता नहीं होगी। अभ्यर्थी प्रथम चक्र की काउंसिलिंग से आवंटित सीट को द्वितीय चक्र की काउंसिलिंग में त्मौनसिम कर सकता है। **द्वितीय चक्र की काउंसिलिंग से त्मौनसिम होने के उपरान्त पूर्व में आवंटित सीट रिक्त होकर किसी अन्य अर्ह अभ्यर्थी को आवंटित हो जायेगी, Reshuffle न होने की दशा में अभ्यर्थी द्वारा प्रथम कांउसिलिंग से प्रवेश ली गयी सीट यथावत बनी रहेगी।"**

8. On the basis of said provision, he submits that only if there was a reshuffle in the second round of counselling, the seat vacated would be allotted to someone else, whereas in the present case the seat was not reshuffled as the petitioner was allotted the same College. He further submits that even otherwise all the documents of the petitioner were submitted before the College concerned, which is clear from the perusal of the receipt dated 10.7.2018 and thus no further steps had to be taken by the petitioner even in terms of the allotment of the same College in the second round of counselling.

9. Sri Mahendra Pratap, learned counsel appearing on behalf of respondent no. 2 on the other hand admits that in the first round of counselling, the petitioner was allotted the State Medical College, Azamgarh under the category BCOP, however in the second round of counselling, the petitioner was allotted the category GNOP, although the Medical College remained the same and thus in terms of the Government Order dated 12.6.2018, the seat allotted to the petitioner stood automatically cancelled. He further submits that in terms of the second allotment, the petitioner was advised to report on or before 18.8.2018 and as the petitioner did not report on or before the said date, as such he has no claim to the seat in question. He further argues that the submission of the counsel for the petitioner that all the documents which are required to be submitted were already deposited on 10.7.2018, is not acceptable, as the same exercise had to be completed once again.

10. Sri Mahendra Pratap has relied upon a System Requirement Specifications (Second Counselling) issued by Director General, Medical Education and Training to stress that in terms of the said guidelines if a candidate has been allotted a new seat on the basis of his choice in the second counselling, the seat allotted in the first counselling will automatically be cancelled, however in case he could not be allotted any seat on the basis of his/her choice in the second counselling, the seat allotted in the first counselling will be retained. Relevant paragraph 3 of the said circular is quoted hereinbelow:-

"Candidates who have joined in the institutes on the basis of first allotment and want to reshuffle his/her seat will take part in choice submission process. If he/she has been allotted a new seat on the basis of his/her choices in second counselling, the seat allotted in first counselling will automatically be cancelled. ***In case, he/she could not be allotted any seat on the basis of his/her choices in second counselling, the seat allotted in first counselling will be retained."***

11. During the course of the proceedings, a supplementary counter affidavit was filed on behalf of Sri Mahendra Pratap indicating the seats vacant as on date, which is as under:-

क०सं०	संस्था का नाम	रिक्त सीटो की संख्या

1	मेडिकल कालेज, आगरा	1
2	मेडिकल कालेज, कानपुर	0
3	मेडिकल कालेज, इलाहाबाद	0
4	मेडिकल कालेज, मेरठ	0
5	मेडिकल कालेज, झॉसी	1
6	मेडिकल कालेज, गोरखपुर	0
7	मेडिकल कालेज, कन्नौज	0
8	मेडिकल कालेज, जालौन	0
9	मेडिकल कालेज, आजमगढ़	0
10	मेडिकल कालेज, अम्बेडकरनगर	0
11	मेडिकल कालेज, सहारानपुर	2
12	मेडिकल कालेज, बॉदा	0
13	डा0 राम मनोहर लोहिया आयुर्विज्ञान संस्थान, लखनऊ	1
14	उ0प्र0 आयुर्विज्ञान विश्वविद्यालय, सैफई, इटावा	2
15	के0जी0एम0यू0, लखनऊ	0
	कुल योग	**7**

12. The counsel for the petitioner Sri R.K Ojha argues that he may be allotted any of the vacant seats in any of the Colleges as is evident from the chart given by Sri Mahendra Pratap at the discretion of the respondent no. 2, to which the petitioner would have no objection.

13. The sole question to be considered is whether in terms of the brochure any fault could be attributed to the petitioner and whether the petitioner would be entitled to a relief of admission keeping in view of his conduct and steps taken by the petitioner for correction of the injustice done to him.

14. A perusal of the brochure, which is the basis for any candidate to apply, clearly reveals that only on a reshuffle and the allotment of fresh seat in the second round of counselling, the admission to the seat in the first round of counselling can be held to be lapsed. In fact, the brochure clearly envisages that in the event of there being no reshuffle, the seat allotted in the first found of counselling shall remain as it is.

15. We are not impressed with the submission of Sri Mahendra Pratap that merely because there was a change of category, it would amount to allotment of a new seat and would render the admission to the first seat as lapsed. In the present case, it is not disputed that the petitioner was allotted the same College in the second round of counselling also, he has deposited all his testimonials and the fees at the time of first round of counselling and thus we have no hesitation in holding that merely because a new category was allotted from BCOP to GNOP, the same would amount to a reshuffle and allotment of a new seat. Thus, we hold that the petitioner has been meted with manifest arbitrariness and despite the petitioner being meritorious has been denied admission.

16. Now, considering the question as to what relief can be granted in the facts of the present case, it is essential to note that the petitioner approached this Court with expedition by filing present writ petition on 9th September, 2018 and no order could be passed in favour of the petitioner only on account of a statement made that no seats are vacant as recorded by this Court in its order dated 18.9.2018.

17. A three Judge bench of the Hon'ble Apex Court very recently in **Civil Appeal No. 1081 of 2017** in the case of **S. Krishna Sradha v. The State of Andhra Pradesh & Others** decided on 13.12.2019 answered on a reference the questions which arose on account of a conflict between the pronouncement of the judgments of the Apex Court in the case of ***Asha v. Pt. B.D. Sharma UHS; (2012) 7 SCC 389*** and ***Chandigarh Administration v. Jasmine Kaur; (2014) 10 SCC 521.*** The Apex Court after considering the submissions advanced before it, answered the reference as under:-

*"**9.** In light of the discussion/observations made hereinabove, a meritorious candidate/student who has been denied an admission in MBBS Course illegally or irrationally by the authorities for no fault of his/her and who has approached the Court in time and so as to see that such a meritorious candidate may not have to suffer for no fault of his/her, we answer the reference as under:*

(i) That in a case where candidate/student has approached the court at the earliest and without any delay and that the question is with respect to the admission in medical course all the efforts shall be made by the concerned court to dispose of the proceedings by giving priority and at the earliest.

(ii) Under exceptional circumstances, if the court finds that there is no fault attributable to the candidate and the candidate has pursued his/her legal right expeditiously without any delay and there is fault only on the part of the authorities and/or there is apparent breach of rules and regulations as well as related principles in the process of grant of admission which would violate the right of equality and equal treatment to the competing candidates and if the time schedule prescribed - 30 th September, is over, to do the complete justice, the Court under exceptional circumstances and in rarest of rare cases direct the admission in the same year by directing to increase the seats, however, it should not be more than one or two seats and such admissions can be ordered within reasonable time, i.e., within one month from 30th September, i.e., cut off date and under no circumstances, the Court shall order any Admission in the same year beyond 30 th October. However, it is observed that such relief can be granted only in exceptional circumstances and in the rarest of rare cases. In case of such an eventuality, the Court may also pass an order cancelling the admission given to a candidate who is at the bottom of the merit list of the category who, if the admission would have been given to a more meritorious candidate who has been denied admission illegally, would not have got the admission, if the Court deems it fit and proper, however, after giving an opportunity of hearing to a student whose admission is sought to be cancelled.

(iii) In case the Court is of the opinion that no relief of admission can be granted to such a candidate in the very academic year and wherever it finds that the action of the authorities has been arbitrary and in breach of the rules and regulations or the prospectus affecting the rights of the students and that a candidate is found to be meritorious and such candidate/student has approached the court at the earliest and without any delay, the court can mould the relief and direct the admission to be granted to such a candidate in the next academic year by issuing appropriate directions by directing to increase in the number of seats as may

be considered appropriate in the case and in case of such an eventuality and if it is found that the management was at fault and wrongly denied the admission to the meritorious candidate, in that case, the Court may direct to reduce the number of seats in the management quota of that year, meaning thereby the student/students who was/were denied admission illegally to be accommodated in the next academic year out of the seats allotted in the management quota.

(iv) Grant of the compensation could be an additional remedy but not a substitute for restitutional remedies. Therefore, in an appropriate case the Court may award the compensation to such a meritorious candidate who for no fault of his/her has to lose one full academic year and who could not be granted any relief of admission in the same academic year.

(v) It is clarified that the aforesaid directions pertain for Admission in MBBS Course only and we have not dealt with Post Graduate Medical Course.

***10.** In view of the above, the decision of this Court in the case of **Jasmine Kaur** (Supra) or any other decisions contrary to the above stand overruled. The decision of this Court in the case of **Asha** (Supra) is hereby affirmed to the aforesaid extent. The reference is answered accordingly."*

18. Considering the ratio of the judgments of the Apex Court and the fact that we have already held that the admission was denied to the petitioner on account of totally arbitrary consideration by the respondent authorities and coupled with the fact that the seats are vacant in the Medical Colleges as are indicated in the chart filed by Sri Mahendra Pratap Singh, we hold that the petitioner being a meritorious student is entitled to a restitutionary relief and entitled to be admitted in the College where the seats are vacant to be decided by the respondent no. 2 within a period of 15 days from today subject to the petitioner complying with the other formalities.

19. The writ petition is allowed in terms of the said direction.

(2020)02ILR A362

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 10.02.2020

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.
THE HON'BLE SAURABH SHYAM SHAMSHERY, J.

Writ C No. 31586 of 2016
&
Writ C Cases No. 52602 of 2011, 59955 of 2012, 59958 of 2012, 59962 of 2012, 59964 of 2012, 47504 of 2017, 50821 of 2017, 50824 of 2017, 51857 of 2017, & 57562 of 2017

Kamal Singh & Ors. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Sanjay Kumar Mishra, Sri Anurag Khanna

Counsel for the Respondents:
C.S.C., Sri Anuj Pratap Singh, Sri Kuldeep Singh Chauhan, Sri Neeraj Kumar Srivastava, Sri Prabhakar Awasthi, Sri Yogesh Kumar, Sri Sudhanshu Srivastava, Sri Saurabh Srivastava, Sri M.D. Singh Shekhar, Sri H.N. Singh

A. Land Acquisition Act,1894-initiated for establishing Growth Centre by UPSIDC-compensation paid-land not vacated by farmers-land to be transfered by UPSIDC by

THDCIL-together paid more compensation beyond compensation fixed by Reference Court for taking actual possession as ex-gratia payment-such payment illegal-no provision of granting ex-gratia payment in Act, 1894-direction issued to C.B.I. for registering an F.I.R. and investigation-High Court has power under Article 226- notifications dated 13.02.1991 and 23.03.1991 also challenged in connected writs-challenged after two decades-huge delay-such writs dismissed.
W.P. nos. 52602/2011, 59955/2012, 59958/2012, 59962/ 2012 and 59964/2012-dismissed
W.P. nos. 31586/2016-pending-direction issued to C.B.I. (supra).
W.P. nos.47504/2017, 50821/2017, 50824/2017,51857/2017 and 57562/2017 are pending.

Held:

It was permissible for the Authorities to again pay compensation from the public exchequer to the erstwhile land owners at an exorbitant rate and that too at a rate which was applicable after more than two decades of the acquisition, the finding recorded by the Committee is that it was not permissible to do so and that it was not permissible to subsequently take recourse to the provisions of Section 11(2) of the Act when the award had already been made under Section 11(1) of the Act. **(para 11)**

Though the possession of the land was given to UPSIDC in 1993 but as the UPSIDC failed to make use of the land for a substantially long period, it gave an opportunity to the farmers to re-enter the land and do farming and thereby create a situation for them to make an unreasonable demand.**(para 11)**

The notifications are of the year 1991, whereas the writ petitions were filed in the year 2011 and 2012, after a period of more than 20 years. Averments of the writ petitions are silent on the issue of any explanation of gross delay in approaching this Court.Admittedly, the possession of the land was taken way back in the year 1993. The special land Acquisition Officer had made award in the year 1993 and 1995 and as such entire proceedings of acquisition was completed wayback in the year 1995.In view of above discussions, we dismiss the Writ Petition Nos.52602 of 2011, 59955 of 2012, 59958 of 2012, 59962 of 2012 and 59964 of 2012 on the ground of gross delay and laches.**(para 45)**

Cases Cited:

1. Common Cause, A Registered Society Vs. Union of India &Ors. (1999) 6 SCC 667

2. Secretary, Minor Irrigation & Rural Engineering Services, U.P. and Others Vs. Sahngoo Ram Arya &Anr. (2002) 5 SCC 521

3. State of West Bengal and Others Vs. Committee for protection of Democratic Rights, West Bengal &Ors. (2010) 3 SCC 571

4. Supreme Court Bar Association vs. Union of India, (1998) 4 SCC 409; AIR 1998 SC 1895

5. K.V. Rajendran Vs. Superintendent of Police CBCID South Zone, Chennai &Ors, (2013) 12 SCC 480

6. Dharam Pal Vs. State of Haryana &Ors, (2016) 4 SCC 160

7. Bimal Gurung Vs. Union of India &Ors, (2018) 15 SCC 480

8. E. Sivakumar Vs. Union of India &Ors, (2018) 7 SCC 365

9. Subrata Chattoraj Vs. Union of India, (2014) 8 SCC 768

10. Shree Shree Ram JankiAsthanTapovan Mandir And Another Vs. State of Jharkhand and Ors, (2019) 6 SCC 777

11.Aflatoon Vs. Lt. Governor of Delhi, 1975 (4) SCC 285

12. P. Chinnanna&Ors Vs. State of A.P. &Ors, (1994) 5 SCC 486

13. State of T.N. &Ors Vs. L. Krishnan &Ors, (1996) 1 SCC 250

14. Urban Improvement Trust, Udaipur Vs. Bheru Lal &Ors, (2002) 7 SCC 712

15. Swaika Properties (P) Ltd. &Anr. Vs. State of Rajasthan &Ors, (2008) 4 SCC 695

16. Banda Development Authority Vs. Motilal Agarwal (2011) 5 SCC 394

17. State of Haryana Vs. M/s. G.D. Goenka Tourism Corporation Ltd: (2018) 3 SCC 585

18. Gudulare M.J. Cherian v. Union of India, (1992) 1 SCC 397

19. R.S.Sodhi v. State of U.P., AIR 1994 SC 38

20. Punjab and Haryana High Court Bar Assn, v. State of Punjab, AIR 1994 SC 1023

21. Vineet Narain v. Union of India, (1996) 2 SCC 199

22. Union of India v. Sushil Kumar Modi., AIR 1997 SC 314

23. Disha v. State of Gujarat., AIR 2011 SC 3168

24. Rajendrer Singh Pathania v. State (NCT of Delhi), (2011) 13 SCC 329 State of Punjab v. Devender Pal Singh Bhullar, AIR 2012 SC 364

25. TilokchandMotichand v. H.B. Munshi (1969) 1 SCC 110

26. Rabindranath Bose v. Union of India, (1970) 1 SCC 84

27. Reliance Petroleum Ltd. v. Zaver Chand PopatlalSumaira (1996) 4 SCC 579

28. Hari Singh v. State of U.P. (1984) 2 SCC 624

29. Municipal Corpn. of Greater Bombay v. Industrial Development Investment Co. (P) Ltd.(1996) 11 SCC 501

30. State of Rajasthan v. D.R. Laxmi, (1996) 6 SCC 445

31. Municipal Council, Ahmednagar v. Shah HyderBeig (2000) 2 SCC 48

32. State of Rajasthan v. D.R. Laxmi C.Padma v. Dy. Secy. To the Govt of T.N. (1997) 2 SCC 627

33. State of Madhya Pradesh v. Bhailal Bhai, AIR 1964 SC 1006

34. Ajodhya Bhagat v. State of Bihar (1974) 2 SCC 501

35. Girdharan Prasad Missir v. State of Bihar (1980) 2 SCC 83

36. Municipal Corpn. of Greater Bombay v. Industrial Development Investment Co. (P) Ltd. (1996) 11 SCC 501

37. Ganpatibai v. State of M.P. (2006) 7 SCC 508

38. State of Bihar v. Dhirendra Kumar (1995) 4 SCC 229

39. Swaran Lata v. State of Haryana (2010) 4 SCC 532

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

1. The facts which led to filing of the present bunch of writ petitions are as follows:

2. A notification under Section 4(1) read with Section 17 of Land Acquisition Act, 1894 (hereinafter referred to as 'Act, 1894') was published on 13.2.1991 to acquire a total 969.023 acres of land in four villages namely: Dashahra Kherli, Rukanpur, Jahanpur and Naifal alias Unchagaon, Pargana and Tehsil:Bulandshahr, Uttar Pradesh.

3. The acquisition of land was initiated at the instance of U.P. State Industrial Development Corporation, Kanpur (hereinafter referred to as "UPSIDC') for the purpose of establishing Growth Centre at district Bulandshahr. Declaration under Section 6(1) read with Section 17 of Act, 1894 was made on 23.3.1991. Possession of land was taken

on 7.10.1993, 8.10.1993, 13.10.1993 and 16.10.1993. Special Land Acquisition Officer (hereinafter referred to as 'SLAO') made award determining compensation in respect to the land acquired on 15.10.1993, 16.10.1993, 22.10.1993 and 31.3.1995.

4. The SLAO determined compensation of total Rs.2,87,14,996.53. Certain land owners who were not satisfied with determination of compensation by SLAO got Reference made under Section 18 of Act, 1894. Reference Court increased amount of compensation and fixed at a total of Rs.7,13,37,504/-.

5. After Reference, certain amount of compensation was disbursed and balance amount was deposited as revenue deposit in the Treasury, Bulandshahr, Uttar Pradesh.

6. U.P.S.I.D.C. made various complaints that though compensation has been paid and possession has been taken, still some farmers have not vacated their part of land which was creating obstruction in the development activities. In further development, UPSIDC entered into an agreement (Memorandum of Understanding) on 14.12.2013 with the Tehri Hyrro Development Corporation India Limited (hereinafter referred to as "THDCIL") to establish 1320 Megawatt Super Thermal Power Project on the said land and for that purpose land was sought to be transferred by UPSIDC to THDCIL. The further development in the present case was that district authorities, UPSIDC and THDCIL decided to pay more compensation beyond the compensation fixed by Reference Court in order to settle with the villagers so that UPSIDC took actual possession of land acquired. After certain negotiations with the villagers it was decided to pay compensation at the rate of Rs.721/- per square metre. The said additional compensation was termed as "ex gratia payment'. The total compensation was increased from Rs.7,13,37,504/- to Rs. 3,87,17,71,833/- i.e. on enhancement of about 380 Crores.

7. The main reliefs sought in the bunch of the writ petitions are briefly as follows:

a) Writ Petition No.31586 of 2016, the petitioners have sought for the relief which is as under:

(i) ***To issue*** *a writ, order or direction in the nature of MANDAMUS commanding to Respondent no.3 to release the compensation in respect of petitioners' land comprising of Khata No.162 Plot No.270, 288, 522Sa, 549, 550, 591, 593, 686, 710, 735, 790, 802, 809 and 811 total area 5.391 Hectare situated in village Dashara Kherli, Pargana and Tehsil Khurja, district bulandshahr."*

b) **Writ Petition Nos. 52602 of 2011, 59955 of 2012, 59958 of 2012, 59962 of 2012 and 59964 of 2012:-** in all these writ petitions, a common relief has been sought by the petitioners which is as under:

"(i) A writ, order or direction in the nature of certiorari quashing the impugned notifications dated 13.2.1991 and dated 23.3.1991 issued by respondent no.1 (Annex.Nos.1 and 2)."

8. In **Writ Petition Nos.47504 of 2017, 50821 of 2017, 50824 of 2017, 51857 of 2017 and 57562 of 2017,** petitioners have sought declaration of lapse of acquisition under Section 24 (2) of Right to Fair Compensation and Transparency in land Acquisition,

Rehabilitation and Resettlement Act, 2013 (hereinafter referred as the Act, 2013).

9. When the matter was listed before this Court, after exchange of pleadings, a detailed order dated 29.8.2016 was passed whereby a serious note was taken about the huge payment of "ex-gratia amount' over and above the compensation determined by the authorities under Act, 1894 and a direction was passed to enquire into the matter by a High Powered Enquiry Committee to be constituted by Chief Secretary of Uttar Pradesh. The said Committee was to be headed by a Judicial Officer. It was also directed to examine the facts, (i) Where land acquired and compensation determined and paid under Act, 1894, whether it is permissible for authorities to again pay compensation from public exchequer to erstwhile land owners at an exorbitant rate and that too at a rate which is applicable after more than two decades from acquisition notification under Section 4 of Act, 1894 was issued; (ii) Whether acquired land had market value for the purpose of compensation at Rs.721/- per square metre on the date when notification under Section 4 of Act, 1894 was issued particularly when in this regard awards by District Judge under Section 18 of Act, 1894 have already been made determining much lesser value; (iii) If possession was taken over of acquired land in 1993, why District Administration did not take any effective steps to dispossess unauthorized occupants, and (iv) Who are the persons/authorities responsible to permit continued unauthorized possession of erstwhile tenure holders over acquired land and thereby creating a situation where Farmers re-entered the land and Administration found itself handicapped to dispossess them without accepting their demand.

10. The relevant part of the order is also reproduced hereinafter:

"31. Acquisition which commenced in 1990, SLAO made awards at the rate is less than Rs.2/- per square yard, enhanced to some extent by District Judge, Bulandshahr in some references, the rate has now been increased to several hundred times. Further, on acquisition finalized by SLAO or District Judge with regard to compensation and possession of land was also taken by parties in 1993, for the same land, again compensation is sought to be paid and the total amount which was earlier less than three crores is now increased to 275 crores and above. This is something fantastic and mind-blowing.

32. In our view, facts are self-speaking and smacks of something scammish somewhere. Initially, we intended to have the matter enquired by a Special Investigation Team, headed by a Judicial Officer, or by Central Bureau of Investigation but then it appears to us that authorities at District level and officials of UPSIDC and THDCIL, among themselves, have colluded to extract a huge money from public exchequer in the name of distribution of compensation to Farmers but these facts in entirety were not made known to Government, hence, we require Chief Secretary, U.P., Lucknow to constitute a High Powered Inquiry Committee headed by a Judicial Officer of the rank of not less than Additional Legal Remembrancer. It shall also have as Members, a Senior Official of Revenue Department and a competent Senior Police Official, who would conduct an indepth inquiry in the matter and submit report as to how all this has happened and who are the persons responsible.

33.The aforesaid Committee, besides other, shall also examine the facts, (i) Where land acquired and compensation determined and paid under Act, 1894, whether it is permissible for authorities to again pay compensation from public exchequer to erstwhile land owners at an exorbitant rate and that too at a rate which is applicable after more than two decades from acquisition notification under Section 4 of Act, 1894 was issued; (ii) Whether acquired land had market value for the purpose of compensation at Rs.721/- per square metre on the date when notification under Section 4 of Act, 1894 was issued particularly when in this regard awards by District Judge under Section 18 of Act, 1894 have already been made determining much lesser value; (iii) If possession was taken over of acquired land in 1993, why District Administration did not take any effective steps to dispossess unauthorized occupants, and (iv) Who are the persons/authorities responsible to permit continued unauthorized possession of erstwhile tenure holders over acquired land and thereby creating a situation where Farmers re-entered the land and Administration found itself handicapped to dispossess them without accepting their demand.

34. Chief Secretary, U.P., Lucknow while submitting report of Committee shall also file an affidavit stating, if this case is taken to be an example whether this can be treated as a policy of Government that where-ever erstwhile owners of acquired land, if re-enter the land and get possession unauthorizedly instead of taking appropriate action in law for ousting such unauthorized occupants, State would be justified in accepting their demand of compensation again, at an exorbitant rate, on the pretext of maintenance of law and order.

35. The Committee as directed above, shall be constituted within 10 days from today and shall make inquiry and submit report within three months. Such report shall be submitted to this Court with the affidavit of Chief Secretary, as directed above for further action in the matter."

11. The High Powered Committee consisted of Special Secretary/Additional Legal Remembrancer, Law Department, Deputy Inspector General of Police (Anti Corruption Cell), Lucknow and the Special Secretary, Department of Revenue, State Government submitted their Enquiry Report dated 06.3.2017 which was placed on record by Chief Secretary along with his affidavit sworn on 09.3.2014.

12. The summary of the conclusions of Committee on the four issues which are mentioned in the order dated 9.10.2017 passed by this Court, are as follows:

*"On the **first issue** as to whether when the land had been acquired and compensation had been determined under the provisions of Land Acquisition Act, 18942, it was permissible for the Authorities to again pay compensation from the public exchequer to the erstwhile land owners at an exorbitant rate and that too at a rate which was applicable after more than two decades of the acquisition, **the finding recorded by the Committee is that it was not permissible to do so and that it was not permissible to subsequently take recourse to the provisions of Section 11(2) of the Act when the award had already been made under Section 11(1) of the Act.***

Regarding the ***second issue*** *as to whether the market value of the land on the date Section 4(1) of the Act notification was issued was Rs. 721 per sq. mtrs., the* ***Committee has recorded a finding that Rs. 721/- per sq. mtrs. was not the market rate when Section 4(1) notification was issued on 9 March 1991 and in fact it was the circle rate prevailing in 2014.***

Regarding the third issue as to why the District Administration did not take any effective steps to dispossess the unauthorized occupants when the possession of the land was taken in 1993, the ***finding of the Committee is that though the possession of the land was given to UPSIDC in 1993 but as the UPSIDC failed to make use of the land for a substantially long period, it gave an opportunity to the farmers to re-enter the land and do farming and thereby create a situation for them to make an unreasonable demand.***

In regard to the fourth issue as to who are the persons/authorities responsible for permitting the erstwhile tenure holders of the acquired land to continue in an unauthorized possession of the land, the ***Committee has recorded a finding that as since only names of the officers of UPSIDC posted at Head Office UPSIDC, Regional Offices at Ghaziabad, Aligarh, Kanpur and the names of Officers of the Electricity Division, Kanpur, it was not possible to specify the officers responsible because of lack of information supplied by the Department.*** *The Committee has, however, observed that those officers who were posted in UPSIDC for five years after possession was given to UPSIDC 1993, should be held responsible. The Committee has also noted that the officers continued consultation with the farmers for payment of compensation instead of getting the First Appeals filed in the High Court against the award made by the Reference Court decided."*

(Emphasis added)

13. This Court while taking a serious note of the abovementioned conclusions, directed to implead THDCIL vide order dated 09.10.2017. Thereafter, the matter was adjourned on many dates in order to complete the pleadings. In another order dated 31.10.2017 passed by this Court, seven writ petitions were also directed to be connected along with the leading Writ Petition No.31586 of 2016.

14. By another order dated 06.11.2019, after taking note of the Enquiry Report and other developments, the matter was directed to be placed before Hon'ble the Chief Justice with the request to constitute a bench headed by the Judge who had passed earlier order. Accordingly, this bench was constituted to decide the present bunch of writ petitions. In all the writ petitions pleadings have been exchanged.

15. In the leading writ petition, certain affidavits were also filed, latest being supplementary counter affidavit filed by the respondent no.4 on 3.1.2020, which is taken on record.

16. Shri. Raghvendra Singh, learned Advocate General assisted by Shri.Ajeet Singh, Senior Advocate, Additional Advocate General has submitted that due to peculiar circumstances prevailing in the concerned villages, great resentment was shown by villagers and due to their interference, possession of land was not transferred to the beneficiaries. He further vehemently submitted that there was no option left with the State Government except to pay ex-gratia amount to the

villagers in order to get land vacated from villagers. He has relied upon a supplementary counter affidavit filed on behalf of respondent no.1 on 06.11.2019 sworn on 05.11.2019. The relevant paragraphs of the said affidavit are reproduced hereinafter:

"That in between years 1993 and 1995, land measuring 392.317 hectare (969.415 Acre) in village Dashara Kherli pargana and Tehsil Khurja, District Bulandshahr and in another village Jahanpur, Naiphal @ Unchagaon and Rukanpur Tehsil Khurja district bulandshahr, was acquired by the State Government for Industrial Development (Growth Centre).

That in the aforesaid villages, after issuance of the Notification under Sections 4 (1)/17 and 6 (1)/17 of Land Acquisition Act, after due publication in the local daily newspapers and after hearing the affected farmers under Section 9 (1) (3), determination of compensation under Section 11 (1) of Land Acquisition Act were done on 22.10.1993, 15.10.1993, 16.10.1993 and 31.10.1995 respectively. The compensation as per the award and in few cases after decision of the court the amount has already been paid to the farmers.

That at the time of declaration of award, the physical possession of acquired land of all the four villages referred to above was transferred to U.P. State Industrial Development Corporation (UPSIDC) and after deleting the names of farmers over the acquired land, the name of U.P. State Industrial Development Corporation (State Government) was also recorded and mutated in revenue records.

That the said land was provided to the UPSIDC, but no development work was done by the UPSIDC on the land for quite some time and thereafter in the year 2011, it was provided to the THDC for setting up Super Thermal Power Plant (2x660 MW). When THDC started work at site,the farmers put resistance and started demanding higher compensation.

That since few days earlier, unfortunate incident of violence had taken place at Bhatta Parsaul, Greater Noida while taking possession on the acquired land, the State Government and other officers of the UPSIDC and Power Corporation took a decision to settle the matter after discussing with the farmers by negotiation in the meeting at district level.

That pursuant to above decision, matter was negotiated by the District Officers, officers of THDC and Power Corporation, wherein THDC agreed to pay some more amount as Ex-gratia at the rate of Rs.721/- per sq. meter. The farmers had also agreed on the same.

That since the amount was to be paid by the THDC, the State Government did not raise any objection.

That the THDC India Ltd. Transferred the amount required for this land including aforementioned Ex-gratia amount after approval of (Ministry Of Power, Government of India) Public Investment Board through RTGS in the account of SLAO, Bulandshahr.

That in the matter of Ex-gratia payment no financial aid by the State Government is given, and role of the State Government/District Magistrate is only to ensure and disburse the payment of Ex-gratia amount to the farmers through RTGS out of Ex-gratia amount made by THDC India Limited.

That Ex-gratia payment deposited by the THDC has also been paid to 1582 farmers and now only 142 farmers

are left to whom the Ex-gratia amount has not been paid and only they are creating obstruction in the construction of Thermal Power Project.

That the State Government did not object for the enhanced payment because the matter was settled by the THDC itself and the THDC had also agreed to pay the Ex-gratia payment.

That the THDC is still ready to make payment and rather it has already deposited the amount in the account of Special Land Acquisition Officer, Bulandsahar."

(Emphasis added)

17. Shri. H.N.Singh, learned Senior Counsel assisted by Shri Prabhakar Awasthi, Advocate appearing on behalf of respondent no.4 forcefully submitted that actual possession was not given to the respondent no.4 on any part of land which remained occupied by the villagers. He has relied upon certain communications in order to show that respondent no.4, repeatedly, intimated authorities to get the land vacated from villagers. However, no action was taken. He has relied upon a supplementary counter affidavit filed on behalf of respondent no.4 sworn on 2.1.2020. The relevant part of the said supplementary counter affidavit is reproduced hereinafter:

"That from the fact stated above it is apparent that it was well informed by the corporation to the Government as well as to the T.H.D.C. India Ltd. And it is also noticed by the Government as well as by the T.H.D.C. that the Corporation has not get the actual physical possession of the acquired land though the land stood recorded with the name of the Corporation in the Government records. The Government of Uttar Pradesh as well as T.H.D.C. India Ltd. knowing fully well that actual possession of the land was not available to the Corporation and there is a Memorandum of Understanding between the T.H.D.C. and the Government of Uttar Pradesh to make available the land of the Corporation to T.H.D.C. India Ltd. and if it is not possible then to acquire land as per the acquisition policies of the State Government and this Memorandum of Understanding was entered on 31.12.2010 without knowing to the Corporation the Government of Uttar Pradesh by its own has proceeded to negotiate in the matter for making available to the land to T.H.D.C. for the purpose of project and for that purpose to negotiate with the farmers to deliver the possession on agreed rate which was ultimately negotiated @ 721 per Sqa. Meter.

That the Corporation was one of the party at the instance of the Government to negotiate with the farmers as land was originally acquired for the Corporation but virtually in absence of the actual physical possession the provision of Section 48 of the Land Acquisition Act stood attracted and the State Government with the farmers for taking the land under the agreement and that power was exercised by the State Government under Section 11 (2) of the Land Acquisition Act.

That in the entire proceeding the U.P.S.I.D.C. was to get back the amount already paid with interest and all the cost of acquisition with interest if payable and all legal cost was to be paid by the T.H.D.C. India Ltd.

That under Section 4 of the Land Acquisition Act land may be acquired for public purpose or for Company. The public purpose has been defined under Section 3 F of the Land Acquisition Act which include in Clause IV of the land for

the Corporation owned or controlled by the State. The Corporation owned and controlled by the Government is defined under Section 3 CC means nobody corporate established by or under the Central Provincial or State Act and includes a Government Company has defined under Section 617 of the Companies Act, 1956.

That U.P. State Industrial Development Corporation is a Government Company registered under the Companies Act, 1956 and is fully owned and controlled by the State Government and as such the acquisition of the land for public purpose or for company includes for the Corporation which is a Company registered under the Companies Act.

That the State Government may acquired for public purpose which includes Corporation owned and controlled by the State Government i.e. Government Companies registered under the Companies Act and once the land is acquired for the Corporation the same will fully vested in the Corporation and the villages of collector/Special Land Officer or other revenue authorities work for taken for acquisition and to deliver the possession and once the land is acquired the same stood vested free from all encumbrances in the Corporation under Section 16 of the Land Acquisition Act.

That Section 11(2) provided that the land may be acquired and compensation may be paid under the agreement and such agreement is not required to be registered under Section 11 (4). The award is a decree as provided under Section 26(2) of the Land Acquisition Act and as such once the award is made and compensation was paid, possession was taken, no further registration or stamp is required if the acquisition is for public purpose and the Company. Section 50 of the Land Acquisition Act provides that in case of the acquisition on the case of the local authority or being the company may adduce the evidence for the determination of compensation and Section 51 grant exemption from taking of stamp on award or agreement made under the Land Acquisition Act.

That with the acquisition of the land in favour of the Corporation same stood vested in the Corporation and complete title of the land acquired stood transfer and Corporation is full owner and was competent to transfer the subject to getting actual physical possession. The Corporation in detail has entered at various stages to the Government, District Administration and the T.H.D.C. that the Corporation is not in actual physical possession of the complete land and the land may be transferred only after getting the possession from the farmers for which the Government of Uttar Pradesh has accepted to enter into negotiation with the farmers for getting the possession and by the Corporation and so that the Corporation may be in position to transfer the land to T.H.D.C.

That at the instance of the Government of Uttar Pradesh the District Magistrate, Bulandshahar and its authorities have made all effort for holding various meetings with the farmers and ultimately District Administration with the approval of the State Government, entered into an agreement with the farmers for payment of compensation so that the farmers may hand over the possession to the Corporation.

That in entire proceeding Corporation had not at all failed and Corporation has no means of taking forcibly possession and admittedly the

District Administration taken of the forcibly possession on the rate of which the award was passed will create position of the law and order. The Corporation has no objection in transferring the land on the rate awarded by the Court if the State Government is in position to hand over the actual physical possession to the Corporation taking the same from the farmers otherwise the Corporation is to transfer on the rate agreed by the State Government through its agencies with the farmers and the said amount accepted by the T.H.D.C. subject to return all *the amount already paid by the Corporation with interest."*

(Emphasis added)

18. We have also heard Shri Sanjay Kumar Mishra, learned counsel for petitioners, Sri M.C. Chaturvedi, learned Additional Advocate General and Sri H.N. Singh, learned Senior Advocate assisted by Sri Prabhaker Awasthi, learned counsel for respondent-4 and Sri Ajeet Singh, learned Chief Standing Counsel assisted by Sri Sudhanshu Srivastava, learned counsel for respondents- 1 and 3 in the leading writ petition as well as in other connected writ petitions.

19. The High Powered Committee constituted in pursuance of the order passed by this Court submitted report on 06.3.2017 which was filed along with the affidavit of Chief Secretary, Government of U.P. sworn on 09.3.2017. It is relevant to note here that the conclusions of enquiry were neither disputed nor challenged by any of the respondents. The report has dealt with all the issues which were referred in the order dated 29.8.2016 passed by this Court. It is essential to mention the conclusion of the Committee on each of the issues which are as follows:

Point no.1

Where land acquired and compensation determined and paid under Act, 1894, whether it is permissible for authorities to again pay compensation from public exchequer to erstwhile land owners at an exorbitant rate and that too at a rate which is applicable after more than two decades from acquisition notification under Section 4 of Act, 1894 was issued;

"प्रस्तुत प्रकरण में स्थिति पूर्णतः स्पष्ट है कि भूमि अधिग्रहण के सम्बन्ध में अन्तर्गत धारा 11(1) एवार्ड की घोषणा विशेष भूमि अध्याप्ति अधिकारी द्वारा सुनवाई का अवसर प्रदान कर सक्षम स्तर के अनुमोदन से की गयी है और उक्त एवार्ड से असंतुष्ट प्रभावित कृषकों द्वारा अधिनियम के अन्तर्गत अनुमन्य विधिक उपचार अन्तर्गत धारा 18 रेफरेन्स भी सक्षम न्यायालय में योजित किया गया । इसके अतिरिक्त यू०पी०एस०आई०डी०सी० द्वारा रेफरेन्स में निर्णीत एवार्ड के सम्बन्ध में अपील भी मा० उच्च न्यायालय में योजित की गयी है। उक्त से यह भी स्पष्ट है कि प्रकरण में धारा 11(2) के प्राविधान आकर्षित नहीं हैं क्योंकि सम्पूर्ण कार्यवाही अन्तर्गत धारा 11(1) के अन्तर्गत अग्रसारित रही। जहाँ तक उ०प्र० भूमि अर्जन (करार द्वारा प्रतिकर की अवधारणा और अधिनिर्णय की घोषणा) नियमावली 1997 का प्रश्न है तो उक्त नियमावली प्रथमतः अधिसूचना की तिथि 16 सितम्बर 1997 से लागू है और प्रस्तुत प्रकरण में धारा 11(2) के लागू न होने के दृष्टिगत नियमावली के लागू होने का प्रश्न ही नहीं है।

यह भी स्पष्ट है कि जब धारा 4(1) सपठित धारा 17 के अन्तर्गत भूमि अधिग्रहीत की जाती है तब अधिसूचना के दिनांक से आच्छादित भूमि समस्त भारों से मुक्त होकर सरकार में पूर्णतः निहित हो जाती है। तत्पश्चात्

मात्र प्रतिकर का उचित निर्धारण का प्रश्न शेष रहता है। जब आपसी सहमति से प्रतिकर निर्धारण नहीं होती है तब प्रतिकर के निर्धारण के लिये अन्तर्गत धारा 11(1) की कार्यवाही भूमि अध्याप्ति अधिकारी द्वारा की जाती है। घोषित एवार्ड से यदि कृषक असंतुष्ट है तो वे धारा 18 के अन्तर्गत जिला न्यायालय में रेफरेन्स कलक्टर के माध्यम से कर सकते हैं एवं यहाँ से भी असंतुष्ट होने पर मा० उच्च न्यायालय एवं मा० उच्चतम न्यायालय की शरण में जा सकते हैं। स्पष्ट है कि इस प्रक्रिया में धारा 11(1) की कार्यवाही के पश्चात् धारा 11(2) के अन्तर्गत अग्रिम कार्यवाही के पश्चात् धारा 11(2) के अन्तर्गत अग्रिम कार्यवाही किये जाने का कोई विकल्प नहीं है। स्पष्ट है कि धारा 11(2) के प्रविधान के अन्तर्गत आपसी सहमति से एवार्ड की घोषणा की जाती है जिसे प्रश्नगत प्रकरण में एवार्ड के स्थान पर एक्स-ग्रेशिया का नाम दिया गया है, जो मान्य नहीं है। अतः उपरोक्त प्रक्रिया से विचलित होकर एक बार प्रतिकर के निर्धारण के उपरान्त पुनः प्रतिकर का निर्धारण विधिक नहीं माना जा सकता है।"

Point No.2.

Whether acquired land had market value for the purpose of compensation at Rs.721/- per square metere on the date when notification under Section 4 of Act, 1894 was issued particularly when in this regard awards by district Judge under Section 18 of Act, 1894 have already been made determining much lesser value;

"प्रकरण में टी०एच०डी०सी० के आने के उपरान्त विभिन्न वार्ताओं के पश्चात् दिनांक12-8-2014 को यू०पी०एस०आई०डी०सी० के प्रबन्ध निदेशक, श्री मनोज कुमार सिंह के पत्र संख्या 132/एसआईडीसी /आर०एम० सूरजपुर कैम्प द्वारा जिलाधिकारी बुलन्दशहर को अवगत कराया गया कि काश्तकारों से वार्ता के पश्ताच् रू० 721/- प्रति वर्ग मीटर की दर से आम सहमति बनी है एवं इस धनराशि को टी०एच०डी०सी० से प्राप्त कर एक्सग्रेसिया के रूप में वितरित किया जाना है।

जिलाधिकारी, बुलंदशहर द्वारा तथ्यात्मक आख्या में उल्लिखित किया गया है कि ग्राम दशहरा खेरली व रूकनपुर की अर्जित भूमि राष्ट्रीय राजमार्ग जी०टी० रोड के दोनों ओर स्थित है तथा इन ग्रामों में सड़क के किनारे की भूमि का समझौते के समय रूपये 1120/- प्रति वर्गमीटर तथा ग्राम जहॉनपुर एवं नायफल उर्फ ऊँचागाँव में 800/- रूपये प्रति वर्गमीटर के स्टाम्प दर कृषि उपयोग के लिए निर्धारित था। निर्धारित स्टाम्प दर से कम दर रूपये 721/- प्रति वर्ग मीटर पर ही कृषकों से सहमति प्राप्त की गई। उक्त से स्पष्ट है कि अधिग्रहीत भूमि बाजारू मूल्य रूपये 721/- प्रति वर्गमीटर की दर अन्तर्गत धारा-4 अधिसूचना की तिथि पर नहीं था। उपरोक्त से स्पष्ट है कि रू० 721/- की दर वर्ष 2014 की है न कि अधिसूचना के प्रकाशन दिनांक 09.03.1991 की ।"

Point No.3

If possession was taken over of acquired land in 1993, why District Administration did not take any effective steps to dispossess unauthorized occupants.

"समिति ने स्थानीय प्रशासन, यू०पी० एस०आई०डी०सी० व टी०एच०डी०सी० द्वारा उपलब्ध कराये गये समस्त सुसंगत अभिलेखों के सम्यक परिशीलन से यह स्थापित पाया है कि वस्तुतः अन्तर्गत धारा-17 अर्जेंसी क्लाज में अधिग्रहण के उपरान्त भी यू०पी० एस०आई०डी०सी० का रवैया अधिग्रहीत भूमि के तात्कालिक उपयोग/उपभोग के सम्बन्ध में उदासीन रहा। जिलाधिकारी, बुलंदसशहर की आख्या दिनांक 12-06-1997 में भी उल्लेख है कि संदर्भित भूमि का कब्जा यद्यपि क्रमशः 15-10-93, 16-10-93, 08-10-93 व 07-10-93 को विधिक रूप से स्थानांतरित किया जा चुका है परन्तु भूमि का उपयोग यू० पी०एस०आई०डी०सी० द्वारा गत लम्बे समय से

न करने के कारण किसान मौके पर खेती कर रहे हैं।

यू० पी० एस० आई० डी० सी० के असकारात्मक रवैये के कारण अधिग्रहीत भूमि पर 1993 में ही कब्जा प्राप्त करने के उपरान्त कोई कार्यवाही नहीं करने से प्रभावित किसानों को अवसर प्राप्त हुआ कि वह अधिग्रहीत भूमि पर पुनः प्रवेश कर सके और भविष्य में परिस्थियाँ इतनी प्रतिकूल हो गई कि बिना उनके अनुचित मॉग को स्वीकार किये उक्त अधिग्रहित भूमि का उपयोग/उपभोग यू०पी०एस०आई०डी०सी० द्वारा किया जाना सम्भव नहीं हो पाया।

उपरोक्त की गयी कार्यवाही से विदित होता है कि अनधिकृत कृषकों को अधिग्रहित भूमि से हटाने के लिये मात्र कागज पर पत्राचार किया गया। इस अवधि में यू०पी०एस०आई०ंडी०सी० की तरफ से भूमि पर कार्य आरम्भ कराने की दृढ़ ईच्छा-शक्ति का अभाव परिलक्षित हुआ।"

Point No.4

Who are the persons/authorities responsible to permit continued unauthorized possession of erstwhile tenure holders over acquired land and thereby creating a situation where Farmers re-entered the land and Administration found itself handicapped to dispossess them without accepting their demand.

"इस समिति की अनुग्रह राशि की दर निर्धारण सम्बन्धी बैठक नहीं हुई और न ही अनुग्रह राशि के निर्धारण/वितरण के सम्बन्ध में निर्णय लिया गया। ऊर्जा मंत्रालय भारत सरकार के अपर सचिव श्री देवेन्द्र चौधरी द्वारा जिलाधिकारी बुलन्दशहर को किसानों के साथ नेगोशियेशन करने के लिये कहा गया (बैठक दिनांंक 29-01-2014 की प्रतिलिपि संलग्न V)। इसके उपरान्त जिलाधिकारी बुलन्दशहर द्वारा स्थानीय महत्वपूर्ण व्यक्तियों एवं कृषकों के प्रतिनिधियों के साथ वार्ता कर दर का निर्धारण कर प्रबन्ध निदेशक यू०पी०एस०आई०डी०सी० को सूचित किया गया। अन्ततः अनुग्रह राशि की दर का निर्धारण यू०पी०एस०आई०डी०सी० के प्रबन्ध निदेशक द्वारा किया गया। अतः अनुग्रह राशि की दर निर्धारित करने में टी०एच०डी०सी० की कोई भूमिका नहीं है।"

"प्रश्नगत प्रकरण के सम्बन्ध में सुसंगत है कि जिला प्रशासन द्वारा यू०पी०एस०आई०डी०सी० के अनुरोध पर तहसील खुर्जा जनपद बुलन्दशहर में ग्रोथ सेन्टर हेतु 392.32 हेक्टेयर भूमि, भूमि अर्जन अधिनियम 1894 की धारा 4(1)/17 के अन्तर्गत अर्जित की गयी। धारा 4(1)/17 की अधिसूचना का प्रकाशन दिनांक 9-3-1991 को, धारा 6(1)/17 की अधिसूचना का प्रकाशन दिनांक 30-3-2011 को करने के उपरान्त दिनांक 16-10-1993 तक यू०पी०एस०आई०डी०सी० को कब्जा प्रदान करते हुए उनका नाम खतौनी में दर्ज किया गया। इस प्रकार आपातिक स्थित (Emergency clauses) दर्शते हुए भूमि का अधिग्रहण किया गया किन्तु कब्जा प्राप्त करने के पश्चात् तत्काल प्रभाव से निर्माण कार्य न करने के कारण ऐसी स्थिति उत्पन्न हुई जिससे कृषक अपनी भूमि पर पुनः प्रवेश कर काश्तकारी करते रहे। यू०पी०एस०आई०डी०सी० का यह कर्तव्य था कि जब उनके द्वारा आपातिक स्थिति (Emergency clauses) के अन्तर्गत भूमि का अधिग्रहण किया गया था तो वे भूमि की बाउण्ट्री का निर्माण कराते एवं ग्रोथ सेन्टर के निर्माण करने की कार्यवाही आरम्भ करते और इसका विरोध करने पर स्थानीय प्रशासन से प्रभावी आवश्यक कार्यवाही करने का अनुरोध करते। अभिलेखों से स्पष्ट है कि वर्ष 1997 में ग्रोथ सेन्टर की बाउण्ट्री के निर्माण हेतु निविदा स्वीकार की गयी। इस प्रकार 4 वर्षों तक इस भूमि का प्रभावी उपयोग नहीं किया गया और यह भूमि बगैर देख-रेख के पड़ी रही अर्थात

जिसको देखने वाला कोई नहीं था। इस कारण कृषक भूमि अर्जन के उपरान्त भी काश्तकारी करते रहे। वर्ष 1997 के माह सितम्बर में करार नियमावली का प्राख्यापन हुआ एवं जब यह जानकारी उन काश्तकारों को मिली जो अपनी भूमि पर अधिग्रहण के पश्चात् भी काश्तकारी कर रहे थे तब उन्होने अपनी जमीन के अवैध कब्जे को छोड़ने के स्थान पर उग्र आन्दोलन आरम्भ कर दिया। अभिलेखों से स्पष्ट है कि आपातिक स्थित (Emergency clauses) को दर्शाते हुए जो भूमि का अधिग्रहण किया गया वह किसी भी स्तर से आवश्यक एवं उचित नहीं ठहराया जा सकता क्योंकि जिस भूमि का अधिग्रहण किया गया उस पर विकास/निर्माण कार्य कभी प्रारम्भ ही नहीं हुआ और 18 वर्ष पश्चात् ग्रोथ सेन्टर बनाने के स्थान पर टी०एच०ड़ी०सी० की तापीय विद्युत परियोजना को दे दिया गया।"

(Emphasis added)

20. There is no dispute that in the name of ex-gratia payment, the total compensation amount was increased many folds. Payment of "Ex-gratia amount' was made without any legal basis. High Powered Committee also came to the specific conclusion that there was no provision of granting "ex-gratia' payment in Act, 1894 and there was absolutely no justification for "ex-gratia' payment. However, High Powered Committee has restrained themselve from naming the persons responsible for doing such illegal act, which has ultimately caused huge loss to public exchequer.

21. The High Powered Committee had deprecated conduct of U.P.S.I.D.C. It was also critical to government authorities. The State Officials, cannnot absolve themselves by contending that "since the amount was to be paid by the T.H.D.C., the State Government did not raise any objection.' The amount paid by T.H.D.C. is also a public money. The State has miserably failed to place on record what was the actual condition of the land? Whether any attempt was undertaken to remove the encroachers? Why State authorities surrendered before encroachers? Who were the Officers responsible for knowingly taking illegal decision and why not recovery be effected from erring officials of such illegal payment in the name of "ex-gratia amount'? These are the questions among others which remained unanswered.

22. The above-mentioned facts are self speaking and smacks of something scammish and in order to unearth the conspiracy behind such illegal decision, a proper investigation is warranted. Since number of government officials including senior officials belong to administrative cadre like I.A.S., P. C.S., are likely to be involved in this matter, it is not advisable to direct investigation to be conducted by State Police Administration. In order to unearth the conspiracy of payment of illegal "ex-gratia amount' it is necessary to have fair, honest and complete investigation.

23. In ***Common Cause, A Registered Society Vs. Union of India & Ors. (1999) 6 SCC 667,*** Court held in paras 174, 176 and 177 that:

"174. The other direction, namely, the direction to the C.B.I. to investigate "any other offence" is wholly erroneous and cannot be sustained. Obviously, direction for investigation can be given only if an offence is, prima facie, found to have been committed or a person's involvement is prima facie

established, but a direction to the C.B.I. to investigate whether any person has committed an offence or not cannot be legally given. Such a direction would be contrary to the concept and philosophy of "LIFE" and "LIBERTY" guaranteed to a person under Article 21 of the Constitution. This direction is in complete negation of various decisions of this Court in which the concept of "LIFE" has been explained in a manner which has infused "LIFE" into the letters of Article 21."

"176. A man has, therefore, to be left alone to enjoy "LIFE" without fetters. He cannot be hounded out by the Police or C.B.I. merely to find out whether he has committed any offence or is living as a law-abiding citizen. Even under Article 142 of the Constitution, such a direction cannot be issued. While passing an order under Article 142 of the Constitution, this Court cannot ignore the substantive provision of law much less the constitutional rights available to a person. (See : Supreme Court Bar Association vs. Union of India, (1998) 4 SCC 409; AIR 1998 SC 1895).

"177.Mr. Gopal Subramaniam contended that the Court has itself taken care to say that the C.B.I. in the matter of investigation, would not be influenced by any observation made in the Judgment and that it would independently hold the investigation into the offence of criminal breach of trust or any other offence. To this, there is a vehement reply from Mr. Parasaran and we think he is right. It is contended by him that this Court having recorded a finding that the petitioner on being appointed as a Minister in the Central Cabinet, held a trust on behalf of the people and further that he cannot be permitted to commit breach of the trust reposed in him by the people and still further that the petitioner had deliberately acted in a wholly arbitrary and unjust manner and that the allotments made by him were wholly mala fide and for extraneous consideration, the direction to the CBI not to be influenced by any observations made by this Court in the Judgment, is in the nature of palliative. The CBI has been directed to register a case against the petitioner in respect of the allegations dealt with and findings reached by this Court in the Judgment under review. Once the findings are directed to be treated as part of the First Information Report, the further direction that the CBI shall not be influenced by any observations made by this Court or the findings recorded by it, is mere lullaby. "

24. In ***Secretary, Minor Irrigation & Rural Engineering Services, U.P. and Others Vs. Sahngoo Ram Arya & Anr. (2002) 5 SCC 521***, Court held in paras 5 and 6 that:

"5. While none can dispute the power of the High Court under Article 226 to direct an inquiry by the CBI, the said power can be exercised only in cases where there is sufficient material to come to a prima facie conclusion that there is a need for such inquiry. It is not sufficient to have such material in the pleadings. On the contrary, there is a need for the High Court on consideration of such pleadings to come to the conclusion that the material before it is sufficient to direct such an inquiry by the CBI.

This is a requirement which is clearly deducible from the judgment of this Court in the case of Common Cause, (1999) 6 SCC 667. This Court in the said judgment at paragraph 174 of the report has held thus: (SCC p.750, para 174)

"174.The other direction, namely, the direction to CBI to investigate

"any other offence' is wholly erroneous and cannot be sustained. Obviously, direction for investigation can be given only if an offence is, prima facie, found to have been committed or a person's involvement is prima facie established, but a direction to CBI to investigate whether any person has committed an offence or not cannot be legally given. Such a direction would be contrary to the concept and philosophy of "LIFE' and "LIBERTY' guaranteed to a person under Article 21 of the Constitution. This direction is in complete negation of various decisions of this Court in which the concept of "LIFE' has been explained in a manner which has infused "LIFE' into the letters of Article 21."

6. It is seen from the above decision of this Court that the right to life under Article 21 includes the right of a person to live without being hounded by the Police or the CBI to find out whether he has committed any offence or is living as a law-abiding citizen. ***Therefore, it is clear that a decision to direct an inquiry by the CBI against a person can only be done if the High Court after considering the material on record comes to a conclusion that such material does disclose a prima facie case calling for an investigation by the CBI or any other similar agency, and the same cannot be done as a matter of routine or merely because a party makes some such allegations.*** *In the instant case, we see that the High Court without coming to a definite conclusion that there is a prima facie case established to direct an inquiry has proceeded on the basis of "ifs" and '"buts" and thought it appropriate that the inquiry should be made by the CBI. With respect, we think that this is not what is required by the law as laid down by this Court in the case of Common Cause, (1999) 6 SCC 667."*

(Emphasis added)

25. In ***State of West Bengal and Others Vs. Committee for protection of Democratic Rights, West Bengal & Ors. (2010) 3 SCC 571,*** Court in paras 68, 69 and 70 held that:

"68.Thus, having examined the rival contentions in the context of the Constitutional Scheme, we conclude as follows:

(i) The fundamental rights, enshrined in Part III of the Constitution, are inherent and cannot be extinguished by any Constitutional or Statutory provision. Any law that abrogates or abridges such rights would be violative of the basic structure doctrine. The actual effect and impact of the law on the rights guaranteed under Part III has to be taken into account in determining whether or not it destroys the basic structure.

(ii) Article 21 of the Constitution in its broad perspective seeks to protect the persons of their lives and personal liberties except according to the procedure established by law. The said Article in its broad application not only takes within its fold enforcement of the rights of an accused but also the rights of the victim. The State has a duty to enforce the human rights of a citizen providing for fair and impartial investigation against any person accused of commission of a cognizable offence, which may include its own officers. In certain situations even a witness to the crime may seek for and shall be granted protection by the State.

(iii) In view of the constitutional scheme and the jurisdiction conferred on this Court under Article 32 and on the

High Courts under Article 226 of the Constitution the power of judicial review being an integral part of the basic structure of the Constitution, no Act of Parliament can exclude or curtail the powers of the Constitutional Courts with regard to the enforcement of fundamental rights. As a matter of fact, such a power is essential to give practicable content to the objectives of the Constitution embodied in Part III and other parts of the Constitution. Moreover, in a federal constitution, the distribution of legislative powers between the Parliament and the State Legislature involves limitation on legislative powers and, therefore, this requires an authority other than the Parliament to ascertain whether such limitations are transgressed. Judicial review acts as the final arbiter not only to give effect to the distribution of legislative powers between the Parliament and the State Legislatures, it is also necessary to show any transgression by each entity. Therefore, to borrow the words of Lord Steyn, judicial review is justified by combination of "the principles of separation of powers, rule of law, the principle of constitutionality and the reach of judicial review".

(iv) If the federal structure is violated by any legislative action, the Constitution takes care to protect the federal structure by ensuring that Courts act as guardians and interpreters of the Constitution and provide remedy under Articles 32 and 226, whenever there is an attempted violation. In the circumstances, any direction by the Supreme Court or the High Court in exercise of power under Article 32 or 226 to uphold the Constitution and maintain the rule of law cannot be termed as violating the federal structure.

(v)Restriction on the Parliament by the Constitution and restriction on the Executive by Parliament under an enactment, do not amount to restriction on the power of the Judiciary under Article 32 and 226 of the Constitution.

(vi) If in terms of Entry 2 of List II of The Seventh Schedule on the one hand and Entry 2-A and Entry 80 of List I on the other, an investigation by another agency is permissible subject to grant of consent by the State concerned, there is no reason as to why, in an exceptional situation, court would be precluded from exercising the same power which the Union could exercise in terms of the provisions of the Statute. In our opinion, exercise of such power by the constitutional courts would not violate the doctrine of separation of powers. In fact, if in such a situation the court fails to grant relief, it would be failing in its constitutional duty.

(vii) When the Special Police Act itself provides that subject to the consent by the State, the CBI can take up investigation in relation to the crime which was otherwise within the jurisdiction of the State Police, the court can also exercise its constitutional power of judicial review and direct the CBI to take up the investigation within the jurisdiction of the State. The power of the High Court under Article 226 of the Constitution cannot be taken away, curtailed or diluted by Section 6 of the Special Police Act. Irrespective of there being any statutory provision acting as a restriction on the powers of the Courts, the restriction imposed by Section 6 of the Special Police Act on the powers of the Union, cannot be read as restriction on the powers of the Constitutional Courts. Therefore, exercise of power of judicial review by the High Court, in our opinion, would not amount to infringement of either the doctrine of separation of power or the federal structure.

69. In the final analysis, our answer to the question referred is that ***a direction by the High Court, in exercise of its jurisdiction under Article 226 of the Constitution, to the CBI to investigate a cognizable offence alleged to have been committed within the territory of a State without the consent of that State will neither impinge upon the federal structure of the Constitution nor violate the doctrine of separation of power and shall be valid in law. Being the protectors of civil liberties of the citizens, this Court and the High Courts have not only the power and jurisdiction but also an obligation to protect the fundamental rights, guaranteed by Part III in general and under Article 21 of the Constitution in particular, zealously and vigilantly.***

70. Before parting with the case, we deem it necessary to emphasise that despite wide powers conferred by Articles 32 and 226 of the Constitution, while passing any order, the Courts must bear in mind certain self-imposed limitations on the exercise of these Constitutional powers. The very plenitude of the power under the said Articles requires great caution in its exercise. In so far as the question of issuing a direction to the CBI to conduct investigation in a case is concerned, although no inflexible guidelines can be laid down to decide whether or not such power should be exercised but time and again it has been reiterated that such an order is not to be passed as a matter of routine or merely because a party has levelled some allegations against the local police. ***This extra-ordinary power must be exercised sparingly, cautiously and in exceptional situations where it becomes necessary to provide credibility and instil confidence in investigations*** *or where the incident may have national and international ramifications or where such an order may be necessary for doing complete justice and enforcing the fundamental rights. Otherwise the CBI would be flooded with a large number of cases and with limited resources, may find it difficult to properly investigate even serious cases and in the process lose its credibility and purpose with unsatisfactory investigations."*

(Emphasis added)

26. In ***K.V. Rajendran Vs. Superintendent of Police CBCID South Zone, Chennai & Ors, (2013) 12 SCC 480,*** Court held in paras 13 and 17 that:

"13.The issue involved herein, is no more res integra. This Court has time and again dealt with the issue under what circumstances the investigation can be transferred from the State investigating agency to any other independent investigating agency like CBI. It has been held that the power of transferring such investigation must be in rare and exceptional cases where the court finds it necessary in order to do justice between the parties and to instil confidence in the public mind, or where investigation by the State police lacks credibility and it is necessary for having "a fair, honest and complete investigation", and particularly, when it is imperative to retain public confidence in the impartial working of the State agencies. Where the investigation has already been completed and charge sheet has been filed, ordinarily superior courts should not reopen the investigation and it should be left open to the court, where the charge sheet has been filed, to proceed with the matter in accordance with law. Under no circumstances, should the court make any expression of its opinion on merit relating to any accusation against any individual. (Vide:

Gudulare M.J. Cherian v. Union of India, (1992) 1 SCC 397; R.S.Sodhi v. State of U.P., AIR 1994 SC 38; Punjab and Haryana High Court Bar Assn, v. State of Punjab, AIR 1994 SC 1023; Vineet Narain v. Union of India, (1996) 2 SCC 199; Union of India v. Sushil Kumar Modi., AIR 1997 SC 314; Disha v. State of Gujarat., AIR 2011 SC 3168; Rajendrer Singh Pathania v. State (NCT of Delhi), (2011) 13 SCC 329; and State of Punjab v. Devender Pal Singh Bhullar, AIR 2012 SC 364).

17.In view of the above, the law can be summarised to the effect that ***the Court could exercise its Constitutional powers for transferring an investigation from the State investigating agency to any other independent investigating agency like CBI only in rare and exceptional cases. Such as where high officials of State authorities are involved,*** *or the accusation itself is against the top officials of the investigating agency thereby allowing them to influence the investigation, and further that it is so necessary to do justice and to instil confidence in the investigation or where the investigation is prima facie found to be tainted/biased."*

(Emphasis added)

27. In ***Dharam Pal Vs. State of Haryana & Ors, (2016) 4 SCC 160,*** Court in paras 24 and 25 held that:

"24. Be it noted here that the constitutional courts can direct for further investigation or investigation by some other investigating agency. The purpose is, there has to be a fair investigation and a fair trial. The fair trial may be quite difficult unless there is a fair investigation. We are absolutely conscious that direction for further investigation by another agency has to be very sparingly issued but the facts depicted in this case compel us to exercise the said power. We are disposed to think that purpose of justice commands that the cause of the victim, the husband of the deceased, deserves to be answered so that miscarriage of justice is avoided. Therefore, in this case the stage of the case cannot be the governing factor.

25. We may further elucidate. ***The power to order fresh, de-novo or re-investigation being vested with the Constitutional Courts, the commencement of a trial and examination of some witnesses cannot be an absolute impediment for exercising the said constitutional power which is meant to ensure a fair and just investigation.*** *It can never be forgotten that as the great ocean has only one test, the test of salt, so does justice has one flavour, the flavour of answering to the distress of the people without any discrimination. We may hasten to add that the democratic setup has the potentiality of ruination if a citizen feels, the truth uttered by a poor man is seldom listened to. Not for nothing it has been said that sun rises and sun sets, light and darkness, winter and spring come and go, even the course of time is playful but truth remains and sparkles when justice is done. It is the bounden duty of a Court of law to uphold the truth and truth means absence of deceit, absence of fraud and in a criminal investigation a real and fair investigation, not an investigation that reveals itself as a sham one. It is not acceptable. It has to be kept uppermost in mind that impartial and truthful investigation is imperative. If there is indentation or concavity in the investigation, can the "faith" in investigation be regarded as the gospel truth? Will it have the sanctity or the purity of a genuine investigation? If a*

grave suspicion arises with regard to the investigation, should a Constitutional Court close its hands and accept the proposition that as the trial has commenced, the matter is beyond it? That is the "tour de force" of the prosecution and if we allow ourselves to say so it has become "'idee fixe" but in our view the imperium of the Constitutional Courts cannot be stifled or smothered by bon mot or polemic. Of course, the suspicion must have some sort of base and foundation and not a figment of one's wild imagination. One may think an impartial investigation would be a nostrum but not doing so would be like playing possum. As has been stated earlier, facts are self-evident and the grieved protagonist, a person belonging to the lower strata. He should not harbour the feeling that he is an "orphan under law".

(Emphasis added)

28. In ***Bimal Gurung Vs. Union of India & Ors, (2018) 15 SCC 480,*** Court in paras 27 and 29 held that:

"27.Before we advert to the facts of the present case and prayers made in the writ petition, it is useful to recall necessary principles as enumerated by this Court while exercising jurisdiction by this Court under Article 32 or the High Court under Article 226 for transferring investigation of a criminal case to a Central Agency. The Constitution Bench of this Court in State of West Bengal Vs. Committee for Protection of Democratic Rights, (2010) 3 SCC 571, has authoritatively laid down that the High Court under Article 226 and this Court under Article 32 can issue direction to CBI to investigate a cognizable offence within the State without consent of that State. The Constitution Bench also in the above context has held that although this Court has implied power and jurisdiction to direct for the transfer to CBI to investigate a cognizable offence but also has obligation to exercise the said power with great caution which must be exercised sparingly, cautiously and in exceptional situations. In paragraph 70 with regard to exercise of such power following has been laid down by the Constitution Bench:

"70. Before parting with the case, we deem it necessary to emphasise that despite wide powers conferred by Articles 32 and 226 of the Constitution, while passing any order, the Courts must bear in mind certain self-imposed limitations on the exercise of these constitutional powers. The very plenitude of the power under the said articles requires great caution in its exercise. Insofar as the question of issuing a direction to CBI to conduct investigation in a case is concerned, although no inflexible guidelines can be laid down to decide whether or not such power should be exercised but time and again it has been reiterated that such an order is not to be passed as a matter of routine or merely because a party has levelled some allegations against the local police. This extraordinary power must be exercised sparingly, cautiously and in exceptional situations where it becomes necessary to provide credibility and instil confidence in investigations or where the incident may have national and international ramifications or where such an order may be necessary for doing complete justice and enforcing the fundamental rights. Otherwise CBI would be flooded with a large number of cases and with limited resources, may find it difficult to properly investigate even serious cases and in the process lose its credibility and purpose with unsatisfactory investigations."

29. The ***law is thus well settled that power of transferring investigation to other investigating agency must be exercised in rare and exceptional cases where the Court finds it necessary in order to do justice between the parties to instil confidence in the public mind,*** *or where investigation by the State Police lacks credibility. Such power has to be exercised in rare and exceptional cases. In K.V. Rajendran vs. Supt. Of Police, (2013) 12 SCC 480, this Court has noted few circumstances where the Court could exercise its constitutional power to transfer of investigation from State Police to CBI such as: (i) where high officials of State authorities are involved, or (ii) where the accusation itself is against the top officials of the investigating agency thereby allowing them to influence the investigation, or (iii)where investigation prima facie is found to be tainted/biased."*

(Emphasis added)

29. In ***E. Sivakumar Vs. Union of India & Ors, (2018) 7 SCC 365,*** Court in paras 12, 13, 14 and 16 held that:

"12. The third contention urged by the petitioner, that neither special reasons have been recorded nor the status report of the investigation already done by the Vigilance Commission has been considered, also does not commend us. As noted earlier, the High Court in the impugned judgment has exhaustively analysed all aspects of the matter as can be discerned from paragraphs 84 to 87, 91 to 97, 100 to 107; and again in paragraphs 141-144 which have been extracted hitherto. In our opinion, in the peculiar facts of the present case, the High Court has justly transferred the investigation to CBI after due consideration of all the relevant aspects, which approach is consistent with the settled legal position expounded in the decisions adverted to in the impugned judgment, including the decision in Subrata Chattoraj Vs. Union of India, (2014) 8 SCC 768, which predicates that transfer of investigation to CBI does not depend on the inadequacy of inquiry/investigation carried out by the State police. We agree with the High Court that the facts of the present case and the nature of crime being investigated warrants CBI investigation.

13. In Dharam Pal Vs. State of Haryana (2016) 4 SCC 160, this Court has underscored the imperativeness of ensuring a fair and impartial investigation against any person accused of commission of cognizable offence as the primary emphasis is on instilling faith in public at large and the investigating agency. The dictum in paragraph 24 and 25 of this reported decision is quite instructive which read thus:

"24. Be it noted here that the constitutional courts can direct for further investigation or investigation by some other investigating agency. The purpose is, there has to be a fair investigation and a fair trial. The fair trial may be quite difficult unless there is a fair investigation. We are absolutely conscious that direction for further investigation by another agency has to be very sparingly issued but the facts depicted in this case compel us to exercise the said power. We are disposed to think that purpose of justice commands that the cause of the victim, the husband of the deceased, deserves to be answered so that miscarriage of justice is avoided. Therefore, in this case the stage of the case cannot be the governing factor.

25. We may further elucidate. The power to order fresh, de novo or reinvestigation being vested with the

constitutional courts, the commencement of a trial and examination of some witnesses cannot be an absolute impediment for exercising the said constitutional power which is meant to ensure a fair and just investigation. It can never be forgotten that as the great ocean has only one test, the test of salt, so does justice has one flavour, the flavour of answering to the distress of the people without any discrimination. We may hasten to add that the democratic set-up has the potentiality of ruination if a citizen feels, the truth uttered by a poor man is seldom listened to. Not for nothing it has been said that sun rises and sun sets, light and darkness, winter and spring come and go, even the course of time is playful but truth remains and sparkles when justice is done. It is the bounden duty of a court of law to uphold the truth and truth means absence of deceit, absence of fraud and in a criminal investigation a real and fair investigation, not an investigation that reveals itself as a sham one. It is not acceptable. It has to be kept uppermost in mind that impartial and truthful investigation is imperative. If there is indentation or concavity in the investigation, can the "faith" in investigation be regarded as the gospel truth? Will it have the sanctity or the purity of a genuine investigation? If a grave suspicion arises with regard to the investigation, should a constitutional court close its hands and accept the proposition that as the trial has commenced, the matter is beyond it? That is the "tour de force" of the prosecution and if we allow ourselves to say so it has become "idée fixe" but in our view the imperium of the constitutional courts cannot be stifled or smothered by bon mot or polemic. Of course, the suspicion must have some sort of base and foundation and not a figment of one's wild imagination. One may think an impartial investigation would be a nostrum but not doing so would be like playing possum. As has been stated earlier, facts are self-evident and the grieved protagonist, a person belonging to the lower strata. He should not harbour the feeling that he is an "orphan under law".

14. ***Suffice it to observe that we do not intend to deviate from the conclusion reached by the High Court that in the peculiar facts and circumstances of the case, it is but appropriate that investigation of the crime in question must be entrusted to CBI.***

16. While parting, we may restate the observations made by the High Court in para 144 of the impugned judgment to clarify that the transfer of investigation of the crime in question to CBI is no reflection on the efficiency or efficacy of the investigation done by the State Vigilance Commission. We reiterate that position."

(Emphasis added)

30. In ***Shree Shree Ram Janki Asthan Tapovan Mandir And Another Vs. State of Jharkhand and Ors, (2019) 6 SCC 777,*** Court has held in paras 12,14 and 22 that:

"12. The question as to whether the High Court could direct CBI to take over investigation in the facts of the present case needs to be examined. The Constitution Bench in its judgment State of W.B. Vs. Committee for Protection of Democratic Rights, (2010) 3 SCC 571 has examined the question as to the rights of CBI to investigate a criminal offence in a State without its consent. This Court examined Entry 2 of List II of VII Schedule

of the Constitution. It was held that the legislative power of the Union to provide for the regular police force of one State to exercise power and jurisdiction in any area outside the State can only be exercised with the consent of the Government of that particular State in which such area is situated. The Court held that though the Court had wide powers conferred by Articles 32 and 226 of the Constitution, but it must bear in mind certain self-imposed limitations on the exercise of these constitutional powers. ***This extraordinary power must be exercised sparingly, cautiously and in exceptional situations where it becomes necessary to provide credibility and instil confidence in investigation or where the incident may have national or international ramifications or where such an order is necessary for doing complete justice and enforcing fundamental rights.*** *14. The Court approved earlier two Judge Bench Judgment Minor Irrigation & Rural Engg. Services vs. Sahngoo Ram Arya (2002) 5 SCC 521, wherein it was held that the High Court under Article 226 of the Constitution can direct inquiry to be conducted by CBI but such power can be exercised only in cases where there is sufficient material to come to a prima facie conclusion that there is need for such inquiry. It was held that it is not sufficient to have such material in the pleadings. The Court also held that the right to live under Article 21 include the right of a person to live without being hounded by the police or CBI to find out whether he has committed any offence or is living as a law-abiding citizen.*

22. It may be kept in mind that the public order (Entry 1) and the police (Entry 2) is a State subject falling in List II of the VII Schedule of the Constitution. It is a primary responsibility of the investigating agency of the State Police to investigate all offences which are committed within its jurisdiction. ***The investigations can be entrusted to Central Bureau of Investigation on satisfaction of the conditions as specified therein only in exceptional circumstances as laid down in State of W.B. Vs. Committee for Protection of Democratic Right, (2010) 3 SCC 571 case. Such power cannot and should not be exercised in a routine manner without examining the complexities, nature of offence and some time the tardy progress in the investigations involving high officials of the State investigating agency itself."***

(Emphasis added)

31. From the above mentioned judgments, it is evident that High Court under Article 226 of the Constitution can issue direction to C.B.I. to investigate a case. However, Court must bear self imposed limitations on the exercise of the constitutional power. This power must be exercised to provide credibility and instil confidence in the investigation. Few circumstances where High Court could exercise such power is where higher officials of State authorities are involved. In the present case all the facts are glaring. The top officials on their own had decided to pay ex-gratia compensation, which was known to them to be illegal. In this case, State police would not be able to investigate fairly and we are of the considered view that in order to unearth truth, present matter should be referred to C.B.I. for investigation.

32. In these peculiar facts and circumstances, we have no other option but to direct Central Bureau of Investigation to conduct a preliminary inquiry and to register a First Information

Report to unearth the scam and to submit the status report of investigation to this Court in a sealed cover after three months. Let a certified copy of this order along with entire record be sent to the Director, C.B.I. New Delhi for compliance of the order. Registrar General of High Court is directed to take appropriate steps to comply the order.

33. With regard to **Writ Petition No.31586 of 2016,** the prayer made therein was regarding payment of compensation. We have not stopped the process of granting ex-gratia compensation, therefore, petitioners may be paid compensation, but it would be subject to ultimate result of the writ petition.

34. The petitioners of **Writ Petition Nos.52602 of 2011, 59955 of 2012, 59958 of 2012, 59962 of 2012 and 59964 of 2012,** have prayed for quashing of the notifications dated 13.2.1991 and 23.3.1991. All these writ petitions were filed in the year 2011 and 2012, after a period of about two decades of issuance of impugned notifications.

35. We have gone through the contents of all these writ petitions and found that there is not a single averment to explain such huge delay.

36. Learned counsel appearing on behalf of the State submitted that these writ petitions may be dismissed on the ground of delay and laches.

37. This issue has been dealt with by the Apex Court in various judgments.

38. In **Aflatoon Vs. Lt. Governor of Delhi, 1975 (4) SCC 285,** Constitution Bench held in paras 9, 10 and 11 that:

"9.Assuming for the moment that the public purpose was not sufficiently specified in the notification, did the appellants make a grievance of it at the appropriate time? If the appellants had really been prejudiced by the non-specification of the public purpose for which the plots in which they were interested were needed, they should have taken steps to have the notification quashed on that ground within a reasonable time. They did not move in the matter even after the declaration under Section 6 was published in 1966. They approached the High Court with their writ petitions only in 1970 when the notices under Section 9 were issued to them. In the concluding portion of the judgment in Munshi Singh v. Union of India (supra), it was observed: [SCC p.344 para 10] :

"In matters of this nature we would have taken due notice of laches on the part of the appellants while granting the above relief but we are satisfied that so far as the present appellants are concerned they have not been guilty of laches, delay or acquiescence, at any stage."

We do not think that the appellants were vigilant.

10. That apart, the appellants did not contend before the High Court that as the particulars of the public purpose were not specified in the notification issued under Section 4, they were prejudiced in that they could not effectively exercise their right under Section 5A. As the plea was not raised by the appellants in the writ petitions filed before the High Court, we do not think that the appellants are entitled to have the plea considered in these appeals.

11.Nor do we think that the petitioners in the writ petitions should be allowed to raise this plea in view of their

conduct in not challenging the validity of the, notification even after the publication of the declaration under Section 6 in 1966. Of the two writ petitions, one is filed by one of the appellants. There was apparently no reason why the writ petitioners should have waited till 1972 to come to this Court for challenging the validity of the notification issued in 1959 on the ground that the particulars of the public purpose were not specified. A valid notification under Section 4 is a sine qua non for initiation of proceedings for acquisition of property. To have sat on the fence and allowed the Government to complete the acquisition proceedings on the basis that the notification under Section 4 and the declaration under Section 6 were valid and then to attack the notification on grounds which were available to them at the time when the notification was published would be a putting premium on dilatory tactics. The writ petitions are liable to be dismissed on the ground of laches and delay on the part of the petitioners (see Tilokchand Motichand v. H.B. Munshi (1969) 1 SCC 110 and Rabindranath Bose v. Union of India, (1970) 1 SCC 84."

39. In ***P. Chinnanna & Ors Vs. State of A.P. & Ors, (1994) 5 SCC 486,*** Court held in para 11 that:

"11. .....In fact, in relation to acquisition proceeding involving acquisition of land for public purposes, the court concerned must be averse to entertain writ petitions involving the challenge to such acquisition where there is avoidable delay or laches since such acquisition, if set aside, would not only involve enormous loss of public money but also cause undue delay in carrying out projects meant for general public good."

40. In ***State of T.N. & Ors Vs. L. Krishnan & Ors, (1996) 1 SCC 250,*** Court held in paras 40 and 41 that:

"40.There is yet another and a very strong factor militating against the writ petitioners. Not only did they fail to file any objections in the enquiries held under Section 5-A, they also failed to act soon after the declarations under Section 6 were made. As stated above, the declarations under Section 6 were made in the year 1978 and the present writ petitions were filed only sometime in the year 1982-83 when the awards were about to be passed. It has been pointed out in Aflatoon (1975) 4 SCC 285 that laches of this nature are fatal. Having held that the public purpose specified in the notification concerned therein is not vague, Mathew, J. made the following observations:(SCC pp.290-91 paras 9-12)

"Assuming for the moment that the public purpose was not sufficiently specified in the notification, did the appellants make a grievance of it at the appropriate time? If the appellants had really been prejudiced by the non-specification of the public purpose for which the plots in which they were interested were needed, they should have taken steps to have the notification quashed on that ground within a reasonable time. They did not move in the matter even after the declaration under Section 6 was published in 1966. They approached the High Court with their writ petitions only in 1970 when the notices under Section 9 were issued to them.

x x x

Nor do we think that the petitioners in the writ petitions should be allowed to raise this plea in view of their conduct in not challenging the validity of

the notification even after the publication of the declaration under Section 6 in 1966. Of the two writ petitions, one is filed by one of the appellants. There was apparently no reason why the writ petitioners should have waited till 1972 to come to this Court for challenging the validity of the notification issued in 1959 of the ground that the particulars of the public purpose were not specified. A valid notification under Section 4 is a sine qua non for initiation of proceedings for acquisition of property. To have sat on the fence and allowed the Government to complete the acquisition proceedings on the basis that the notification under Section 4 and the declaration under Section 6 were valid and then to attack the notification on grounds which were available to them at the time when the notification was published would be putting a premium on dilatory tactics. The writ petitions are liable to be dismissed on the ground of laches and delay on the part of the petitioners (See Tilokchand Motichand v. H.B. Munshi (1969) 1 SCC 110 and Rabindranath Bose v. Union of India (1970) 1 SCC 84).

From the counter affidavit filed on behalf of the Government, it is clear that the Government have allotted a large portion of the land after the acquisition proceedings were finalised to cooperative housing societies. To quash the notification at this stage would disturb the rights of third parties who are not before the Court."

41. The above observations speak for themselves - and are fatal to the writ petitioners."

41. In ***Urban Improvement Trust, Udaipur Vs. Bheru Lal & Ors, (2002) 7 SCC 712,*** Court held in para 21 that:

"21.Further, learned counsel for the appellant rightly submitted that on the ground of delay and laches in filing the writ petitions, the Court ought to have dismissed the same. In the present case, as stated above, the Notification under Section 6 was published in the Official Gazette on 24.5.1994. The writ petitions are virtually filed after two years. In a case where land is needed for a public purpose, that too for a scheme framed under the Urban Development Act, the Court ought to have taken care in not entertaining the same on the ground of delay as it is likely to cause serious prejudice to the persons for whose benefit the Housing Scheme is framed under the Urban Development Act and also in having planned development of the area. The law on this point is well settled. (Reliance Petroleum Ltd. v. Zaver Chand Popatlal Sumaira (1996) 4 SCC 579 and Hari Singh v. State of U.P. (1984) 2 SCC 624)."

42. In ***Swaika Properties (P) Ltd. & Anr. Vs. State of Rajasthan & Ors, (2008) 4 SCC 695,*** Court held in paras 16, 17 and 18 that:

"16. This Court has repeatedly held that a writ petition challenging the notification for acquisition of land, if filed after the possession having been taken, is not maintainable. In Municipal Corpn. of Greater Bombay v. Industrial Development Investment Co. (P) Ltd.(1996) 11 SCC 501 where K. Ramaswamy, J. speaking for a Bench consisting of His Lordship and S.B. Majmudar, J. held : (SCC p.520,para 29)

"29. It is thus well-settled law that when there is inordinate delay in filing the writ petition and when all steps taken in the acquisition proceedings have

become final, the Court should be loath to quash the notifications. The High Court has, no doubt, discretionary powers under Article 226 of the Constitution to quash the notification under Section 4 (1) and declaration under Section 6. But it should be exercised taking all relevant factors into pragmatic consideration. When the award was passed and possession was taken, the Court should not have exercised its power to quash the award which is a material factor to be taken into consideration before exercising the power under Article 226. The fact that no third party rights were created in the case is hardly a ground for interference. The Division Bench of the High Court was not right in interfering with the discretion exercised by the learned Single Judge dismissing the writ petition on the ground of laches."

In the concurring judgment, S.B. Majmudar, J. held as under:(Industrial Development Investment case (1996) 11 SCC 501 SCC pp 522-23, para 35)

"35..... Such a belated writ petition, therefore, was rightly rejected by the learned Single Judge on the ground of gross delay and laches. The respondent-writ petitioners can be said to have waived their objections to the acquisition on the ground of extinction of public purpose by their own inaction, lethargy and indolent conduct. The Division Bench of the High Court had taken the view that because of their inaction no vested rights of third parties are created. That finding is obviously incorrect for the simple reason that because of the indolent conduct of the writ petitioners land got acquired, award was passed, compensation was handed over to various claimants including the landlord. Reference applications came to be filed for larger compensation by claimants including writ petitioners themselves. The acquired land got vested in the State Government and the Municipal Corporation free from all encumbrances as enjoined by Section 16 of the Land Acquisition Act. Thus right to get more compensation got vested in diverse claimants by passing of the award, as well as vested right was created in favour of the Bombay Municipal Corporation by virtue of the vesting of the land in the State Government for being handed over to the Corporation. All these events could not be wished away by observing that no third party rights were created by them. The writ petition came to be filed after all these events had taken place. Such a writ petition was clearly stillborn due to gross delay and laches."

17. Similarly, in State of Rajasthan v. D.R. Laxmi, (1996) 6 SCC 445 following the decision of this Court in Municipal Corporation of Greater Bombay (1996) 11 SCC 501 it was held : (D.R. Laxmi case, (1996) 6 SCC 445 SCC p 452, para 9)

"9.... When the award was passed and possession was taken, the Court should not have exercised its power to quash the award which is a material factor to be taken into consideration before exercising the power under Article 226. The fact that no third party rights were created in the case, is hardly a ground for interference. The Division Bench of the High Court was not right in interfering with the discretion exercised by the learned Single Judge dismissing the writ petition on the ground of laches."

18. To the similar effect is the judgment of this Court in Municipal Council, Ahmednagar v. Shah Hyder Beig (2000) 2 SCC 48 wherein this Court, following the decision of this Court in C.Padma v. Dy. Secy. To the Govt of T.N.

(1997) 2 SCC 627 held : (Shah Hyder case (2000) 2 SCC 48, SCC p.55,para 17)

"17.In any event, after the award is passed no writ petition can be filed challenging the acquisition notice or against any proceeding thereunder. This has been the consistent view taken by this Court and in one of the recent cases (C.Padma v. Dy. Secy. To the Govt of T.N. (1997) 2 SCC 627) ...."

43. In ***Banda Development Authority Vs. Motilal Agarwal (2011) 5 SCC 394*** this Court held in paras 17, 18, 19, 20, 21, 22, 23,24 and 25 that:

"17.It is true that no limitation has been prescribed for filing a petition under Article 226 of the Constitution but one of the several rules of self imposed restraint evolved by the superior courts is that the High Court will not entertain petitions filed after long lapse of time because that may adversely affect the settled/crystallized rights of the parties. If the writ petition is filed beyond the period of limitation prescribed for filing a civil suit for similar cause, the High Court will treat the delay unreasonable and decline to entertain the grievance of the petitioner on merits.

18. In State of Madhya Pradesh v. Bhailal Bhai, AIR 1964 SC 1006, the Constitution Bench considered the effect of delay in filing writ petition under Article 226 of the Constitution and held: (AIR pp 1011-12 paras 17 and 21)

"17....It has been made clear more than once that the power to give relief under Article 226 is a discretionary power. This is specially true in the case of power to issue writs in the nature of mandamus. Among the several matters which the High Courts rightly take into consideration in the exercise of that discretion is the delay made by the aggrieved party in seeking this special remedy and what excuse there is for it.....It is not easy nor is it desirable to lay down any rule for universal application. It may however be stated as a general rule that if there has been unreasonable delay the court ought not ordinarily to lend its aid to a party by this extraordinary remedy of mandamus.

21.....Learned counsel is right in his submission that the provisions of the Limitation Act do not as such apply to the granting of relief under Article 226. It appears to us however that the maximum period fixed by the legislature as the time within which the relief by a suit in a Civil Court must be brought may ordinarily be taken to be a reasonable standard by which delay in seeking remedy under Article 226 can be measured. This Court may consider the delay unreasonable even if it is less than the period of limitation prescribed for a civil action for the remedy but where the delay is more than this period, it will almost always be proper for the court to hold that it is unreasonable."

19. In matters involving challenge to the acquisition of land for public purpose, this Court has consistently held that delay in filing the writ petition should be viewed seriously and relief denied to the petitioner if he fails to offer plausible explanation for the delay. The Court has also held that the delay of even few years would be fatal to the cause of the petitioner, if the acquired land has been partly or wholly utilised for the public purpose.

20. In Ajodhya Bhagat v. State of Bihar (1974) 2 SCC 501, this Court approved dismissal by the High Court of the writ petition filed by the appellant for quashing the acquisition of his land and observed: (SCC p.506,para 23)

"23. The High Court held that the appellants were guilty of delay and laches. The High Court relied on two important facts. First, that there was delivery of possession. The appellants alleged that it was a paper transaction. The High Court rightly rejected that contention. Secondly, the High Court said that the Trust invested several lakhs of rupees for the construction of roads and material for development purposes. The appellants were in full knowledge of the same. The appellants did not take any steps. The High Court rightly said that to allow this type of challenge to an acquisition of large block of land piecemeal by the owners of some of the plots in succession would not be proper. If this type of challenge is encouraged the various owners of small plots will come up with writ petitions and hold up the acquisition proceedings for more than a generation. The High Court rightly exercised discretion against the appellants. We do not see any reason to take a contrary view to the discretion exercised by the High Court."

21. In State of Rajasthan v. D.R.Laxmi (1996) 6 SCC 445, this Court referred to Administrative Law H.W.R. Wade (7th Ed.) at pages 342-43 and observed: (SCC p.453, para 10)

"10. The order or action, if ultra vires the power, becomes void and it does not confer any right. But the action need not necessarily be set at naught in all events. Though the order may be void, if the party does not approach the Court within reasonable time, which is always a question of fact and have the order invalidated or acquiesced or waived, the discretion of the Court has to be exercised in a reasonable manner. When the discretion has been conferred on the Court, the Court may in appropriate case decline to grant the relief, even if it holds that the order was void. The net result is that extraordinary jurisdiction of the Court may not be exercised in such circumstances."

22. In Girdharan Prasad Missir v. State of Bihar (1980) 2 SCC 83, the delay of 17 months was considered as a good ground for declining relief to the petitioner.

In Municipal Corpn. of Greater Bombay v. Industrial Development Investment Co. (P) Ltd. (1996) 11 SCC 501, this Court held: (SCC p 452, para 9)

"9. ....It is thus well-settled law that when there is inordinate delay in filing the writ petition and when all steps taken in the acquisition proceedings have become final, the Court should be loath to quash the notifications. The High Court has, no doubt, discretionary powers under Article 226 of the Constitution to quash the notification under Section 4 (1) and declaration under Section 6. But it should be exercised taking all relevant factors into pragmatic consideration. When the award was passed and possession was taken, the Court should not have exercised its power to quash the award which is a material factor to be taken into consideration before exercising the power under Articloe 226. The fact that no third party rights were created in the case is hardly a ground for interference. The Division Bench of the High Court was not right in interfering with the discretion exercised by the learned Single Judge dismissing the writ petition on the ground of laches."

23. In Urban Improvement Trust v. Bheru Lal (2002) 7 SCC 712, this Court reversed the order of the Rajasthan High Court and held that the writ petition filed for quashing of acquisition of land for a residential scheme framed by the

appellant-Urban Improvement Trust was liable to be dismissed on the ground that the same was filed after two years.

24. In Ganpatibai v. State of M.P. (2006) 7 SCC 508, the delay of 5 years was considered unreasonable and the order passed by the High Court refusing to entertain the writ petition was confirmed. In that case also the petitioner had initially filed suit challenging the acquisition of land. The suit was dismissed in 2001. Thereafter, the writ petition was filed. This Court referred to an earlier judgment in State of Bihar v. Dhirendra Kumar (1995) 4 SCC 229 and observed: (Ganpatibai v. State of M.P. (2006) 7 SCC 508, SCC p.510, para 9)

"9. In State of Bihar v. Dhirendra Kumar (1995) 4 SCC 229 this Court had observed that civil suit was not maintainable and the remedy to question notification under Section 4 and the declaration under Section 6 of the Act was by filing a writ petition. Even thereafter the appellant, as noted above, pursued the suit in the civil court. The stand that five years after the filing of the suit, the decision was rendered does not in any way help the appellant. Even after the decision of this Court, the appellant continued to prosecute the suit till 2001, when the decision of this Court in 1995 had held that suit was not maintainable."

25. In Swaran Lata v. State of Haryana (2010) 4 SCC 532, the dismissal of writ petition filed after seven years of the publication of declaration and five years of the award passed by the Collector was upheld by the Court and it was observed: (SCC p.535 para 11)

"11. In the instant case, it is not the case of the petitioners that they had not been aware of the acquisition proceedings as the only ground taken in the writ petition has been that substance of the notification under Section 4 and declaration under Section 6 of the 1894 Act had been published in the newspapers having no wide circulation. Even if the submission made by the petitioners is accepted, it cannot be presumed that they could not be aware of the acquisition proceedings for the reason that a very huge chunk of land belonging to a large number of tenure-holders had been notified for acquisition. Therefore, it should have been the talk of the town. Thus, it cannot be presumed that the petitioners could not have knowledge of the acquisition proceedings."

44. From the above mentioned judgments, it is clear that there is a consistent view that in case there is an inordinate delay in approaching the Court and when all steps taken in the acquisition proceedings have become final, the Court should be loath to quash the proceedings.

45. In the present case, the notifications are of the year 1991, whereas the writ petitions were filed in the year 2011 and 2012, after a period of more than 20 years. Averments of the writ petitions are silent on the issue of any explanation of gross delay in approaching this Court.

46. Admittedly, the possession of the land was taken way back in the year 1993. The special land Acquisition Officer had made award in the year 1993 and 1995 and as such entire proceedings of acquisition was completed wayback in the year 1995.

47. In view of above discussions, we dismiss the **Writ Petition Nos.52602 of 2011, 59955 of 2012, 59958 of 2012,**

59962 of 2012 and 59964 of 2012 on the ground of gross delay and laches.

48. So far as the prayers made in the **Writ Petition Nos. 47504 of 2017, 50821 of 2017, 50824 of 2017, 51857 of 2017 and 57562 of 2017** are concerned, as the matter is seized with the Hon'ble Supreme Court and there is a request to High Court for not to deal with such cases relating to the interpretation of or concerning Section 24 of Act of 2013. **(State of Haryana Vs. M/s. G.D. Goenka Tourism Corporation Ltd: (2018) 3 SCC 585)**. Accordingly, we are not passing any order on these petitions at this stage.

49. Registrar General of this Court is directed to take appropriate steps to comply with the directions made in paragraph 32 of this judgment regarding direction to Central Bureau of Investigation to conduct preliminary enquiry and register First Information Report.

50. List leading Writ Petition i.e. 31586 of 2016 on 11.5.2020.

(2020)02ILR A392

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 08.01.2020

BEFORE
THE HON'BLE DR. YOGENDRA KUMAR SRIVASTAVA, J.

Writ C No. 32914 of 2008

Meghai & Anr. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri B.N. Pathak, Sri Pawan Giri

Counsel for the Respondents:
C.S.C., Sri Anuj Kumar, Sri Awadhesh Mishra

A. Civil Law-U.P. Imposition of Ceiling on Land Holdings Act, 1960 – Object – The enactment having been made in the interests of the community with the object to ensure a more equitable distribution of land and to provide land for the landless agricultural labourers to ensure increased agricultural production and for other public purposes as best to subserve the common good – The provisions of the Act have to be read in a manner so as to subserve the intent and purpose of the enactment. (Para 14)

B. Civil Law-U.P. Zamindari Abolition and Land Reforms Act, 1950 – Section 195 and 198 – UPICLH Act, 1960 – Section 27 – Surplus land – Order of Preference – Power of Collector – A conjoint reading of the statutory provisions indicates that any land which remains surplus after making provisions for settlement of land with the Gaon Sabha under Section 27(1) and permitting the use thereof for other public purposes under Section 25, is to be settled by the Collector in accordance with the order of preference and subject to the limits specified respectively in subsections (1) and (3) of Section 198 of the 1950 Act – The order of preference provided under Section 198(1) provides for allotment in favour of landless agricultural labourers of the specified categories in the order of preference prescribed under clause (c) thereof. (Para 10 and 11)

C. Civil Law-U.P. Imposition of Ceiling On Land Holdings Act, 1960 – Section 27 (3) and (4) – Cancellation of lease – The petitioners were not eligible for grant of lease inasmuch as they did not belong to the class of landless agricultural labourers – They could not have been admitted to the land as per the order of preference in accordance with the provisions contained under Section 195 r/w Section 198 of the 1950 Act and as such the settlement of the surplus land under subsection (3) of Section 27 was irregular – The land in question being already in occupation of landless agricultural labourers belonging to

scheduled castes, the land could not be said to be vacant and the same could not have been allotted to the petitioners. (Para 22)

D. Interpretation of Statute – The principle of construing a remedial statute so as to effectuate the purposes of the legislature and to accomplish the object sought – The Court's function, in view of the foregoing discussion, would thus be to construe the words used in an enactment, so far as possible, in a way which best gives effect to the purpose of the enactment . (Para 19 and 20)

Writ Petition dismissed. (E-1)

List of cases cited :-

1. R (on the application of Quintavalle) Vs. Secretary of State for Health (2003) UKHL 13, (2003) 2 AC 687, (2003) 2 All ER 113 (UK House of Lords)

2. Bharat Singh Vs. Management Of New Delhi Tuberculosis Centre, New Delhi & Ors. (1986) 2 SCC 614

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

1. Heard Sri Pawan Giri, holding brief of Sri B.N.Pathak, learned counsel for the petitioners and Sri Amit Manohar, learned Additional Chief Standing Counsel appearing for the State respondents.

2. Challenge in the present petition is to an order dated 02.06.2008 passed by the Additional Commissioner(Administration),Vindhyachal Mandal, Mirzapur in Case No. 12/333 of 2007 (Ghurau Vs. Meghai) in proceedings under Section 27 (4) of the U.P. Imposition of Ceiling On Land Holdings Act, 19601, whereby the lease granted in favour of the petitioners has been cancelled and the land in question has been directed to be reverted to the State Government.

3. Contention of the learned counsel for the petitioners is that the lease had been granted to the petitioners after completion of the requisite procedural formalities and that the order impugned has been passed without giving proper opportunity to the petitioners and as such the same is legally unsustainable.

4. Per contra, learned Additional Chief Standing Counsel appearing for the State respondents has supported the order passed by the Additional Commissioner by stating that the petitioners did not belong to the category of persons eligible for allotment of the ceiling surplus land and accordingly the proceedings for cancellation of allotment were rightly initiated. Placing reliance upon the order-sheet of the case, a copy whereof has been annexed as annexure CA-1 to the counter affidavit filed by the State respondents, it is submitted that the order has been passed after due notice and opportunity to the petitioners and as such the same cannot be said to be arbitrary and illegal. It has also been pointed out that the land in question being not vacant at the relevant point of time the same could not have been allotted to the petitioners.

5. In order to appreciate the rival contentions the relevant statutory provisions may be adverted to.

6. The disposal and settlement of land declared surplus in proceedings under the Ceiling Act is provided for under Chapter IV thereof. For ease of reference, Section 27 of the Ceiling Act which pertains to the settlement of surplus land is being extracted below:-

"Section 27 - Settlement of surplus land - (1) The State Government shall settle out of the surplus land in a village in which no land is available for

community purposes or in which the land as available is less than 15 acres with the Gram Sabha of that village so, however, that the total land in the village available for community purposes after such settlement does not exceed 15 acres. The land so settled with the Gram Sabha shall be used for planting trees, growing fodder or for such other community purposes, as may be prescribed.

(2) The State Government may either settle any surplus land in accordance with sub-section (1) or sub-section (3) or use or permit its use in accordance with Section 25 or manage or otherwise deal with it in such manner as it thinks fit.

(3) Any remaining surplus land shall be settled by the Collector in accordance with the order of preference and subject to the limits, specified respectively in sub-sections (1) and (3) of Section 198 of the Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950.

(4) The Commissioner may of his own motion and shall, on the application of any aggrieved person enquire into such settlement and if he is satisfied that the settlement is irregular he may after notice to the person in whose favour such settlement is made to show cause--

(i) cancel the settlement and the lease, if any, and thereupon, notwithstanding anything contained in any other law or in any instrument, the rights, title and interest of the person in whose favour such settlement was made or lease executed or any person claiming through him in such land shall cease, and such land shall revert to the State Government; and

(ii) direct that every person holding or retaining possession thereof may be evicted, and may for that purpose use or cause to be used such force as may be necessary.

(5) Every order passed by the Commissioner under sub-section (4) shall be final.

(6) The Commissioner acting of his own motion under subsection (4) may issue notice, and an application under that sub-section may be made,--

(a) in the case of any settlement made or lease granted before November 10, 1980, before the expiry of a period of seven years from the said date; and

(b) in the case of any settlement made or lease granted on or after the said date, before the expiry of a period of five years from the date of such settlement or lease or up to November 10, 1987, whichever be later.

(6-A) Where any surplus land has been settled by the Collector under sub-section (3), and any person other than the person in whose favour such settlement was made is in occupation of such land in contravention of the provisions of this Act, the Collector may, of his own motion and shall on the application of the person in whose favour such settlement was made, put him in possession of such land and may for that purpose use or cause to be used such force as he considers necessary.

(6-B) Where any person, after being evicted under this section, reoccupies the land or any part thereof without lawful authority, he shall be punishable with imprisonment for a term which may extend to two years but which shall not be less than three months and also with fine which may extend to three thousand rupees :

Provided that the Court convicting the accused may while passing the sentence direct that the whole or such portion of the fine that may be recovered as the Court considers proper, be paid to the person in whose favour such settlement

was made as damages for use and occupation.

(6-C) Where in any proceeding under sub-section (6-B), the Court at any stage after cognizance of the case has been taken is satisfied by affidavit or otherwise--

(a) that the accused is in occupation of the land to which such proceeding relates, in contravention of the provisions of the Act; and

(b) that the person in whose favour such settlement was made is entitled to the possession of such land ;

the Court may summarily evict the accused from such land pending the final determination of the case and may put the person in whose favour such settlement was made in possession of such land.

(6-D) Where in any such proceeding, the accused is convicted the interim order passed under sub-section (6-C) shall be confirmed by the Court.

(6-E) Where in any such proceedings the accused is acquitted or discharged and the Court is satisfied that the person so acquitted or discharged is entitled to be put back in possession over such land, the Court shall, on the application of such person direct that delivery of possession be made to him.

(6-F) Notwithstanding anything contained in the Code of Criminal Procedure, 1973, every offence punishable under sub-section (6-B) shall be cognizable and non-bailable and may be tried summarily.

(6-G) For the purpose of speedy trial of offences under this section, the State Government may, in consultation with the High Court, by notification/constitute, special courts consisting of an officer not below the rank of Sub-Divisional Magistrate, which shall, subject to the provisions of the Code of Criminal Procedure, 1973, exercise in relation to such offences the powers of a Judicial Magistrate of the first class.

(7) The State Government may, by a general or special order to be published in the manner prescribed, declare that as from a date to be specified in this behalf, all surplus land situate in a circle which could not be settled under the provisions of this Act, shall vest in the Gram Sabha concerned, and the provisions of Section 117 of the Uttar Pradesh Zamindari Abolition and Land Reforms Act, shall *mutatis mutandis* apply in relation to such vesting."

7. In terms of sub-section (3) of Section 27 of the Ceiling Act the land remaining surplus after providing for the use thereof for community purposes by way of settlement with the Gaon Sabha in terms of sub-section (1) and for use for other public purposes in accordance with Section 25, is to be settled by the Collector in accordance with the order of preference and subject to the limits specified respectively in sub-sections (1) and (3) of Section 198 of the U.P.Zamindari Abolition and Land Reforms Act, 19502.

8. Section 198 of the 1950 Act prescribes the order of preference to be followed in admitting persons to land under Sections 195 and 197 and the same is reproduced herein below :-

"198. Order of preference in admitting persons to land under Sections 195 and 197. - (1) In the admission of persons to land as bhumidhar with non-transferable rights or asami under Section 195 or Section 197 (hereinafter in this section referred to as allotment of land) the Land Management

Committee shall, subject to any order made by a Court under Section 178 observe the following order of preference :

(a) landless widow, sons, unmarried daughters or parents residing in the circle of a person who has lost his life by enemy action while in active service in the Armed Forces of the Union;

(b) a person residing in the circle, who has become wholly disabled by enemy action while in active service in the Armed Forces of the Union;

(c) a landless agricultural labourer residing in the circle and belonging to any one of the following categories in the order of preference:-

(i) persons belonging to the Scheduled Castes or the Scheduled Tribes;

(ii) persons belonging to Other Backward Classes;

(iii) persons belonging to the general category living below poverty line.;

(d) any other landless agricultural labourer residing in the circle;

(e) a bhumidhar or asami residing in the circle and holding land less than 1.26 hectares (3.125 acres);

(f) a landless person residing in the circle who is retired, released or discharged from service other than service as an officer in the Armed Forces of the Union;

(g) a landless freedom fighter residing in the circle who has not been granted political pension; and

(h) any other landless agricultural labourer, not residing in the circle, but residing in the Nyaya Panchayat circle referred to in Section 42 of the United Provinces Panchayat Raj Act, 1947 and belonging to any of the following categories in the order of preference:-

(i) persons belonging to the Scheduled Castes or the Scheduled Tribes;

(ii) persons belonging to Other Backward Classes;

(iii) persons belonging to the general category living below poverty line.

Explanation. - For the purposes of this sub-section-

(1) 'landless' refers to a person who or whose spouse or minor children hold no land as bhumidhar, or asami and also held no land as such within two years immediately preceding the date of allotment; and

(2) 'agricultural labourer' means a person whose main source of livelihood is agricultural labour;

(3) 'Freedom-Fighter' means an inhabitant of Uttar Pradesh who is certified by the Collector to have participated in the National struggle for freedom during the period between 1930 and 1947 and who in connection with such participation, is similarly certified to have-

(a) undergone a sentence of imprisonment for a period of at least two months; or

(b) been in jail for a period of at least three months by way of preventive detention or as an undertrial; or

(c) been subjected to at least ten stripes in execution of a sentence of whipping; or

(d) been declared an absconding offender; or

(e) suffered a bullet injury;

and includes a person who was involved in the Peshawar-Khand or who was a recognised member of the Indian National Army or former India Independence League; but does not include a person who was granted pardon on account of his tendering apology or expressing regret for such participation.

(4) 'Other Backward Classes' means the Backward Classes of citizens specified in Schedule I of the Uttar

Pradesh Public Services (Reservation for Scheduled Castes, Scheduled Tribes and Other Backward Classes) Act, 1994 (U.P. Act No. 4 of 1994).

(5) 'Persons of General Category living below poverty line' means such persons as may be determined from time to time by the State Government.

(2) (*Omitted* by U.P.Act No. 30 of 1975).

(3) The land that may be allotted under sub-section (1) shall not exceed-

(i) in the case of a person falling under Clause (e) such area as together with the land held by him as bhumidhar or asami immediately before the allotment would aggregate to 1.26 hectares (3.125 acres);

(ii) in any other case, an area of 1.26 hectares (3.125 acres).

(4) The Collector may of his own motion and shall on the application of any person aggrieved by an allotment of land inquire in the manner prescribed into such allotment and if he is satisfied that the allotment is irregular, he may cancel the allotment and the lease, if any.

(4-A) (*Omitted* by U.P.Act No. 27 of 2004 (w.e.f. 23.08.2004).

(5) No order for cancellation of an allotment or lease shall be made under sub-section (4), unless a notice to show cause is served on the person in whose favour the allotment or lease was made or on his legal representatives :

Provided that no such notice shall be necessary in proceedings for the cancellation of any allotment or lease where such proceedings were pending before the Collector or any other Court or authority on August 18, 1980.

(6) Every notice to show cause mentioned in sub-section (5) may be issued-

(a) in the case of an allotment of land made before November 10, 1980, (hereinafter referred to as the said date), before the expiry of a period of seven years from the said date; and

(b) in the case of an allotment of land made on or after the said date, before the expiry of a period of five years from the date of such allotment or lease or up to November 10, 1987, which ever be later.

(7) Where the allotment or lease of any land is cancelled under sub-section (4) the following consequences shall ensue, namely-

(i) the right, title and interest of the allottee or lessee or any other person claiming through him in such land shall case and the land shall revert to the Gaon Sabha;

(ii) the Collector may direct delivery of possession of such land forthwith to the Gaon Sabha after ejectment of every person holding or retaining possession thereof and may for that purpose use or cause to be used such force as may be necessary.

(8) Every order made by the Collector under sub-section (4) shall, subject to the provisions of Section 333, be final.

(9) Where any person has been admitted to any land specified in Section 132 as a sirdar or bhumidhar with non-transferable rights at any time before the said date and such admission was made with the previous approval of the Assistant Collector-in-charge of the sub-division in respect of the permissible area mentioned in sub-section (3), then notwithstanding anything contained in other provisions of this Act or in the terms and conditions of the allotment or lease under which such person was admitted to that land, the following consequences shall, with effect from the said date ensure, namely-

(a) the allottee or lessee shall be deemed to be an asami of such land and shall be deemed to be holding the same

from year to year and the allotment or lease of the land to the extent mentioned above shall not be deemed to be irregular for the purposes of sub-section (4);

(b) the proceedings, if any, pending on the said date before the Collector or any other Court or authority for the cancellation of the allotment or lease of such land, shall abate."

9. Section 195 which provides for allotment of land is also being extracted below :-

"195. Admission to land. - The Land Management Committee with the previous approval of the Assistant Collector-in-charge of the sub-division shall have the right to admit any person as bhumidhar with non-transferable rights to any land (other than land being in any of the classes mentioned in Section 132) where-

(a) the land is vacant land;

(b) the land is vested in the Gaon Sabha under Section 117; or

(c) the land has come into the possession of Land Management Committee under Section 194 or under any other provisions of this Act."

10. A conjoint reading of the aforementioned statutory provisions indicates that any land which remains surplus after making provisions for settlement of land with the Gaon Sabha under sub-section (1) of Section 27 and permitting the use thereof for other public purposes under Section 25, is to be settled by the Collector in accordance with the order of preference and subject to the limits specified respectively in sub-sections (1) and (3) of Section 198 of the 1950 Act.

11. The order of preference provided under sub-section (1) of Section 198 provides for allotment in favour of landless agricultural labourers of the specified categories in the order of preference prescribed under clause (c) thereof.

12. Section 195 provides for admission of land other than land being in any of the classes mentioned in Section 132 where: (a) the land is vacant land; (b) the land is vested in the Gaon Sabha under Section 117; or (c) the land has come into the possession of Land Management Committee under Section 194 or under any other provisions of the Act.

13. Sub-section (4) of Section 27 of the Ceiling Act provides that the Commissioner may of his own motion and shall on the application of any aggrieved person enquire into such settlement and if he is satisfied that the settlement is irregular he may after notice to the person in whose favour such settlement is made to show cause cancel the settlement and the lease and as a consequence thereof the land shall revert to the State Government.

14. The U.P. Imposition of Ceiling on Land Holdings Act, 1960 was promulgated as an Act to provide for imposition of ceiling on land holdings in the State of Uttar Pradesh and certain other matters connected therewith. The enactment having been made in the interests of the community with the object to ensure a more equitable distribution of land and to provide land for the landless agricultural labourers to ensure increased agricultural production and for other public purposes as best to subserve the common good, the provisions of the Act have to be read in a manner so as to subserve the intent and purpose of the enactment.

15. Land being pivotal to both income and employment around which socio-economic privileges and deprivations revolve the distribution of ceiling surplus land is seen as an instrument of land reforms aimed at creation of an egalitarian rural society. The enactment has been included in the Ninth Schedule of the Constitution of India so as to ensure speedy and unhindered implementation of the various legislative measures.

16. Imposition of ceiling and distribution of ceiling surplus land being therefore primarily concerned with the distributive aspect of land reforms aimed at reducing ineqalities of land owner-ship the allotment of ceiling surplus land is to be made in a manner to subserve the objects and purposes of the enactment so that the distribution of land is made to the real beneficiaries.

17. It is beyond question the duty of courts, in construing statutes to give effect to the intent of the law making power and to seek for that intent in every way. The object and interpretation of construction of statutes is to ascertain the meaning of the legislature and to ensure that the provisions are interpreted so as to subserve that intent. There is a general presumption that an enactment has to be given a purposive construction with a construction that best gives effect to the purpose of the enactment.

18. Reference may be had to the judgment in **R (on the application of Quintavalle) Vs. Secretary of State for Health**, for the proposition that in construing an enactment effort should be made to give effect to the legislative purpose. The observations made in the judgment are as follows:-

"8. The basic task of the Court is to ascertain and give effect to the true meaning of what Parliament has said in the enactment to be construed. ... Every statute other than a pure consolidating statute is, after all, enacted to make some change, or address some problem, or remove some blemish, or effect some improvement in the national life. The Court's task, within the permissible bounds of interpretation, is to give effect to Parliament's purpose. So the controversial provisions should be read in the context of the statute as a whole, and the statute as a whole should be read in the historical context of the situation which led to its enactment."

19. The Court's function, in view of the foregoing discussion, would thus be to construe the words used in an enactment, so far as possible, in a way which best gives effect to the purpose of the enactment.

20. The principle of construing a remedial statute so as to effectuate the purposes of the legislature and to accomplish the object sought has been emphasised in the **Construction of Statues by Crawford** in the following terms:-

"...Remedial statutes, that is, those which supply defects, and abridge superfluities, in the former law, should be given a liberal construction, in order to effectuate the purposes of the legislature, or to advance the remedy intended, or to accomplish the object sought, and all matters fairly within the scope of such a statute be included, even though outside the letter, if within its spirit or reason."

21. Reference may also be had to the case of **Bharat Singh Vs. Management Of New Delhi Tuberculosis Centre, New Delhi & Ors.**, where purposive interpretation safeguarding the rights of have-nots was preferred to a literal construction in interpreting a welfare legislation, and it was held as follows:-

"11. ...the court has to evolve the concept of purposive interpretation which has found acceptance whenever a progressive social beneficial legislation is under review. We share the view that where the words of a statute are plain and unambiguous effect must be given to them. Plain words have to be accepted as such but where the intention of the legislature is not clear from the words or where two constructions are possible, it is the court's duty to discern the intention in the context of the background in which a particular Section is enacted. Once such an intention is ascertained the courts have necessarily to give the statute a purposeful or a functional interpretation. Now, it is trite to say that acts aimed at social amelioration giving benefits for the have-nots should receive liberal construction. It is always the duty of the court to give such a construction to a statute as would promote the purpose or object of the Act. A construction that promotes the purpose of the legislation should be preferred to a literal construction. A construction which would defeat the rights of the have-nots and the underdog and which would lead to injustice should always be avoided..."

22. In the instant case the order passed by the Additional Commissioner has specifically recorded that the petitioners were not eligible for grant of lease inasmuch as they did not belong to the class of landless agricultural labourers they could not have been admitted to the land as per the order of preference in accordance with the provisions contained under Section 195 read with Section 198 of the 1950 Act and as such the settlement of the surplus land under sub-section (3) of Section 27 was irregular. It has further been recorded that the land in question being already in occupation of landless agricultural labourers belonging to scheduled castes, the land could not be said to be vacant and the same could not have been allotted to the petitioners.

23. The principal contention which is sought to be raised on behalf of the petitioners is that the order has been passed without notice and opportunity to the petitioners also does not inspire confidence inasmuch as the order-sheet of the case which is on record as part of the counter affidavit filed by the State respondents clearly shows that the order impugned has been passed after due notice and opportunity to the petitioners.

24. Counsel for the petitioners has not been able to demonstrate from the records that the petitioners belong to the eligible criteria so as to be entitled for allotment of the ceiling surplus land.

25. No other ground has been urged.

26. No material error or irregularity has been pointed out in the order impugned so as to warrant interference.

27. The writ petition lacks merit and is accordingly dismissed.

(2020)02ILR A400

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 02.12.2019

BEFORE

THE HON'BLE AJAY BHANOT, J.

Writ C No. 32955 of 2019

Ajay Singh ...Petitioner

Versus

Union of India & Ors. ...Respondents

Counsel for the Petitioner:
Sri Pankaj Kumar Mishra

Counsel for the Respondents:
A.S.G.I., Sri Shashank Shekhar Singh

A. Constitution of India – Fundamental Rights – Nature – The text of the Constitution, is a conceptual philosophy of fundamental rights, and not an exhaustive guide to fundamental rights – The text of the Constitution is fixed, fundamental rights are always evolving. This is the essence of constitutional law jurisprudence – Evolution of constitutional law rights are guided and controlled by the text of the constitution, long settled judicial principles of interpretation of the constitution, and judicial precedents in point – The march of law is also assisted by consensus of values, in the comity of civilized nations. (Para 39 and 40)

B. Constitution of India – Article 21 – Human dignity – Means and Scope – Human dignity made a decisive contribution in the development of the rights of life and liberty, in jurisprudential systems of free societies across the world – Consistent and high authority have thus entrenched human dignity as fundamental to right to life, which flows from Article 21 of the Constitution of India. (Para 77, 106)

C. Constitution of India – Article 21 – Validity of Punishment – Imposed on delinquent student – Punishment has to be effective to serve its purpose; however, it cannot be purblind to human dignity, if it is to retain its constitutionality – Degree of injuries to self esteem, extent of degradation of human worth, depth of humiliation caused by the punishment, are facts to be probed in an enquiry into the validity of the punishment – Punishment for deviant conduct, cannot be so severe as to degrade human life. Every form of punishment should protect the essential sanctity of human life and comport with fundamental norms of decency evolved by a civilized society. (Para 117, 119 and 121)

D. Constitution of India – Article 21 – Rehabilitation and Reformation – Absence of an environment of reform, self development and rehabilitation in a university, denies the opportunity of redeeming one's reputation – The individual is permanently discarded by the institution, and loss of human self worth is total – This system of punishment is destructive of fundamental elements of human dignity, and violative of Article 21 of the Constitution of India – Held, The impugned action taken by the university, against the petitioner is violative of the fundamental right of human dignity of the petitioner, guaranteed under Article 21 of the Constitution of India, as it fails to consider his susceptibility to reform. (Para 122 and 134)

E. University Law– Its role and contribution – Preservation of Constitutional values – University is a paternal institution – It is a microcosm of the Society – There are no other institutions of equal standing, to engage with the youth, deal with the discontent or aberration, and channelize youthful energies – The role of the University does not end in punishing perpetrators of violence. It begins with the identification of the causes of violence, communal hatred, and other forms of deviant conduct – Thereafter the responsibility to achieve behavioral change commences – The universities have the responsibility, to preserve this heritage, and the obligation to nurture these constitutional values. (Para 147, 148, 151 and 159)

F. Nudge – Methodology – Behavioral Change – Importance of Yoga, Meditation and Vipassana – The methodology of 'nudges', in creating behavioral change has been gaining acceptability. The organization 'Nudge' in Lebanon, has done noteworthy work with refugee children, and on environmental protection – The Behavioral Insights Teams sometimes called 'Nudge Units', are also existing in many nations including Australia, Canada, Germany, Qatar, the United Arab Emirates, Japan, the United States, and the United Kingdom – Ancient branches of

knowledge and wellness like yoga, meditation, vipassana and so on may prove to be rich resources to benefit from. (Para 174, 175 and 176)

G. Therapeutic Approach – Significance – To solve Social Problem – Under the therapeutic method, however, an individual's happiness depends on his or her self-esteem, and self-esteem is a by-product of public recognition – With the rise of therapeutic approaches by mid century, they were increasingly seen as social pathologies that needed to be treated through counseling and psychiatric intervention – Therapeutic solutions to social problems, are being increasingly recognized by social scientists, medical experts, psychologists, and jurists alike. (Para 138 and 179)

Writ Petition disposed of. (E-1)

List of cases cited :-

1. Vishaka Vs. State of Rajasthan, reported at 1997 (6) SCC 241

2. Rattan Chand Hira Chand v. Askar Nawaz Jung, (1991) 3 SCC 67

3. Sajjan Singh v. State of Rajasthan, AIR 1965 SC 845.

4. Kesavananda Bharati v. State of Kerala (1973) 4 SCC 225

5. Maneka Gandhi v. Union of India, (1978) 1 SCC 248)

6. Olga Tellis v. Bombay Municipal Corpn (1985) 3 SCC 545).

7. Prem Shankar Shukla v. UT of Delhi (1980) 3 SCC 526

8. Francis Coralie Mullin v. UT of Delhi (1981) 1 SCC 608

9. Bandhua Mukti Morcha v. Union of India (1984) 3 SCC 161

10. Khedat Mazdoor Chetna Sangath v. State of M.P. (1994) 6 SCC 260

11. M.Nagaraj v. Union of India (2006) 8 SCC 212

12. Shabnam v. Union of India (2015) 6 SCC 702

13. Jeeja Ghosh v. Union of India (2016) 7 SCC 761

14. Mehmood Nayyar Azam v. State of Chhattisgarh (2012) 8 SCC 1

15. National Legal Services Authority v. Union of India (2014) 5 SCC 438

16. Maharasthra University of Health Sciences v. Satchikitsa Prasarak Mandal (2010) 3 SCC 786

17. Selvi v. State of Karnataka (2010) 7 SCC 263

18. Sunil Batra (II) Vs. Delhi Administration 1980 (3) SCC 488)

19. T.K. Gopal v. State of Karnataka (2000) 6 SCC 168

20. Asfaq v. State of Rajasthan and Others (2017) 15 SCC 55

21. K.S. Puttaswamy v. Union of India (2017) 10 SCC 1

22. Rosenblatt v. P Baer 1966 SCC OnLine US SC 22 : 383 US 75 (1966)

23. Armoniene v. Lithuania (2009) EMLR 7

24. Procunier, Corrections Director, ET AL. Vs. Martinez ET AL. 416 U.S. 396 (1974)

25. Trop Vs. Dulles 356 US 86 (1958)

26. Bijoe Emmanuel and others vs. State of Kerala and others (1986) 3 SCC 615

27. Avinash Nagra Vs. Navodaya Vidyalaya Samiti and Others (1997) 2 SCC 534

28. Devarsh Nath Gupta Vs. State of U.P. and Others, 2019(6) ADJ 296 (DB)

(Delivered by Hon'ble Ajay Bhanot, J.)

1. This judgment has been structured by dividing it into various sections to facilitate analysis and for easy read. They are:

A.	Reliefs sought
B.	Arguments of learned counsels for the parties
C.	Facts
D.	Legal Issues common in all writ petitions
E.	Stands of various respondents on affidavits (i).Response of IIT BHU (ii).Response of AMU (iii).Response of BHU (iv).Response of UGC (v).Response of UoI
F.	Evolution of Fundamental Rights by courts (i) Legislative lag, executive inertia and fundamental rights
G.	Process of law and the courts : Current State & Contemporary Challenges
H.	Education (i). Importance and scope (ii). Role and obligation of universities
I.	Discipline in Universities: Concept, Need & Challenges (i). Violence, intimidation and moral turpitude (ii). Communal disturbances in universities (iii). Discipline in universities (iv). Statutory approach to maintaining discipline
J.	Statutory Regime of Punishments in light of Article 21 & Doctrine of Proportionality
K.	Punishments & Article 21 (i). Right to human dignity (ii). Supreme Court on human dignity (iii). Comparative International Jurisprudence (iv). Constitutionality of punishments under the statutes (v). Systemic responses : Responsibilities of the State and the universities
L.	Reform, Self Development & Rehabilitation: (i). Role of universities in achieving behavioural change (ii). Imbibing constitutional values and purging communal hatred (iii). Present discontents of students and solutions (iv). Creation of reform/self development/rehabilitation programmes (v). Concerns of universities regarding discipline, & restraints during the reformation, self development & rehabilitation programme
M.	Conclusions & Reliefs
N.	Appendix

A. *Reliefs sought*

2. The petitioner has assailed the following orders passed by the respondent University:

(i) The order of suspension dated 13.02.2019 passed by the Proctor, Aligarh Muslim University, Aligarh;

(ii) The order dated 28.03.2019 whereby the petitioner was directed to appear before the disciplinary committee and respond to the query, which he was failed to answer on the earlier occasion;

(iii) The chargesheet dated 16.03.2019.

3. The petitioner has further prayed for a direction to be issued to the authorities to permit the petitioner to submit his project work and allow him to appear in the viva-voce test, in which he has been left out and to declare the result of the petitioner.

4. The petitioner has also prayed for a direction to be issued to the respondent University to permit the petitioner to pursue his studies in the ongoing academic sessions.

B. *Arguments of the learned counsels for parties*

5. Sri R. K. Ojha, learned Senior Counsel assisted by Sri Ratnakar Upadhyay, learned counsel for the petitioner submits that the impugned order was passed in violation of the statutes of the university. The punishment imposed upon the petitioner is disproportionate. There is no provision for reform and

rehabilitation of delinquent students in the statutes, which has resulted in violation of the fundamental right of the petitioner guaranteed under Article 21 of the Constitution of India.

6. Sri Anish Kumar, Sri Pankaj Misra and Sri Gaurav Pundir, learned counsels for the petitioner in connected writ petitions adopt the aforesaid arguments of the learned Senior Counsel, apart from raising factual issues peculiar to the respective writ petitions in which they appear.

7. Sri V.K. Upadhyaya, learned Senior Counsel assisted by Sri V.D. Chauhan, learned counsel for the BHU submits that the BHU has taken action as per law.

8. The learned Senior Counsel relied on the affidavits filed by the B.H.U., on creation of a reform, self development and rehabilitation programme for delinquent students.

9. Sri Ajit Kumar Singh, learned Senior Counsel assisted by Sri V. D. Chauhan, learned counsel for the IIT BHU, contends that the IIT BHU, as a matter of policy accepts and is willing to adopt a professionally designed reform and rehabilitation programme for delinquent students. However, good order and discipline have to be maintained in the university, at all costs. In fact IIT BHU is currently even running a reform programme. He fairly conceded that the programme is not fully developed, and does not have a supporting statutory/legal frame work.

10. Sri Shashank Shekhar Singh, learned counsel for the respondent-AMU, submits that the AMU fully accepts the idea of a reform and rehabilitation programme for delinquent students on an institutional basis. He however contends that no compromise with the good order, discipline and the stability of the academic atmosphere can be made in any manner.

11. Sri Rizwan Akhtar, learned counsel for the UGC, Sri Rakesh Srivastava, and Sri Abrar Ahmed, learned counsels for the Union of India, have also been heard.

C. *Facts*

12. The petitioner is pursuing his LLM course from the respondent Aligarh Muslim University, Aligarh. The proceedings against the petitioner arise out of an incident of misconduct on 12.02.2019. The substance of the charges, as enumerated in the chargesheet dated 16.03.2019, is that the petitioner along with others persons, threatened and physically assaulted one Imran Khan on 12.02.2019. Imran Khan managed to escape, from the scene of the scuffle, but the petitioner and his companions, destroyed valuable documents and snatched a bag from his room. The petitioner and his companions tried to disrupt the communal harmony of the campus and created a law and order situation.

(i) Suspension, Enquiry, Current Status

13. The inquiry against the incident was earlier completed. However, the petitioner was later asked to re-testify before the enquiry committee and clarify the some issues. The enquiry is pending ever since. The petitioner stands suspended indefinitely.

D. *Legal Issues common in all writ petitions*

14. Absence of any reform and rehabilitative measures, in the administrative and legal frameworks of the universities, has serious legal and constitutional implications.

15. The impugned action and the statutory regime of imposing punishments will also be judged in such constitutional and legal perspectives. The discussion on these issues shall be common in all the companion writ petitions.

16. Calling attention to the statutes of the universities, namely, BHU, IIT BHU and AMU, the learned counsels for the petitioners; contended that the said statutes do not contain provisions for reform and rehabilitation of delinquent students. The action against delinquent students, is governed and regulated, solely by the penal provisions of the statutes of the respective universities. The punitive scheme is a common thread in the statutes of all the three universities.

17. In response, all the counsels for the various respondents universities', in fact conceded that as on date no structured and professionally designed programmes for reform, self development and rehabilitation of delinquent students, backed by a proper legal frame work, exist in the respective universities.

18. Accordingly, various orders were passed by this Court, from time to time, requiring the respective universities namely, Banaras Hindu University, Indian Institute of Technology Banaras Hindu University, and Aligarh Muslim University, as well as the University Grants Commission and the Union of India through the Ministry of Human Resource Development, New Delhi, to submit their responses in regard to creation of a reform and rehabilitation frame work, for delinquent students in universities and institutions of higher learning. The respondents were also required to indicate, whether they had any opposition or even reservation, in regard to the creation of the reform and rehabilitative programme for delinquent students in the universities.

19. All the respondents namely Banaras Hindu University (hereinafter referred to as BHU), Indian Institute of Technology, Banaras Hindu University (hereinafter referred to as IIT BHU), Aligarh Muslim University (hereinafter referred to as the AMU) as well as Union of India through Ministry of HRD and University Grants Commission (hereinafter referred to as UGC) have submitted their responses to the aforesaid issues.

E. *Stands of respective respondents on affidavits*

(i) Response of IIT BHU

20. The IIT BHU in its affidavit has recorded its full agreement with a reform oriented approach, to deal with deviant behaviour in students. Thus IIT, B.H.U., has made a ringing endorsement, of the need to adopt a reform and rehabilitation programme for delinquent students. However, it has also underscored the need for punitive action, to maintain a peaceful environment in the campus. The relevant paras of the affidavit are quoted hereinunder:

"2. That the present affidavit is being filed in compliance of the order dated 19.9.2019 passed by this Hon'ble Court.

4. That the Institute as indicated in the foregoing paragraph, is in full agreement with a reform oriented approach. However, in cases where reformative steps do not yield the desired corrections in behavior and actions of erring students, the Institute has to resort to punitive action in order to maintain the peaceful environment in the campus."

21. By categorically stating its commitment to reform of delinquent students, the IIT BHU has been true to its founding principles, and has faithfully discharged its obligations, under law and to the society.

(ii) Response of AMU

22. Upon orders being passed by this Court, the AMU to its credit, constituted an expert committee. The report of the expert committee has been submitted, and is made part of the record of the Court. The relevant parts of the Committee Report are extracted hereinbelow:

"In the light of the above the committee observes as under:

1. Our criminal justice system envisages two type of laws: one for Juveniles and second for other than Juveniles. There is a separate law for Juveniles known as Juvenile Justice Act, 2015 whereas others are covered under Code of Criminal Procedure, 1. 1976 and Indian Penal Code, 1860. The application of AMU Discipline and Conduct Rules, 1985 does not come primarily under the definition of Juvenile therefore the protection available to Juveniles are not available to the Students of the university in general. It becomes more relevant in view of the fact that at the time of admission every the disciplinary jurisdiction of the Vice Chancellor and the other authorities of the University is required to sign a declaration to the effect that he submits himself to the disciplinary jurisdiction of the Vice Chancellor and the other authorities of the University.

2. That it is also pertinent to mention here that Aligarh Muslim University is primarily a RESIDENTIAL UNIVERSITY and there are approximately 36,665 Students [22.593 University Students and departments/courses/Schools in the Aligarh Muslim University. Among these students 12,158 students reside in 56 Hostels (22 for girls) in the campus within the radius of 10 KM. Therefore, the future career of thousands of the students cannot be allowed to be jeopardized for the sake of handful of students who are involved in the indiscipline act and are destroying the whole atmosphere of the University.

3. In principle that criminal activity has no role to play in our education system therefore the students who are involved in the criminal activity have also no role to play in our education system. The students who are indulged in the criminal activity have different mind-set and have nothing to do with their studies. They are not at all interested to pursue their studies and their presence only hampers the study of the other students who are interested to pursue their study. It is the duty of the University to marginalize such type of students so that the students at large, who are more interested to pursue their studies, may pursue their studies in cordial and peaceful/ atmosphere.

4. That as per existing rules of the University, there is no compulsory/ mandated counselling available to students against whom the discipline and conduct rules are invoked. These rules are also not invoked in a routine way but

being a residential University there are day-today interactions/counselling with the Wardens, Provost Tutors, Teachers and Senior Students holding positions of Senior Hall/Food etc.

5. That the extreme punishments as provided in the 1985 rules are invoked when there is an extreme situation and continuance/presence of the students became a threat to the academic environment and campus life of the University.

6. At the same time the observations of the Hon'ble Mr. Justice Ajay Bhanot in this matter are highly appreciable in the context to infuse a reformative approach that the solution lies in engaging with the students, and harnessing their energies creatively. Errant behavior has to be reformed and not condemned. Erring students have to be transformed and not judged. The purpose of education is to unlock the immense potentiality in the human resource of the nation. This is possible by bringing about a conceptual shift in the concept of enforcing discipline, in the portals of the University. Indiscipline unchecked is indiscipline unleashed. But it is equally true. that expelling students from the University is a short term, if not a myopic view of the issue. A balance has to be drawn by the University authorities. The University has to create an ecosystem, with qualified staff and detailed programs of engaging with such students, with a view to give them an opportunity to reform themselves. Expulsion of students would abandon them to their own devices, close the doors of reformation to them, and shut them out from the redeeming light of knowledge. Leaving children accused of misconduct or deviant behavior, to fend for themselves would create issues for the society at large. In case Universities decline to shoulder the responsibilities of bringing such children back to the correct path, and do not provide the frame work for mainstreaming this class of students, the consequences would be detrimental to the society at large. There is no better institution in our democratic frame work, to embrace the young and questing spirits who have strayed from their path of morally upright and correct conduct. The Universities are uniquely equipped to deal with the challenge on an institutional basis. The Universities are repositories of knowledge, resources and experience to meet the challenge at hand. What is at stake, is not merely the future of an individual, but stability of the society The concerns of the society have to be handled by the University. The magnitude of the challenge is large, but it is imperative for the Universities to accept it and provide the adequate response.

After detailed deliberations and in the backdrop of above the committee proposes that:

1. Structural reformative approach may be included in the AMU Students Conduct and Discipline Rules of 1985 as this committee has identified some areas (not all inclusive) for counselling by a psychologist as enumerated above.

2. As the misconduct offences/crimes related to internet and cyberspace were not available when the Discipline Rules were framed, the same needs to be identified and appropriately included in the AMU Students Conduct and Discipline Rules of 1985 as it is growing among young and youth.

3. Outside campuses were not established when these rules were framed, hence, there is also need to amend these rules to include a structure for those centres.

The committee therefore recommends to the Vice-Chancellor as follows:

AMU Students Conduct and Discipline Rules 1985 were framed almost 30 years back and in the light of the observations given above, a detailed and exhaustive exercise may be undertaken by a committee to be appointed by the Vice-Chancellor under the convenorship of the Proctor of the University to formulate and propose a draft of revised AMU Students Conduct and Discipline Rules, inclusive of reformative approach, after exploring similar rules already enforced by sister universities and institutions in India and abroad for further consideration of the Vice-Chancellor and Academic Council of the University."

23. The AMU has thus in principle, recognized the need for a reform and rehabilitation programme for delinquent students in some areas in the university. The AMU too has accorded top priority, to the maintenance of discipline in the campus, and is rightly unwilling to compromise with the same.

(iii) Response of BHU

24. The initial affidavit filed by the BHU, in regard to their stand on a reformative and rehabilitation programme for delinquent students, stated in effect that the reformation of the students indulging deviant behaviour is achieved, by providing for various categories of punishments, depending upon the nature of indiscipline. It further asserted, that in the name of reformation, the University cannot give a "go by", to the objectives of the university. The relevant paras 17 and 18 of the affidavit dated 17.09.2019 are extracted hereunder:

"17. In the present case no such conditions exist and as such the continuance of the order of suspension of the petitioner from the privileges of the University and Hostel is in accordance with law. That 17. it is the University humbly that submitted administration and the Vice-Chancellor in particular is the custodian of the interests of all the students involved in various academic pursuits in the University. In the case of Banaras Hindu University the number of all the students at various levels runs into more than 30 thousand. For the smooth functioning of the University and maintenance of an environment conducive to academic pursuits the interest of an individual student must give way to the larger interests of all the students as a whole. This is not only in the interest of the students themselves but also in public interest. In the of reformation of the students the University name administration cannot give a go by to the objectives of the University nor can it take an action which may have the potential of destroying the smooth functioning of the University embroiling the University in large scale unrest both in the student as well as in the teaching community. If the University such situation is brought about a administration would be failing in its duty. The fact that Banaras Hindu University is the largest residential University in the country if not the world cannot be lost sight of. Even small spark has the potential of turning into a conflagration which may become difficult to contain.

18. That the facility and provisions aimed at reformation of the erring students found indulging in deviant behavior is inherent in the Ordinances of the University dealing with students' indiscipline by providing for various

categories of punishments depending upon the nature of indiscipline."

25. However, subsequently, the BHU filed an affidavit on 26th September, 2019, easing its reservations, against a reform and rehabilitation programme. The affidavit exhibited a shift in stand, indicating a willingness to consider a reformative approach. The para 7 of the affidavit is extracted hereunder:

"7. That all the aforesaid mechanisms and provisions exist in the University for creation and preservation of an academic ambience conducive to teaching and learning and vibrant and peaceful community life. However, there exist no provision in the Rules of the University for any formal reformative mechanism or process for such students as are found involved in an offence involving moral turpitude or heinous crime and hence are suspended from the privileges of the University. However, the University is not averse to considering this aspect, if it is found appropriate by the University through Constitution of a Committee of stakeholders which may look into as to whether such a mechanism is desirable in principle in the context of maintenance of academic ambience of the University or it may be detrimental to it, particularly, to the interest of larger group of the students, teachers and employees."

26. In substance the BHU was open to the concept of a structured reformative programme. It has however, desisted from taking a categorical position, on this most critical issue. While openness to new ideas is appreciated, failure to take a specific stand is also noticed. The Court will go no further.

(iv) Response of UGC

27. Sri Rizwan Ali Akhtar, learned counsel for the UGC has relied on the affidavit filed by the UGC. The UGC in its affidavit, stated that the universities are autonomous institutions. The academic and administrative decisions, are to be taken by the universities concerned, as per law. It was also stated that "the UGC has no role to play on day to day function of the Central Universities".

(v) Response of UoI

28. The Ministry of Human Resource Development, Government of India has chosen not to file any affidavit, despite orders passed by the Court and opportunities granted by the Court. The Court has to proceed, with the hearing in the interests of justice.

29. It was informed that the Ministry of Human Resource Development, Government of India, on its part had sent communications to the AMU and BHU, to protect its interests. The Court finds that the interests of the Union of India, are in no manner adversely affected. In these cases the interests of the Union of India, are not converse to the universities.

"The best lack all conviction."
~WB Yeats

30. Present discontents cannot be addressed by rote responses. Contemporary problems cannot be resolved by jejune formulae.

31. The universities cannot avoid a stand at the decision point. By prevarication at the decision point, the

university may postpone the reckoning, but cannot escape responsibility.

32. Law has to hold institutions accountable to their obligations, to the founding purposes, to the students and to the society at large.

33. Universities of eminence cannot justify present inertia on the foot of past glory. Universities have to be aware of the risks, of basking in the reflected glory of the past. Eminence is achieved by past glory, however, reputation is retained by present endeavours.

34. Universities at certain critical decision points, would be true to their founding purposes and extant obligations by making clear and creative interventions. The universities as well as other authorities cannot show ineptitude in the face of crises, and equivocation in the face of solutions. In these critical situations the universities as well as other authorities, have to stand up and intervene and not stand by and equivocate.

F. *Evolution of Fundamental Rights by courts*

35. The fundamental rights of citizens are stated in Part III of the Constitution of India. But as in all cases, text of the rights can never be the exhaustive description of all rights. Rights have to be interpreted from the text of the Constitution. The process of interpretation of the text, often results in the evolution of rights. The Constitution is the textual origin of fundamental rights. Constitutional law defines the substance of fundamental rights.

(i) Legislative lag, executive inertia and fundamental rights

36. The fast pace of life in modern times often, outstrips the capacity of the legislature, to cope with the consequences of social change. There is a limit to human foresight, but the possibilities of life are limitless. The limits of legislation are the constraints of human foresight. The legislative process is complex and even time taking. Human affairs do not wait on the legislative process. These facts frequently create a legislative lag. It is almost inevitable in the nature of things.

37. The first intersection of life with law, at times happens in courts, even before the legislature grapples with the problems. The courts are often seized, of various emerging issues in social and individual lives, before the legislatures are cognizant of them.

38. A legislative hiatus or executive lethargy, cannot cause a constitutional stasis. The enforcement of fundamental rights, cannot be forestalled by a legislative lag or executive inertia. Constitutional guarantees and Fundamental Rights, have to be enforced on demand. Constitutional overhang is perpetual. Law is always in motion, and never on a holiday.

39. The text of the Constitution, is a conceptual philosophy of fundamental rights, and not an exhaustive guide to fundamental rights. The text of the Constitution is fixed, fundamental rights are always evolving. This is the essence of constitutional law jurisprudence. There is a method in the evolution of constitutional law jurisprudence.

40. Evolution of constitutional law rights are guided and controlled by the text of the constitution, long settled judicial principles of interpretation of the constitution, and judicial precedents in point. The march of law is also assisted by consensus of values, in the comity of civilized nations. These universal values are often manifested in International Conventions and Treaties. Another source of such values is comparative international jurisprudence. The felt needs of the times are also factored in by the courts. Development of constitutional law happens on these sure foundations. Constitutional rights are distilled from this process. In this process, the courts discharge their constitutional obligations. This is not judicial activism by courts. It is judging.

41. The Hon'ble Supreme Court in the case of ***Vishaka Vs. State of Rajasthan,*** reported at ***1997 (6) SCC 241,*** issued various guidelines for the safety of women at working places. The guidelines held the field, till the Parliament enacted the legislation in that regard. Judicial directions in that case preceded, the legislative enactment. Infact the legislature was alerted, to the need of a legislation to cover the field, by the judgment of the Hon'ble Supreme Court.

42. This narrative will profit from the observations of the Hon'ble Supreme Court, in the case of ***Rattan Chand Hira Chand v. Askar Nawaz Jung,*** reported at ***(1991) 3 SCC 67:***

"The legislature often fails to keep pace with the changing needs and values nor is it realistic to expect that it will have provided for all contingencies and eventualities. It is, therefore, not only necessary but obligatory on the courts to step in to fill the lacuna. When courts perform this function undoubtedly they legislate judicially. But that is a kind of legislation which stands implicitly delegated to them to further the object of the legislation and to promote the goals of the society. Or to put it negatively, to prevent the frustration of the legislation or perversion of the goals and values of the society. So long as the courts keep themselves tethered to the ethos of the society and do not travel off its course, so long as they attempt to furnish the felt necessities of the time and do not refurbish them, their role in this respect has to be welcomed.

All courts have at one time or the other felt the need to bridge the gap between what is and what is intended to be. The courts cannot in such circumstances shirk from their duty and refuse to fill the gap. In performing this duty they do not foist upon the society their value judgments. They respect and accept the prevailing values, and do what is expected of them. The courts will, on the other hand, fail in their duty if they do not rise to the occasion but approve helplessly of an interpretation of a statute or a document or of an action of an individual which is certain to subvert the societal goals and endanger the public good."

G. *Process of law and the courts : Current State & Contemporary Challenges*

43. The pace of technological, social and economic developments, often pose a challenge to the courts. Courts of today often have to deal with complex issues ranging from science, technology, economics, archaeology, medicine, social

sciences and across other fields of highly specialized knowledge.

44. Lawyers on occasions lack the expertise, to grasp and simplify issues of varying complexity, from fields unrelated to law. Judges do not fare any better. Parties have their interests to protect.

45. The intellectual capital created by traditional resources of the judicial process, may not be adequate to manage such contemporary challenges. The judicial process would have to evolve, to meet the felt needs of the time. The rising tides of human knowledge, cannot pass the courts by. This shall require change in procedures, and development of infrastructure.

46. The intellectual resource base has to be widened. The debate has to be broadbased, to include direct inputs from experts as well. This would also entail well equipped libraries, which are staffed by qualified personnel and research assistants, and may be even experts. Institutional arrangements for interface of the courts with experts, have to be in place to ensure procedural propriety.

47. Debate on these issues will pave the way for the most important change, i.e. change in mindset. For the process to be credible and efficacious, a change has to come from within the judicial system. But change is inevitable, if judicial adjudication is to be just and remain relevant. In this regard, the High Court has a responsibility to fulfill, if not an obligation to discharge.

H. *Education*

(i) Importance and scope

"Where the mind is without fear
and the head is held high,
Where knowledge is free".
~Tagore

48. In education mankind discovered the message of unquenchable optimism, that humans could be separated from the cycle of repetitive thought and action. Learning was the key to the uninterrupted progress of any society. Knowledge instilled the belief that human life could be improved. Through knowledge alone, the hope is realized that humans can be reformed, and humanity can be transformed. Education is the supreme act of nation building, which essentially means nurturing of constitutional values, realization of constitutional goals, and strengthening the rule of law.

49. The idea of the Indian nation is founded, on the ideals of the Indian civilization. Many of these ideals are manifested in the Constitution, and find expression in constitutional law.

50. The quest for knowledge defines the Indian civilization. A salient feature in the search for learning, distinguishes the Indian civilization. Knowledge in Hellenic civilization was founded on reason. The human thirst for knowledge was also quenched by revelation. The distinctive feature of learning in Indian civilization, is that India's search for knowledge, while always embracing reason as a method and never denying revelation as a source, insists on realization as its goal.

51. The diversity of thought is reflected in the plurality of discourse in India. The enduring values which define India, have been preserved and propagated by the tradition of civilized debate. The unity of our nation is protected by respect and affirmation of a multi hued cultural

heritage and embracement of varied traditions of thought.

(ii) Role and obligation of universities

"Where the mind is led forward by thee
Into ever widening thought and action."
~Tagore

52. The universities are the custodians of the old values, even as they ceaselessly push the boundaries of modern knowledge.

53. In universities students of diverse backgrounds, and different beliefs, congregate in a common pursuit of knowledge. Through knowledge they will learn, that humanity unites more than diversity differentiates. With learning they will understand, that diversity enriches human life, and does not divide humankind. University experience will help them, cultivate constitutional values, and transcend violent and other aberrational tendencies.

54. Universities are not teaching shops, nor are they mere examining bodies. Universities nurture the intellect and develop the character of the young citizens in a wholesome manner. Students gain knowledge and imbibe values in universities. These dual pursuits constitute the founding purpose of a university, in fact its raison detre.

55. A unifocal approach promoting scholastic achievements, to the exclusion of character building, would undermine the founding principles of a university. A failure of character or deficit of values in students, may impel action against the delinquent student, but should also cause introspection in university authorities.

56. University education is not an arm's length transaction, between the teachers and the taught. Nor is university education an exact contractual relation, in the likeness of a consumer and a service provider.

I. *Discipline in Universities: Concept, Need & Challenges*

(i) Violence, intimidation and moral turpitude

"Where the clear stream of reason has not lost its way into the dreary desert sand of dead habit"
~Rabindranath Tagore

57. Violence degrades human life. Intimidation stifles human thought. Moral turpitude is the low ebb of human conduct. These are the scourges and yet inescapable facts of human life. Our society faces these issues, and our varsities grapple with them.

58. Violence, intimidation, and acts of moral turpitude, are not conducive to the academic atmosphere of a varsity, and pose a mortal threat to the values of a university. They retard the growth of free thought and reasoned debate. These evils have no place in our universities. The universities can prosper only when such evils are got rid of.

(ii) Communal disturbances in universities

"Where the world has not been broken up into fragments by narrow domestic walls".
~Rabindranath Tagore

59. In Writ C No. 32955 of 2019, (Ajay Singh Vs. Union of India and Others), the petitioner is charged with disturbing the communal harmony in the university.

60. Stoking communal hatred not only disrupts peace and order in a university, but can roil the foundations of law and harmony in our society. The problem cannot be tackled as a "discipline" issue alone. A composite and a conceptual approach has to be adopted. The roots of communal hate have to be analyzed and addressed. Communal hatred is a narrative, which stands in direct opposition, to our civilizational ethos and constitutional values. Communal hatred holds a threat, to the rule of law. Communal hatred cannot be countenanced in our universities, nor can be given any space in our society.

(iii) Discipline in universities

61. Discipline is the bedrock of any organization. In a university, discipline does not mean conformity of thought, or creation of a regimented class of people. In a varsity discipline is not the residue, after dissent is stifled and dissenters purged.

62. Discipline in a university is the consensus among all stakeholders, to live by the universal values which define the academic world. Discipline in a varsity is common allegiance and unshakable adherence, to values which nurture free thought, respect dissentient opinions, and create an environment of unimpeded academic pursuits. Hate and true debate cannot co-exist. Violence and true learning cannot cohabit.

63. Discipline has to be preserved at all costs, if the raison detre of the University is to be protected at all times. Indiscipline unchecked is indiscipline unleashed. However in our constitutional scheme, the means of ensuring discipline, is as important as the end of keeping discipline.

(iv) Statutory approach to maintaining discipline

64. The universities have created legal frameworks, to deal with acts of indiscipline, and to maintain discipline and order.

65. The power to take disciplinary action, and impose punishment upon delinquent students, is vested in the competent authorities, by the statutes of the concerned university. The following statutes govern and regulate, the process of initiating disciplinary action against delinquent students, and imposition of penalty for misconduct.

BHU -The Banaras Hindu University Act No. XVI of 1915 {Section 60}

ii. Chapter VIII, Ordinances Governing Maintenance of Discipline and Grievances Procedure.

iii. Notification, New Delhi, 31st July, 2017, BHU

AMU- The Aligarh Muslim University (Act No. XL of 1920), [Amendment] Act, 1981 (62 of 1981)

ii. Section 35 (5) of the AMU

iii. The Statutes of the University (as adapted under Section 28 of the Act) amended upto December, 2012).

IIT BHU - i. The Institutes of Technology Act, 1961

ii. The Institutes of Technology Amendment Act, 2012.

iii. Section 17(2) of the Act, 1961 (already quoted)

(The relevant extracts of the statutes are appended as appendix 1 to the writ petition.)

J. *Statutory Regime of Punishments in light of Article 21 & Doctrine of Proportionality*

66. The statutes of all the three universities contemplate only penal action, to deal with all forms of indiscipline or deviant conduct. The penal action may lead to suspension, and can even extend to expulsion and debarment.

67. The punitive provisions of the Statutes of the respective universities, manifest the deterrent intent of the law. A reformist approach to the problem is absent in the statutes. The makers of statutes have solely adopted a punitive or deterrent approach to the exclusion of other methods of dealing with issues of indiscipline or deviant conduct.

68. The aforesaid ordinances of the universities and the affidavits of the respondents have been perused. Submissions of the learned counsel for the universities have been considered. This Court finds that there is no structured, professionally designed reform, self development and rehabilitation programme, or therapeutic support system backed by a legal frame work, to deal with the delinquent students and like issues in the universities.

69. The statutory monopoly of a punitive approach, to deviant behaviour, and the exclusion of all other responses, often creates a lack of balance in the actions of the concerned University. In such cases, the punishment becomes disproportionate, not because the decision maker was incapable of measured action, but because the ordinances/statutes preclude a proportional response.

70. It is clarified, that the requirement of punitive provisions in the statutes is a given. The need to empower the authority, to take disciplinary action in law is undisputed. There is no infirmity in the statutory provisions. The inadequacy is in the reach of the statutory provisions.

71. The decision maker is constrained in his choices, by the absolute dominance of punitive provisions, and complete omission of reformative measures in the ordinances.

72. The impact of absence of reformative provisions and the presence of a statutory bias in favour of a punitive approach, on the fundamental rights of the petitioners, shall also be assessed in the next part of the judgment.

K. *Punishments and Article 21*
(i) Right to human dignity

73. A life without dignity is robbed of its meaning. Absent self worth, life is devoid of content.

74. Human dignity as a concept, was created by an international consensus, on universal human values. "Human dignity" and "self worth" are used, in close proxmity in international instruments, reflecting the affinity between the concepts.

75. The comity of nations, first pledged commitment to protecting the "dignity and worth" of the human person,

in the charter of the United Nations. These eternal values were reiterated, in subsequent international instruments and conventions including the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others (1951); the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (1956); the Convention on the Elimination of All Forms of Discrimination against Women (1979); the Convention on the Rights of the Child (1989); and the Convention on the Rights of Persons with Disabilities (2006).

76. Human dignity and self worth, were increasingly incorporated in the jurisprudence of all liberty loving nations in the post World War II era.

77. The complexity of the concept of human dignity, never diluted the usefulness of the theory of human dignity in enhancing the worth of the human person. Human dignity made a decisive contribution in the development of the rights of life and liberty, in jurisprudential systems of free societies across the world.

78. However, the Court would do well to observe the caution, that a sweeping judicial definition of human dignity, would make an abstract theory, unintelligible. An unduly wide judicial construct of human dignity, would create unworkable judicial tests.

79. Likewise if the courts adopt too narrow a view of human dignity, a concept which has made stellar contribution to the advancement of human rights will be lost.

80. Keeping these pitfalls in mind, a balance has to be maintained, between attempting too much and recoiling from the task altogether.

81. The applicability of human dignity, would be determined in this case, by evolving a workable test or construct of human dignity and self worth applicable to these cases.

82. Human dignity is not inserted in the text of the fundamental rights under the Constitution of India. Human dignity occurs in the Preamble to the Constitution of India.

83. The Preamble to the Constitution, reflects the resolve of the People of India, to secure to all its citizens

"Justice social, economic and political;
Liberty of thought, expression, belief, faith and worship;
Equality of status and of opportunity;
and to promote among them all and
Fraternity assuring the dignity of the individual and the unity of the Nation."

The Preamble to the Constitution is not analogous, to a preamble to any legislative enactment.

84. The unique place of the Preamble, in the Constitution came to be noticed very early, in ***Sajjan Singh v. State of Rajasthan,*** reported at ***AIR 1965 SC 845.*** The Hon'ble Supreme Court found that the Preamble to our Constitution is "not of the common run". Further the Preamble bore the "stamp of deep deliberation" and precision.

85. This feature shines light on the special significance, attached to the Preamble by the framers of the Constitution. The Preamble was held to be a part of the Constitution, by the Hon'ble Supreme Court in ***Kesavananda Bharati v. State of Kerala,*** reported at ***(1973) 4 SCC 225.***

86. The words 'life, law and liberty' in Article 21 of the Constitution of India, were freed from the confines of narrow and literal interpretation by the Courts. (See ***Maneka Gandhi v. Union of India, (1978) 1 SCC 248***)

87. A defining moment came when the Hon'ble Supreme Court, liberated "life" from the fetters of mere physical existence. (see ***Olga Tellis v. Bombay Municipal Corpn.*** Reported at ***(1985) 3 SCC 545***).

88. Over the years human dignity, has been read into the meaning of life and liberty, under Article 21 of the Constitution of India, by consistent pronouncements of the courts.

89. A broad overview of some of the leading pronouncements of the Hon'ble Supreme Court, elevating human dignity to the status of a fundamental right, are discussed in the succeeding paragraphs.

(ii) Supreme Court on human dignity

90. The concept of human dignity forming a part of Article 21, was introduced in ***Prem Shankar Shukla v. UT of Delhi,*** reported at ***(1980) 3 SCC 526.*** While construing the constitutional rights of prisoners, in ***Prem Shankar Shukla (supra),*** Krishna Iyer, J. speaking for a three-Judge Bench of the Hon'ble Supreme Court held:

"1. ... the guarantee of human dignity, which forms part of our constitutional culture, and the positive provisions of Articles 14, 19 and 21 spring into action when we realise that to manacle man is more than to mortify him; it is to dehumanise him and, therefore, to violate his very personhood, too often using the mask of "dangerousness" and security.

21. The Preamble sets the humane tone and temper of the Founding Document and highlights justice, equality and the dignity of the individual."

91. Undermining the human dignity of a detenue, under the Conservation of Foreign Exchange and Prevention of Smuggling Activities (COFEPOSA) Act, 1974 was not countenanced by the Hon'ble Supreme Court in ***Francis Coralie Mullin v. UT of Delhi,*** reported at ***(1981) 1 SCC 608*** by ruling thus:

"6. ... The fundamental right to life which is the most precious human right and which forms the ark of all other rights must therefore be interpreted in a broad and expansive spirit so as to invest it with significance and vitality which may endure for years to come and enhance the dignity of the individual and the worth of the human person.

7. ... the right to life enshrined in Article 21 cannot be restricted to mere animal existence. It means something much more than just physical survival."

92. The right to live with human dignity flowing from Article 21, was employed by the Hon'ble Supreme Court to unlock the fetters of those living in

bondage and setting them free in ***Bandhua Mukti Morcha v. Union of India,*** reported at ***(1984) 3 SCC 161.*** The Hon'ble Supreme Court in ***Bandhua Mukti Morcha (supra)*** observed that:

"10. ...This right to live with human dignity enshrined in Article 21 derives its life breath from the directive principles of State policy and particularly clauses (e) and (f) of Article 39 and Articles 41 and 42 and at the least, therefore, it must include protection of the health and strength of the workers, men and women, and of the tender age of children against abuse, opportunities and facilities for children to develop in a healthy manner and in conditions of freedom and dignity, educational facilities, just and humane conditions of work and maternity relief. These are the minimum requirements which must exist in order to enable a person to live with human dignity, and no State -- neither the Central Government nor any State Government -- has the right to take any action which will deprive a person of the enjoyment of these basic essentials."

93. Dehumanizing treatment given to the arrested activists of an organization by the police authorities was called out by the Hon'ble Supreme court, in ***Khedat Mazdoor Chetna Sangath v. State of M.P.,*** reported at ***(1994) 6 SCC 260,*** wherein it was recognized:

"10. ... It is, therefore, absolutely essential in the interest of justice, human dignity and democracy that this Court must intervene; order an investigation, determine the correct facts and take strongest possible action against the respondents who are responsible for these atrocities."

94. The right of human dignity was also construed by the Hon'ble Supreme Court in ***M.Nagaraj v. Union of India,*** reported at ***(2006) 8 SCC 212.*** In that case the right was held to be intrinsic to and inseparable from human existence:

"26. ... The rights, liberties and freedoms of the individual are not only to be protected against the State, they should be facilitated by it. ... It is the duty of the State not only to protect the human dignity but to facilitate it by taking positive steps in that direction. No exact definition of human dignity exists. It refers to the intrinsic value of every human being, which is to be respected. It cannot be taken away. It cannot give (sic be given). It simply is. Every human being has dignity by virtue of his existence.

42. India is constituted into a sovereign, democratic republic to secure to all its citizens, fraternity assuring the dignity of the individual and the unity of the nation. The sovereign, democratic republic exists to promote fraternity and the dignity of the individual citizen and to secure to the citizens certain rights. This is because the objectives of the State can be realised only in and through the individuals. Therefore, rights conferred on citizens and non-citizens are not merely individual or personal rights. They have a large social and political content, because the objectives of the Constitution cannot be otherwise realised."

95. The Hon'ble Supreme Court in ***Shabnam v. Union of India,*** reported at ***(2015) 6 SCC 702*** elaborated the following elements of the human dignity;

"14. This right to human dignity has many elements. First and foremost, human dignity is the dignity of each

human being "as a human being". Another element, which needs to be highlighted, in the context of the present case, is that human dignity is infringed if a person's life, physical or mental welfare is harmed. It is in this sense torture, humiliation, forced labour, etc. all infringe on human dignity. It is in this context many rights of the accused derive from his dignity as a human being."

(emphasis in original)

96. Aharon Barak (former Chief Justice of the Supreme Court of Israel), discussed the constitutional value of human dignity, in the following celebrated passage:

"The constitutional value of human dignity has a central normative role. Human dignity as a constitutional value is the factor that unites the human rights into one whole. It ensures the normative unity of human rights. This normative unity is expressed in the three ways: first, the value of human dignity serves as a normative basis for constitutional rights set out in the constitution; second, it serves as an interpretative principle for determining the scope of constitutional rights, including the right to human dignity; third, the value of human dignity has an important role in determining the proportionality of a statute limiting a constitutional right. "

97. The views of the Judge Aharon Barak, were approved and incorporated in the corpus of human dignity jurisprudence, in our country by the Hon'ble Supreme court in ***Jeeja Ghosh v. Union of India,*** reported at ***(2016) 7 SCC 761.***

98. The consequences of loss of human dignity in an individual's life, were noted by the Hon'ble Supreme Court in ***Mehmood Nayyar Azam v. State of Chhattisgarh,*** reported at ***(2012) 8 SCC 1.***

99. Similar sentiments were expressed on human dignity, by the Hon'ble Supreme Court in ***National Legal Services Authority v. Union of India,*** reported at ***(2014) 5 SCC 438.***

100. In ***Maharasthra University of Health Sciences v. Satchikitsa Prasarak Mandal*** reported at ***(2010) 3 SCC 786,*** the Hon'ble Supreme court upon consideration of good authority, reiterated the dignity of the individual as a core constitutional concept.

101. While in ***Selvi v. State of Karnataka*** reported at ***(2010) 7 SCC 263,*** the Hon'ble Supreme Court ruled thus:

"244.....we must recognize that a forcible intrusion into a person's mental processes is also an affront to human dignity and liberty, often with grave and long-lasting consequences."

102. Even prisoners have been found entitled to the fundamental rights while in custody by the Hon'ble Supreme Court (see ***Sunil Batra (II) Vs. Delhi Administration,*** reported at ***1980 (3) SCC 488***).

103. The importance of therapeutic approach in dealing with the criminal tendencies of prisoners and the necessity for reform, was considered by the Hon'ble Supreme Court in ***T.K. Gopal v. State of Karnataka,*** reported at ***(2000) 6 SCC 168,*** by holding that:

"15. The therapeutic approach aims at curing the criminal tendencies

which were the product of a diseased psychology. There may be many factors, including family problems. We are not concerned with those factors as therapeutic approach has since been treated as an effective method of punishment which not only satisfies the requirements of law that a criminal should be punished and the punishment prescribed must be meted out to him, but also reforms the criminal through various processes, the most fundamental of which is that in spite of having committed a crime, maybe a heinous crime, he should be treated as a human being entitled to all the basic human rights, human dignity and human sympathy. It was under this theory that this Court in a stream of decisions, projected the need for prison reforms, the need to acknowledge the vital fact that the prisoner, after being lodged in jail, does not lose his fundamental rights or basic human rights and that he must be treated with compassion and sympathy."

104. In ***Asfaq v. State of Rajasthan and Others,*** reported at ***(2017) 15 SCC 55,*** the Hon'ble Supreme Court emphasizing the need for reform of a convict held that "redemption and rehabilitation of such prisoners for good of societies must receive due wightage while they are undergoing sentence of imprisonment."

105. The judicial authorities can be multiplied, reiterating the above holdings. However, the same will add volume, but not value to the narrative.

106. Consistent and high authority have thus entrenched human dignity as fundamental to right to life, which flows from Article 21 of the Constitution of India.

107. The narrative would not be complete without reference to the most authoritative pronouncement, of the Hon'ble Supreme Court in the case of ***K.S. Puttaswamy v. Union of India*** reported at ***(2017) 10 SCC 1***

108. Dr. D. Y. Chandrachud, J. speaking for the Constitution Bench, firmly and irrevocably, reiterated that human dignity is a fundamental right under Article 21 of the Indian Constitution, with customary eloquence, in ***K.S. Puttaswamy (supra).*** Dr. D. Y. Chandrachud, J., upon consideration of the judicial precedents in point distilled the concept of human dignity and its place in part III of the Constitution:

"Jurisprudence on dignity

"108. Over the last four decades, our constitutional jurisprudence has recognised the inseparable relationship between protection of life and liberty with dignity. Dignity as a constitutional value finds expression in the Preamble. The constitutional vision seeks the realisation of justice (social, economic and political); liberty (of thought, expression, belief, faith and worship); equality (as a guarantee against arbitrary treatment of individuals) and fraternity (which assures a life of dignity to every individual). These constitutional precepts exist in unity to facilitate a humane and compassionate society. The individual is the focal point of the Constitution because it is in the realisation of individual rights that the collective well-being of the community is determined. Human dignity is an integral part of the Constitution. Reflections of dignity are found in the guarantee against arbitrariness (Article 14), the lamps of freedom (Article 19) and in the right to life and personal liberty (Article 21).

118. Life is precious intself. But life is worth living because of the freedoms which enable each individual to live life as it should be lived. The best decisions on how life should be lived are entrusted to the individual. They are continuously shaped by the social milieu in which individuals exist. The duty of the State is to safeguard the ability to take decisions. "Life" within the meaning of Article 21 is not confined to the integrity of the physical body. The right comprehends one's being in its fullest sense. That which facilitates the fulfillment of life is as much within the protection of the guarantee of life.

119. To live is to live with dignity. The draftsmen of the Constitution defined their vision of the society in which constitutional values would be attained by emphasising, among other freedoms, liberty and dignity. So fundamental is dignity that it permeates the core of the rights guaranteed to the individual by Part III. Dignity is the core which unites the fundamental rights because the fundamental rights seek to achieve for each individual the dignity of existence. Privacy with its attendant values assures dignity to the individual and it is only when life can be enjoyed with dignity can liberty be of true substance. Privacy ensures the fulfilment of dignity and is a core value which the protection of life and liberty is intended to achieve."

(iii) Comparative International Jurisprudence

109. A survey of comparative international jurisprudence, on the point of human dignity and the rights flowing therefrom, shows convergence in the values of human dignity across the free world.

110. The foreign authorities can be cited to show that human dignity is an accepted universal value in the comity of nations.

111. In ***Rosenblatt v. P Baer,*** reported at ***1966 SCC OnLine US SC 22 : 383 US 75 (1966),*** the US Supreme Court found that "The essential dignity and worth of every human being" was at the root of any system of "ordered liberty".

"The right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being- a concept at the root of any decent system of ordered liberty."

112. In the case of ***Armoniene v. Lithuania,*** reported at ***(2009) EMLR 7,*** the European Court of Human Rights set its face against an act of disclosure of a person's state of health, causing "exclusion from social life", and found it violative of the right to privacy by holding thus:

"The Court takes particular note of the fact that the family lived not in a city but in a village, which increased the impact of the publication on the possibility that the husband's illness would be known by his neighbours and his immediate family, thereby causing public humiliation and exclusion from village social life."

113. The human dignity rights of prisoners included rehabilitation, in the opinion of the US Supreme Court in ***Procunier, Corrections Director, ET AL. Vs. Martinez ET AL.*** reported at ***416 U.S. 396 (1974***):

"The Court today agrees that "the weight of professional opinion seems to be that inmate freedom to correspond

with outsiders advances rather than retards the goal of rehabilitation."

Balanced against the State's asserted interests are the values that are generally associated with freedom of speech in a free society - values which "do not turn to dross in an unfree one." Sostre v. McGinnis, supra, at 199. First Amendment guarantees protect the free and uninterrupted interchange of ideas upon which a democratic society thrives. Perhaps the most obvious victim of the indirect censorship effected by a policy of allowing prison authorities to read inmate mail is criticism of prison administration. The threat of identification and reprisal inherent in allowing correctional authorities to read prisoner mail is not lost on inmates who might otherwise criticize their jailors. The mails are one of the few vehicles prisoners have for informing the community about their existence and, in these days of strife in our correctional institutions, the plight of prisoners is a matter of urgent public concern. To sustain a policy which chills the communication necessary to inform the public on this issue is at odds with the most basic tenets of the guarantee of freedom of speech.

The First Amendment serves not only the needs of the polity but also those of the human spirit - a spirit that demands self-expression. Such expression is an integral part of the development of ideas and a sense of identity. To suppress expression is to reject the basic human desire for recognition and affront the individual's worth and dignity. 14 Cf. Stanley v. Georgia, 394 U.S. [416 U.S. 396, 428]557 (1969). Such restraint may be "the greatest displeasure and indignity to a free and knowing spirit that can be put upon him." J. Milton, Aeropagitica 21 (Everyman's ed. 1927). When the prison gates slam behind an inmate, he does not lose his human quality; his mind does not become closed to ideas; his intellect does not cease to feed on a free and open interchange of opinions; his yearning for self-respect does not end; nor is his quest for self-realization concluded. If anything, the needs for identity and self-respect are more compelling in the dehumanizing prison environment. Whether an O. Henry writing his short stories in a jail cell or a frightened young inmate writing his family, a prisoner needs a medium for self-expression. It is the role of the First Amendment and this Court to protect those precious personal rights by which we satisfy such basic yearnings of the human spirit."

114. The validity of a punishment causing loss of nationality, for an act of desertion in military service, was in issue before the ***US Supreme Court, in Trop Vs. Dulles,*** reported at ***356 US 86 (1958).*** The US Supreme Court in **Trop (supra)** reiterated the importance and role of rehabilitation in a penal system, while dealing with the validity of the punishment. The principle holding of the US Supreme Court on these points is as under:

"Expatriation, in this respect, constitutes an especially demoralizing sanction. The uncertainty, and the consequent psychological hurt, which must accompany one who becomes an outcast in his own land must be reckoned a substantial factor in the ultimate judgment.

The novelty of expatriation as punishment does not alone demonstrate its inefficiency. In recent years we have seen such devices as indeterminate sentences and parole added to the traditional term of imprisonment. Such penal methods seek to

achieve the end, at once more humane and effective, that society should make every effort to rehabilitate the offender and restore him as a useful member of that society as society's own best protection. Of course, rehabilitation is but one of the several purposes of the penal law. Among other purposes are deterrents of the wrongful act by the threat of punishment and insulation of society from dangerous individuals by imprisonment or execution. What then is the relationship of the punishment of expatriation to these ends of the penal law? It is perfectly obvious that it constitutes the very antithesis of rehabilitation, for instead of guiding the offender back into the useful paths of society it excommunicates him and makes him, literally, an outcast. I can think of no more certain way in which to make a man in whom, perhaps, rest the seeds of serious antisocial behavior more likely to pursue further a career of unlawful activity than to place on him the stigma of the derelict, uncertain of many of his basic rights. Similarly, it must be questioned whether expatriation can really achieve the other effects sought by society in punitive devices. Certainly it will not insulate society from the deserter, for unless coupled with banishment the sanction leaves the offender at large. And as a deterrent device this sanction would appear of little effect, for the offender, if not deterred by thought of the specific penalties of long imprisonment or even death, is not very likely to be swayed from his course by the prospect of expatriation. However insidious and demoralizing may be the actual experience of statelessness, its contemplation in advance seems unlikely to invoke serious misgiving, for none of us yet knows its ramifications."

(iv) Constitutionality of punishments under the statutes

"Universities are made by love, love of beauty and learning."

~ Annie Besant

115. The engagement of human dignity and Article 21 will now be examined in the context of punishment, imposed on a delinquent student.

116. The statutory scheme of enforcing discipline by imposition of punishments and suspension has a salutary purpose, but it needs to be compliant with the requirements of fundamental rights.

117. Punishment has to be effective to serve its purpose; however, it cannot be purblind to human dignity, if it is to retain its constitutionality.

118. Severity of a punishment is not sufficient basis for holding it unconstitutional. The enquiry into the constitutionality of a punishment, will examine the relationship between the punishment and its purpose, and whether the penalty can achieve the purpose. The enquiry will also determine whether the punishment degrades the human person, and whether it devalues human dignity against established norms of decency, or has a dehumanizing effect.

119. Degree of injuries to self esteem, extent of degradation of human worth, depth of humiliation caused by the punishment, are facts to be probed in an enquiry into the validity of the punishment.

120. Experience teaches the fact of human fallibility, but knowledge holds the hope of human redemption. If error is part of human nature, reform is an element of human spirit. The capacity of human beings to introspect on erring ways and the power of human will to reform deviant conduct are building blocks of the concept of human dignity. "Every sinner has a future, many a saint had a past."

121. Punishment for deviant conduct, cannot be so severe as to degrade human life. Every form of punishment should protect the essential sanctity of human life and comport with fundamental norms of decency evolved by a civilized society. Any act which dehumanizes life cannot be countenanced by societies and courts which value life and liberty. The degrading or dehumanizing elements of the punishment have to be eliminated to bring it in conformity with requirement of human dignity, contemplated by Article 21 of the Constitution of India.

122. Failure to consider susceptibility to reform, while denying the right to access privileges and activities of the university, negates the possibility of rehabilitation. Absence of an environment of reform, self development and rehabilitation in a university, denies the opportunity of redeeming one's reputation. Termination of dialogue with the delinquent student, without offering an opportunity to reform, makes him an outcaste. The individual is permanently discarded by the institution, and loss of human self worth is total. This system of punishment is destructive of fundamental elements of human dignity, and violative of Article 21 of the Constitution of India.

123. Another aspect of the punishment which needs consideration, is the consequence exclusion from higher education.

124. Education is a most credible and effective mode of restoring self esteem and enhancing self worth. By denying opportunities of education to a delinquent student, without looking at the possibility of reform, the power to redeem one's errors and enhance self worth is taken away from an individual. In these cases, closure of avenues of education, extinguishes the hope for a better tomorrow. Loss of hope and its sequitor perpetual condemnation are fatal blows to the human spirit and self esteem.

125. Acts of deviant conduct, violence or intimidation, do not cease the need for social engagement or knowledge. Such needs are more acutely felt and require satisfaction in these cases.

126. Order may be enforced by punishments. Causes of deviant conduct can be addressed only by engagement. Punishments deal with the offence, reform deals with the offender.

127. Public interest however demands that the claim for further education, and engagement with delinquent students, should be guided and controlled by the authorities.

128. Statutory regimes in universities, dealing with delinquent behaviour and university environments, which are bereft of therapeutic and reform based support systems, are incompatible with the constitutional mandate to uphold human dignity. The violations of human dignity, in such cases, are summed up hereinunder:

129. Dignity violations occur when a punishment meted out to a student, does not consider his susceptibility to reform, and degrades his person by exclusion to the point where his diminished self worth cannot be reinstated due to systemic inadequacies or institutional shortcomings.

130. By denying further education, and neglecting to create an institutional system of reform, self development and rehabilitation, the university in effect tells the delinquent student, that it does not recognize the student's need to re-establish his self esteem. In other words, the student is not only impervious to reform, but incapable of enhancing his self esteem.

131. Dignity of an individual/student is injured, when it is found that the punishment precludes reform by rehabilitative measures, and prevents self enhancement by further education.

132. The punitive consequences of the action, cannot go beyond the requirements of the case. In this case they do.

An institutional reform, self development and rehabilitation programme, will enable a delinquent student to introspect on errors, express remorse and correct course.

133. Neglect by the universities to create an institutional reform, self development and rehabilitation programme thus places substantial obstacles in the enjoyment of the fundamental right of human dignity under Article 21.

134. The result of the preceding narrative is as follows:-

(i) The impugned action taken by the university, against the petitioner is violative of the fundamental right of human dignity of the petitioner, guaranteed under Article 21 of the Constitution of India, as it fails to consider his susceptibility to reform, and does not enable the petitioner to undergo a reform and self development process to redeem himself.

(ii) The statutory omission of reform measures, is an inadequacy which renders the university incapable of rectifying the violation made by it. The systemic fault-line is contrary to the mandate of Article 21 of the Constitution of India.

(v) Systemic responses : Responsibilities of the State and universities

135. Exercise of judicial power is the prerogative of the courts; but upholding the Constitution is not the monopoly of the courts.

136. To realize the fundamental rights guaranteed under the Constitution and to achieve the goals contemplated under the Preamble, all stakeholders have to play their part and all organs of governance have to perform their obligations. Constitutional ideals will become meaningful only if constitutional values animate the functioning of all institutions of governance. Universities have a special role to play.

137. The State and in this case the universities too, have the obligation to create an enabling environment, (emphasis supplied) where life and life enhancing attributes under Article 21 of the

Constitution of India flourish and where constitutional ideals become a reality.

138. The importance of "therapeutic approach" in solving social dysfunctions, the growth in role of the State to give away public recognition in the way they treat their citizens, the evolution of law on the subject, and the contribution of universities were analyzed by Francis Fukuyama in his book "Identity". Some of the instructive passages are extracted below:

"The therapeutic turn in the popular culture of advanced liberal democracies such as the United States was inevitably reflected in its politics, and in an evolving understanding of the role of the state. In the classical liberalism of the nineteenth century, the state was held responsible for protecting basic rights such as freedom speech and association, for upholding a rule of law, and for providing essential public services such as police, roads, and education. The government "recognized" its citizens by granting them individual rights, but the state was not seen as responsible for making each individual feel better about himself or herself."

"Under the therapeutic method, however, an individual's happiness depends on his or her self-esteem, and self-esteem is a by-product of public recognition. Governments are readily able to give away public recognition in the way that they talk about and treat their citizens, so modern liberal societies naturally and perhaps inevitably began to take on the responsibility for raising the self-esteem of each and every one of their citizens".

"Therapeutic services came to be deeply embedded in social policy, not just in California but throughout the United States and in other liberal democracies. States began to offer psychological counseling and other mental health services, and schools began to incorporate therapeutic insights into the way that they taught children."

"In the early twentieth century, social dysfunctions such as delinquency or teen pregnancy were seen as deviant behaviour that needed to be dealt with punitively, often through the criminal justice system".

"But with the rise of therapeutic approaches by mid century, they were increasingly seen as social pathologies that needed to be treated through counseling and psychiatric intervention".

"The 1956 amendments to the Social Security Act allowed for federal reimbursements of a range of therapeutic services to strengthen family life and self-support."

"The therapeutic state metastasized across a wide number of institutions, including a large non-profit sector that by the 1990s had become the delivery vehicle for state-funded social services".

"Universities found themselves at the forefront of the therapeutic revolution."

(emphasis supplied)

139. These special needs of citizens have to be addressed by State action, and also through judicial interventions in a nuanced manner, and in a larger perspective. Exclusive reliance on coercive powers of the law, shall be inadequate and an unsatisfactory way of dealing with the problem. The therapeutic jurisprudence draws heavily from concept of human dignity and self worth for its philosophical underpinning.

140. Disciplinary action should also be supported by reformative philosophy. Reformative philosophy does not undermine the deterrent approach.

141. The statutory regime imposes punishment for delinquent acts. The reform programme will address the cause of delinquency itself. Framing the approach to discipline as a choice between punishment or reform is misleading. A just corrective system needs both. Both approaches complement each other and can be pursued simultaneously. Deterrent aspect may also be reinforced, by making grant of the degree contingent upon successful completion of the reform programme.

142. The ordinances providing for punishments for deviant conduct need to be duly supported by a legal framework for structured reform, self development and rehabilitation programmes. This environment will accord social recognition to the need for reform of delinquent students. The degrading effect of punishment will be ameliorated. Dialogue will end isolation, reform will reinstate self worth and education will enhance self esteem.

143. Structured reform, self development and rehabilitation programmes and therapeutic support, within a legal framework, will create an ***enabling environment*** *(emphasis supplied)* in the universities, to realize the fundamental right of human dignity, flowing from Article 21 of the Constitution of India.

L. *Reform, Self Development & Rehabilitation*

(i) Role of universities in achieving behavioral change

"You must be the change you wish to see in the world"

~Mahatma Gandhi

144. Non violence as a philosophy of thought, and a creed of conduct, was developed in India on a scale wider than elsewhere. From the Buddha to Ashoka and the Mahatma, behavioral change in adopting non violence as a way of life, at the national scale was greatly accomplished in India.

145. The response of the Indian civilization, to the challenges of communal hatred and communal otherness, was profound and without parallel. The unique response of the Indian society was fashioned by the universal philosophy of the Indian civilization; of affirming the unity of the human race, of embracing diversity, of respecting dissent, and creating a harmonious dialogue of faiths. The lives and teachings of saints and thinkers like Guru Nanak, Kabir, Vivekananda, Tagore and Mahatma Gandhi, bear testimony to this composite culture.

146. For each generation to produce such individuals of excellence is an exorbitant demand. Today behavioral change is achieved in a different manner, albeit more incrementally and less dramatically. Institutions like universities have a critical role to play. Universities have an obligation to the society and the individual. The universities have an irrevocable compact, and an organic connect with the society.

147. University is a paternal institution. By the act of suspension or debarment of a delinquent student, the university abandons its ward. The university has solved its problem, but the society has one at its hands. The downstream effects of the punishments, have not been considered by the

respondents. Clearly there are direct costs to the society as well. There are no other institutions of equal standing, to engage with the youth, deal with the discontent or aberration, and channelize youthful energies.

148. The role of the University does not end in punishing perpetrators of violence. It begins with the identification of the causes of violence, communal hatred, and other forms of deviant conduct. Thereafter the responsibility to achieve behavioral change commences. The fruit of knowledge imparted by the universities lies in the manifestation of human values in the human personality and expression of humanity in human conduct. Knowledge which does not change human behaviour in this manner is futile.

(ii) Imbibing Constitutional values and purging communal hatred

149. The Indian civilizational ethos and the Indian constitutional values are congruent. The Supreme Court distilled the essence of Indian values, when it emphasised "our tradition teaches tolerance, our philosophy preaches tolerance and our Constitution practises tolerance; let us not dilute it" while upholding the religious rights of Jehovah's witnesses in ***Bijoe Emmanuel and others vs. State of Kerala and others,*** reported at ***(1986) 3 SCC 615.***

150. Universities have to protect the space for open dialogue, respectful engagement and reasoned debate. Universities need to ensure that the space for constitutional values, is not encroached by communal hatred.

151. The universities have the responsibility, to preserve this heritage, and the obligation to nurture these constitutional values. University experience has to inculcate these values in the students.

152. The universities may consider holding seminars, workshops, heritage festivals, cultural festivals, literature festivals, and encourage other activities to achieve this end. This has to be a part of the larger programme of value creation and self development.

(iii) Present discontents of students and solutions

153. The preceding discussion shows how a reform, self development and rehabilitation programme, will create an enabling environment, for realization of the fundamental rights of the individual under Article 21. How such programme, will yield tangible benefits for the society, will now be examined.

154. The paradox of the digital age is a plethora of devices and a dilution of dialogue, the substitution of conversation by chatter. There is the ever present danger of growth of knowledge and diminution of thought. The young are empowered by technology, but made restless by the void in values, and lack of direction.

155. The dilemmas of the digital age were acutely summed up by Yuval Noah Harari in his profound and acclaimed work "Homo Deus":

"Today our knowledge is increasing at breakneck speed, and theoretically we should understand the world better and better. But the very opposite is happening. Our new-found knowledge leads to faster economic, social and political changes; in an attempt to understand what is happening, we accelerate the accumulation of knowledge, which leads only to faster and greater upheavals. Consequently we are less and less able to make sense of the present or forecast the future."

156. In this situation lack of avenues of engagement, absence of a structured reform, self development and therapeutic support system, leaves the students with little options. The choices available in the society, to satisfy their need for belonging, to recover self esteem, and to channelize youthful energies are not very encouraging.

157. Re-establishing meaningful dialogue, recreating an environment of fruitful conversation, and making empathetic engagement are some of the present challenges. The responsibility of reaching out and engaging with the students, and increasing quality interface with them, lies with the universities and the teachers.

158. These obligations can be accomplished by a meticulously created reform/self development programme and high quality of academic leadership within a comprehensive legal framework.

159. Universities are a microcosm of the society. They are laboratories of social change, and also agents of social transformation.

160. The manner in which the universities deal, with aberrations of violence other forms of deviant conduct, and deficit of values in students, has repercussions for the society at large. The divergent pulls of primordial instincts of hate and violence, against a citizen's duties in a nation ruled by law can best be managed by universities.

161. The universities are uniquely placed to deal with these issues. The universities have the intellectual capital, institutional framework and moral leadership, which puts them in the front rank of institutions to effect such change. The environment in the University should encourage and engender reflective actions instead of automatic choices.

162. The reform/self development and rehabilitation programme, will give an individual student correct direction in life, and prevent one from drifting away. The student will be anchored in constitutional values, and will not be led astray by social evils. The support and aid by the university will give one a sense of ownership and belonging. No harvest is richer for a nation, than citizens empowered by a constitutional value system.

163. The high pedestal at which teachers are placed in Indian traditions and thoughts, was recalled to explain the current role of teachers in Indian society, by the Hon'ble Supreme Court in the case of **Avinash Nagra Vs. Navodaya Vidyalaya Samiti and Others,** reported at **(1997) 2 SCC 534.** The relevant extracts were succinctly summed up by a Division Bench of this Court, in the case of **Devarsh Nath Gupta Vs. State of U.P.**

and Others, reported at **2019(6) ADJ 296 (DB):**

"22. Special status of teacher has been reminded by Court in Avinash Nagra vs. Navodaya Vidyalaya Samiti and others (1997) 2 SCC 534. Quoting Father of the Nation, Court said that a teacher cannot be without character. If he lacks it, he will be like salt without its savour. A teacher must touch the hearts of his students. Boys imbibe more from the teacher's own life than they do from books. If teachers impart all the knowledge in the world to their students but do not inculcate truth and purity amongst them, they will have betrayed them. Quoting Shri Aurobindo, Court said that it is the teacher's province to hold aloft the torch, to insist at all times and at all places that this nation of ours was founded on idealism and that whatever may be the prevailing tendencies of the times, our children shall learn to live among the sun-lit peaks. Court also referred Dr. S. Radhakrishanan saying that we, in our country, look upon teacher as gurus or, as acharyas. An Acharya is one whose achar or conduct is exemplary. He must be an example of Sadachar or good conduct. He must inspire the pupils who are entrusted to his care with love of virtue and goodness. The ideal of a true teacher is "andhakaraniridhata gurur itya bhidhiyate" (Andhakar is not merely intellectual ignorance, but is also spiritual blindness). He, who is able to remove that kind of spiritual blindness, is called a 'guru'. Swami Vivekananda was also quoted saying that student should live from his very boyhood with one whose character is a blazing fire and should have before him a living example of the highest teaching. In our country, the imparting of knowledge has always been through men of renunciation. The charge of imparting knowledge should again fall upon the shoulder of Tyagis."

164. In ***Avinash Nagra (supra),*** the obligations of teachers to transform students into responsible citizens, and inculcate the value system of the Indian Constitution, was stated thus:

"...The State has taken care of service conditions of the teacher and he owed dual fundamental duties to himself and to the society. As a member of the noble teaching profession and a citizen of India he should always be willing, self-disciplined, dedicated with integrity to remain ever a learner of knowledge, intelligently to articulate and communicate and imbibe in his students, as social duty, to impart education, to bring them up with discipline, inculcate to abjure violence and to develop scientific temper with a spirit of enquiry and reform constantly to rise to higher levels in any walk of life nurturing Constitutional ideals enshrined in Article 51A so as to make the students responsible citizens of the country. Thus the teacher either individually or collectively as a community of teachers, should regenerate this dedication with a bent of spiritualism in broader perspective of the Constitutionalism with secular ideologies enshrined in the Constitution as an arm of the State to establish egalitarian social order under the rule of law. Therefore, when the society has given such a pedestal, the conduct, character, ability and disposition of a teacher should be to transform the student into a disciplined citizen, inquisitive to learn, intellectual to pursue in any walk of life with dedication, discipline and devotion with an inquiring mind but not with blind customary beliefs....."

165. The students entering universities embark on a new phase in their lives. Many are often removed from their comfort zone, and the secure environment of their homes, to face the challenges of independent life. At times these new challenges can be intimidating, and the uncertainties can create apprehensions, in the minds of the young adults.

166. Some students are unmoored in this trying phase of life and change of circumstances. Ragging of juniors in institutions of higher learning and other evils make the situations worse for freshers. Such students especially girls students in our country, need full institutional support to face these challenges.

167. It is the responsibility of the universities and the institutions of higher learning to create requisite environment of sensitizing the senior students and supporting the freshers in every possible manner.

168. A programme for self development implemented in a proactive manner shall foster constitutional values among students. Students need to realize the value of dissent in a democracy, but also have to understand the manner of dissent in a society ruled by law.

169. This process also requires initiation of engagement with the students and improving the quality of interface between the teachers and the taught. Educating the educators in this regard has to be a part of any such programme. Workshops have to be held and other methods have to be explored, to cultivate constitutional values in students and achieve behavioral change.

170. These are the preventive measures to address the issues of indiscipline, deficit in values and deviant behaviour in all institutions of higher learning.

171. The preventive measures preclude the occurrence of deviant behaviour. The post facto rehabilitation measures prevent recurrence of deviant behaviour. Both have to be integrated into one conjoint system of value creation, in the universities and institutions of higher learning.

172. Structured reform/self development programmes run by universities, can be catalysts for inducing behavioral change, and inculcating a constitutional value system in students. A successful reform, self development and rehabilitation programme, can convert a possible danger into a real asset for the society.

(iv) Creation of Reform, Self Development & Rehabilitation Programmes

173. Many branches of knowledge in modern times are devoted to the study of human psychology, social behaviour and behavioural change. Psychology, Psychiatry, Sociology, Anthropology and Behavioral Economics, are some fields dedicated to gaining insights into human behaviour and inducing behavioural change.

174. Works of the Nobel prize winning economist Richard Thaler deserve special mention. The methodology of

"nudges", in creating behavioral change has been gaining acceptability. The organization "Nudge" in Lebanon, has done noteworthy work with refugee children, and on environmental protection.

175. The Behavioral Insights Teams sometimes called "Nudge Units", are also existing in many nations including Australia, Canada, Germany, Qatar, the United Arab Emirates, Japan, the United States, and the United Kingdom. The Economic Survey released by India's Finance Ministry in July, 2019 has concluded with the clear recommendations that "the proposal to set up a behavioral economics unit in the NITI Ayog must be immediately activated". The report further noticed that the unit should work with State Governments, helping them to make their programme more effective, and informing them of the potential value of Behavioural Insights.

176. Ancient branches of knowledge and wellness like yoga, meditation, vipassana and so on may prove to be rich resources to benefit from.

177. Many scientific researches have confirmed the efficacy of these ancient systems of human wellness. These branches of knowledge have to be approached with a scientific and an open academic mindset. Personal beliefs have to be respected at all times. There can be no imposition of any system, which is resisted on grounds of faith or beliefs; in which cases other options may be given.

178. Socially useful work like planting and taking care of trees, and flora may be a part of the programme. Sports and sporting activities also go a long way in creating integrating social values, and enhancing emotional intelligence. Teaching needy children, serving the sick, and other forms of service to the society are options which may be explored. Counselling sessions with experts and psychologists could prove useful.

179. Therapeutic solutions to social problems, are being increasingly recognized by social scientists, medical experts, psychologists, and jurists alike.

180. Creation of course content of the reform or self development programme, and manner of its implementation has to be decided by the respondents. This requires wide consultations, deliberations and workshops with academia, varsities, institutions of research, student counsellors, psychologists, psychiatrists, students and other stakeholders.

181. The UGC is a statutory body, and cannot abdicate its responsibilities in this scenario. The functions of the UGC are enumerated in the University Grants Commission Act, 1956. The UGC will play an important role, in the creation and standardization of the course, for reformation and self development, and aid its implementation on an institutional basis.

182. The Government of India in particular, the Ministry of Human Resource Development, also has a contribution to make in the process. The Ministry of Human Resource Development, Government of India, New Delhi, has to provide the necessary support to the University as may be required under law to create and implement the reform, self development and rehabilitation programme. This support would include

the creation of necessary infrastructure for implementing the programmes.

183. Both the University Grants Commission and the Ministry of Human Resource Development, Government of India, are required to support the universities in their endeavours to create and implement the programmes of reform, self development and rehabilitation.

184. Law enforcement agencies the world over are engaging with the youth, to draw them away from the appeal of extreme ideologies.

185. The prestige enjoyed by universities and the teachers in society, will make the programme credible to concerned individuals, and acceptable to the student community. The key to the efficacy of any structured reform programme, is empathetic engagement and a supportive environment.

186. An impersonal approach and institutional prejudice, can make the programme a non starter. Due sensitization of all stakeholders is required, before implementing the programme.

187. The founding purpose of universities to supply intellectual and moral leadership to the society, and to be at the vanguard of social transformation, will be eminently achieved by effective reformation/therapeutic/self development programmes.

(v) Concerns of universities regarding discipline & restraints during the reformation, self development & rehabilitation programme:

188. The Court is cognizant of concerns of the universities, that a reform programme should not derail university administration, nor should it have a detrimental effect on discipline and good order in the campus. A reform and rehabilitation programme, is not intended to allow a wrongdoer to escape justice.

189. Apprehensions of the universities need to be addressed. The reform programme has to be created and structured and implemented in a manner that it does not adversely impact the good order and discipline in the university campus.

190. The start of reform programme does not inevitably mean a free access to, or unconditional reinstatement of a delinquent student into the university campus. In cases of indiscipline where presence of individuals poses a threat of breakdown of order in the university campus, a decision can be made only by the university. Even when such students undergo a reform programme, and the students are pursuing their academic studies, the university may impose restraints it deems fit.

191. To obviate possibilities of disruption in the academic atmosphere, various measures of graduated restrictions may be imposed on a case to case basis. These restraints may include minute monitoring of movements in campus, restricting movements and contact, an employee escort till the student is in the campus, alteration of class schedules and timings. Such lighter restrictions could continue, while undergoing reform programmes along with the academic course.

192. More stringent measures in aggravated cases, may include a campus ban, with on-line classes and home schooling. Transfer to constituent colleges

or other universities from a pool of universities, or setting up separate premises are among the options. In these cases entry to the specific university campus may be barred, even as the reform programme is underway, and the student is prosecuting his academic course.

193. These are some illustrative instances, of restraints which may be imposed by the universities.

M. *Proportionality & Punishment*

194. The controversy has to be seen from another critical legal perspective. The doctrine of proportionality is an established ground of judicial review in the Indian Constitutional jurisprudence.

195. Aharon Barak, former President of Supreme Court of Israel in his book "Proportionality" thus defines the rules of the doctrine of proportionality, "According to the four components of proportionality a limitation of constitutional right will be permissible if, (1) It is designated for a proper purpose, (2) The measures undertaken to effectuate such a limitation are rationally connected to the fulfillment of that purpose, (3) The measures undertaken are necessary and in that there are alternative measures that may similarly achieve that same purpose with a lesser degree of limitation and finally; (4) Their needs to be a proper relation "proportionality strict senso and balance" between the importance of achieving the proper purpose and social importance of preventing the limitation on the constitutional right."

196. The concept of proportionality essentially visualizes, a graduated response to the nature of the misconduct by a delinquent student. The purpose of the institution, its role in the society and its obligations to the nation, provide the setting for adjudication of the issue of proportionality.

197. Proportionality first came to be applied in the context of punishments imposed for misconduct in service jurisprudence. The necessity of proportional punishment, in cases of misconduct by students is more strongly needed. Hence action of the respondent-University, is liable to be tested on the anvil of disproportionality.

198. The "doctrine of proportionality" was introduced, and embedded in the administrative law of our country, by the Hon'ble Supreme Court in the case of ***Ranjit Thakur Versus Union of India,*** reported at ***(1987) 4 SCC 611.*** The Hon'ble Supreme Court in Ranjit Thakur held thus:

"Judicial review generally speaking, is not directed against a decision, but is directed against the "decision making process". The question of the choice and quantum of punishment is within the jurisdiction and discretion of the Court-Martial. But the sentence has to suit the offence and the offender. It should not be vindictive or unduly harsh. It should not be so disproportionate to the offence as to shock the conscience and amount in itself to conclusive evidence of bias. The doctrine of proportionality, as part of the concept of judicial review, would ensure that even on an aspect which is, otherwise, within the exclusive province of the Court-Martial, if the decision of the Court even as to sentence is an outrageous defiance of logic, then the sentence would not be immune from correction. Irrationality and

perversity are recognised grounds of judicial review. "

199. The essence of proportionality is that, the competent authority while imposing a punishment upon a delinquent student, has to co-relate and balance the imperatives of institutional discipline with the demands of individual rights. Too light a punishment will not be conducive to institutional discipline. Too harsh a punishment will not be consistent with norms of justice.

200. The enquiry into the four components of proportionality, as elucidated by Justice Aharon Barak in his book "Proportionality" has been made in the preceding part of the judgment. The purpose and obligations of universities, have also received consideration, in the earlier part of the narrative.

201. The measures undertaken against the petitioner, are not rationally connected to the fulfillment of the purpose sought to be achieved. The proper and designated purpose of a punishment in a university, has to include reform of the student, not mere imposition of penalty. Clearly there are alternative reformative measures, that can achieve the same purpose, with a lesser degree of curtailment of the students rights.

202. The action taken against the petitioner, does not achieve the purpose, and social importance of the reform and rehabilitation of the delinquent student. These aspects need consideration by the respondents.

N. *Conclusions and Reliefs*

203. I see merit in the submission of the learned counsel for the petitioner that without prejudice to his rights to establish his innocence before the University authorities, the future prospects of the petitioner may also be given due weightage. The petitioner has submitted a contrite apology before the Court (without prejudice to his defence) and also makes a prayer for being given a chance to atone his misconduct, reform himself and redeem his reputation.

204. Charges of the misconduct, and the material before this Court amply demonstrate that the petitioner is susceptible to reform. The material in the record and submissions of the counsels, underscore the urgent requirement of a reform, self development and rehabilitation programme in the University.

205. The acts of violence (if provided) may warrant disciplinary action to maintain discipline in the campus. But the facts of the case, also require reformative measures to protect the future of the petitioner.

206. In these circumstances, the University cannot deny the petitioner, the freedom to pursue his academic courses of his choice in the University.

207. However, in the facts of the instant case and the material in the records, the reinstatement of the petitioner in the LLM course shall happen in the manner and the time frame provided in the final directions.

208. These orders shall not affect the ongoing proceedings against the petitioner,

or his right to pursue his remedies before the respondent University.

209. It is noteworthy that the delay in the final decision is due to the failure of the University to conclude the disciplinary proceedings expeditiously. The disciplinary proceedings cannot continue interminably for that would mean that the petitioner shall remain suspended indefinitely. This situation would cause a miscarriage of justice.

210. Since the enquiry has been almost completed, this Court is not going into the issue of validity of the suspension order at this stage. However, in case the directions to complete the enquiry are not complied within the stipulated time period, it shall be open to the petitioner to file a fresh writ petition.

211. In these facts, this Court is compelled to issue directions in the interest of justice to safeguard the future of the petitioner and also protect the rights of the University to conduct the disciplinary proceedings and addresses its concerns regarding good order and discipline in the University.

212. The issue relating to creation of reform, self development and rehabilitation programmes in the University was heard as a common issue in various writ petitions. The Secretary, Ministry of Human Resource Development, Union of India, New Delhi and the Chairman, University Grants Commission, New Delhi, were also parties in the leading two writ petitions, namely, Writ C No. 13214 of 2019 (Anant Narayan Mishra Vs. The Union of India and Others) and Writ C No. 26755 of 2019 (Mohammad Ghayas Vs. State of U.P. and Others). All connected writ petitions were heard together.

213. The directions issued to the Secretary, Ministry of Human Resource Development, Union of India, New Delhi and the Chairman, University Grants Commission, New Delhi, in the leading two writ petitions namely Writ C No. 13214 of 2019 (Anant Narayan Mishra Vs. The Union of India and Others) and Writ C No. 26755 of 2019 (Mohammad Ghayas Vs. State of U.P. and Others) being of a general nature, shall be part of all connected writ petitions including the instant writ petition.

214. The matter is remitted to the respondents.

215. A writ in the nature of mandamus is issued commanding the respective respondents to execute the following directions :

I. The respondent University is directed to conclude the enquiry proceedings against the petitioner and take a final decision in the matter within a period of one month from the date of receipt of a certified copy of this order;

I(i) In the event there is further delay in conclusion of the disciplinary proceedings, the petitioner may move an application before the University authorities for being provisionally permitted to continue his studies. In case, such application is made, the respondent University shall decide the same within a period of one month to ensure that the petitioner does not face any further academic loss due to the delay on the part of the respondent University;

I(ii) This direction is without prejudice to the right of the petitioner to

benefit from the reform, self development and rehabilitation programme.

II. The University shall create a reform, self development and rehabilitation programme for students accused of misconduct and against whom disciplinary action or any action to deny facilities of the University is proposed or taken;

III. The reform, self development and rehabilitation programme should be created after wide consultations and workshops with institutions of higher learning and research, universities, experts, student counsellors/psychologists, psychiatrists, students and other stakeholders;

IV. University Grants Commission will aid the above process by providing the necessary support to the University to create, standardize and effectuate the reform, self development and rehabilitation programme in the university;

V. The Secretary, Ministry of Human Resource Development, Government of India, New Delhi, shall also provide the necessary support to create infrastructure in the University to effectuate the reform, self development and rehabilitation programme in the University, in light of this judgment and as per law;

VI. The reform, self development and rehabilitation programmes shall be processed as per law and integrated into the existing legal/statutory framework of the University dealing with deviant conduct and punishments;

VII. In case the petitioner is not reinstated after the disciplinary enquiry, the petitioner shall be given the benefit of the reform, self development and rehabilitation programme. After the creation of the self development and rehabilitation programme, the petitioner shall be reinstated as a student and permitted to continue his studies along with the said programme;

VIII. Attendance of the petitioner in the said programme shall be compulsory. An evaluation sheet of the petitioner's performance in the programme shall also be prepared;

IX. Once the reform, self development and rehabilitation programme is set in motion, all endeavours shall be made by the University to ensure that loss of academic time is not caused to the petitioner;

X. The exercise shall be completed, preferably, within six months, but not later than 12 months. At all times the respondents keeping in mind the best interests of the students and the society, shall make all efforts to expedite the compliance of the directions;

XI. It shall be open to the respondents to create a scheme for reform, self development and rehabilitation for convicts in criminal cases who wish to pursue further higher studies in the respondent University;

XII. The counsels for the respondents shall provide certified copy of this judgment along with a copy of the judgment of this Court rendered in Writ C No. 13214 of 2019 (Anant Narayan Mishra Vs. The Union of India and Others) to the Vice Chancellor, Aligarh Muslim University, Aligarh; the Secretary, Ministry of Human Resource Development, Union of India, New Delhi and the Chairman, University Grants Commission, New Delhi, for necessary compliances.

216. The writ petition is finally disposed of.

(2020)02ILR A438

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 05.11.2019

BEFORE
THE HON'BLE PRADEEP KUMAR SINGH BAGHEL, J.
THE HON'BLE PIYUSH AGRAWAL, J.

Writ C No. 34838 of 2019

Gaurav Kapoor ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Jamal Ahmad Khan

Counsel for the Respondents:
C.S.C., Sri Shivam Yadav

Chapter IV, rule 18 of Allahabad High Court Rules, 1952- Affidavit sworn by the father of the Petitioner-but at relevant place-name of Petitioner shown-clear prohibition in Rules, 1952-correction requires in affidavit-not a matter of verification-after Affidavit sworn-no correction-W.P. dismissed with liberty to file fresh petition.

Cases cited:

1. Dwarka Nath Vs. Income Tax Officer and another, AIR 1966 Supreme Court, 81

(Delivered by Hon'ble Piyush Agrawal, J.)

1. The petitioner has filed the present writ petition seeking mandamus directing to respondent-2 to take appropriate steps on the complaint made by the petitioner on 10.4.2019 alleging that respondent-4 is engaged in commercial activity in the residential area.

2. Sri Shivam Yadav, learned counsel for the respondent has pointed out that affidavit filed in support of the writ petition is being sworn by father of the petitioner but at the relevant place of affidavit, name of the petitioner has been shown. There is defect in the affidavit filed in support of the writ petition. Therefore, the present writ petition is not maintainable.

3. On 24.10.2019, the counsel for the petitioner was granted time to move an appropriate application for correcting the affidavit. Learned counsel for the petitioner has moved an application to amend the said defect.

4. However, our attention has been drawn to Chapter IV, Rule 18 of the Allahabad High Court Rules, 1952; wherein, it is provided that no interlineations, alternations or erasures in an affidavit shall be permitted after swearing has been done.

5. Chapter IV, Rule 18 of Allahabad High Court Rules reads thus:-

"18. Correction in affidavit:- *All interlineations, alterations or erasures in an affidavit shall be initialled by the person swearing it and the person before whom it is sworn. Such interlineations, alterations or erasures shall be made in such manner as not to obliterate or render it impossible or difficult to read the original matter. In case, such matter has been obliterated so as to make it impossible or difficult to read it, it shall be re-written on the margin and initialled by the person before whom the affidavit is worn. No interlineation, alteration or erasure shall be made in an affidavit after it has been sworn"*

6. In **Dwarka Nath Vs. Income Tax Officer and another, AIR 1966 Supreme Court, 81,** one of the question which comes for consideration before the Supreme Court was that the order of Commissioner Income Tax under Section 33 A of the Act was challenged under Article 226 of the Constitution, in which this Court has dismissed the writ petition on the ground that affidavit was defective and it was held that some of the paragraphs were based on perusal of the record and some paragraphs were on deponent's own knowledge. The Supreme Court held that if affidavit was defective in any manner, the High Court instead of dismissing the petition, should have given the appellant a reasonable opportunity to file a better affidavit. The relevant part of the judgement reads as under:-

"9.The High Court mainly dismissed the writ petition on the ground that the affidavit filed in support of the writ petition was highly unsatisfactory and that on the basis of such an affidavit it was not possible to entertain the petition. In exercise of the powers conferred by Article 225 of the constitution and of other powers enabling it in that behalf of the High Court of Allahabad framed the Rules of Court. Chapter XXII thereof deals with the procedure to be followed in respect of proceeding under Article 226 of the constitution other than a writ in the nature of habeas corpus. The relevant rule is sub-rule (2) of rule 1 of Chapter XXII, which reads :

The application shall set out concisely in numbered paragraphs the facts upon which the applicant relies and the grounds upon which the court is asked to issue a direction, order or writ and shall conclude with a prayer stating clearly, so far as circumstances permit, the exact nature of the relief sought. The application shall be accompanied by an affidavit or affidavits in proof of the facts referred to in the application. Such affidavit or affidavits shall be restricted to matters which are within the deponent's own knowledge."

7. We have heard the learned counsel for the petitioner, Sri Anup Trivedi, learned Senior Counsel assisted by Sri Abhinav Gaur for respondent- 4, Sri Shivam Yadav, learned counsel for the Development Authority and learned Standing Counsel for the State - respondents.

8. We have carefully perused the judgement of Supreme Court in Dwarka Nath (supra). The said extract shows that the Court has considered the sub rule 2 of Rule 1 of Chapter XXII of Allahabad High Court Rules, which deals with the procedure of writ under Article 226 and 227 of the Constitution. In that case, the dispute was with regard to the verification clause whether the amendment was made on the basis of personal knowledge or on the basis of perusal of record. Supreme Court has quoted the entire affidavit in its judgement.

9. In the present case, the matter is in respect of defective affidavit as the deponent's name has wrongly shown in the affidavit. This defect in the affidavit has referable to Chapter IV, which deals with the affidavits and oath commissioners. Chapter IV, Rule 18 deals with the corrections of the affidavit, which is extracted above. A perusal of Rule 18 shows that it clearly provide that no interlineation, alteration or erasure shall be made in an affidavit after it has been sworn.

10. In our view, the nature of mistake in the affidavit requires correction in the affidavit. It was not a matter of verification of the affidavit. Hence, in view of clear prohibition that after the affidavit sworn, it cannot be corrected. In the present case, Rule 18 of Chapter IV is attracted. Accordingly no correction is permissible, if there is no defect in the affidavit. But as held by Supreme Court in Dwarka Nath (supra) a defect in verification clause whether an affidavit has been sworn on the basis of personal knowledge or on perusal of document, it can be corrected by giving opportunity to the petitioner to rectify the mistake.

11. In view of the said fact, the learned counsel for the petitioner seeks the leave of this Court to withdraw this writ petition to file better affidavit.

12. The leave is granted.

13. The writ petition is **dismissed** with the liberty to file a fresh writ petition.

(2020)02ILR A440

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 31.10.2019

BEFORE
THE HON'BLE BALA KRISHNA NARAYANA, J.
THE HON'BLE PRAKASH PADIA, J.

Writ C No. 36047 of 2016

Ram Autar ...Petitioner
Versus
Union of India & Ors. ...Respondents

Counsel for the Petitioner:
Sri Birendra Singh, Sri P.K. Singh

Counsel for the Respondents:
A.S.G.I., Sri Ghan Shyam, Sri Rajesh Kumar Jaiswal, S.C., Sri Vikas Budhwar

Application for retail outlet of Hindustan Petroleum Corporation -rejected-lease agreement does not contain any sub lease clause-apart from original lessor-two other persons were co-sharers in the said land-this facts not disclosed-this corretion not permissible after submission of form-impugned order perfect-W.P. dismissed.

Cases Cited-

1. Bharat Petroleum Corporation Ltd. and others Vs. Swapnil Singh, Civil Appeal no.69286929/2015

2. Smt. Sunita Gupta Vs. Union of India and others reported in 2009 (7) ADJ 534 (DB)

(Delivered by Hon'ble Prakash Padia, J.)

1. Heard learned counsel for the petitioner.

2. Sri R. K. Jaiswal learned counsel has accepted notice on behalf of respondent no. 1 and Sri Vikas Budhwar, learned counsel has put his appearance on behalf of respondent nos. 2 and 3.

3. Sri Ghanshyam, Advocate, has filed an application for impleadment on behalf of newly added respondent Smt. Jyoti Yadav w/o Sri Prashant Kumar Yadav.

4. The petitioner has preferred the present writ petition challenging the order dated 09.07.2016 passed by the Chief Regional Manager, Hindustan Petroleum Corporation Limited, 85/4, Ispat Bhawan 3rd Floor, Sanjay Place, Agra/respondent no. 3 with further prayer to issue a

mandamus commanding the respondents, specially respondent no. 3 to include the application of the petitioner in the forthcoming lottery draw for selection of retail outlet of Hindustan Petroleum Corporation for the location in question namely Faizabad Shamshabad Road KM. Stone between 2 and 4 District Farrukhabad under the OBC category.

5. Facts in brief as contained in the writ petition are that an advertisement was published by the respondent corporation on 13.10.2014 inviting applications from interested persons in respect of grant of retail outlet distributorship for various locations including the location in question.

6. It is contended in the writ petition that the petitioner is OBC category candidate. He applied on a prescribed form for the retail outlet in question. In this regard the petitioner had taken land on lease for a period of 30 years from one of the co-sharer of Khata No.356, Khasra No.202 area 0.9590 hectare situated in Village Khanpur, Pargana-shamshad, Tehsil Kayamganj, District Farrukhabad.

7. The application form submitted by the petitioner was duly examined by the respondent no.3/Chief Regional Manager, Hindustan Petroleum Corporation Ltd.85/4, Ispat Bhawan, 3rd Floor, Sanjay Place, Agra, and he informed the petitioner that the candidatures of the petitioner was not found eligible for retail outlet dealership due to following reasons :-

a. The Khasra/khatauni/gata no. is not mentioned in the lease deed of the offered land.

b. The lease agreement for the offered land does not contain sublease clause, on the contrary sub-lease is barred.

8. In the aforesaid letter it is further stated that if the petitioner has any grievance he can make an application/representation within 10 days from the date of the letter. It is further contended that the petitioner has submitted his representation on 4.6.2016. Along with the said representation the petitioner submitted the extract of Khatauni no.18020901052 of Khata No.356, Khasra No.202 area 0.9590 hectare situated in Village Khanpur, Pargana-shamshad, Tehsil Kayamganj, District Farrukhabad in the name of Smt. Munni Devi, Revenue Map of the said khata and land drawing map of proposed outlet. Apart from the same petitioner also submitted a supplementary/corrigendum of lease deed executed by Smt. Munni Devi in favour of petitioner, which was registered on 4.6.2016 in the office of Sub Registrar, Kayamganj.

9. In view of the aforesaid it is argued by learned counsel for the petitioner that the petitioner has already removed all the shortcoming, which were very minor in nature and as such petitioner became entitled for consideration of his application form for the grant of retail outlet in question.

10. The representation submitted by the petitioner was rejected by the respondent no.3 vide its order dated 09.7.2016. By the aforesaid order, the petitioner was informed that since he does not fulfill the norms for providing land in accordance with the Point No.4(vi) (kha) of the Dealer Selection Guidelines thus his application cannot be accepted. The order dated 9.7.2016 passed by the respondent no.3 is under challenge in the present writ petition.

11. It is argued by learned counsel for the petitioner that in response to the letter dated 26.5.2016 by which certain shortcomings were informed to the

petitioner were removed by him while submitting certain papers and documents along-with his representation dated 4.6.2016. In view of the aforesaid it is argued that since the shortcomings pointed out by the respondent no.3 had already been removed, the order dated 9.7.2016 passed by him is absolutely arbitrary in nature and the same is liable to be set aside. It is further argued that by way of supplementary/corrigendum of lease dated 4.6.2016 all the shortcomings in land were removed by the petitioner.

12. In the said affidavit it is stated that total four applications were submitted for the aforesaid location, out of which three were rejected including the application form of the present petitioner at the time of scrutiny itself. In view of the aforesaid the only applicant was left to be considered for the grant of retail outlet dealership is Smt. Jyoti Yadav, the proposed applicant for impleadment.

13. It is argued by Sri Vikas Budhwar, learned counsel for the respondent Hindustan Petroleum Corporation that along-with the application form petitioner has submitted a lease deed dated 31.10.2014. From perusal of the same it is clear that there is neither any reference to gata number sought to be leased out nor any condition with respect to sub lease in favour of respondent corporation. During the course of scrutiny certain discrepancies were found in the application form of the petitioner as such a letter dated 26.5.2016 was written by the respondent no.3 to the petitioner. In response to the aforesaid letter petitioner submitted his representation dated 4.6.2016. Along-with the aforesaid representation the petitioner has appended a correction deed dated 4.6.2016 making correction in the lease deed dated 31.10.2014. It is further argued that vide correction deed dated 4.6.2016 petitioner has sought correction in the lease deed dated 31.10.2014 to the effect that gata no.202 was sought to be mentioned and for the first time provision of sub lease in favour of respondent corporation was made, copy of the correction deed dated 4.6.2016 is appended as annexure 3 to the counter affidavit. It is further argued by Sri Vikas Budhwar that after considering the representation of the petitioner, the corporation authorities passed the order dated 09.7.2016 whereby the claim set up by the petitioner was found "unsuitable" on the ground that in view of express condition of Clause 14-H (Viii) no alteration/addition/deletion is permissible after submission of the application form. It is further argued that the procedure and manner according to which selection ought to be conducted in respect of retail outlet is set out in the brochure for the selection of "Dealer for Regular and Rural Retail Outlet". The relevant clause being clause-4(vi) is reproduced hereinbelow :-

'(VI). Land (Applicable to all categories)

The applications would be classified into two groups as mentioned below based on the land offered by them in the application form.

" Group 1: Applicants having suitable piece of land in the advertised location/area either by way of ownership/long terms lease for a period of minimum 30 years (as advertised by the Oil Company).

Group 2: Applicants having Firm Offer for a suitable piece of land for purchase of long term lease for a period of minimum 30 years (as advertised by the Oil Company).

The other conditions with respect to offering of land are as under:

a) The land should be available with the applicant on the date of affidavit and should have minimum lease of 30 years (as advertised by the concerned Oil Company) from the date or after the date of advertisement but not later than the date of affidavit (Appendix- XA/XB)

b) If the offered land is on Long term lease then the Lease agreement should have a provision to sub-leased the land wherever the locations are advertised under Gorpus Fund Scheme (CFS), Other (Corporation owned Sites ('A"/'CC" sites) and Company leased sites.

For Dealer owned sites ('B"/'DC" sites) the applicant should ensure that the land arranged by the applicant is either registered in the applicant's name or leased in favour of the applicant for a minimum period of 30 years as advertised by the concerned Oil Company)

c) The applicant (s) under Group-1, should furnish at least one of the following documents in support of ownership of land offered for the Dealership.

** Khasra/Khatauni or any equivalent revenue document or Certified from revenue official confirming status of the ownership of the land.*

** Registered Sale deed/Registered Gift deed.*

** Registered Lease deed for a minimum period 30 years as advertised by the concerned Oil Company.*

** Any other type of ownership/transfer deed document*

** Lease agreement or firm allotment letter issued by Government/Semi Government bodies.*

d) The land owned by the family members (the family will comprise of the :Family Unit" as defined in Multiple dealership norms under clause 10 "Disqualification' will also be considered as belonging to the applicant/subject to producing the consent letter in the form of affidavit (Appendix -VA) from the concerned member(s) of the 'family unit'

e) The eligibility of the Land will be decided by Oil Company with reference to a confirmatory letter from an advocate (Appendix VB) to be arranged by the applicant.

f) In case the applicant or member (s) of 'family unit' own the land jointly with third person, the consent letter in the form of an affidavit (Appendix VA) or Power of Attorney clearly authorizing the applicant for such use of land from third person is also required.

g) The 'firm offer' of land will include land offer from third party based on Agreement to purchase/long term lease (as per terms and conditions of the OMCs) offer/letter should be in the form of an Affidavit (Appendix VA) or Power of Attorney for the purpose along with one of the documents mentioned in (c) above, in support of ownership of land offered for the Dealership.

h) Various situations of ownership for defining owned/firm offer are as under:

S.No	Situation of ownership	Share of applicant in land	Additional documents required	Evaluation as
GROUP 1				
1	Self	Full	Nil	Owned
2	Self with members of family unit or owned exclusively by family members	Part/Nil	Consent letter in the form of affidavit from members of family unit- **Appendix**	Owned

			V A	
3	.Self with other owners . Family members with other owner(s) . Self with family members & other owners	Part Nil Part	If the share of the applicant and/or family members is more than or equal to land required by the company. Consent letter on stamp paper or an affidavit or Power of Attorney from all Co-owner(s) should be provided- **Appendix-V A.**	Owned
4	Land owned by Government/ Semi-Government bodies	Full	Allotment Letter from the Governme nt/Semi-Governme nt bodies in the name of Self with specific mention for use of petrol pump.	Owned
GROUP 2				
5	Land owned by third party in part or full	Part/Nil	Consent letter in the form of affidavit/P ower of Attorney from other owner(s)- **Appendix V A**	Firm Offer

i) Each applicant will have to declare in the form the category under which offered land falls Supporting the above, a conformity letter from an advocate (Appendix V B) giving details of the current ownership documents relied upon and the category under which the land falls (Group 1 or 2) also is to be submitted. The eligibility and the Group under which the applicants land falls, would be determined based on the declaration given in the application confirmatory letter from the advocate and relevant Clause of the affidavit (Appendix XA/XB as applicable) regarding the same.

j) Verification of the supporting documents submitted by the applicant will be carried out for the selected candidates at the time of Field Verification Credentials"

Note:

a) 'Own' means having ownership by way of Registered Sale deed, Registered Gift deed etc. or title of the property or registered long lease (as per individual OMC norms) in the name of applicant/'family unit' as defined in multiple dealership norm under clause 10 (Disqualification)

b) Only one piece of suitable land to be offered by the applicant.

c) In-spite of above, if an applicant offers more than one land then, a confirmation in writing is to be obtained by Land Evaluation Committee (LEC) from the applicant with regard to the plot of land to be considered.

d) The same piece of land cannot be offered by more than one applicant for a particular RO location against an advertisement. In case more than one application is received offering the same piece of land all such applications would be rejected.

e) The selected candidate has to make available the offered land duly developed up to the road level by cutting/filling (as applicable) with good

earth/murum layerwise compacted as per standard engineering practice to the satisfaction of the concerned OMC. The selected candidate is also required to provide retaining wall and compound wall of min. height: 1.5 meters designed as per site conditions as per approval of OMC

f) There is no commitment by the Oil Company for taking the offered land from the applicant, if an applicant after selection is unable to provide the land indicated in the application form within a period of 2 months (for Group 1) and 4 months (for Group 2) from the date of Letter of Intent (LOI) Oil Company will have the right to cancel/withdraw the LOI issued in favour of the selected candidate for allotment of dealership'.

14. It is further argued by Sri Vikas Budhwar that in the present case admittedly at the time of submission of application form dated 16.11.2014, though the petitioner mentioned in Clause 9 of his application form khasra and khatauni number 202 and appended the lease deed executed by one Smt. Munni Devi wife of Roshan Lal in favour of petiitoner on 31.10.2014 but in the said lease deed neither the gata number was mentioned nor there was any provision of sub lease as provided under Clause 4 -(Vi-b) of the selection guidelines. Apart from the same petitioner in the lease deed dated 31.10.2014 depicted himself to be the sole and exclusive owner of the land which was sought to be leased out. However, subsequently after rejection of his candidature on 26.5.2016 petitioner submitted a representation dated 4.6.2016 making correction in the lease deed dated 31.7.2014 with respect to khasra no.202 whereby besides lessor being Smt. Munni Devi names of two persons namely Jaiveer and Havaldar was also mentioned as co-owners. The aforesaid facts were not disclosed by the petitioner at the time of submission of his form that these persons were co-owners of the land in question. Apart from the same no consent letter from the co-owners was submitted along-with the application form as required under Clause 4 (Vi) of the brochure as quoted above.

15. Sri Vikash Budhwar, learned counsel for the respondent-corporation relied the following judgements :-

I. ***Civil Appeal Nos.6928-6929 of 2015 (Bharat Petroleum Corporation Ltd. and others Vs. Swapnil Singh)*** decided on September 8, 2015.

II. ***Smt. Sunita Gupta Vs. Union of India and others*** reported in ***2009 (7) ADJ 534 (DB).***

16. During the course of arguments certain papers and documents were provided by Sri Vikash Budhwar, learned counsel for the respondent corporation, the same are taken on record. It reveals from perusal of the aforesaid papers that the respondent no.4 was issued a letter of intent by the respondent corporation on 29.6.2018, thereafter no objection certificate was also issued on 15.2.2019. It is contended by Sri Vikash Budhwar that after the aforesaid proceedings, a letter of appointment was also issued in favour of the respondent no.4 and the respondent no.4 is at present running the retail outlet.

17. A short counter affidavit was also filed by Sri. R. K. Jaiswal, learned counsel on behalf of respondent no.1/Union of India. In the aforesaid short counter affidavit it is stated that after dismantling of the Administered Pricing Mechanism (APM) in the petroleum section with effect

from 1.4.2002, the selection process of dealers/distributors for retail outlets (petrol pumps)/LPG distributorships (cooking gas agencies) is done by the oil marketing companies themselves subject to broad policy guidelines issued by Ministry from time to time relating to matters, like reservation for weaker section, reconstitution, revival of defunct outlets, resitement, and transparency in selection. The public section oil companies enjoy commercial freedom in the matter of marketing/distribution of petroleum products, through their respective networks of retail outlet dealership, LPG distributorships and SKO-LDO dealerships. The oil companies choose their own locations for setting up such dealerships/distributorship, if found viable after feasibility study thereof by the oil companies themselves. The Government has no role in the selection of sites. It may be noted that the answering respondent vide its letter dated 19th August, 2003 has advised certain broad parameters to the oil marketing companies and, thereafter, the companies frame their own guidelines for selection of dealers/distributorships.

18. It is further stated in paragraph 5 of the short counter affidavit that the Ministry of Petroleum & Natural Gas, Government of India has issued letter dated 02nd September, 2005 for pleading before the Hon'ble Courts all over the country to delete the Union of India from the array of respondents, at the time of admission stage itself. The copy of letter dated 2nd September, 2005 is annexed as annexure no.S.C.A.-2 to the short counter affidavit.

19. Heard learned counsel for the parties.

20. With the consent of learned counsel for the parties present writ petition is being disposed of finally at the admission stage.

21. From perusal of the facts as narrated above, it is clear that in terms of the advertisement dated 11.10.2014, an application form was submitted by the petitioner for grant of retail outlet dealership. Since certain discrepancies were found in the application form submitted by the petitioner a letter dated 26.5.2016 was written by the respondent no.3 to the petitioner. A reply dated 4.6.2016 was submitted by the petitioner stating therein that the discrepancies were duly removed. After the aforesaid letter was received in the office of the respondent corporation, the corporation rejected the same vide its order dated 9.7.2016 on the ground that Clause 4 (Vi) (kha) of the guidelines were not fulfilled by the petitioner. It reveals from perusal of the records that while submitting the application form the petitioner has submitted certain papers and documents. Two short comings were pointed out in the application form of the petitioner namely khasra/khatauni number is not mentioned in the lease deed and lease agreement does not contain any sub lease clause. After the aforesaid letter was received by the petitioner he submitted a representation. Along-with representation petitioner appended the correction dated 4.6.2016 making corrections in the lease deed dated 31.10.2014. By the aforesaid corrections the petitioner had sought correction in the lease deed dated 31.10.2014 to the effect that gata no.202 was sought to be mentioned and for the first time provision of sub lease in favour of the respondent corporation was also mentioned. The petitioner tried to remove the

discrepancies as pointed out by the corporation vide letter dated 26.5.2016. Apart from the original lessor of the land two other persons namely Jaiveer and Havaldar were also co-sharers in the land. The aforesaid fact was not disclosed at any point of time by the petitioner or by Smt. Munni Devi before respondent corporation. No consent letters of the aforesaid co-sharers were submitted by the petitioner along-with his application form. Apart from the same corrections, which were made by the petitioner in the correction deed were also not liable to be taken into consideration by the respondent corporation due to the fact that these corrections are not permissible after submission of the application form.

22. In the case of ***Bharat Petroleum Corporation Ltd. (supra)*** it was held by the Supreme Court that :-

"We have gone through the records of the case along with the assistance of learned counsel for the parties and we find that the brochure read with the application form is absolutely clear in the sense that the applicant must be the owner of specified area of land or must have a registered lease deed of the specified area of land on the date of application. The admitted position (which is also clear from the counter affidavit filed by the respondent in this Court) is that on 13th September, 2011 when the application for allotment was made, the respondent was neither the owner of any land nor had any registered sale deed/lease deed in her name. In fact, the lease deed came into existence only on 20th December, 2012, and that was registered on 21st December, 2012. Clearly, on the date of the application, the respondent was not eligible in terms of the brochure and the application form.

The Culcutta High court has proceeded on the basis of a notarized lease agreement which appears to have been produced by the respondent before the High court, photocopy of the notarized lease agreement has been shown to us and that document is dated 13th September, 2011. Learned counsel for the respondent has relied upon this document to contend that the respondent was eligible as on 13th September, 2011 in terms of the notarized lease agreement.

We are unable to accept this contention of learned counsel for the respondent. The brochure and the application form clearly require the applicant to have a registered lease deed in her name. What is shown to us is a notarized document and admittedly this document, even though it may have been in existence, was formalised into a lease agreement only on 20th December, 2012 and that was registered on 21st December, 2012. The notarized document, therefore, does not advance the case of the respondent any further. Therefore, it is quite clear that the respondent was not eligible on the date of application, i.e., 13th September, 2011.

Under the circumstances, we allow these appeals and set aside the order passed by the Division Bench of the Culcutta High Court. No costs."

23. In the case of ***Smt. Sunita Gupta (supra)*** it was held by the Division Bench of this Court that :-

"23. Para 12.1 of guidelines for selection of retail outlet dealers, provides that an application form alongwith relevant documents should be submitted

within the time prescribed,no addition/deletion/alteration will be permitted in the application once it is submitted. No additional documents whatsoever will be accepted or considered after the cut-off date of the application. In the present writ petition we have found that the petitioner could not file all required documents alongwith application form. The land proposed for the purpose was found joint ownership of several persons including her husband and no valid and legal partition of the land took place between them. The petitioner's husband was not found the sole owner of the land offered by her for retail outlet dealership. Under these circumstances the respondents were justified in reviewing the decision taken by the selection committee and cancelling the interview and selection of the petitioner.

24. On the basis of above submissions made by learned counsel for parties and their pleadings as well as the documents filed on record. We have found that the respondents have not committed any mistake in not taking into consideration the documents which have been submitted subsequent to last date of submission of the application form, because those documents could not be considered in view of Para 12.1 of guidelines. We have also observed that the respondents have afforded full opportunity to the petitioner of being heard and there is no violation of natural justice. No opportunity appears to have been afforded to the petitioner before cancellation of selection, but in pursuance of the order passed by this Court in writ petition, the respondents have afforded full opportunity to the petitioner of being heard on her representation. The respondents have rightly rejected the representation of the petitioner through detailed and speaking order, which does not suffer from any infirmity, mistake or error, because the husband of the petitioner has not been found exclusive owner and in possession of the land proposed for retail outlet and no legal partition has taken place among all co-sharers as memorandum of alleged partition dated 3.7.1984 is a waste paper having no evidentiary value, which cannot be relied on and referred to in any proceeding.

25. Under these circumstances no principles of natural justice has been violated by the respondents. The petitioner herself concealed the important facts at the time of presenting her application form and interview about the ownership of land and infrastructure facility. Thus the decision has been validly reviewed and selection of the petitioner has been rightly cancelled, which cannot be said to be vitiated in view of any fact and circumstance. The selection of the petitioner does not confer any right to a prospective candidate because no letter of intent has been issued by the respondents in pursuance of the selection and no agreement has been executed by the parties in response to above selection."

24. In view of the facts as stated above, we are of the opinion that the order passed by the respondent no.3 dated 9.7.2016, which is impugned in the present writ petition is absolutely perfect and valid order and does not call for any interference by this Court specially under Article 226 of the Constitution of India.

25. The writ petition being devoid of merit is dismissed.

(2020)02ILR A448

ORIGINAL JURISDICTION
CIVIL SIDE

DATED: ALLAHABAD 19.12.2019

BEFORE
THE HON'BLE RAMESH SINHA, J.
THE HON'BLE AJIT KUMAR, J.

Writ C No. 36576 of 2019

Puneet Kumar Singh ...Petitioner
Versus
BPCL, Distt. Chandauli & Anr.
...Respondents

Counsel for the Petitioner:
Sri Tarun Agrawal

Counsel for the Respondents:
Sri Vikas Budhwar, Sri Utkarsh Tripathi, Sri Vijay Kumar Rai

Candidature of Petitioner rejected -for allotment of retail outlet dealership of petroleum products-for not creating sufficient right in Petitioner's favour-impugned order legal-surrender letter by the original lessor in Petitioner's favour has a condition of re-entry-Corporation has discretion-to decide which land suits its bussiness.W.P. dismissed..

Held, *Section 111 (e) and (f) contemplate relinquishment of rights and interest whether by express act or implied as required in law but such relinquishment should be of lease rights in its entirety as it determine the base as a whole.* (para 70 (iv))

CASE CITED:

1. H.K. Sharma v.. Ramlal (2019) 4 Supreme Court Cases 153.

2. Abdul Majid v. Hari Charan Hlder and others 53 Ind. Cas 17 (MANU/ WB/0200/1917)

3.Elias Meyer v. Manoranjan Bagchi and others 22c WN 441 (MANU/ WB/0534/1918).

4. Konijeti Venkayya and ors v. Thammana Peda Venkata Subbarao and others AIR 1957 AP 619 (MANU/ AP/ 0347/1955).

5. Jamuna Oil Mills v. The AddI. District Judge and others 1978 AWC 413 All (MANU/UP/ 0547/1978)

6. T.K. Lathika v. Karsandas Jamandas AIR 1995 SC 3335, (MANU/SC/0535/1999).

7. Krishna Kumar Khemka V. Grindlays Bank MANU/SC/0200/1991: [1990] 2 SCR 961

8. Krishna Kumar Khemka v. Grindlays Bank P.L.C. and others (1990) 3 Supreme Court Cases 669

9. ITC Ltd v. State of U.P. (2011) 7 Supreme Court Cases 493

10. Tirath Ram Gupta v. Gurubachan Singh and another AIR 1987 Supreme Court 770

11. H.K. Sharma Vs. Ram Lal (2019) 4 Supreme Court Cases 153

12. Sunil Kumar Roy v. Bhowra Kankanee Collieries Ltd. And others AIR 1971 Supreme Court 751

13. Chandrakant Shankarao Machale v. Parubhai Bahiru Mohite (dead) (2008) 6 Supreme Court Cases 745.

14. K.B. Saha and sons private limited v. Development Consultant Limited (2008) 8 Supreme Court Cases 564.

15. B. Ahmed Marcair v. Muthuvlliappa Chettiar 1961 AIR (Madras) 28

16. M.S. Ram Singh v. Bijoy Singh Surana AIR 1972 Calcutta 190

17. Ratan Lal and others Vs. Hari Shanker and others AIR 1980 Allahabad 180

18. Ranganatha Gounder v. Perumal Nattar AIR 1999 Madras 133

19. Kale and others v. Deputy Director of Consolidation and others

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

1. Heard Sri Tarun Agrawal, learned counsel for the petitioner and Sri Vikas Budhwar, learned counsel for respondent Corporation.

2. Invoking extraordinary jurisdiction of this Court under Article 226 of the Constitution of India, the petitioner herein has challenged the order dated 2.11.2019, whereby candidature of the petitioner for the allotment of retail outlet dealership of petroleum products, in connection with advertisement dated 25.11.2018, has been rejected.

3. In narrow compass the facts of the case can be drawn like this that petitioner pursuant to advertisement dated 25.11.2018 issued by Bharat Petroleum Corporation Ltd, namely, respondent no. 1, invited application for allotment of retail outlet dealership of the petroleum product in district Chandauli for allocation at old National Highway No. 2 between Varanasi and Chandauli. The petitioner applied vide application dated 24.12.2018 filling up online application form. Petitioner submitted the documents in respect thereof which included the lease document relating to the land offered by the petitioner falling in Khasra No. 154 with a dimension of 35X35 metres total measuring to 1575 square metres.

4. The piece of land offered by the petitioner vide his application (hereinafter referred to as the Land in question) was obtained by the petitioner under a lease agreement executed and registered on 14/15.12.2018 for a period of 29 years and 11 months by the original tenure-holder Mangla Singh and thus, in view of the detail submitted by the petitioner, petitioner's application was entertained in Group-I category and having been selected in the draw of lots, he became entitled for consideration for allotment of retail outlet dealership.

5. In the meanwhile, it appears that, some complaint was made regarding offer of land by the petitioner to be not a valid offer and consequently a notice was issued to the petitioner by the Territory Manager Retail (Varanasi) on 10.6.2019 asking him to confirm as to whether the land offered by him was already subject matter of lease agreement between the tenure-holder Mangla Singh and one M/S. B.S.C.- C&C-"JV" (hereinafter referred to as original lessee) executed and registered on 20.11.2017 and was in subsistence till 19.11.2019. He was asked to submit reply within ten days.

6. The petitioner did submit a reply explaining away that the land though formed part of the lease agreement between tenure-holder and one original lessee but in view of surrender of land measuring 1925 square meters by the lessee on 15.9.2018 Mangla Prasad the tenure-holder got the right to execute a fresh lease of 1575 square meters out of the surrendered part. The petitioner appended with his reply dated 19.5.2019 the confirmation letter.

7. Having thus, received the reply of the petitioner the Territory Manager enquired from the Deputy Registrar, Sadar, Chandauli as to whether the second lease dated 15.12.2018 was valid in face of the fact that there already existed a lease dated 25.5.2018 in favour of one original lessee and whether the surrender letter amounted to a valid surrender and as to whether on the basis of such letter of surrender a subsequent lease could have been executed. The Deputy Registrar,

Chandauli in his reply dated 28.6.2019 declined to answer the questions on the ground that the he does not enjoy any authority under the Registration Act, 1908 to enquire into the validity of written instrument and so far as the letter dated 15.9.2018 issued by the original leessee Satish Kumar in respect of lease deed numbers 53077/2018 and 5282 of 2018 is concerned no legal opinion can be expressed in respect of the legal effect of such letter.

8. It appears that on the same date i.e., 22.6.2019 the Territory Manager also enquired from the original lessee as to whether this letter was issued by Satish Kumar and in reply to that the authorized signatory of original lessee wrote to the Territory Manager that such letter is a valid one to the best of his knowledge and was issued by his office.

9. It appears that considering the reply of the petitioner submitted on 19.6.2019, the reply of the Deputy Registrar and that of Satish Kumar and having visited the site, the Land Evaluation Committee submitted report that the land did not meet the required norms and consequently the candidature of the petitioner was rejected vide order dated 27.7.2019.

10. The order dated 27.7.2019 came to be challenged before this Court vide Writ Petition No. 26050 of 2019 and as the order was absolutely non-speaking except referring to some report of the Land Evaluation Committee which was not discussed in the order and similarly orders were passed by the Corporation in some other matters challenged in a number of writ petitions filed before this Court all were heard and decided together by common judgment dated 13.8.2019 with Writ C No. 24484 of 2019 (Ansar Ali Vs. Union of India and 2 others) quashing the order impugned including the one dated 27.7.2019 (*supra*). The matter was remitted to the authority to consider afresh by supplying copy of the reports to the respective petitioners inviting their objections and then to decide the same by means of a reasoned and speaking order.

11. In view of the judgment of the High Court dated 13.8.2019 (*supra*), the respondents issued noticed to the petitioner on 4.10.2019 inviting objection and the petitioner submitted reply on 10.10.2019. Having considered the reply of the petitioner, this time the respondent-Corporation again rejected the candidature of the petitioner by a detailed order dated 2.11.2019 on the ground that in view of Clause-7 of the lease deed dated 25.5.2018 and Section 111(e) and Section 111 (f) of the Transfer of Property Act, the surrender under the letter dated 15.09.2018 would not amount to absolute surrender and consequently the offer of a piece of land would not be one referable to Group-I category and thus the candidature of the petitioner would be liable to be considered under Group-III category. Thus the candidature of the petitioner as such in Group-I category came to be rejected.

12. Assailing the order impugned now, the arguments advanced by learned counsel for the petitioner is three fold:-

(A) The lease was validly executed and registered and no one having put it to challenge the title and possessory rights to the extent as provided for under the lease were intact and valid on the date offer was made, for a period of 29 years and 11 months and such being the position

on the date of submission of application by the petitioner, the offer of the petitioner was a valid offer of piece of land as defined under Group-A category and, therefore, the respondents were not justified in rejecting the same;

(B) The surrendered part of the lease under the letter dated 15.9.2018 (hereinafter referred to as letter) was a valid surrender in the light of the provision contained under Section 111 (e) and Section 111 (f) of the Transfer of Property Act, 1872 (hereinafter referred to as T.P. Act, /) and the interpretation thereof by the respondent Corporation is errorenous in law;

(C) A mere condition prescribed under the surrender letter as " Just in case there is some emergency space requirement for me and in case the surrender plot remain unused by you, I may use it temporarily" would not make the surrender bad and resultantly the subsequent lease is not invalid so as to reject the candidature of the petitioner in Group-A I category, in other words the argument is that the surrender letter was a valid one per provision contained in Para-7 of the lease deed dated 25.5.2018.

13. Thus advancing the above arguments further, on the argument A, learned counsel for the petitioner has placed reliance upon Clause 4 (V) of the Guidelines as contained under the Brochure dated 24.11.2018 framed for selection of dealers for Regular and Rural Retail Outlets (for short Brochure). Clause-5 of the Brochure as it defines Groups I, II and III is reproduced hereinunder:

"Group 1: Applicants having suitable piece of land in the advertised location/area either by way of ownership/ long term lease for a period of minimum 19 years 11 months or as advertised by the OMC.

Group 2: Applicants having Firm Offer for a suitable piece of land for purchase or long term lease for a period of minimum 19 years 11 months or as advertised by the OMC.

Group 3: Applicants who have not offered land in the application."

14. The above provision has been quoted to the extent it is necessary for the appreciation of the argument of the petitioner referable to Group-I.

15. It is submitted by the learned counsel that since he had a valid lease agreement qua a of piece of land with a dimension of 35 metres X 45 metres and it being not questioned either by the lessor or by the original lessee who had surrendered that piece of land and since the lease was for a period of 29 years 11 months, a period more than required one, in favour of the petitioner to bring him within the ambit and scope of Group-I. He submits that it is not disputed that the land fell in Khasra 154 and was part of transfer by registered document and that too by a tenure-holder, the mere complaint by a third party would not make the offer of piece of land within Group-I category as bad. So according to him in view of the definition of land provided under Clause 4 (V), the petitioner being eligible candidate his application was rightly entertained and having been selected in draw of lots, he was right in offering the land for allotment of dealership of the petroleum products under the letter dated 7.2.2019.

16. The argument B and C since relate to the issue of surrender and part of surrender of lease rights by the original

lessee referable to Section 111 (e) and 111 (f) of the Act, 1882 and the scope of para-7 of the lease deed dated 25.5.2018 both being related to each other the legal argument is that surrender of part of lease rights was valid and so also the subsequent lease in favour of the petitioner. Learned counsel for the petitioner has relied upon various authorities of the High Court and the Supreme Court in support of his argument. He has drawn attention of the Court to Section 111 Sub-sections (e) and (f) Act No. 87 of 1882. For the appreciation of the argument so advanced, the two clauses are reproduced hereunder:

"(e) by express surrender; that is to say, in case the lessee yields up his interest under the lease to the lessor, by mutual agreement between them;

(f) by implied surrender;"

17. It has been argued by learned counsel for the petitioner that a bare reading of Clauses (e) and (f) clearly provide that the legislative intent is to acknowledge surrender of lease rights by act of specific written document or by implied surrender to wit by consent and, therefore, he argues that since Clause-7 of the lease deed prescribes for surrender of lease rights, entitling the lessee to take such an action in the light of the provision as contained in Clause (e) and (f). He contends that if original lessee had written letter, expressing relinquishment of his lease rights in respect of lease land, it would be a valid one.

18. He has placed reliance upon paragraph-27 of the Judgment of Apex Court in the case of ***H.K. Sharma v.. Ramlal (2019) 4 Supreme Court Cases 153.*** Paragraph-27 relied upon by the petitioner's counsel,of the judgment is reproduced hereunder:

"27. *This Court in ShanMathuradas Manganlal & Co. V Nagappa Shankarappa Malage considerd the scope of Clauses (e) and (f) of Section 111of the TP Act and laid down the following principle in para 19 as under: (SCC P. 665)*

"19. A surrender under clauses (e) and (f) of Section 111 of Transfer of Property Act, is an yielding up of the term of the lessee's interest to like a contract by mutual consent on the lessor's acceptance of the act of the lessee. The lessee cannot, therefore, surrender unless the term is vested in him; and the surrender must be to a person in whom the immediate reversion expectant on the term is vested. Implied surrender by operation of law occurs by the creation of a new relationship, or by relinquishment of possession. It the lessee accepts a new lease that in itself is a surrender. Surrender can also implied from the consent of the parties or form such facts as the relinquishment of possession by the lessee and taking over possession by the lessor. Relinquishmement of possession operates as an implied surrender. There must be a taking of possession, not necessarily a physical taking, but something amounting to a virtual taking of possession. Whether this has occurred is a question of fact."

19. In support of his contention he has further relied upon the judgment of Calcutta High Court in the Case of ***Abdul Majid v. Hari Charan Hlder and others 53 Ind. Cas 17 (MANU/ WB/0200/1917)*** and has placed reliance on paragraphs 2 and 3, wherein concurrent view has been

expressed by two Judges. Paras 2 and 3 run as under:

*" **2.** It is contended on behalf f the plaintiff appellant that the surrender was not really a surrender, but a sale, because there was consideration, the consideration being the rent for which a decree had been obtained and accrued since the date of suit. It appears to me that there is no reason for saying that it was not a surrender to the landlord; no authority has been shown to us for holding that the surrender must be by instrument registered. For these reasons this appeal must be dismissed with costs.*

***3.** I agree. Under Section 111 of the Transfer of Property Act, a lease of Immovable property determines, by express surrender, that is to say, by the lessee yielding up his interest under the lease to the lessor, by mutual agreement between them. It is found that in this case the lessee did surrender her interest by mutual agreement, and it seems to me that it makes no difference that the mutual agreement was by reason of a consideration that was received from the tenant by the landlord. The Transfer of Property Act does not require a registered document in such cases and no authority has been shown to us in support of this contention."*

20. Learned counsel for the petitioner has drawn our attention on para-16 of the judgment in the case of ***Elias Meyer v. Manoranjan Bagchi and others 22c WN 441 (MANU/ WB/0534/1918).*** Para 16 of the judgment runs as under:

*"**16.** In this country a surrender or relinquishment does not require to be in writing but can be inferred from the acts of the parties. This is well illustrated by the case of Chundermani Byabhsa v. Shambu Chandra Chukerbutty [1864] W.R. 270, a decision which has never been question in this Court."*

21. Reliance has also been placed upon a judgment of Andhra Pradesh High Court in the Case of ***Konijeti Venkayya and ors v. Thammana Peda Venkata Subbarao and others AIR 1957 AP 619 (MANU/ AP/ 0347/1955).*** Counsel for the petitioner has vehemently argued that in India lease rights are surrendered orally also and at times even such relinquishment can be inferred from the conduct of the parties. He has tried to distinguish the Indian legal position from English one where the statute requires for surrender to be documented one evidencing the factum of surrender. He has relied upon para-6, 13 and 17 of the judgment (*supra*) which are reproduced hereinunder:

*"**6.** On a surrender by the lessee, a lease of immovable property comes to an end. It has to be ascertained whether there was an actual surrender or surrender in fact by the plaintiff of his leasehold right under Exhibit B-8 in favour of the lessor, his father. In England it has been held that where the subject- matter of the lease is a reversion, it is a " a matter, lying in grant, and not in livery, and of which therefore, there could be no valid surrender in fact otherwise than by deed." Lyon v. Reed (1844) 153 ER 118 126 (E). under Section 111(e) of the Transfer of Property Act if a lessee yields up his interest under the lease to the lessor by mutual agreement between them, there is an express surrender or surrender in fact. In India, a surrender may be oral and may by inferred from the acts and conduct of the parties there being no statutory provision like Section 3 of the English Statute of Frauds that a surrender*

should be evidenced by a document in writing or like Section 3 of 8 and 9 Vic. C. 106 requiring a deed for the purposes. See Elias. Myer V. Maoranjan 22 Cal W/N 441: (AIR 1919 Cal 694) (F) Brojo Nath V. Maheswar 28 Cal LJ 220; (AIR 1918 Cal 233) (1) (G) Chunder Monee Nya Busan V. Sham-buchandra Chukerbutty 1884) WR CR 270 (H) and Narasimma V. Lakshmana ILR 13 Mad 124 126, 127 (I).

13. *According to English Decisions a fresh lease accepted by a lessee during the continuance of a prior lease operates as a surrender of the original lease because by accepting the new lease, the lessee is a party to an act the validity of which he is, by law, afterwards stepped from disputing and which would not be valid if the first lease continued to exist and the lessor was not in a position to upt the lessee in possession at the date of the new lease. The law attributed the ofrce of estappel to certain acts of notoreity such as livery of sees in, entry, aceptance of an estate See Parke B. in (1844) 153 ER 118 127 (E) and Chitty, J. in Wallis V. Hands 1893 2 CH 75 at PP 79 and 82 (o). The grant of new lease to a stranger with the tenants' assent and change of possession at about the time of the new lease were held to bring the case within the scope of the doctrine of implied surrender. The insistence on delivery of possession by the old lessee and the assumption that the lessor was in possession at the date of the new lease and delivered possession under the new lease was due to the fact that, in England, it was for a long time considered necessary that a lessor should be in possession of the land intended to be leased. I twas therefore decided by the English Courts that where a lessee assented to a lease being granted to Anr. And also gave up possession to the new lessee there was a surrender by operation of law. Davision V. Gent (1857) 1 H & N 744 (p), 189 & 2 CH 75 at pp 79 and 82 (o). This requirement of the English common law that the lessor should have been in possession and given possession to the lessee at the time of the lease was dispensed with by Section 4 (2) of the Law of property Act, 1925, but it influenced the course of decision In England. Another consideration which weighed with the English Courts in holding that an assent by the tenant to the new lease would not amount to a surrender by operation of law without actual delivery of possession to the new tenant was adverted to by Chitty,J., in 1893 2 CH 75 PP. 79 and 82 (o), in these terms:*

To hold that mere oral assent to new lease operates as surrender in law would be a' most dangerous doctrine; it would practically amount to a repeal of the Statute of frauds and would let in all the mischief against which the statute is intended to guard; the policy of that statute is carried still further by the Statute 8 and 9 Vic. C.106, Section 3 which requires a deed in cases where formerly a mere writing would have sufficed.

17. *It was argued for the Respondent that even if Exhibits B-8 and B-12 were inconsistent or in compatible, the operation of Exhibit B-8 would remain suspended only during 1947-1948 at the end of which the term of Exhibit B012 would expire and that Exhibit B-8 would continue to be in force from 1948-1949 onwards till 1962-1963 according to its tenor. Reliance was placed on the following observation of Ramesam J in (MANU/ TN/ 0049/292: ILR 48 Mad 815, 819 AIR 1925 Mad 127, 1278) (N).*

22. Then again, learned counsel for the petitioner submits that in the case of

Jamuna Oil Mills v. The AddI. District Judge and others 1978 AWC 413 All (MANU/UP/ 0547/1978). Paragraphs 34 and 35 run as under:

*"**34.** To begin with it, it will be proper to give in brief the requirements of express or implied surrender of tenancy rights. Section 111 of the Transfer of Property Act lays down, amongst others, that a tenant can surrender his or her rights expressly or impliedly. Woodfall in his book on '' Landlor and Tenant', 27th ED. P. 362 says that "an implied surrender can also be by the conduct of both the parties" He writes "the term surrender by operation of law or implied surrender (there being no distinction is the expression used to describe all those cases where the law implies surrender from unequivocal conduct of both parties which is inconsistent with the continuance of the existing tenancy;*

***35.** In Amar Krishna v. Nazir Hasan AIR 1939 Oudh 257 at page 267 it was observed:*

An implied surrender takes place either by the creation of new relationship between the lesor and the lessee such as the acceptance of a new lease which must operate as implied surrender of the old one or in other ways based on the consent of the parties or by the relinquishment of possession by the lessee and taking over possession by the lessor which would lead to the inference of an implied surrender of the lease."

23. Placing reliance upon another judgment in the case of ***T.K. Lathika v. Karsandas Jamandas AIR 1995 SC 3335, (MANU/SC/0535/1999).*** Learned counsel for the petitioner has placed emphasis on paragraphs 11,12,13, and 15 which are reproduced hereunder:

*"**11.** The principle which governs the doctrine of implied surrender of a lease is that when certain relationship exist between two parties in respect of a subject matter and a new relationship has come into existence regarding the same subject matter, the two sets cannot co-exist, being inconsistent and incompatible between each other, i.e. if the latter can come into effect only on termination of the former, then it would be deemed to have been terminated in order to enable the latter to operate. A mere alteration or improvement or even impairment of the former relationship would not ipso facto amount to implied surrender. It has to be ascertained on the terms of the new relationship vis- a-vis the erstwhile demise and then judge whether there was termination of the old jural relationship by implication.*

***12.** The following passage in the Halsbury's Law of England, 4th Edn. Vol 27 at page 355, is apposite:*

449. Surrender by change in nature of tenant's occupation. A surrender is implied when the tenant remains in occupation of the premises in a capacity inconsistent with his being tenant, where, for instance, be becomes the landlord's employee, or where the parties agree that the tenant is in future to occupy the premises rent free for life as a license. An agreement by the tenant to purchase the reversion does not itself effect a surrender, as the purchase is conditional on a good title being made by landlord.

***13.** In Hill and Redman' s Law of Landlord and Tenant (16th Edn.) at page 451 it is observed that " a surrender does not follow from a mere agreement made during the tenancy for the reduction or increase of rent, or other variation of its terms, unless there is some special reasons to infer a new tenancy, where, for instance*

, the parties make change in the rent under the belief that the old tenancy is at an end.

15. *In Krishna Kumar Khemka V. Grindlays Bank MANU/SC/0200/1991: [1990] 2 SCR 961 a two- judge Bench of this Court held thus:*

Surrender of a part doe not amount to implied surrender of the entire tenancy and the rest of the tenancy remains untouched....

Likewise the mere increase or reduction of rend also will not necessarily import a surrender of an existing lease and the creation of anew tenancy"

24. Justifying the part of surrender of land as legally sustainable and accordingly defending letter dated 15.9.2018 and consequently subsequent lease deed dated 14/15.12.2018, learned counsel for the petitioner has cited the Supreme Court Judgment in the Case of ***Krishna Kumar Khemka v. Grindlays Bank P.L.C. and others (1990) 3 Supreme Court Cases 669*** where the Apex Court vide paragraphs 8 and 9 has held thus:

*"**8.** Learned counsel for the respondents, on the other hand, submitted that there was no new tenancy and surrender of flat Nos. 1 and 2 by the Grindlays and retaining two more flats does not amount to a new tenancy at least so far as Grindlays is concerned and a reduction of rend also does not create new tenancy inasmuch as the rent is that they had to pay was only for two flats in respect of each (sic which) their tenancy continue.*

9. *In Woodfall's Law of Landlord and Tenant, (25th edn., p. 969 paragraph 2079 reads as under:*

"2079. Implied surrender of part only. If a lessee for yeas accepts a new lease by indenture of part of the lands, it is a surrender for that part only, and not for the whole; and though a contract for years cannot be so divided, as to be avoided for part of the years and to subsist for the residue, either by act of the party or act in law; yet the land itself may be divided, and the tenant may surrender one or two acres, either expressly or by act of law, any the lease for the residue will stand good and untouched."

In Halsbury's Law of England(4th end., Volume 27) paragraph 449 reads and under:

"449. Surrender by change in nature of tenant's occupation. A surrender is implied when the tenant remains in occupation of the premises in a capacity inconsistent with his being tenant, where, for instance, he becomes the landlord's employee, or where the parties agree that the tenant is in future to occupy the premises rent free for life as a licensee. An agreement by the tenant to purchase the reversion does not of itself effect a surrender, as the purchase is conditional does not itself being made by the landlord."

In Foa's General Law of Landlord and Tenant (7th edn.) by Judge Forbes, paragraph991 reads thus:

91. Lease of part- It has been held that acceptance of a new lease of part only of the demised premises operates as a surrender of that part and no more; but any arrangement between landlord and tenant which operates as a fresh demise wil work a surrender of the old tenancy, and this may result from an agreement under which the tenant gives up part of the premies and pays a diminish rent for the remainder- and it may result from the mere alteration in the amount of rent payable. Where one only of two or more lessees accepts a new lease, it is a surrender only of his share."

In Hill and Redman's Law of Lanlord and Tenant (16th edn. On page 451) it is observed:

"Any arrangement between the landlord and tenant which operates as a fresh demise will work a surrender of the old tenancy and this may result from an agreement under which the tenant gives up part of the premises and pays a diminished rent for the remainder, provided a substantial difference is thereby made in the condition of the tenancy. But a surrender does not follow from a mere agreement made during the tenancy for the reduction or increase of rent, or other variation of its terms, unless there is some special reason to infer a new tenancy, where, for instance, the parties make the change in the rent in the belief that the old tenancy is at an end."

From the above passages it can be inferred that surrender of a part does not amount to implied surrender of the entire tenancy and the rest of the tenancy remains untouched. We shall now examine the cases cited. In Konijeti Venkayya V. Thammana Peda Venkata Subbaro Viswanatha Sastri,J.referred to the abovementioned passage from Woodfall's Law of Landlord and tenant and observed that the principle of law is stated correctly."

25. Finally defending the lease deed executed in favour of the petitioner by the original tenure holder, learned counsel for the petitioner has relied upon the judgment of the Apex Court in the Case of ***ITC Ltd v. State of U.P. (2011) 7 Supreme Court Cases 493*** wherein it has been held that unless and until a duly executed and registered lease deed is questioned and canceled by competent court of law, it will have all legal effects and can not by itself amount to be bad by any unilateral action even at the end of lessor. Learned counsel has placed reliance upon legal position held by the Supreme Court in paragraph 30 of the said judgment which runs as under:

"30. *A lease governed exclusively by the provisions of the Transfer of property Act, 1882 ("the TP Act, for short) could be canceled only by filling a civil suit for its cancellation or for a declaration that it is illegal, null and void and for the consequential relief of delivery back possession. Unless and until a court of competent jurisdiction grants such a decree, the lease will continue to be effective and binding. Unilateral cancellation of a registered lease deed by the lessor will neither terminate the lease nor entitle the lessor to seek possession. This is the position under private law. But where the grant of lease is governed by a statute or statutory regulations, and if such statute expressly reserves the power of cancellation or revocation to the lessor, it will be permissible for an authority, as the lessor, to cancel a duly executed and registered lease deed, even if possession has been delivered, on the specific grounds of cancellation provided in the statute."*

26. A careful reading of the aforesaid citation reveals that even the lessor does not have the right to unilaterally terminate the lease and seek possession so long as the existing rights the lease has not been surrendered by the lessee. The lessor would not get any right out of his action except in those cases where the statutory regulation reserves the right of cancellation or revocation in favour of the lessor. So it is a statutory authority which enjoys the right to cancel the lease even unilaterally in cases where possession has

been delivered to the lessee, provided of course, where grounds for cancellation are part of terms and condition of the lease.

27. Learned counsel for the petitioner has urged that in the present case, it is just a complaint by complainant a third party, and neither lessor nor, the original lessee who had surrendered part of the lease land making way for a subsequent lease in favour of the petitioner, has questioned the subsequent lease. The factual position of surrender followed by subsequent lease has created indefeasible rights favour of the petitioner and would not automatically get rendered as bad so as to reject his candidature on that count. He argues, therefore, the piece of land so long as it is a subject matter of a valid conveyance, until, of course cancelled or set aside or declared non est or bad by a competent court of law, the authorities were not justified in holding that the lease itself was bad.

28. On the question of condition being led in the surrender letter on right to re-entry in case of emergency or in case of non use of land, it is argued that this right stood extinguished the moment a subsequent lease got executed by the lessor. He submits that the execution of the subsequent lease, the petitioner being lessee herein entered into possession and the contingency as stipulated in the letter of surrender stood evaporated. It is further submitted that the lessee of the original lease had a contract of transfer in his favour from the original lessor and any terms and condition would be intra party on the principle of privity of contract between the two and it is admitted to the original lessee and the lessor and it has not been doubted at all even by the Corporation that the original lessee prior to the execution of subsequent lease on 15.12.2018 did not re-enter the land and so, those conditions would not be any more binding either upon the lessor or upon the petitioner and to the limited extent described under the lease agreement the rights, title have flown in favour of the petitioner from the lease agreement and the rights and interest of the original lessor have even got extinguished qua the land and the land has to be taken as a clean land free from all encumbrances to be taken within the definition of land under Clause 4 (V) of the Brochure as of Group-I category.

29. He submits that the complaint was absolutely baseless and the Corporation was not justified in questioning the lease deed and, therefore, he submits that the order impugned is not sustainable in the eyes of law and is liable to be quashed.

30. Per contra the argument advanced by the learned counsel for the respondent Corporation Sri Vikas Budhwar is that in view of the provision contained under the Registration Act which came into force in the year 1908, the legal position prior to the said order would not be applicable. In the present case according to him, a document that conveys transfer of immovable property is necessarily required to be registered under Section 17 of the said Act failing which the document is inadmissible in law and a document which is inadmissible in law cannot create any right or title in the eyes of law and thus the argument is that letter of surrender dated 15.9.2018 cannot be a valid surrender within the meaning and scope of the provisions of Transfer of Property Act,1882 read with relevant

provision of registration under the Indian Registration Act, 1908.

31. The second argument advanced by the learned counsel for the respondent is that Clause-7 of the lease agreement does not talk of part surrender of lease and since the original lessee pursuant to the lease agreement dated 25.5.2018 was bound by the terms and conditions contained therein, he was not justified in surrendering lease rights in respect of the part of the property in variation to the conditions prescribed under the lease agreement and if at all it could have been, it ought to have been a registered one.

32. The third argument advanced by learned counsel appearing on behalf of the Corporation is that it is well within the rights of the Corporation to determine whether a land is suitable or not for the purposes of setting up retail outlet of the petroleum products. He submits that though dealership offer by the respondent Corporation is on the basis of owned dealership retail outlets, in the present case, but the Corporation would be the best judge to determine that a particular land is a suitable land for the purposes of investment. He submits that investment is long drawn one and, therefore, it has to be secured one. He submits that merely because the land is as per the measurement and located at the site itself would not make it suitable in every sense of word, meaning thereby, he argues, if the document qua land creates an impression of any likelihood of civil litigation relating to rights and title of the land property, the Corporation would be justified in not treating such land to be suitable land. Thus according to him merely because lessor and the original lessee have not questioned the title, it would hardly matter as in case if the documents relating to the lease or title of land are such that may make it questionable in court of law at an future point of time resulting in a long drawn civil litigation.

33. It is argued that the Corporation, may be a public sector Corporation, but if it is dong business then it is the best judge to ensure its business prospects. Merely because an advertisement has been issued inviting application and one is selected in draw of lots, would not create any indefeasible right in his favor to claim for allotment of dealership as a rule.

34. On the legal point raised by Sri Vikas Budhwar that if a lease deed is executed and it's surrendered is sought and the surrender of rights is in part of the lease property, it cannot be as part relinquishment is not contemplated either under the original lease agreement or under Section 111 of T.P. Act 1882 and if at all it is done, it is in variation to the clause of lease agreement and so it is required to be registered. Sri Budhwar has drawn attention of the Court towards Clause-7 of the original lease deed dated 25.5.2018 executed by the tenure holder Mangal Singh in favour of Ms. B.S.C.-C&C-JV. Clause-7 of the original lease deed dated 25.5.2018 is reproduced herein under:

"7. That the lessee shall be at liberty to vacate to determine this agreement by giving notice of two months in writing to the lessor expiring at any time during the currency of this period."

35. A bare reading of the Clause 7 clearly reveals that lessee shall be at liberty to vacate to determine this agreement by giving notices of two

months in writing to the lessor during the currency of the lease period. It is argued that it talks of whole surrender of the lease as it refers to determination of the lease itself. Sri Budhwar has also taken us to Clause-8 of the lease deed which runs as under:

"8. That if lessee become unable to complain the above terms and condition the lessor will able to compensate his loss from the lessee company property situated at the above plot (land)"

36. Clause-8 of the lease shows that the lease has been executed on the terms and conditions is styled as such "hereinafter mentioned which is ageed by the parties as follows" shows that the terms and condition bound the lessee to act in the manner in which they are provided. He argues that since the lease did not provide for the part surrender of the land, the surrender letter dated 15.92011 would not amount to a lawful surrender.

37. Advancing the argument further he submits that under Section 111(e) what is contemplated is the surrender of the entire interest under the lease. He has relied upon paragraph-10 of the judgment in the case of ***Tirath Ram Gupta v. Gurubachan Singh and another AIR 1987 Supreme Court 770*** which runs as under:

"The lessee has a right to transfer by sub-lease even a part of his interest in the property as provided in Section 108(j) of the Transfer of Property Act. A transferee from the lessee has a right to claim the benefit of contract to the lessee's interest, vis-a-vis the landlord, (vide Section 108 second paragraph of clause (c) of the Transfer of Property Act) Thus a sub-lessee who has obtained a part of the interest of the head tenant will be entitled to claim the benefit of the contract vis-a-vis the lessor, as the lessee (head tenant) cannot surrender the lease in part. Section 111(e) contemplates a surrender of the entire inter- est under the lease and not a part of the interest alone. Moreover, a lease can be determined only by restoring pos- session in respect of the entire property which was taken on lease (see Section 108(m). Section 115 of the Transfer of Property Act provides that the surrender of a lease does not prejudice an under-lease of the property or in part thereof previously granted by the lessee. The lessee, having parted with a part of the interest in the property in favour of the sub-lessee, cannot surrender that part of the property which is in the possession of the sub-lessee for he cannot restore possession of the same to the lessor apart from the fact the he can terminate the contract of lease only as a whole and not in respect of a part of it. Having regard to all these factors, even without going into the question of the partial surrender of lease being vitiated by collusion, it is not open to the appellant in law to contend that the second respondent is entitled to and had validly surrendered a portion of the lease-hold property and the first respondent, being the sub-tenant is bound by the surrender and should deliver possession."

38. He further argues that mere act or conduct of the party whether in writing or otherwise would not amount to determination of lease unless such intention to surrender in the existing lease is incorporated in writing any subsequent agreement is acknowledgment of the consent of the lessee in that regard. He therefore, seeks to urge that a surrender

has to be in writing and that has to be a registered one and it should be in respect of entire property. He has placed reliance upon the Judgment of Supreme Court in the Case of ***H.K. Sharma Vs. Ram Lal (2019) 4 Supreme Court Cases 153*** in which vide paragraphs 23 to 35 the Court has held thus:

*"**23**. in other words, the question that arises for consideration is when the lessor enters into an agreement to sell the tenanted property to his lessee during the subsistence of the lease, whether execution of such agreement would ipso facto result in determination of the lease and sever the relationship of lessor and the lessee in relation to the leased property.*

***24.** In our considered opinion, the aforementioned question has to be decided keeping in view the provisions of Section 111 of the TP Act and the intention of the parties to the lease- whether the parties intended to surrender the lease on execution of such agreement in relation to the tenanted premises or they intended to keep the lease subsisting notwithstanding the execution of such agreement.*

***25.** Chapter V of the TP Act deals with the leases of immo0valble property. This chapter consists of Section 105 to Section 117.*

***26.** A lease of an immovable property is a contract between the lessor and the lessee. Their rights are governed by Sections 105 to 117 of the TP Act read with the respective State rent laws enacted by the State. Section 111 of the T Act deals with the determination of lease. Clauses (a) to (h) set out the grounds on which a lease of an immovable property can be determined. Clauses (e) and (f) with which we are concerned here provide that a lease can be determined by an express surrender; in case, the lessee yields up his interest under the lease to the lessor by mutual agreement between them whereas clause (f) provides that the lease can be determined by implied surrender.*

***27.** This Court in Shah Mathuradas Manganlal & Co. V. Nagappa Shankarappa Malage considered the scope of clauses (e) and (f) of Section 111 of he TP Act and laid down the following principles in para 19 as under: (SCC p. 665)*

"19. A surrender under clauses (e) and (f) of Section 111 of Transfer of Property Act, is an yielding up of the term of the lessee's interest to him who has the immediate reversion or the lessor's interest. It takes effect like a contract by mutual consent on the lessor's acceptance of the act of the lessee. The lessee cannot, therefore, surrender unless the terms vested in him; and the surrender must be to a person in whom the immediate reversion expectant on the term is vested. Implied surrender by operation of law occurs by the creation of a new relationship, or by relinquishment of possession. It the lessee accepts a new lease that in itself is a surrender. Surrender can also be implied from the consent of the parties or from such facts as the relinquishment of possession by the lessee and taking over possession by the lessor. Relinquishment of possession operates as an inplied surrender. There must be a taking of possession, not necessarily a physical taking, but something amounting to a virtual taking of possession. Whether this has occurred is a question of fact."

***28.** It is in the light of the aforementioned legal principle, the question involved in this case has to be examined.*

***29.** Perusal of agreement to sell dated 13.5.1993 (Annexure P-1) shows*

that though the agreement contains 9 conditions but none of the conditions provides, much less in specific terms, as to what will be the fate of the tenancy. In other words, none of the conditions set out in the agreement dated 13.5.2003 can be construed for holding that the parties intended to surrender the tenancy rights.

30. *A fortiori, the parties died not intend to surrender the tenancy rights despite entering into an agreement of sale of the tenanted property. In other words, if the parties really intended to surrender their tenancy rights as contemplated in clauses (e) or (f) of Section 111 of the TP Act while entering into an agreement to sell the suit house, it would have made necessary provision to that effect by providing a specific clause in the agreement. It was, however, not done. On the other hand, we find that the conditions set out in the agreement do not make out a case of express surrender under clause (e) or implied surrender under clause (f) of Section 111 of the TP Act.*

31. *It is for this reason, the law laid down by this court in R.Kanthimathi has no application to the facts of this case and is therefore, distinguishblae on fact. Indeed it will be clear from mere perusal of para 4 of the said decision quoted hereinbelow:(SCC p.341)*

"4. As aforesaid, the question for consideration is , whether the status of tenant as such changes on the execution of an agreement of sale with the landlord. It is relevant at this junction first to examine the terms of the agreement of sale. The relevant portions of the agreement of sale recorded the following:

'I the aforesaid Mrs Bratrict Xavier hereby agree out of my own free will, to sell, convey and transfer the property to you Mrs. R. Kanthimathi wife of Mr. S. Ramaswami, 435 Trichy Road, Coimbatore for a mutually agreed sale consideration of Rs. 25,000/

I shall be proceeding to Coimbatore and shall execute the sale deed and present the same for admission and registration before the Registering Authority, accepting and acknowledge payment of the balance of consideration of Rs. 5000 (Rupees five thousand only) at the time of registration and shall complete the transaction for sale and conveyance as the property demised has already been surrendered to your possession.

(emphasis in original)

The words highlighted in italics of the agreement were construed by their Lordships for holding that these italicised words in the agreement clearly indicate that the parties had really intended to surrender their tenancy rights on execution of the agreement of sale and bring to an end their jural relationship of the landlord and tenant.

32. *As observed supra, such is not the case here because we do not find any such clause or a clause akin thereto in the agreement dated 13-5-1993 and nor we find that the existing conditions in the agreement discern the intention of the parties to surrender the tenancy agreement either expressly or impliedly.*

33. *In the light of the foregoing discussion, we are of he consiered opinion that the tenancy in question between the parties did not result in its determination as contemplated under Section 111 of the TP Act due to execution of the agreement dated 13-5-1993 between the parties for sale of the suit house and the same remained unaffected notwithstanding execution of the agreement dated 13-5-1993*

34. *A fortiori, the respondent (lessor) was rightly held entitled to file an application against the appellant (lessee)*

under Section 21 (1) (a) of the U.P. Act and seek the appellant's eviction from the suit house after determining the tenancy in question.

35. *Before parting, we make it clear that we examined the terms of the agreement dated 13-5-1993 only for deciding the question as to whether the execution of agreement, in any manner, resulted in determination of the existing tenancy rights between the parties in relation to the suit house in the context of the TP Act and the U.P. Act and not beyond it."*

39. On the question of agreement that varies essential terms of existing registered lease, it must be registered one. The learned counsel for the respondent has drawn our attention to Section 107 of the Transfer of Property Act and Section 17 of Registration Act. Which are reproduced hereunder:

"107. A lease of immovable property from year to year, or for any term exceeding one year, or reserving a yearly rent, can be made only by a registered instrument."

"Section 17 - Indian Registration Act, 1908

(1) The following documents shall be registered, if the properties to which they relate is situate in a district in which, and if they have been executed on or after the date on which, Act No. XVI of 1864, of the Indian Registration Act 1866, or the Indian Registration Act 1871, or the Indian Registration Act 1877, or the this Act came or comes into force, namely:-

(a) instruments of gift of immovable property;

(b) other non-testamentary instruments which purport or operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of one hundred rupees, and upwards, to or in immoveable property;

(c) non-testamentary instruments which acknowledge the receipt or payment of any consideration on account of the creation, declaration, assignment, limitation or extinction of any such right, title or interest; and

(d) leases of immoveable property from year to year, or for any term exceeding one year, or reserving a yearly rent;

(e) non-testamentary instruments transferring or assigning any decree or order of a court or any award when such decree or order or award purports or operates to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of one hundred rupees and upwards, to or in immoveable property (Added by Act No. 21 of 1929);

PROVIDED that the State Government may, by order published in Official Gazette, exempt from the operation of this sub-section any leases executed in any district, or part of a district, the terms granted by which do not exceed five years and the annual rent reserved by which do not exceed fifty rupees.

(2) Nothing in clauses (b) and (c) of sub-section (1) applies to -

(i) any composition-deed; or

(ii) any instrument relating to shares in a joint stock company, notwithstanding that the assets of such company consists in whole or in part of immovable property; or

(iii) any debenture issued by any such company and not creating, declaring, assigning, limiting or extinguishing any

right, title or interest, to or in immovable property except insofar as it entitles the holder to the security afforded by a registered instrument whereby the company has mortgaged, conveyed or otherwise transferred the whole or part of its immovable property or any interest therein to trustees upon trust for the benefit of the holders of such debentures; or

(iv) any endorsement upon or transfer of any debenture issued by any such company; or

(v) any document not itself creating, declaring, assigning, limiting or extinguishing any right or title or interest of the value of one hundred rupees and upwards to or in immovable property, but merely creating a right to obtain another document which will, when executed, create, declare, assign, limit or extinguish any such right, title or interest; or

(vi) any decree or order of a court [except a decree or order expressed to be made on a compromise and comprising immovable property other than that which is the subject-matter of the suit or proceedings] (Substituted by Act No. 21 of 1929 for the words 'and any award');

(vii) any grant of immovable property by government; or

(viii) any instrument of partition made by a revenue officer; or

(ix) any order granting a loan or instrument of collateral security granted under the Land Improvement Act 1871, or the Land Improvement Loans Act 1883; or

(x) any order granting a loan under the Agriculturists Loans Act 1884, or instrument for securing the repayment of a loan made under that Act; or

[(x-a) any order made under the Charitable Endowments Act 1890 (6 of 1890) vesting any property in a treasurer of Charitable Endowments or divesting any such treasurer of any property; or] (Inserted by Act No. 39 of 1948)

(xi) any endorsement on a mortgage-deed acknowledging the payment of the whole or any part of the mortgage-money, and any other receipt for payment of money due under a mortgage when the receipt does not purport to extinguish the mortgage; or

(xii) any certificate of sale granted to the purchaser of any property sold by public auction by a civil or revenue officer.

***Explanation**: A document purporting or operating to effect a contract for the sale of immovable property shall not be deemed to require or ever to have required registration by reason only of the fact that such document contains a recital of the payment of any earnest money or of the whole or any part of the purchase money. (Inserted by Act No. 2 of 1927)*

(3) Authorities to adopt a son, executed after the 1st day of January 1872, and not conferred by a will, shall also be registered.

40. From the bare perusal of the aforesaid provision, it is urged, it is quite clear that every document which conveys transfer of immovable property needed to be registered and unless such document is registered, it does not at all or in anyway conveys the title may be in the limited scope of the document so executed. Learned counsel for the respondent has placed reliance upon para-3 of the judgment of Supreme Court in the Case of ***Sunil Kumar Roy v. Bhowra Kankanee Collieries Ltd. And others AIR 1971 Supreme Court 751*** which runs as under:

*"**3.** Mr. B. Sen for the appellant sought to raise the question about the*

admissibility of Exh. A-4 for want of registration. In the first place this contention cannot be entertained so long as the finding of the High Court on the only point which was canvassed before it about the reduction of the rate of royalty is not set aside. The High Court had held after an examination of the evidence that it had not been proved that there was any change in the market condition in July or in December 1953 to call for a reduction in the rate of royalty or that there was any mutual lessor or the lessee for such reduction which was to become effective from July 1952. No attempt was made by Mr. Sen to persuade us to reverse this conclusion. Even on the assumption that a mutual arrangement or agreement as evidenced by Exh. A-4 was arrived at between the appellant and the Eastern Coal Co. Ltd., we are unable to agree that any reduction in the rate of royalty could have been effected by means of Exh. A-4 which had not been registered under the provisions of the Indian Registration Act. It is well settled by now that a document which varies the essential terms of the existing registered lease, such as the amount of rent, must be registered: See Durga Prasad Singh V. Rajendera Narain Bagchi, (1910) ILR 37 Cal 293 which was approved by the Full Bench in Lalit Mohan Ghosh v Gopal Chuck Coal Company (1912) ILR 39 Cal 294 (FB) decision of the Madras High Court in Obai Goundan v. Ramalinga Ayyar, (1899) LIR 22 mad 217, taking a contrary view has not been followed by the High Courts in India and the consistent view that has been taken in that registration of an agreement is necessary which reduces the rent of an existing registered lease. See Mulla on Indian Registration Act, 7th Edn. Pages 75-76.

41. Learned counsel for the respondents has placed reliance upon paragraphs 12 and 15 of the Judgment of the Supreme Court in the Case of ***Chandrakant Shankarao Machale v. Parubhai Bahiru Mohite (dead) (2008) 6 Supreme Court Cases 745.*** Paras 12 and 15 runs as under:

*"**12.** The deed of mortgage dated 28-2-1983 was a registered document. The terms of a registered document could be varied or altered only by another registered document. A finding of fact has been arrived at that the appellant could not prove his possession as a tenant. We have noticed hereinbefore that the appellant was put in possession a a mortgagee. It was, therefore, in our opinion, impermissible in law to change his status from a mortgagee to that of a lessee by reason of an unregistered deed of lease (eve if we assume that the same had been executed.)*

***15.** The deed of mortgage was a registered one. It fulfilled the conditions of a valid mortgage. Its terms could not have been varied or altered by reason of an unregistered document so as to change the status of the parties from mortgagee to a lessee. [See S. Saktivel V. M Venugoal pillai (SCC p. 108, para 6: AIR paras 6-7)].*

42. Counsel for the respondent has further placed emphasis upon paragraph 31 of the judgment of the Supreme Court in the case of ***K.B. Saha and sons private limited v. Development Consultant Limited (2008) 8 Supreme Court Cases 564.*** Para 31 runs as under:

*"**31.** The High Court in the impugned judgement relied on a decision of the Allahabad High Court in Ratan Lal V. Hari Shanker to hold that since the appellant wanted to extinguish the right of the respondent with the help of the unregistered tenancy, the same was not a collateral purpose. In Ratan lal case while discussion the meaning of the terms " collateral purpose" the High Court had observed as follows: (AIR pp. 180-81, para 4)*

"4. The second contention was that the partition deed, even if it was not resisted could certainly be looked into for a collateral purpose... but the collateral purpose has a limited scope and meaning. It cannot be used for the purpose of saying that the deed created or declared or assigned or limited or extinguished a right to immovable property... term "collateral purpose' would not permit the party to establish any of these acts from the deed."

43. Counsel for the respondent has further placed reliance upon the judgment of the Madras High Court in the case of ***B. Ahmed Marcair v. Muthuvlliappa Chettiar 1961 AIR (Madras) 28*** in which vide paragraphs 7 and 8 the court held thus:

*"7. In this connection the learned District Munsif has pertinently pointed out the implications of the decision in **Gopal Chandra Das v Harendra Natha datta, 63 Ind Cas 483 (Cal).** In that case the Calcutta High Cout held that though no writing was ordinarily necessary in this country for surrendering a tenancy if the original lease is registered the surrender of a portion of the tenancy with an abatement of rent can only be effected by a registered instrument as in such a case the surrender involves a variation of the original contract of tenancy. The Calcutta High Court has also held that oral evidence as regards such surrender is inadmissible under Section 92 of the Evidence Act. This decision has been cited with the approval in the well-known commentaries on the Transfer of Property Act by Chitaley and Annaji Rao, Third Edition (1950) page 1861.*

*8.When the facts lead to the conclusion that there was sufficient interruption, substantial Interference - it need not be physical exposition (?) (Sic (dispossession) to the quiet enjoyment of the lessee of the demised land unde the lessor assured to the lessee under Section 108 C of the Transfer of Property Act what are the consequences which flow? The Courts below have rightly relied on the decision in **Dhunput Singh v. Mohomed Kazim , ILR 24 Cal 296** and held that the lessee in this case can plead that his obligation to pay rent or balance of rent due to the lessor be held under suspension or must be held to have abated by reason of the conduct of the lessor. The effect of partial eviction by a lessor has been dealt with in the following passage at page 659 under Section 108(L) in Mulla's Transfer of Property Act Fourth Edition (by C.J. S.R.Das)*

"If the premises are let for one rent, the rule of English law is that the eviction of the lessee by the lessor from part of the demised premises suspends the rent for the whole. The reason of the rule given in the earlier cases is that the landlord being in feudal times the defender and protector of the tenant should not be encouraged to disturb him. In later cases the reason given is that the landlord is not entitled to apportion his wrong. Judicial decisions in India on this point have not been uniform. In some cases this rule of English law has been followe and it has

been held that if the rent is an entire rent for all the property leased, eviction by the lessor of the lessee from part of the property leased suspends the whole rent."

44. Yet another judgment in that regard relied upon by learned counsel for respondent is of Calcutta High Court in the case of ***M.S. Ram Singh v. Bijoy Singh Surana AIR 1972 Calcutta 190*** wherein the Court in paras 19, 20 and 21 has held thus:

*"**19.** Mr. Banerjee referred to the decision in Bengal Coal Co. Ltd V. Nonoranjan Bagchi AIR 1919 Cal 694 in which it was observed that a surrender or relinquishment does not require to be in writing but may be inferred from acts of parties. In Abdul Majid V . Hari Charan Halder AIR 1919 Cal 840, it was held that a surrender is not required to be by an instrument registered. The same view was taken in Sari Debi V. Sailabala Dasi AIR 1920 Cal 858 in which it was held that even though the original tenancy was created by the registered lease, its surrender would be valid if it is accepted and acted upon by the landlord. But in the present case, as the surreder was by instrument in writing it was compulsory registrable as was held in Nadig Neelakanta Rao V. state of Mysore. AIR 1960 Mys 87. It was held that as the instrument of surrender purports to extinsguish the rights of the tenant, valued at over Rs. 100.- it is compulsorily registrable.*

***20.** Mr. Ghosh disputed the contention and in his turn contended on the authorities of this Court cited above, that as the surrender was accepted and acted upon as also evidenced by Exs 6 and 7, no further instrument was necessary. He further contended that surrender was not an extinguishment of interest in immovable property as contemplated in Cl. (B) of Section 17 (1) of the said Act but as it was relinquishment of the lessee's interest, Cl. (b) of Section 17 (1) was not attracted. Further the interest of the original tenant was that of a monthly tenant and such tenancy does not require registration under Cl. (d) and its surrender accordingly did not require registration. Mr. Ghosh also contended that the EX. 7 did not by itself create declare or extinguish any right as would appear reading the document as a whole and accordingly it came under the exception in Cl. (b) of sub-section (2) of S.17. On that ground the decision in Nadig Neelkanta Ra, AIR 1960 Mys 87 (supra) was sought to be distinguished.*

***21.** As we have seen surrender is an extinguishment of the lessee's interest and there is no dispute that value of the interest would be over Rs. 100/-. the document recites a surrender in praesenti and even if the surrender purports to be effective on a further date, it would make no difference on this aspect for the purposes of registration. Clause (b) of Section 17 (1) includes all instruments which purport or operate to create, assign, limit or extinguish whether in present or in future any right, title or interest of value of Rs. 100/- and upwards to or in immovable property. Apart from the surrender as evidenced by the document Ex.7 and the evidence in support thereof there is no other pleading or evidence in support of oral surrender nor it is dependent on any subsequent document. The document Ex. 7, as we have see, purports to extinguish the interest of the lessee in his tenancy, and though a surrender on a future date as contended it is an invalid surrender, for the purpose of Section 17(1) of the Indian Registration Act the document is*

compulsorily registrable and is not excepted by any of the provision of the Act.

45. Placing reliance upon the judgment of Allahabad High Court in the case of ***Ratan Lal and others Vs. Hari Shanker and others AIR 1980 Allahabad 180.*** It is contended by the learned counsel for the respondent that mere family arrangement cannot be itself a document to create rights in favour of the beneficiaries which otherwise is required under law to be compulsorily registriable. Learned counsel for the respondent has placed reliance upon paragraph -5 of the judgment which is reproduced hereunder:

"Learned counsel then contended that the deed could be treated to be a family arrangement was not compulsorily registrable. This was not compulsorily registerable. This contention, in my opinion, is not correct. The Supreme Court in the case of Kale V. By. Director of Consolidation , (AIR 1976 SC 807), held that a family arrangement in case it is oral needs no registration, but if the terms thereof were reduced into writing, it became imperative to have the document registered and unless it was registered, it could not be looked into. The pleas of family arrangement is sought to be derived from Exhibit-1. That document is in writing. Even if it was treated to be a family arrangement, it required registration, and having not been registered, it could not be looked into for the purposes of showing it to be a family arrangement.

46. He has relied upon a judgment of the Madras High Court in the case of ***Ranganatha Gounder v. Perumal Nattar AIR 1999 Madras 133*** wherein vide paragraph-3 of the judgment the Court has held thus:

"3. *Mr.V Raghavachari, learned Counsel appearing for the petitioner, therefore contended that the order of the Court below is bad in law and the document shall not be received in evidence. Mr. K. Kannan, learned counsel appearing for the respondent would state that there is no legal right in favour of the defendant as a lessee when he executed the document in question and when that is so, he cannot validly transfer or extinguish any such alleged right in the property. Therefore, according to him, the document is not hit be Secs. 17 (1) (b) and 49 (c) of the Act. In elaborating this argument, he wold add that there is no lease document between the parties and, therefore, there is no legal right in the defendant. Applying my mind to the argument of the learned Counsel for the respondent, I find that no foundation is laid for such an argument. It must be noticed that the plaintiff himself relies upon this document. Mr. V. Raghavachari, in support of his contention that this document requires compulsory registration and in the absence of the same, it shall not be received in evidence, brought to my notice three judgments viz. Rangayya Appa Rau v. Kameshwara Rau , (1897) ILR 20 Mad 367: 7 m ad LJ 59 (DB); Neelakanta Rao. Vs. Sate of Mysore, AIR 1960 Mys 87 (DB) and M.S. Ram Singh V. B.S. Surana , AIR 1972 Cal 190 (DB) . In the first case, the plaintiff was a Zamidar ad the defendant was a tenant. He sues for declaration of his title and for possession of certain land of which the first defendant had been in possession as a tenant. It appears that the tenant having fallen into difficulties executed a document on the 20th June, 1888 addressed to the plaintiff in the following terms:*

" To the Zamidar, (sic) & C, relinquishment report put in by Govindarazulau Kameswara Rau, cultivator of Gurazada. Being unable to cultivae the 16 acres 84 cents of dry land and 7 acrs and 87 cents of wet land, 24 acres and 72 cents in all which I have been cultivating in the village of Gurazada, and finding it inconvenient to

pay the arrears on it, I have relinquished the rights to the Sirkar (i.e. Zamidar). I agree to the removal of that land from the village accounts in my name for Fasli 1298 and to your disposing of the same at your pleasure without may having anything to do with the arrears of Rs. 600 and odd due thereon. This relinquishment report is put in with consent."

The Courts below refused to admit that document for want of registration. In that context, the learned Judges of this Court held that the document referred to above was one given for consideration which moved from the plaintiff to the defendant, that is the waiver by the former of his right to the arrears of rent amounting to Rs. 600 due at the time of relinquishment, which is clear from the terms of the instrument itself and therefore, it requires registration. In Neelakanta Rao v. state of Mysore (AIR 1960 Mys 87) (referred above) , the question that was considered is whether the surrender deed executed between the tenant in favour of the landlord requires registration or not. The learned Judges have held as follows:

"A surrender deed executed by the tenant in favour of the landlord in respect of this tenancy the due of which exceeds Rs. 100 is clearly an instrument which purports to extinguish the right of the tenant, the value of which is over Rs. 100/- and as such comes within Cl. (B) of Sec. 17 91) and therefore is compulsorily registable. Such a document if not registered, cannot be received in evidence of the transaction of surrender affecting the property in view of S.49, Registration Act."

This was followed in the last judgment referred to above, In the case on h and, there is no dispute that the value of the property is more than Rs. 100/- since the plaintiff himself valued the suit properties at Rs. 300/-. Therefore, I have no hesitation to hold that the document dated 22-6-1995 stated to be entered into between the defendant and the plaintiff in O.S. No. 859 of 1995 on the file of Additional District Munsif, Villupuram, is compulsorily registrable and as it is not so done, it is inadmissible in evidence. Civil Revision petition is allowed. No costs Consequently C.M.P. No. 17480 of 1998 is dismissed."

47. Learned counsel for the respondent has finally relied upon the judgment of the Apex Court in the case of ***Kale and others v. Deputy Director of Consolidation and others*** to argue that the family arrangement though have been held to be binding amongst the members of the family but such family arrangements may not be having any binding effect in respect of third party who is a stranger to the same and further no arrangement in respect of the strangers who are not part of the family would amount to a valid settlement creating rights, can be permitted to do away with the condition of registration of such a document. Further he has argued that even in cases of family settlement where it is sought to be reduced in writing then it is compulsorily required to be registered one. He submits that an oral family settlement may have a mutual binding effect and to that extent it may determine the rights of the parties to which they mutually agreed but when it is sought to be documented to have a force of law then it is required to be registered one. He has placed reliance upon paragraph-4 of the judgment of the Apex Court in which speaking for himself and for the majority V. R. Krishna Iyer, J and Murtaza Fazl Ali, J observed thus:

"(4) It is well settled that registration would be necessary only if the terms of the family arrangement are reduced into writing. Here also, a

distinction should be made between a document containing the terms and recitals of a family arrangement made unde the document and a mere memorandum prepared after the family arrangment had already been made either for the purpose of the record or for information of the court for making necessary mutation. In such a case the memorandum itself does not create or extinguish any rights in immovable properties and therefore does not fall within the mischief of Section 17(2) (sic (Section 17 (1) (b)?) of the Registration Act and is, therefore not compulsorily registrable;"

48. Thus, the judgment of the High Court was set aside on the ground that it did not acknowledge the oral settlement between the parties for the reason that parties on account of some oral settlement/ some mutual settlement that was sustainable but then the High Court erred in law in rejecting such compromise only for being unregistered. It is argued by learned counsel for the respondent that the Apex Court took the view on account of the fact that mutuation petition before the Assistant Commissioner did not carry any terms of the family settlement but was merely in the nature of memorandum. Justice R.S. Sarkaria though gave a separate judgment but agreed to the findings returned by the majority on the ground that since the petition did not itself create or decline any right qua the immovable property above the value of Rs. 100/- or more was not hit by Section 17(b) of the Registration Act.

49. It has been finally submitted by the learned counsel appearing for respondent Corporation that since the condition prescribed under the alleged surrender letter amounted to variation of the conditions of the original lease, and so it was of necessity required to be registered in view of Section 17 of the Registration Act, 1908. Learned counsel for the respondent has further sought to distinguish the legal position prior to 1908 from post 1908 when Indian Registration Act came into force.

50. On the consideration of business prospects and discretion of the Corporation to consider the land as suitable or not, learned counsel for the petitioner has argued that evaluation of credentials and land evaluation at the site is primary function of the committee constituted for such purpose and the committee so constituted conducts its affairs very fairly in the presence of the applicant and after such exercise being conducted if it is found that the land is not suitable, Corporation has no reason to disagree unless there exists any element of bias, mala fides or arbitrariness reflected from the action and the decision taken by the committee. The judgment of committee qua suitability of site on the spot and wisdom of the Corporation's officials in the evaluation of the report qua suitability of land should not be ordinarily permitted to be questioned because it is the ultimate interest of the Corporation which is at the stake and not the person who has applied for the allotment of dealership. It is argued that to the extent of fairness in action, one can always plead for right to be considered but where no such element is detectable, one cannot claim the allotment as a rule merely because one has been selected in the draw of lots.

51. It is argued by the learned counsel for the respondent Corporation that since the lease itself has become

questionable even if not by institution of civil proceedings at the end of lessor or lessee but the papers and the document that have been executed did have the elements to make it questionable in a court of law, and so the Corporation cannot be compelled to set up petrol pump unit for the sale of petroleum products compulsorily over such place.

52. Having heard learned counsels for the parties and their arguments advanced across the bar and having perused the records and having considered the merits in this case, two points emerge:

(A) Whether the piece of land offered by the petitioner is a subject matter of a valid lease deed, and so an offer of land deserves to be considered under Group-I?

(B) Whether the suitability of the land determined by the Corporation can be questioned and discretion of the respondent Corporation in the facts and circumstances of the present case, should be judicially reviewed in the absence of any mala fides or arbitrariness.

53. Now coming to the question that relates to the lease document of the petitioner dated 14/ 15.12.2018 presented by the petitioner seeking allotment of the retail outlet dealership, it is needed to be examined as to whether the rights created under the said lease agreement could be said to be a valid one and to that extent the lease to be held valid so as to hold the respondent's stand to the contrary as incorrect.

54. Lease has come to be defined under the Transfer of Property Act as a transfer of a right to enjoy such property, made for certain time, expressed or implied or in perpetuity in consideration of price paid or promised (Section 105 T.P. Act). So virtually transfer of property and interest therein by means of lease deed could be time specific or in perpetuity. A lease can, of course, be in the form of a written contract or as per the local usage (106 TP Act) . However, whether time specific or in perpetuity a lease has to be made only by a registered instrument but it should be accompanied by delivery of possession by the lessor in favour of the lessee (107 TP Act).

55. The rights and liabilities of the lessor as per Section 108 of the T.P Act are governed by the terms and condition that are contained in the lease document and so also they guide the future course of action for the purposes of determination of lease except as provided for under Section 111 of the T.P. Act, or to further create such lease in favour of a third party.

56. The argument advanced in the present case centers around the provision contained under Section 111 of the T.P. Act especially clauses (e) and (f) that talk of express and implied surrender of lease. Learned counsel for the petitioner has argued first in favour of clause (e) of Section 111 and since the surrender letter has been objected to by the respondent being not a registered document as it varies the terms and conditions of the lease by conduct of dividing/ partitioning two property by lessee, alternatively it has been argued that the letter of surrender and thereafter no objection by the original lessee in respect of subsequent lease executed by the tenure-holder in favour of the petitioner, would amount to implied surrender.

57. Learned counsel for the petitioner has drawn our attention to paragraph-27 of

quoted hereinabove in the case of ***H.K. Sharma (supra)*** where implied surrender of lease has been discussed referring to another judgment of the Apex Court in the Case of Shah Mathurdas Maganlal & Co, that creation of a new relationship or relinquishment of the possession, is an act indicative of implied surrender of the lease and therefore, it is argued that since by the letter dated 15.9.2018 the original lease virtually surrendered certain area of the lease property in favour of the tenure holder lessor, it would amount to be a valid surrender in view of Section 111 and as such the relinquishment of the right would not require to be registered on one hand, and the second is that since the original lesee did not put any objection to the subsequent lease of a part of land in favour of the petitioner on 14/15.12.2018, such a conduct would be deemed as it would amount to be an implied surrender.

58. We have carefully gone through the judgment of the Apex Court and we find that the Apex Court has held vide paragraph 29 that the lease rights since are governed by the terms and condition contained therein and if the subsequent agreement did not provide about the fate of tenancy earlier created, such subsequent agreement would not amount to surrender of tenancy rights created under the lease and thus, vide paragraphs 32 and 33 the Court has held thus:

*"**32.** As observed supra, such is not the case here because we do not find any such clause or a clause akin thereto in the agreement dated 13-5-1993 and nor we find that the existing condition in the agreement discern the intention of the parties to surrender the tenancy agreement either expressly or impliedly.*

***33.** In the light of the foregoing discussion, we are of the considered opinion that the tenancy in question between the parties did not result in its determination as contemplated under Section 111 of the TP Act due to execution of the agreement dated 13-5-1993 between the parties for sale of the suit house and the same remained uneffected not withstanding execution of the agreement dated 13-5-1993."*

59. Applying the above principle to the facts of the present case, we find that in this case the term of the lease did not provide any such surrender or transfer of part of the land and, therefore, it is difficult to accept the letter of the lessee dated 15.9.2018 to be a letter referable to clause-7 of the lease agreement as the said clause does not talk of the part surrender of the lease rights qua land, or right in respect of part of the land or the relinquishment of rights in respect of any specific part of the land, nor, does it talk of part specific surrender of land nor, as to how part of land came to identified to justify any part specific surrendered of the lease rights. No such measurement was carried out on the spot to partition the land lawfully by a lessee in the absence of such right being conferred under the lease agreement to provide it a separate regular revenue number so as to hold that there was a consent or agreement between the original lessee and lessor to vary the lease in the manner in which it is stated to be done on account of the letter issued by the original lessee.

60. Coming to the judgment in the case of ***Abdul Majid (supra)*** it again refers to the mutual agreement of the rights as a whole while relinquishment or surrender

has come to be recognized under Section 111of T.P. Act and that it cannot be read to be recognized part surrender of the lease rights. In cases where the part cannot be identified except when undertaken in accordance with provision of revenue laws and if the land falls in a revenue village the partition, therefore, unless it is identifiable in law with due exercise of act of partition, the part surrender of rights would amount to varying the condition of the lease agreement unilaterally and the legal position being very much clear that the document that acknowledges any relinquishment of rights in variation to the term of lease it is required to be registered. Such rights would not acquire validity by mere oral consent of the parties. The Apex Court judgment in the case of Sunil Kumar (*supra*) is very much attracted and applicable here in this case that the document that varies the essential terms of the existing registered lease is required to be registered under Section 17 of the Registration Act.

61. The doctrine of implied surrender as has come to be discussed by Andhra Pradesh High Court in its judgment in the case of ***Konijeti Venkayya (supra)*** also talks of a fact position where the subsequent agreement or mutual agreement has come to be reached between the parties in respect of lease property. Interest that has been held to be valid in the said case would not be attracted in the setting of the facts of the present case where there is no such surrender of wholesome lease rights at any point of time. It is a case where the surrender is guided by an act of partitioning the land which condition is not there in the present case to be taken as a right conferred upon the lessee under the original lease agreement, inasmuch as Clause 7 of the original lease agreement also does not stipulate any such situation where lease rights can be relinquished in part.

62. In our view judgment in the cases of ***Jamuna Oil Mills (supra)*** and ***T.K. Lathika (supra)*** would not be attracted as well in the present case. The land lord and tenant relationship which has come to be discussed in the said case is in respect of the tenanted premises as a whole the area of land that had been surrendered and not any part of the interest being transferred or relinquished in respect thereof.

63. Learned counsel appearing for the petitioner has vehemently urged that in the light of the judgment of the Apex Court in the case of Krishan Kumar Khemka (*supra*) the part surrender of the lease has come to be recognized and acknowledged as valid in law and a mere part surrender would not amount to surrender of entire lease rights. It is interesting to note that in the said case the Court was virtually dealing with the rights of the lessor because the lessee who had the tenanted premises of four flats had come to relinquish rights in respect of two flats duly identified as separate property and then in respect of remaining two flats the Court observed that it would be a surrender of rights in respect of part of the property and the Court, therefore, held that surrender of a part of the lease property would not amount to implied surrender of the entire tenancy and the rest of the tenant would remain untouched. Grindlays Bank that was the tenant of the four flat and had surrendered two flat only which was treated to be a partial surrender and therefore, in that fact background the Court held that they would continue to

enjoy the tenancy in respect of the two remaining flats in their possession.

64. It is not disputed by the parties that the lease agreement is governed under the Transfer of Property Act and, therefore, if the lease rights can be created by a registered document and the document does not create any right that the lease property can be partitioned and any part surrender thereof can be made by the lessee and the property is identified as one and the same, in our considered opinion lessee cannot be permitted partition it in the absence of express condition so as to relinquish interest in part.

65. The judgment in the case of State of H.P. Vs. Kishan Lal (*supra*) very clearly holds that Section 111 (e) contemplates surrender of the entire interest under the lease and not a part of the interest alone. It is worth noticing that the judgment of the Apex Court in the Case of H.P v. Kishan Lal by a two judge bench has not been referred to and discussed in the case of Krishan Kumar Khemka (*supra*) relied upon by learned counsel for the petitioner.

66. In the case of *H. K. Sharma Vs. Ram Lal (supra)* the Apex Court had categorically held that a subsequent agreement ipso facto would not result in determination of lease. The question therefore, is what are the terms and conditions provided in the lease and any act bringing an end to the agreement between the original lessor and the lessee has to be seen and given validity if mutually agreed in tune with terms and condition of the original lease agreement.

67. Coming to the issue of registration of a document as it is argued by the learned counsel for the respondent Corporation that the lease surrender letter dated 9.6.2018 was required to be registered one in order to create any right in favour of the lessor, to execute a subsequent lease, we find that while the lease agreement is necessarily required to be registered under Section 107 of the Transfer of Property Act, Section 17 of the Registration Act provides that non testamentary instruments that purport, decline or limit or extinguish rights in immovable property are required to be registered. Since in the present case, it has been argued by the learned counsel for the respondent Corporation that the doctrine of implied surrender would not be attracted as a part of property is sought to be surrender or in other words part of interest in the property is sought to be relinquished, the letter which has set into motion a subsequent lease was necessarily required to be registered one and since it is not a registered document, it cannot create any right in favour of the lessor to execute a subsequent agreement in respect of that property or part of the property surrendered.

68. He also argues that while the rights and properties are governed under the lease agreement in between the parties if a document is not registered which is otherwise required to be compulsorily registered, then on that count any subsequent document has come to be executed, the Corporation being third party is not bound by such agreement nor, there can it be compelled to acknowledge and admit that such a subsequent lease agreement as valid one. If any document is not required for any collateral purposes and was definitely meant to create rights to further create a third party right, such document of necessity, is required to be

registered under the law. The Collateral purpose it is argued, as defined under the said judgment, would not be for the purposes of creating or assigning or limiting or extinguishing any right in the immovable property. Collateral purpose has also come to be defined in the Ratan Lal and others (*supra*) by Allahabad High Court wherein it was held that parties in a family arrangement that create right by putting them down in writing would not amount a collateral purpose and such document is required to be necessarily registered. So also the Madras High Court in the Case of Raghunath G (*supra*) and the same has remained reiterated by the Apex Court in the case of Kalu and other (*supra*). It is therefore, rightly argued that since the letter of the original lessee is sought to create a new kind of right in favour of the lessor, relinquishing the rights in part of the property, it would require to be registered in law.

69. What the petitioners have sought to urge is that the letter dated 15.9.2018 should be read in evidence as an act of surrender of lease, cannot be accepted in the light of legal principle discussed above. It is a case where the petitioner wants the Corporation to read a document which is otherwise inadmissible in evidence for want of due registration. Act of surrender under the letter dated 15.9.2018 is an express act and not guided by any mutual agreement and therefore, to that extent it being unilateral document creating right in favour of the lessor by means of alleged relinquishment of interest by the original lessee, it cannot be binding on the Corporation, a third party and the Corporation cannot be held to have manifestly erred in rejecting the letter that entitled the original tenure holder to create a further lease.

70. The legal position that emerges out from the above discussions can be summarized as under:

(i) Every transfer of rights and interest by a lease agreement to be time specific or in perpetuity is required to be in writing.

(ii) Every transfer of rights and interest in immovable property for a period beyond one year under lease agreement is required to be by registered instrument.

(iii) A lease agreement lays down terms and condition granting rights and interest of lessee and any variation done by the lessee is permissible in writing only and such document is also required to be registered.

(iv) Section 111 (e) and (f) contemplate relinquishment of rights and interest whether by express act or implied as required in law but such relinquishment should be of lease rights in its entirety as it determine the base as a whole.

(v) Part relinquishment of interest and rights qua leased property is recognized in India but that would be (a) subject to lease agreement (b) if lease property can be divided and identifiable, in other words part relinquishment/ surrender should be part specific and this position should be discernable from the terms of lease.

(vi) Division of a holding/ land or property under a lease if identified as one, it would amount to verying the terms and conditions of lease and, so is necessarily required to be registered.

(vii) Any mutual agreement to permit part surrender of property under a lease except when it provides for that, unless registered, will not bind a third party, as having no evidentiary value thereof and no rights can flow in favour of a third person.

71. In view of the above we are of the view that the lease deed if it has come to be rejected by the Corporation for not creating sufficient right in favour of the petitioner so as to accept offer of land, a subject matter of the lease agreement for the purpose of allotment of retail outlet dealership, nothing wrong has been committed and therefore the question-A stands answered in negative against the petitioner.

72. So far as the other question regarding the discretion of the Corporation, we are of the view that the Corporation is in the best position to decide which land suits to its business prospects and the discretion exercised in that regard has to be seen only from the view that the corporation would be interested in providing its investment only in safe and secured land. If the Corporation has found that the document pertaining to the land are not absolutely clean in the sense that there exists chances of litigation in future qua the land in which investment is to be made, the Corporation is in best position to understand to take decision as to whether the investment should be made or not over such land. So the suitability of the land lies within the domain and the discretion of the Corporation.

73. The Indian Oil Corporation being a public sector corporation and huge public money being involved in the matter any investment of the public money in a property that may turn out to be disputed in future would be against the public policy also and, therefore, we are of the opinion that for the purpose of suitability of land the discretion exercised by the Corporation in the normal circumstances be not interfered with unless it is found to be an act absolutely arbitrary hit by Article 14 of the Constitution or for mala fides in exercise of the discretion by the Corporation.

74. An exercise of evaluation and decision making is subject to judicial review in the event an action is vitiated for bias, mala fides and in violation of principles of natural justice. Even evaluation of credentials if vitiated for utter ignorance of laws or by whimsical action, would invite interference but where a document becomes a matter of contentious issue and involves complicated question of facts qua title and needed adjudication by a civil court for its valid declaration as involving valuable rights of parties, Corporation, a third party would be justified in keeping its hand off. Case in hand has the element to invite long drawn civil litigation in future and so if corporation decides to term such land as not suitable, we do not find any fault with the Corporation.

75. From the discussions that we have made above, we do not find that the discretion exercised by the Corporation is in any manner arbitrary or capricious one so as to warrant interference by this Court under Article 226 of the Constitution. Consequently the writ petition fails and is dismissed with no order as to cost.

(2020)02ILR A477

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 13.01.2020

BEFORE
THE HON'BLE MANOJ KUMAR GUPTA, J.

Writ C No. 39723 of 2017

State of U.P. & Anr. ...Petitioners
Versus
Rajesh Kumar Awasthi & Anr. ...Respondents

Counsel for the Petitioners:
Sri Sanjay Kumar Singh, S.C., Sri Shri Prakash Singh (S.C.)

Counsel for the Respondents:
C.S.C., Sri Kamal Nayan Shukla

A. Civil Law-U.P. Industrial Dispute Act, 1947 – Section 4-K and 6-N – Labour Dispute – Reference regarding termination – Delay – Principle of moulding relief – Reference made after about 20 years from termination was a stale one and made at a point of time when practically no dispute fit for adjudication could be said to be in existence – The inordinate delay and latches, in the instant case, had rendered the claim 'dead' – It was not a case where the claim remained alive but was raised with delay – The principle of moulding relief, where the Tribunal is approached with delay, but in respect a 'live claim' would not apply to the facts of the instant case – The reference held invalid. (Para 12 and 14)

Held –

15. Moreover, in the impugned award, there is no clear cut finding that respondent No. 1 had worked for 240 days in twelve calendar months preceding the termination of his service. The Tribunal had merely observed that there is evidence to show that respondent No.1 had worked as daily wager continuously between November 1985 to 31.5.1990. The Tribunal thereafter referred to Section 6-N and then jumped to the conclusion that there is violation of the said provision. On this ground also the impugned award cannot be sustained in law.

Writ Petition allowed. (E-1)

List of cases cited :-

1. Chief Engineer, Ranjit Sagar Dam and others vs. Sham Lal, AIR 2006 SC 2682

2. Prabhakar vs. Joint Director Sericulture Department and another, AIR 2016 SC 2984

3. State of U.P. vs. Presiding Officer Labour Court and another (Writ-C No.50174 of 2016) decided on 14.11.2019

4. Nedungadi Bank Ltd. vs. K.P. Madhavankutty,(2006) I LLJ 561 SC

5. Ratan Chandra Sammanta and others vs. Union of India and others, 1993 (II) LLJ 676 SC

(Delivered by Hon'ble Manoj Kumar Gupta, J.)

1. Case called out in revised list. Learned Standing Counsel Sri Shree Prakash Singh is present on behalf of the petitioners. No one is present on behalf of the respondents.

2. The petitioners have challenged the award dated 21.9.2016 passed by Industrial Tribunal (respondent No.2) in Adjudication Case No.7 of 2011 in a reference made under Section 4-K of the U.P. Industrial Disputes Act, 1947 (hereinafter referred to as 'the Act'). The Reference was to the following effect :-

Whether the termination of service of Rajesh Kumar Awasthi son of Virendra Kumar Awasthi on 1.6.1990 by the employer was proper and valid. If not, to what relief the workman is entitled to and with what description?

3. The case of respondent No.1 was that he was appointed on the post of Assistant Pairokar in the department on 1.11.1985. He continuously worked since then. Abruptly, his service was terminated on 1.6.1990 without complying with the requirements of Section 6-N of the Act. The petitioners filed their written statement and categorically pleaded that

there was no post of Assistant Pairokar in the department. Respondent No.1 was engaged as daily wager for doing pairvi of court cases. On direction of the then Director, the department stopped taking work from him since 1.6.1990. As he was engaged as daily wager having regard to exigency of work, therefore there is neither termination of service of respondent No.1 nor any question of non compliance of Section 6-N of the Act. The reference made to the Tribunal is bad in law and liable to be dismissed.

4. The record reveals that respondent No.1 had filed two writ petitions before this Court. The first writ petition bearing No.17783 of 1990 was filed by petitioner challenging the order dated 1.6.1990, by which the respondents stopped taking work from the petitioner. The writ petition was dismissed by order dated 21.4.1992 on the ground that the petitioner was only a daily wager. However the representation made by him dated 25.6.1990 was directed to be disposed of within a month. It seems that in compliance of the said direction, the representation of the petitioner was decided by the department on 26.4.1993 and the same was rejected. The request made for re-employment was turned down. The petitioner again approached this Court by way of Writ Petition No.16680 of 1988. It was dismissed on 14.2.2006 on the ground that it was a second writ petition for the same relief and thus not maintainable. The petitioner moved an application on 29.9.2009 seeking reference of dispute under the Act. The dispute raised by the petitioner was referred for adjudication to the Tribunal on 24.12.2010.

5. The Tribunal after considering respective case of the parties accepted the case of the petitioners that there was no post of Assistant Pairokar in the department and that engagement of respondent No.1 was only as a daily wager. It was further held that though respondent No.1 worked as a daily wager, but he was paid salary on monthly basis. He worked continuously from 1985 to 31.5.1990. However, without examining whether respondent No.1 had actually worked for 240 days in twelve calender month preceding termination of service, it was held that there was violation of Section 6-N of the Act. Thereafter, the Tribunal proceeded to consider the issue as to the relief to which respondent No.1 was entitled to. The Tribunal held that the dispute was raised in the year 2010, although service was terminated on 1.6.1990. After such long interval, it would not be proper to direct his reinstatement or grant back wages. Instead, it awarded a lumpsum compensation of Rs.1,50,000/-.

6. Learned counsel for the petitioners submitted that since the service of respondent No.1 was allegedly terminated on 1.6.1990 and the reference was sought in the year 2009, it was apparently a stale claim and ought not to have been entertained. In support of his case, he has placed reliance on judgements of the Supreme Court in **Chief Engineer, Ranjit Sagar Dam and others vs. Sham Lal, AIR 2006 SC 2682,** and **Prabhakar vs. Joint Director Sericulture Department and another, AIR 2016 SC 2984** and judgement of this Court in **State of U.P. vs. Presiding Officer Labour Court and another (Writ-C No.50174 of 2016)** decided on 14.11.2019. He further submitted that there is no clear cut finding that respondent No.1 had worked continuously for more than 240 days in

twelve calender months preceding his termination from service. Consequently, the findings rendered by the Tribunal that there is violation of Section 6-N of the Act is not sustainable in law.

7. It is not in dispute that alleged termination of service was on 1.6.1990. The application seeking reference was filed on 29.9.2009. The reference order is dated 24.12.2010. Undoubtedly, there was delay of 19 years in seeking reference and 20 years if the period is reckoned from the date reference was made. During this period, respondent No.1 had filed two writ petitions before this Court as narrated above, but both of which were dismissed. The first writ petition was dismissed on 21.4.1992 followed by order of the department dated 26.9.1993 rejecting the representation of respondent No.1. The petitioner filed second writ petition in the year 1998 i.e., after more than five years. The said writ petition was also dismissed being for the same relief. Respondent No.1 again kept quite for three years and once again re-agitated the issue in the year 2009 followed by reference in the year 2010. Evidently, there was inordinate delay on part of respondent no.1 in seeking the reference.

8. In **Chief Engineer, Ranjit Sagar Dam** (supra), the Supreme Court placed reliance on Para 6 of its earlier judgement in **Nedungadi Bank Ltd. vs. K.P. Madhavankutty,(2006) I LLJ 561 SC** and others, which is as follows :-

""6. Law does not prescribe any time-limit for the appropriate Government to exercise its powers under Section 10 of the Act. It is not that this power can be exercised at any point of time and to revive matters which had since been settled. Power is to be exercised reasonably and in a rational manner. There appears to us to be no rational basis on which the Central Government has exercised powers in this case after a lapse of about seven years of the order dismissing the respondent from service. At the time reference was made no industrial dispute existed or could be even said to have been apprehended. A dispute which is stale could not be the subject-matter of reference under Section 10 of the Act. As to when a dispute can be said to be stale would depend on the facts and circumstances of each case. When the matter has become final, it appears to us to be rather incongruous that the reference be made under Section 10 of the Act in the circumstances like the present one. In fact it could be said that there was no dispute pending at the time when the reference in question was made. The only ground advanced by the respondent was that two other employees who were dismissed from service were reinstated. Under what circumstances they were dismissed and subsequently reinstated is nowhere mentioned. Demand raised by the respondent for raising an industrial dispute was ex-facie bad and incompetent."

(emphasis supplied)

9. In the said judgement, the Supreme Court has also referred to another judgement in **Ratan Chandra Sammanta and others vs. Union of India and others, 1993 (II) LLJ 676 SC** wherein it was held that a casual labourer retrenched by the employer deprives himself of remedy available in law by delay itself.

10. In **Prabhakar** (supra), the Supreme Court, after considering various aspects resulting from delay in seeking

reference, summarised the legal position thus :-

"42. To summarise, although there is no limitation prescribed under the Act for making a reference under Section 10(1) of the Act, yet it is for the 'appropriate Government' to consider whether it is expedient or not to make the reference. The words 'at any time' used in Section 10(1) do not admit of any limitation in making an order of reference and laws of limitation are not applicable to proceedings under the Act. However, the policy of industrial adjudication is that very stale claims should not be generally encouraged or allowed inasmuch as unless there is satisfactory explanation for delay as, apart from the obvious risk to industrial peace from the entertainment of claims after long lapse of time, it is necessary also to take into account the unsettling effect which it is likely to have on the employer's financial arrangement and to avoid dislocation of an industry."

(emphasis supplied)

11. The decision of this Court in **State of U.P. vs. Presiding Officer** (supra) cited by learned standing counsel holds that in case the termination was made in the year 1991 and reference in the year 2014, it cannot be said to be in respect of any live dispute.

12. Having regard to the legal principles enunciated by the Supreme Court in various decisions discussed above, the inescapable conclusion is that the reference made in the year 2010 with regard to alleged termination of respondent No.1 on 1.6.1990 was a stale one and made at a point of time when practically no dispute fit for adjudication could be said to be in existence. The consistent stand of the petitioners, since they stopped taking work from the respondent, had been that he could not be reengaged as there is no post of Assistant Pairokar nor his service was required otherwise. It was not a case where at any stage any assurance was extended to him even for re-consideration of his case for re-engagement. In such situation, even filing of two writ petitions before this Court, last of which stood dismissed on the ground that it was a second petition for the same cause of action, is not sufficient to infer that the respondent had been bonafidely pursuing the remedies. As noted above, the second writ was dismissed in 2006 itself, but again the respondent did not immediately sought reference but again waited for three years and filed the application in the year 2009.

13. It would be worthwhile to allude to an example cited by Supreme Court in **Prabhakar** (supra) to explain the concept as to when delay would be fatal, rendering the claim 'dead' and when not. To wit :-

"Take, for example, a case where the workman issues notice after his termination, questioning the termination and demanding reinstatement. He is able to show that there were discussions from time to time and the parties were trying to sort out the matter amicably. Or he is able to show that there were assurances by the Management to the effect that he would be taken back in service and because of these reasons, he did not immediately raise the dispute by approaching the labour authorities seeking reference or did not invoke the remedy under Section 2A of the Act. In such a scenario, it can be treated that the dispute was live and existing as the workman never abandoned his right. However, in this very example, even if the

notice of demand was sent but it did not evoke any positive response or there was specific rejection by the Management of this demand contained in the notice and thereafter he sleeps over the matter for number of years, it can be treated that he accepted the factum of his termination and rejection thereof by the management and acquiesced into the said rejection."

14. The inordinate delay and latches, in the instant case, had rendered the claim 'dead'. It was not a case where the claim remained alive but was raised with delay. Therefore, the principle of moulding relief, where the Tribunal is approached with delay, but in respect a 'live claim' would not apply to the facts of the instant case. The reference itself was invalid.

15. Moreover, in the impugned award, there is no clear cut finding that respondent No.1 had worked for 240 days in twelve calendar months preceding the termination of his service. The Tribunal had merely observed that there is evidence to show that respondent No.1 had worked as daily wager continuously between November 1985 to 31.5.1990. The Tribunal thereafter referred to Section 6-N and then jumped to the conclusion that there is violation of the said provision. On this ground also the impugned award cannot be sustained in law.

16. In consequence and as a result of discussion made above, the impugned award dated 21.9.2016 is quashed. The petition is allowed. However, in case any payment has already been made to respondent No.1 in pursuance of interim order of this Court, it shall not be recovered.

(2020)02ILR A482

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 09.12.2019

BEFORE

THE HON'BLE PANKAJ MITHAL, J.
THE HON'BLE DR. YOGENDRA KUMAR SRIVASTAVA, J.

Writ C No. 39738 of 2019

Ravindra Ahlawat ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Anoop Trivedi, Sri Abhinav Gaur, Siddharth Baghel

Counsel for the Respondents:
C.S.C.

A. U.P. Sugarcane (Regulation of Supply and Purchase) Act, 1953 and U.P. Sugarcane (Regulation of Supply and Purchase) Rules, 1954-Rule 29-Petitioner-Chairman of Cane Development Council-granted authorisation u/R 29 -to watch and check the weightments at cane purchase centres within concerned zone-authorisation order withdrawn-Power under Rule 29-to grant authorisation-discretionary-not an individual's rights-no rights of Petitioner is infringed-W.P. dismissed.

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

1. Heard Sri Anoop Trivedi, learned Senior Counsel assisted by Sri Siddhartha Baghel, learned counsel for the petitioner and Sri Mata Prasad, learned Standing Counsel appearing for the State-respondents. Sri Ravindra Singh and Sri Diptiman Singh, learned counsel for the parties who claim to be necessary parties

but have not been impleaded, have also been heard.

2. The petitioner who has stated himself to be the Chairman of Cane Development Council, Daraula, Meerut had been granted authorisation by an order dated 18.10.2017 to watch and check weighments at the cane purchase centres within the zone concerned. The aforesaid authorisation had been made by the Cane Commissioner, Sugarcane and Sugar, U.P. (in short 'the Cane Commissioner') under Rule 29 of the U.P. Sugarcane (Regulation of Supply and Purchase) Rules, 19541.

3. The Cane Commissioner by the order impugned dated 12.04.2018 has divested him of the power to watch and check the weighments etc., as granted in terms of the earlier order dated 18.10.2017. The order withdrawing the authorisation granted to the petitioner has referred to some enquiry report submitted by an enquiry team constituted by the District Magistrate.

4. The order withdrawing the authorisation issued under Rule 29 of the Rules, 1954 is sought to be assailed on the ground that the same has been passed without affording opportunity of hearing to the petitioner and without serving him a show cause notice.

5. In order to appreciate the controversy the provisions under the Uttar Pradesh Sugarcane (Regulation of Supply and Purchase) Act, 19532 and the rules made thereudner namely the Rules, 1954 may be referred to.

6. The aforementioned Act, 1953 and the Rules, 1954 contain detailed and elaborate provisions regarding supply of the sugarcane by the cane growers, its purchase by the sugar factories and payment of price thereof. In terms of the scheme of the Act, 1953, a mechanism is provided for ensuring the required continuous supply of sugarcane to the sugar factories during the crushing season. Keeping in mind the interest of the sugarcane growers, cane growers' co-operative societies, sugar factories and also the *inter* se interest of the sugar factories in the area, the supply of sugarcane to the sugar factories in the quantity which may reasonably be required by them for production in a particular crushing season is regulated by the provisions of the Act, 1953.

7. The Act, 1953 and the Rules, 1954 also provide for an administrative mechanism for inspection of the cane purchase centres and also for checking of the weighments, weigh-bridges and weights.

8. In addition, under Chapter VIII of the Rules, 1954, which relates to weighments, the Cane Commissioner is empowered to authorise any person including such employees and representatives of cane grower's co-operative societies as he may consider necessary to watch or check weighments, weigh-bridges and weights and also to examine the parchas in which the weights and prices of the cane are recorded.

9. Section 11 of the Act, 1953 empowers the State Government to appoint any person or designate such officers of the Government as it thinks fit to be Inspectors within such local limits as may be assigned to them. The Inspectors are required to perform the duties and exercise the powers conferred upon them

under the Act, 1953. For ease of reference Section 11 is being extracted below:-

"11. Inspectors.--(1) The State Government may for purposes of this Act appoint any person or designate such officers of the Government as it thinks fit to be Inspectors within such local limits as may be assigned to them.

(2) The Inspectors shall perform the duties and exercise the powers conferred or imposed upon them by or under this Act."

10. Chapter V of the Rules, 1954 relates to the Inspectors, and in terms of Rule 19 contained thereunder, the Cane Commissioner shall be *ex officio* Inspector for the whole of the State. The Commissioners, the Collectors, the Sub-Divisional Officers, the District Planning Officers, the Deputy Cane Commissioners, the Assistant Cane Commissioners, the Range Co-ordination Officers, the District Cane Officers, the Additional District Cane Officers and the Senior Cane Development Inspectors shall be *ex officio* Inspectors within their respective jurisdiction. In terms of the proviso to Rule 19 the Cane Commissioner may with the object that the inspection may be more effective has been empowered to extend the jurisdiction of the *ex officio* Inspectors other than the Commissioners, the Collectors, the Sub-Divisional Officers, the District Planning Officers and for the said purpose he may form special checking squads headed by such *ex officio* Inspectors. The powers and responsibilities of the Inspectors have been enumerated under Rule 20. For ready reference Rules 19 and 20 of the Rules, 1954, referred to above, are being reproduced below:-

"19. The Cane Commissioner and the Sugar Commissioner shall be *ex officio* Inspectors for the whole of the State. The Commissioners, the Collectors, the Sub-Divisional Officers, the District Planning Officers, the Deputy Cane Commissioners, the Assistant Cane Commissioners, the Range Co-ordination Officers, the District Cane Officers, the Additional District Cane Officers and the Senior Cane Development Inspectors shall be *ex officio* Inspectors within their respective jurisdiction.

Provided that where necessary the Cane Commissioner or the Sugar Commissioner, as the case may be, may with the object that the inspection may be more effective, by order extend the jurisdiction of *ex officio* Inspectors other than the Commissioners, the Collectors, the Sub-Divisional Officers, the District Planning Officers and may from special checking squads headed by such *ex officio* Inspectors.

20. Every Inspector may, within the local limits of his jurisdiction and with such assistance as may be necessary--

(a) enter any factory or other place which is used or which he has reason to believe is being used as a purchasing center or for the maintenance of any records, registers, accounts or other documents relevant thereto.

(b) examine the weighbridge or weights used, kept or possessed for the weighment or purchase of cane.

(c) cause any vehicle carrying cane or other consignments of cane to be weighed or re-weighed in his presence.

(d) check weighments, purchases and payments made.

(e) inspect factory roads, cattlesheds, cattle troughs and lighting arrangements made for weighments of cane.

(f) examine the records showing the amount of cane purchased and crushed.

(g) call for from the occupier of a factory or his employee, any information

relating to the purchase, supply, crushing of cane and payment of cane price.

(h) issue from time to time such instructions as may be necessary to ensure equitable purchase of cane.

(i) examine any records, registers, accounts or documents of Cane-growers' Co-operative Societies.

(j) examine any record, register or documents or call for any information relating to the payment of purchase tax, commission and price of cane.

(k) take into his possession and remove from the premises of a factory or purchasing center such records, registers, documents statements and returns, maintained or caused to be maintained by the occupier of a factory as he may require for the purpose of any enquiry or examination, and

(l) exercise such other powers as may be necessary for carrying out the purposes of the Act and these Rules."

11. Chapter VIII of the Rules, 1954 may also be taken note of which is in respect of weighments, and whereunder in terms of Rule 29 the Cane Commissioner is empowered to authorise any person including such employees and representatives of cane growers' co-operative societies as he may consider necessary to watch or check weighments, weigh-bridges and weights, and also to examine the *parchas* in which the weights and prices of the cane are recorded. Rule 29 of the Rules, 1954 referred to above reads as under:-

"29. The Cane-Commissioner may authorise any person including such employees and representatives of Cane-growers' Co-operative Societies as he may consider necessary to watch or check weighments, weigh-bridges and weights, as also to examine the *parchas* in which the weights and prices of the cane are recorded."

12. The provision for grant of authorisation under Rule 29 to watch or check weighments is thus in addition to the elaborate administrative machinery provided for in terms of Section 11 of the Act, 1953 and the Rules 19 and 20 of the Rules, 1954 in terms of which the Cane Commissioner and certain other specified officers are to be *ex officio* Inspectors empowered with the power of inspection, which inter alia, includes the power to examine the weighments also.

13. It is therefore seen that the power to be exercised by the Cane Commissioner under Rule 29 to grant authorisation to watch or check weighments, is discretionary and is to be exercised whenever the Cane Commissioner may consider it necessary to do so. Conferment of discretionary powers in the hands of administrative authorities is not only well recognised but is also considered essential for effective administration.

14. The provisions under Rule 29 of the Rules, 1954 do not create any obligation on the Cane Commissioner to necessarily authorise any particular person to watch or check the weighments, weigh-bridges and weights as also to examine the *parchas* in which the weights and prices of the cane are recorded and no individual can claim any legally enforceable right with regard to the same.

15. Counsel for the petitioner has not been able to show any right of the petitioner to be allowed to watch or check

weighments by virtue of his holding the office of the Chairman of the Cane Development Council, Daraula, Meerut.

16. In view of the above, no legal right of the petitioner has been infringed even if authorisation granted earlier by the Cane Commissioner has been withdrawn.

17. It has lastly been submitted that a fresh enquiry ought to be conducted in the matter after giving notice and opportunity to the petitioner.

18. The material on record, in particular, the communication dated 15.10.2019 (Annexure-15) of the writ petition indicates that the petitioner was given an opportunity during the course of the enquiry. However, if the petitioner still has some grievance, it would be open to him to approach the authority concerned.

19. This Court is of the view that since no legal rights of the petitioner have been infringed there is no ground for interference in the matter.

20. The writ petition thus fails and is dismissed subject to the observations made above.

(2020)02ILR A486

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 07.02.2020

BEFORE
THE HON'BLE SHASHI KANT GUPTA, J.
THE HON'BLE PIYUSH AGRAWAL, J.

Writ C No. 40523 of 2019

Paras Nath Singh ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri W.H. Khan, Sri Javed Hussain Khan, Sri Gulrez Khan

Counsel for the Respondents:
C.S.C., Sri Vinod Kumar Chandel

A. Civil Law-UP Kshettra Panchayat and Zila Panchayat Act, 1961 – Recovery of contractual amount – Arrears of land revenue – Contractual amount cannot be recovered as arrears of land revenue, in the absence of any provisions contained under UP Kshetra Samiti and Zila Panchayat Adhiniyam, 1961 –The action taken by the respondents by way of issuing the recovery citation is not legally justified. (Para 21)

Writ Petition allowed. (E-1)

List of cases cited :-

1. Writ C No. 12575 of 2013 (Subhas Tiwari Vs. State of UP) decided on 17.10.2014

2. Subhash Chand Vs. Collector, Etawah and others, 1999 (1) AWC, 582

3. Titu Singh Mathura Vs. District Magistrate/Collector, Mathura and others, 2003 (5) AWC 3479

4. Iliyas Vs. State of UP and others, 2007 (2) ADJ, 143 (D.B.)

5. Mohd. Umar Vs. Collector / D.M. Moradabad and others, 2006 (9) ADJ 66 (All) (DB)

6. Sanjay Kumar Gupta Vs. State of UP and others, 2013 (5) ADJ 506 (DB).

(Delivered by Hon'ble Piyush Agrawal, J.)

1. Heard Sri W.H. Khan, learned Senior Advocate assisted by Sri Javed Hasain Khan, for the petitioner, learned Standing Counsel for State-respondents and Sri Vinod Kumar Chandel, for respondent nos. 2 and 3.

2. By means of the present writ petition, the petitioner is challenging the recovery certificate dated 24.8.2019 issued by Upper Mukha Adhikari, Zila Panchayat, Sonebhadra as well as recovery citation dated 0.1.2019 issued by Tehsildar Chunar, District Mirzapur, on the ground that there is no provision under UP Kshetra Samiti and Zila Panchayat Adhiniyam, 1961, to recover the contractual amount as arrears of land revenue.

3. Brief facts of the case is that in pursuance of the Advertisement dated 4.7.2015 issued by Adhyaksh and Upper Mukhya Adhikari, Zila Panchayat Sonebhadra and published in daily "Aaj' dated 7.7.2015 for awarding contract of realizing *Parivahan Shulk* for the year 2015-16, the petitioner submitted his tender and was a successful bidder of the price of Rs. 8 crores. In pursuance thereof an agreement was executed on 20.7.2015 between the petitioner and Zila Panchayat, Sonebhadra.

4. It has been averred that neither at the time of advertisement dated 4.7.2015/7.7.2015 nor at the time of entering into the contract dated 20.7.2015, the respondents informed the petitioner that validity of the by-laws of Zila Panchayat, Sonebhadra was under challenged by several persons whereby the realization of *Pariwahan Shulka* was stayed. In view of the pendency of litigation at various stages i.e. before this Court as well as before the Apex Court, the company as well as the firms did not pay the prescribed *Pariwahan Shulka* to the petitioner and therefore, the petitioner could not realize the same.

5. It is further averred that somehow, the petitioner deposited the first instalment of Rs. 01 crore and security deposit of Rs. 25 lakh, which was to be adjusted in the last instalment. Thereafter another two instalments, firstly on 30.9.2015, the petitioner deposited Rs. 3.50 crore along with tax of Rs. 7 lakhs and additional tax of Rs. 14,000/- and the other on 31.12.2015, deposited Rs. 3.25 crores along with tax of Rs. 07 lakhs and additional tax of Rs. 14,000/-.

6. Learned counsel for the petitioner submitted that on 26.12.2015, Upper Mukhaya Adhikari wrote a letter to the petitioner for deposit of remaining amount of *Parivahan Shulk* within three days and in case of default the loss caused to the Zila Panchayat would be realized from the petitioner. In response thereto, the petitioner sent a reply dated 5.1.2016 to the Upper Mukha Adhikari in which it has been submitted that the petitioner was not informed by Zila Panchayat about the pending litigation, therefore, different companies are neither paying the tax nor cooperating with the petitioner as such the petitioner could not collect the prescribed fee.

7. He further submitted that when the coercive action was taken against the petitioner by terminating the agreement by order dated 18.1.2016, a Writ Petition No. 3954 of 2016 was filed before this Court in which the pleadings have been exchanged but the same is still pending. In the meantime, the impugned recovery notice has been issued for realization of Rs. 3,26,21,116/- including 10 % collection charges as arrears of land revenue.

8. The counsel for the petitioner submitted that admittedly in pursuance of advertisement dated 7.7.2015 published in daily "Aaj' , the petitioner applied for contract of *Pariwahan Shulk* for the period 2015-16 and the petitioner was successful bidder, thus the contract was executed in favour of the petitioner on 20.7.2015. But neither at the time of advertisement nor at the time of execution of contract, Zila Parishad had intimated the petitioner that litigation in respect of validity of by-laws of Zila Parishad is pending as such the *Parivahan Shulk* cannot be realized. It is further submitted that in view of pending litigation, the *Parivahan Shulk* could not be realized and the same was duly intimated to the respondents but instead of co-operating with the petitioner, the respondents choose to terminate the contract of the petitioner and also issued impugned recovery certificate to recover the contractual amount as the arrears of land revenue.

9. He further submitted that under UP Kshetra Samiti and Zila Panchayat Adhiniyam, 1961, there is no provision for recovery of contractual amount as an arrears of land revenue.

10. In support of his contention, learned counsel for the petitioner has relied upon the judgement and order passed by this Court in **Writ C No. 12575 of 2013 (Subhas Tiwari Vs. State of UP)** decided on 17.10.2014; relevant part of the judgement is extracted below :-

"Sri W.H. Khan, learned Senior Counsel appearing for the petitioner has contended before us that the amount which are claimed under the recovery certificate are the sums which the Zila Panchayat alleges to be payable under the contract aforementioned and which cannot be recovered as arrears of land revenue in the light of various Division Bench judgments of this Court. In support of his submission Sri Khan has placed reliance on the judgment rendered by this Court in **Mohd. Umar Vs. Collector / District Magistrate, Moradabad and others 2006 (3) AWC 2412; Sanjay Kumar Gupta Vs. State of U.P. and others 2013 (5) ADJ 506; Abrar Hussain Vs. District Magistrate / Collector and others** in Writ Petition No. 40319 of 2006 decided on 26.11.2013. The counsel for the Zila Panchayat does not dispute the legal proposition and principles laid down in the aforementioned judgements and is also not able to dispute the position in law as noticed and declared in the aforesaid judgments.

For the view taken by the Division Benches of this Court, we find it just and proper to conclude that the impugned recovery certificate, seeking to enforce the recovery as arrears of land revenue, cannot be sustained."

11. The counsel for the petitioner further contended that in the absence of any provision under UP Kshetra Samiti and Zila Panchayat Adhiniyam, 1961, no recovery of contractual amount can be made as arrears of land revenue and in view of the judgement passed by this Court in case of **Subhash Tiwari (*supra*)**, the impugned recovery citation is liable to be set aside.

12. Learned counsel for the respondents did not dispute the aforesaid contention made by the learned counsel for the petitioner.

13. We have considered the arguments of the learned counsel for the parties and perused the material on record.

14. There is no factual dispute in the matter. The only contention raised by the

counsel for the petitioner for consideration of this Court is that the contractual amount cannot be recovered as arrears of land revenue as U.P. Kshetra Samiti and Zila Panchayat Adhiniyam, 1961 does not empower the respondents to do so, therefore the impugned recovery certificate is liable to be set aside.

15. The respondents could not place any material before this Court to show any provision which empowers the Zila Panchayat to recover the contractual amount as arrears of land revenue.

16. This Court in the case of **Subhash Chand Vs. Collector, Etawah and others, 1999 (1) AWC, 582** held as follows:

22. In our view the Theka money due is on account of Tehbazari fee payable to the Zila Parishad. The Zila Parishad in order to managing itself realisation of the Tehbazari fee has given it on Theka of the petitioner. It has passed its headache or burden to the Thekedar. The loss and profits are his responsibility. The Theka money flows from Tehbazari fee therefore how could it be taken away from the scope and ambit of the Act. In our view it has a direct nexus with the Tehbazari fee. We have to consider the substance and not the form while interpreting the document.

23. The Legislature has used the phraseology "any sum due" in Section 161 of U. P. Kshettra Panchayats and Zila Panchayats Adhiniyam, 1961. Similarly, the Legislature has used the phraseology "any sum due" in Section 159 also of the said Act. Thus, a combined reading of both these statutory provisions, i.e. Sections 159 and 161 of the said Act makes it crystal clear that the phraseology "any sum due" has been used by the Legislature in such a comprehensive sense that it covers in its widest amplitude any sum due under the Act or under any rule/bye-law framed thereunder and therefore, any such sura would be recoverable as arrears of land revenue, i.e. in the manner as provided under Chapter VIII of the said Act. Accordingly we are of the considered view that the term 'any sum due' in the facts and circumstances of present case, would Include the Theka money, i.e. the amount due from the Thekedar towards the Tehbazari fee or licence fee. This is the harmonious construction of the two provisions. The Legislature has used the term 'mutatis mutandis' in Section 161 of the Act which means in the given context that the provisions of Chapter VIII would apply to deal the recovery of taxes and certain other claims. The Legislature has purposely used the terms 'certain other claims' which includes any sum due. The mode of recovery provided by the Legislature is to recover as arrears of land revenue is a speedy and expeditious mode of recovery and we cannot question the wisdom of the Legislature in providing such a speedy and effective mode of recovery. It is very interesting aspect of the matter to note in the instant case. that the recovery certificate issued by the Atirikt Mukhya Adhikari, the respondent No. 3 to Collector Etawah attached as Annexure-1 to the writ petition has been challenged by means of this writ petition. A bare perusal of Annexure-1 shows that the amount of Rs. 2,75,000 which was sought to be recovered was shown as the amount due to the Zila Parishad. The relevant portion of Annexure-1 reads as under :

'महोदय, श्री सुभाष चन्द्र पुत्र श्री नत्थू सिंह निवासी संवारपुर परगवा इटावा जिसके संबंध में यह विश्वाश किया जाता है कि यह आपके जिले में स्थान संवारपुर परगना इटावा में निवास करता है उसकी

सम्पति ग्राम संवारपुर परगना इटावा में आपके जिले में है.....तहबाजारी वेदपुरा वर्ष 86–87 के बकाये मददे 2,75,000.00 (दो लाख पचहत्तर हजार रू. मात्र) की धनराशि शेष है।

रेवेन्यू रिकवरी एक्ट –1989 के उपबंधों के अधीन रहते हुये धनराशि आपके जिले में प्रतिभूति हुई माल गुजारी बकाये के रूप में आप द्वारा वसूल की जा सकने वाली है और आपसे अनुरोध किया जाता है कि आप उसे वसूल करवाने का कष्ट करें तथा जिला परिषद इटावा को जिला निधि, जिला–परिषद एकाउन्ट में जमा कराने का कष्ट करें । इस बकाया की वसूली हेतु जिलाधिकारी/अध्यक्ष ने वहैसियत परिषद स्वीकृति प्रदान कर दी है ।

भवदीय,

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अतिरिक्त मुख्य अधिकारी

24. After hearing the learned counsel for the parties we are of the view that the amount in question can be recovered as arrears of land revenue and it is unfortunate that public money is not being paid by the petitioner. We are also of the view that the submissions raised by Mr. Agarwal that it cannot be recovered as arrears of land revenue are of no substance and we are also of the view that the petitioner introduced some pleas of the writ petition filed by one Sri Ali Hasan which is of no relevance in this petition as the land was different and the scope of that writ petition was different. It was regarding validity of fee.

25. We have considered the aforementioned judgments referred by the learned counsel for the petitioner first in *Surendra Kumar Rai* (*supra*)--the question of Section 161 was never discussed in this case. Similarly in Raj *Bahadur Singh* (*supra*)--it deals with U. P. Town Area Act. *Bhagwati Prasad* (*supra*)--it also deals with U. P. Town Area Act (Sections 20 and 21} *Angad Pandey* (*supra*)--it also deals with U. P. Town Area Committee and money dues which cannot be recovered as arrears of land revenue and it was held that any amount due to the Thekedar in view of the contractual term cannot be recovered as arrears of tax. Similarly in Umesh Chandra (*supra*)--it was observed that amount of Rs. 5,500 can be recovered under Section 158 of the Act as it is due to a Contractor and cannot be recovered under U. P. Moneys Recoveries of Dues Act as it is not tax or rent.

26. In other words the consistent view was that it is a contractual amount between the Contractor and Zila Panchayat and has no link with the fee. On the aforesaid facts we do not accept the ration as Section 161 did not fall for consideration in those judgments.

27. We are of the considered view that the plea raised by the petitioner that the money due cannot be recovered as arrears of land revenue and should not be ordinarily entertained in writ proceedings. We refuse to exercise, in the facts and circumstances, our discretion under Article 226 of the Constitution of India.

17. Similar view has been taken by this Court in the case of **Titu Singh Mathura Vs. District Magistrate/Collector, Mathura and others, 2003 (5) AWC 3479.** Relevant part of the judgement is extracted below:-

6. From perusal of the aforesaid provisions of the Municipalities Act and Town Area Act, it is clear that the contention of the learned Counsel for the petitioner is well founded. Under Section 173-A of the Municipalities Act, it is provided that any sum due on account of tax, other thanoctroi or toll or any similar tax payable upon immediate demand, from a person to a board, the board may, recover as arrears of land revenue. In the instance case the amount in question became due from the petitioner as a result of default in payment of Theka money

between the parties. Similarly Section 21 of the Town Areas Act provides that arrears of any tax imposed under this Act may be recovered and no other amount. Therefore, the provisions of Section 173-A of the Municipalities Act, and Section 21 of the Town Areas Act are not attracted. The amount in question is not a tax imposed under the aforesaid two Act and as such the amount due from the petitioner could not be recovered as arrears of land revenue. Besides the aforesaid decisions, there are two recent decisions also in Bisheshwar Singh @ Kalloo v. District Magistrate/Collector. Shahjahanpur and Ors. MANU/UP/0433/2001 and Rakesh Shukla v. District Magistrate/Sub-Divisional Magistrate, Phoolpur, Allahabad and Anr. MANU/UP/0554/2002. In these decisions also, the Division Bench found that the Theka money could not be recovered as arrears of land revenue. However, the Bench did not interfere on the ground that the equity was not in favour of the petitioner.

7. Therefore, in view of the decisions of the Division Benches, clearly holding that only taxes imposed under the Municipalities Act, and Town Area Act can be recovered as arrears of land revenue, we are of the opinion that the amount in question cannot be recovered as arrears of land revenue and the recovery certificate as well as the citation are liable to be quashed.

18. In the case of **Iliyas Vs. State of UP and others, 2007 (2) ADJ, 143 (D.B.)** this Court has held as follows:

4. In view of the aforesaid provisions the learned counsel for the petitioner submits that it is clear that only taxes, which are due to the municipalities can be recovered as arrears of land revenue and no other sum can be recovered as arrears of land revenue.

5. The petitioner has placed reliance upon a Division Bench judgment of this Court reported in 2006(3) UPLBEC, 2643 Mohammad Umar Vs. Collector/District Magistrate, Moradabad and others and reliance has been placed upon paras 10, 12 to 14 and paras 15 and 17 of the said judgment and has submitted that the Division Bench of this Court has held that amount due towards the contract for realization of Tehbazari cannot be recovered as arrears of land revenue and there is no provision under the Municipalities Act or U.P. Town Area Act authorizing the respondents to realize theka money as arrears of land revenue, as such, the said amount cannot be recovered in the said manner and has held that in view of the aforesaid fact, the respondents have no authority to recover the amount due to the petitioner as arrears of land revenue.

6. We have considered the submission made on behalf of the petitioner and the respondents. We are in full agreement with the judgment relied upon by the counsel for the petitioner. As there is no factual dispute in the present writ petition, the only question was to be decided whether the amount due against the petitioner can be recovered as arrears of land revenue or not. As in view of the Division Bench judgment of this Court, which is fully applicable to the present case, the Tehbazari amount due against the petitioner cannot be recovered as arrears of land revenue, as such, without inviting the counter affidavit, with the consent of the parties, the writ petition is being disposed of.

7. In view of the aforesaid fact, the recovery certificate dated 10.5.2004

(Annexure 5 to the writ petition issued by the respondents is hereby quashed. The writ petition is allowed. It is, however, open to the respondents to recover the amount from the petitioner in accordance with law.

19. This Court in the case of **Mohd. Umar Vs. Collector / D.M. Moradabad and others, 2006 (9) ADJ 66 (All) (DB)** has held herein below:

65. The first question which poses consideration is whether in the absence of execution of agreement an enforceable contract between the parties came into existence. The petitioners participated in the public auction for the collection of Tehbazari dues and were highest bidders. In a public auction the bidders offer their bids and the moment of fall of hammer on highest bid, that highest bid is taken to be accepted. In a public auction the fall of hammer concludes the contract. The auction proceedings, the list of bidders is the only evidence of the contract indicating that out of various offers the highest bid was accepted. Section 97 of the U.P. Municipalities Act relates to the execution of the contracts and provides that every contract made by or on behalf of a Municipality whereof the value or the amount exceeding to Rs.250/- shall be in writing provided that unless the contract has been duly executed in writing, no work including collection of materials in connection with the said contract shall be commenced or undertaken. Every such contract shall be signed by the President or the Vice President or by Executive Officer or Secretary or by any person or persons empowered under sub section (2) of sub-section (3) of previous section to sanction the contract if further and in the like manner empowered in this behalf by the Municipality. The auctions of Tehbazari contract were held in which the petitioners offered highest bids and made part payment of auction money. The petitioners having accepted the conditions of auction sale and having made payment in part performance of the contract a binding contract came into existence between the petitioners and the respondents. In a public auction on the acceptance of the highest bid of the tenderer a concluded contract between the parties enforceable at law came into existence. The highest bids of the petitioners at various auctions were in the nature of an offer which were accepted by the petitioners who were highest bidders and the petitioners deposited the amount in part a performance of the conditions of auction sales, therefore, a valid and legally enforceable contract came into being. Reliance in this regard may be placed on the decision in B.C. Mohendra Versus Municipal Board, Saharanpur AIR 1970 SC 729. Section 10 of the Indian Contract Act provides that all agreements are contracts if they are made by free consent of the parties competent to contract, for a lawful consideration and with a lawful object and are not expressly declared to be void. In all these cases the petitioners participated in an auction sale and being highest bidder made part payment under the terms and conditions of auction sales and carried out the work of collection of Tehbazari dues. The petitioners cannot wriggle out of the contract on the ground of non-execution of agreements. A concluded contract at auction sales came into being between the parties on the fall of hammer and acceptance of higher bid.

....

69. The decisions in the cases of Mahesh Chand (*supra*) and Surendra Kumar Rai (*supra*) have been

distinguished and held to be per incuriam in the case of Subhash Chand Versus Collector Etawah and others 1999 (1) AWC 582 as the provisions of section 161 of the Adhiniyam 1961 did not fall for consideration in those judgments. Section 161 of the Adhiniyam 1961 provides that any sum due to Kshetra Panchayat under this Act or under any rule or under any bye-law made therein and declared by this Act or such rule or bye-law to be recovered in the manner provided by this Chapter shall mutatis mutandis be recoverable as provided in this Chapter. Section 161 deals with the recovery of dues of Kshettra Panchayat which is a distinct and separate body from a Zila Panchayat. The provisions exclusively relating to Kshettra Panchayat are not applicable to Zila Panchayats. Moreover, for the applicability of the provisions of section 161 any sum must be due to a Kshettra Panchayat and it must have been declared to be recoverable in the manner provided in Chapter VIII. In these writ petitions the Theka money is not due to Kshettra Panchayat under this Act or under any rule or any bye-laws made thereunder. The auction money is due to Zila Panchayats which are distinct and separate body. The amount being due to Zila Panchayats, the facts of the case of Subhash Chandra (*supra*) are distinguishable. In view of these facts, the unpaid amount of auction sale held by the Zila Panchayat cannot be recovered as arrears of land revenue.

20. Similar view has been taken by this Court in the case of **Sanjay Kumar Gupta Vs. State of UP and others, 2013 (5) ADJ 506 (DB).** Relevant part of the judgement is extracted below :-

9. Admittedly, the contract between the petitioner and Nagar Palika Parishad, Mawana was for realisation of entry fees/parking fees from the vehicles which enter the territory of Nagar Palika Parishad, Mawana, Meerut. It is thus in the nature of 'toll' and not 'tax'. Under Section 173(A) of the Municipalities Act, 1916, the Municipal Board can only recover a sum due on account of tax as arrears of land revenue. The section itself carves out an exception, by laying down that the Board will have no power to recover arrears of octroi or toll as arrears of land revenue. Interpreting the aforesaid provision of law, a Division Bench of this Court in Titu Singh v. District Magistrate/Collector, Mathura, 2003 (5) AWC 3479, has held that the arrears of theka money (parking fees) cannot be realised as arrears of land revenue. The said decision has been followed in [Iliyas v. State of U.P. and others,].

10. We are in respectful agreement with the view taken in the aforesaid decisions. Accordingly, it is held that the impugned citation for recovery of balance theka money, as arrears of land revenue is without jurisdiction.

11. Before parting, it may be stated that the contention of the respondents that since it is public money and therefore, the petitioner may be directed to pay the said amount, does not desist us from granting aforesaid relief to the petitioner as even in case it is public money, it has to be recovered only in accordance with the procedure prescribed by law.

12. The Apex Court in its judgment in Iqbal Naseer Usmani v. Central Bank of India and others, 2006 (2) SCC 241, repelled similar contention and held as under:

According to the High Court "the money of the Bank and financial institutions is public money, which should be in circulation, otherwise the Bank and depositors will suffer." We are afraid that while this may be very good sentiment, it cannot apply in the face of Section 3 of the Act for the reason that Section 3 does not envisage the provisions of the Act being utilised for recovery of every loan taken. Section 3(1)(b) permits this to be done only in respect of loans taken under a "State-sponsored scheme", which expression has been defined in Section 2(g) of the Act. Since it is admitted that the loan taken by the appellant was not under or in relation to a "State-sponsored Scheme" within the meaning of Section 2(g), whatever else it may be, it would not be recoverable by recourse to the machinery under Section 3 of the Act.

13. Following the law laid down by the Apex Court, we have no hesitation in granting the relief prayed for. Accordingly, the impugned citation dated 1.12.2009 issued by the Tehsildar, Mawana, District Meerut is hereby quashed.

21. In view of the legal proposition enumerative above as well as the principles laid down by this Court in the aforesaid judgements, it is very clear that contractual amount cannot be recovered as arrears of land revenue, in the absence of any provisions contained under UP Kshetra Samiti and Zila Panchayat Adhiniyam, 1961. Therefore, the action taken by the respondents by way of issuing the recovery citation is not legally justified.

22. The counsel for the respondents also could not bring any material or law contrary to the aforesaid judgements, before this Court, therefore, the action taken by the respondents in issuing recovery citation for recovery of the contractual amount as arrears of land revenue, is illegal.

23. In the facts of the case, we find just and proper to conclude that the impugned recovery certificate dated 24.8.2019 issued by Upper Mukhya Adhikari, Zila Panchayat, Sonebhadra and recovery citation dated 1.11.2019 issued by Tehsildar Chunar, Distt. Mirzapur, seeking to enforce the recovery of contractual amount as arrears of land revenue, cannot be sustained and are hereby quashed.

24. The writ petition is **allowed**. No order as to costs.

(2020)02ILR A494

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 10.12.2019

BEFORE

THE HON'BLE RAMESH SINHA, J.
THE HON'BLE AJIT KUMAR, J.

Writ C No. 40656 of 2019

Mufeed Ali ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Alok Kumar Singh, Sri Vikas Budhwar, Sri Shashi Nandan

Counsel for the Respondents:
C.S.C., Sri Atul Tej Kulsrestha

A. Prevention of Cruelty to Animals Act, 1960 – Section 38 – Prevention of Cruelty to Animals in Animal Market Rules, 2018 – Rule 3

and 16 –Licence to run Cattle market – Cancellation – Prevention of Cruelty to Animals Committee – Under the provision, it is the Committee, which is vested with detailed power – Constitution of the Committee by District Magistrate was completely *de hors* the rules prescribed and therefore illegal and cannot result in any recommendation legally enforceable – If the committee is to be constituted as contemplated under the law then the constitution of the Committee has to be in consonance with the provisions contained under Rules 3. (Para 9 and 10)

Writ Petition allowed. (E-1)

List of cases cited :-

1. Deepak Babaria and another Vs. State of Gujarat and others, (2014) 3 SCC 502

(Delivered by Hon'ble Ramesh Sinha, J. & Hon'ble Ajit Kumar, J.)

1. Heard Sri Shashinandan, learned Senior Advocate assisted by Sri Vikas Budhwar, learned counsel for the petitioner, Sri Atul Tej Kulshrestha, learned counsel for the respondent Nos.3 and 4, Sri Arun Kumar Srivastava, learned Standing Counsel for respondent Nos.1 and 2 and perused the record.

2. By means of this petition under Article 226 of the Constitution of India the petitioner has questioned legality and propriety involved in the order dated 27.11.2019 whereby the petitioner's licence of the cattle fare/cattle market on his own land has come to be cancelled. He has accordingly, sought quashing of the order dated 27.11.2019 which has been filed as Annexure 7 to the writ petition.

3. Briefly stated facts of the case are that the petitioner having licence to run cattle market over his own land, was initially aggrieved against the notice dated 15.11.2019 whereby the running of the cattle market over the land of the petitioner was stopped on certain grounds regarding sanitation of the place over which the cattle market was being run and that too as a serious threat to the environment and the public at large. The petitioner rushed to this Court and this Court has, accordingly, passed an order on 21.11.2019 in Writ-C No.38021 of 2019 directing the respondent to consider the reply of the petitioner to get the spot inspection done of the place where the market was being run and that too in presence of the petitioner and thereafter take a decision by passing a reasoned and speaking order. It appears pursuant to the order dated 21.11.2019 the petitioner submitted his reply on 23.11.2019 and thereafter the District Magistrate constituted a five member Committee to get the inspection done of the place where the cattle market was being run by the petitioner. Some report was submitted on 26.11.2019 and consequential action has been taken on 27.11.2019 on the basis of report, which according to the order, recommended for action impugned as the cleanliness was not found to the satisfaction and as per norms under the Prevention of Cruelty to Animals Act, 1960 and also the Animal Market Rules framed thereunder and thus, the Upper Mukhya Adhikari, Zila Panchayat has come to exercise his power under Section 78-D of the 1961 Act, cancelling the licence of the petitioner.

4. Assailing the order impugned dated 27.11.2019 it has been contended on behalf of the petitioner that the Prevention of Cruelty to Animals Act, 1960 is a Central Act under which the Animal Markets Rules, 2018 have been framed and the Acts provide under Section 38 to

make rules for the purposes to carry out the object of the Act, and further it is argued that the Rules provide for constitution of a Committee. The Committee that has to be constituted necessarily includes District Magistrate, one of the representative of the State Animal Welfare Board and other members also including the Chairperson of the Zila Panchayat but in the present case the Committee that was constituted by the District Magistrate did not consist of those members as have been mentioned in Rule 3 of the 2018 Rules. It is further submitted that all the powers under the Rules are vested with the Committee constituted for the said purpose and it is on the basis of the recommendation of the Committee that a decision to be taken by the Board. Further while Committee recommends for a decision be taken in the matter, the Committee shall afford a reasonable opportunity to the aggrieved party to be heard vide Rule 16 after the inspection of the animal market is carried out and, therefore, it is argued that the order passed by the respondent dated 27.11.2019 and the procedure followed by him in passing the order has been de hors the provisions as contained under the Rules and the Act and, therefore, unsustainable.

5. *Per contra*, the argument advanced by learned counsel appearing for the respondents is that the power vests with the Chairman of the Kshetra Panchayat under Section 78-D of U.P. Kshetra Panchayat and Zila Panchayat Adhiniyam, 1961 for the grant of licence as well as cancellation thereof and therefore, the power has been exercised taking recourse to the said provision and, it cannot be said that the power exercised is de hors the provisions contained under any Rule or Act.

6. Having heard learned counsel for the petitioner, learned counsel appearing for the respondents, learned Standing Counsel and their arguments advanced across the Bar and having perused the record, we find that the controversy revolves around the decision making process as prescribed procedure to be followed for action in cases where the cattle market is being run is found not being run properly in the sense that the cleanliness and other hygiene is not maintained on the spot, has been allegedly not followed.

7. A close scrutiny of the Act of 1960 reveals that the scheme of Act clearly provides for such action to be preceded by a detailed procedure. The statements and objects of the Act of 1960 clearly disclose that since earlier provisions of the Act were only confined to only the urban areas within municipality limits, the legislature thought in its wisdom to enact a detailed law governing the field. Section 38 of the Act provides for rule making power of the Central Government and Section 41 provides for repeal of such provision if prevalent in any State relating to the subject matter of the Act, shall stand repealed within enforcement of the Provision of this Act of 1960. It is admitted to the parties that the Prevention of Cruelty to Animals Act, 1960 is the Central Law which is prevalent at this point of time and the State laws have come to be repeal by virtue of Section 41 of the Central Act. It is also not disputed to the parties that exercising the rule making power under Section 38 of the Central Act, Prevention of Cruelty to Animals in Animal Market Rules, 2018 (hereinafter referred to as the "Rule") have come to be enforced w.e.f. 22.03.2018 with it's publication in the official gazette

as prescribed for under Section 38 of the Central Act. From the close scrutiny of the relevant provisions of the Rule, we come to notice that an Cruelty to Animals Committee is sought to be constituted vide Rule 3 of the said Rule. Rule 3 of the Rule is reproduced hereunder:

"3. **Constitution of Prevention of Cruelty to Animals Committee-** (1) There shall be a Prevention of Cruelty to Animals Committee in each district for the purpose of exercising the powers under these rules, to be constituted or designated by the concerned State Government.

(2) The Committee shall comprise of the following members:-

(a) the District Magistrate;

(b) one representative of the State Animal Welfare Board;

(c) the Superintendent of Police of the district;

(d) one representative of a local Non Governmental Organisation dealing with animal welfare;

(e) one representative of the SPCA;

(f) district veterinary officer, who shall be the Member Secretary;

(g) chairperson of the Zilla Parishad or Autonomous Council, as the case may be;

(h) chairman of the Municipality; or Panchayat at the district level;

(i) the Committee may co-opt such other person, not exceeding three, with expertise in animal welfare, veterinary sciences, governance, and law enforcement.

Provided that the State Government may designate any Committee set up by it or a district administration under it or a State Act or the rules or regulations made thereunder for the upkeep of animal markets, as the Prevention of Cruelty to Animals Committee for the enforcement of these rules.

Provided further that the provisions of clauses (a) to (I) shall not apply in the case a Committee referred to in the first proviso.

(3) A person who has been convicted under the Act shall be prohibited from being a member of the Committee."

8. From the perusal of the above provision it is quite explicit that a committee that is contemplated under the Rule shall consist of as many as nine members necessarily. The functions of the Committee have been provided under Rule 4. Rule 7 provides for the facilities that have to be maintained in the animal market to prevent cruelty to the animals and Rule 9 provides for certain practices which are rendered as prohibited practices, then Rule 14 provides for the inspection of the animal market. Rules 7, 9, 14, 15 and 16 lay down the procedure how the inspection has to be carried out. For the convenience these Sections are reproduced hereunder:

"7. **Facilities at animal markets to prevent cruelty to animals -** (1) Every animal market shall ensure that the following facilities are available:-

(i) water supply;

(ii) lighting in areas where the markets function after sunset;

(iii) feed storage area and feed supply;

(iv) provisions for proper disposal of dead animals from the site;

(v) provisions to ensure hygiene, proper disposal of manure and bio-waste.

(2) The Committee shall, for reasons to be recorded in writing,

determine the maximum holding capacity of every animal market.

(3) specifications regarding the facilities mentioned in sub-rule (1) and the maximum holding capacity determined as per sub-rule (2), shall be intimated to each animal market by the Committee and prominently displayed at the animal market in such manner as the Committee may direct.

9. **Prohibited practices** - The following cruel and harmful practices shall be prohibited at animal markets, namely:-

(a) animal identification methods such as hot branding and cold branding;

(b) shearing of horns, bishoping in horses and ear cutting in buffaloes;

(c) casting animals on hard ground without adequate bedding during farriery;

(d) use of any hazardous chemicals on body parts of animals;

(e) sealing teats of the udder using any material such as adhesive pats to prevent suckling;

(f) forcefully drenching any fluids or liquids or using steroids or diuretics or antibiotics, other than prescribed by a veterinarian for the purpose of treatment;

(g) use of any type of muzzle, that hurts, to prevent young animals from suckling or eating good;

(h) injecting oxytocin into milch animals;

(i) castration of animals by quacks or traditional healers;

(j) nose-cutting or ear-slitting or cutting by knife or hot iron marking for identification purposes other than by a veterinarian;

(k) tying rope around the penis of animal; or

(l) any other prohibited practice as determined by the Committee, for reasons to be recorded in writing.

Provided that Committee may, for reasons to be recorded in writing, relax any of the above practices as per local conditions.

14. **Powers of State Board to authorise inspection**- For the purpose of ensuring compliance with these rules, the State Board, may authorise any of its officers in writing to inspect any animal market and submit a report to the State Board and the Committee for further action and any officer so authorised may-

(a) enter at reasonable times to inspect the animal market;

(b) require any person to produce any record kept by him with respect to the said market.

(c) take photographic and video proof of cruelty to animals.

15. **Inspection of animal markets**- (1) The Committee shall cause regular inspections of animal markets in tis jurisdiction to be made by authorised officials, as may be required.

(2) Every such inspection shall be followed by an inspection report, to be scrutinised by the Committee to recommend future action.

(3) The Committee may remove from the animal market, any animal, if it has rason to believe that the animal is being treated cruelly at an animal market, and the animal to seized shall be kept in the custody of the local SPCA or an animal welfare organisation recognised by the Board.

16. **Action for non-compliance**- If any animal market fails to comply with these rules, the Committee may recommend to the authority invested by

law to licence or register an animal market in a State or Union Territory-

(a) for cancellation of licence or registration of such animal market;

(b) for imposition of a bar on any person from entering an animal market, if non-compliance is owing to any act or omct of whom, such recommendation is being made, an opportunity of being heard."

9. From the bare reading of the aforesaid provisions it is clearly revealed that the legislature has intended that it is the Committee which is vested with detailed power as provided under the Rules and, therefore, the Committee has to inspect the site where the animal market is being run and if the Committee finds anything wrong in terms of Rule 7 and Rule 9 of the Rules then the Committee shall prepare report for that purpose and shall also make recommendation to the authority who is vested by law to issue license or to cancel the same. However, any such recommendation before the Committee made the *proviso* to Rule 16 clearly stipulates that the such aggrieved person shall be given an opportunity to be heard in the matter.

10. Thus, applying the above Act and the Rules we find that the Committee as had been constituted by District Magistrate was completely de hors the rules prescribed and therefore, the constitution of the Committee was per se illegal and cannot result in any recommendation legally enforceable. If the committee is to be constituted as contemplated under the law then the constitution of the Committee has to be in consonance with the provisions contained under Rules 3. Besides that, the Committee while making a recommendation has to apply its mind by conducting such inspection as contemplated and to also record findings regarding non-compliance of the norms as contained under Rule 7 or commission of any prohibited practice as prescribed for under Rule 9. We find that the District Magistrate in the present case though, has discussed the inspection report but it is nowhere discussed as to what was the inspection report submitted and whether the petitioner had been offered any opportunity to explain his conduct by the Committee before making such recommendation because the provisions as already quoted above prescribed for such opportunity of hearing to be afforded to the petitioner by the committee itself. Here we are also reminded of the judgment of the Apex Court in **Deepak Babaria and another Vs. State of Gujarat and others, (2014) 3 SCC 502** wherein the Court has held that when a thing is required to be done in a particular manner the same shall be done in that manner alone.

11. In such view of the matter, therefore, we are of the clear opinion that in the present case not only the procedure as prescribed for has not been followed but even the rule of natural justice has come to be violated which has been duly incorporated under Rule 16 of the Rules of 2018 and therefore, the order impugned dated 27.11.2019 cannot be sustained in law and deserves to be set aside and the same is accordingly, set aside, However, it is left open for the District Magistrate to initiate a fresh proceeding but strictly in accordance with law as per 1960 Act and the Rules framed thereunder of 2018 as have been discussed herein above in this judgment.

12. The writ petition thus stands **allowed** as above.

(2020)02ILR A500

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 09.01.2020

BEFORE
THE HON'BLE PANKAJ MITHAL, J.
THE HON'BLE VIPIN CHANDRA DIXIT, J.

Writ C No. 43167 of 2019

Masroor Ahmad & Anr. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Puneet Bhadauria, Sri Rakesh Kumar Srivastava

Counsel for the Respondents:
C.S.C.

Permission to use amplifiers and loudspeaker in religious place -refused not only for noise pollution-but also to maintain peace and tranquility in the area-High Court should maintain social balance-matter donot require any interference-W.P. dismissed.

Cases cited:

1. Acharaya Maharajshri Narandraprasadji Anandprasadji Maharaj Vs. State of Gujarat, 1975 (1) SCC 11

2. Church of God (Full Gospel) in India Vs. K.K.R. Majestic Colony Welfare Association and others, 2000 (7) SCC 282

3. Dr. Subramaniam Swamy Vs. State of Tamilnadu, AIR 2015 SCC 460

4. Sant Kumar and others Vs. Collector, Saharanpur and others, 1999 (2) AWC 1664

5. Noise Pollution (V), IN RE, 2005 (8) SCC 796

6. Farad K. Vadia Vs. Union of India and others, 2009 (2) SCC 442

7. State of Maharashtra Vs. Prabhu, 1994 (2) SCC 481

8. Ritesh Tiwari Vs. State of U.P., AIR 2010 SC 3823

(Delivered by Hon'ble Pankaj Mithal, J. & Hon'ble Vipin Chandra Dixit, J.)

1. Heard Sri Puneet Bhadauria, learned counsel for the petitioners and Sri Amit Verma, learned Standing Counsel for the respondents.

2. The petitioners who are Muslims by religion have preferred this petition for the quashing of the order dated 12.06.2019 (wrongly mentioned as 21.06.2019 in the petition) passed by respondent No.4 Sub-Divisional Magistrate, Shahganj, District Jaunpur (wrongly mentioned as respondent No.3 Superintendent of Police, Jaunpur in the writ petition).

3. The aforesaid order disposes off the representations of the petitioners filed pursuant to the directions of the Court for permission/renewal of the license to use amplifiers and loudspeakers on religious places on the ground that such use of sound equipments is likely to cause animosity between the two religious groups of the village creating law and order situation.

4. The petitioner No.1 had moved application before the authority concerned for license/permission to use amplifiers and loudspeakers on two Mosques, Masjid Abu Bakar Siddiqui and Masjid Rahmani, both situate in village Baddopur, Tehsil Shahganj, District Jaunpur for the purposes of *Azaan for Namaz.*

5. The petitioner No.1 was granted permission by respondent No.4 Sub-Divisional Magistrate, Shahganj on 15.01.2018 to use sound equipments as

aforesaid on Masjid Abu Bakar Siddiqui, Baddopur for the period from 15.01.2018 to 14.07.2018 for specified times mentioned therein with certain conditions. There is no permission on record with regard to the use of amplifiers and loudspeakers in respect of other mosque i.e. Masjid Rahmani of Village Baddopur, Tehsil Shahganj, District Jaunpur.

6. It is alleged that at one point of time, the said sound equipments had to be removed from the said mosque for repairs but when they were being refixed, the local area police stopped the petitioner No.1 from reinstalling the same. Accordingly, petitioner No.1 preferred Writ Petition (C) No. 11840 of 2018 (Masroor Ahmad and others Vs. State of U.P. and 5 others) and the same was disposed off vide order dated 07.03.2019 with liberty to the petitioner to move an application afresh for renewal of license to use amplifiers and loudspeakers in the mosque in accordance with law.

7. It is in consequence to the above direction and the fact that the license/permission granted earlier to the petitioner to use sound equipments at the aforesaid mosque had expired that a representation was submitted on 16.03.2019 before respondent No.4. The respondent No.4 called for a report from the Circle Officer, Shahganj who vide his report dated 09.05.2019 stated that a spot inspection was carried out on 07.03.2019 wherein it was found that in the area of both the mosques, there is a mixed population of Hindus and Muslims. If any party if allowed to use sound amplifiers, the tension between the two groups would escalate disturbing the peace in the area. The Sub-Divisional Magistrate along with the C.O. had also visited the area and it was found that on account of use of sound amplifying system in the area, there is a grave tension amongst the villagers comprising of persons of both religious groups of Hindus and Muslims. In the past also, dispute on this score had taken a serious turn. Therefore, in order to maintain law and order and peace in the area, it is appropriate not to grant permission to any group to use sound amplifying system on any religious place. Accordingly, the license of the petitioners cannot be renewed or extended and no fresh permission can be granted.

8. In short, on the reading of the aforesaid order, it becomes quite evident that the petitioners have been refused permission to use sound amplifying system at the mosque not only for the inherent reason of noise pollution but in order to maintain peace and tranquillity in the area.

9. It may not be out of context to mention that people in India do not realise that noise in itself is a sort of pollution. They are not even fully conscious about its ill effect on health though some concern is being shown to it in recent past.

10. On the other hand, internationally, especially in the U.S.A., England and such other countries, people are very much conscious of the noise pollution and as a matter of course do not even blow horns of their cars and honking is considered to be bad manners as it causes not only inconvenience to others but also pollutes the environment causing hazards to health.

11. The Central Government in exercise of powers under Sections 25 read with Section 6 (2) and Section 3 (2) of the

Environment (Protection) Act, 1986 has framed Noise Pollution (Regulation and Control) Rules, 2000 (hereinafter referred to as ***"Rules"***).

12. The aforesaid Rules apart from placing restrictions on use of horns, sound emitting equipments, loudspeakers, public address system, etc., interalia categoriclly lays down that loudspeakers or public address systems shall not be used except after obtaining written permission of the authority.

13. From the aforesaid Rules, Rule 5 (1) of the Rules which is relevant for our purpose is reproduced hereinbelow-:

"5. Restrictions on the use of loud speakers / public address system and sound producing instruments.-

(1) A loud speaker or a public address system shall not be used except after obtaining written permission from the authority."

14. The authority competent to grant permission is defined under Section 2 (c) of the Rules to mean an include any authority or officer authorized by the Central Government or the State Government, as the case may be, including the District Magistrate, Police Commissioner, or any other officer not below the rank of the Deputy Superintendent of Police.

15. Thus, in view of the aforesaid Rules, no loudspeaker or public address system, in short any sound producing instrument/equipment or amplifier can be used in public place without the permission of the authority concerned.

16. In the case at hand, petitioner No.1 was granted permission to use sound equipments on the concerned mosque for a limited period from 15.01.2018 to 14.07.2018 for specified time of the day with certain conditions. This permission has not been extended or renewed thereafter. Its extension/renewal has been denied on account of law and order situation.

17. It is not the case of the petitioners in the entire writ petition that the installation of such sound equipments is not likely to cause any tension in the locality between the two groups and that law and order situation does not demand such refusal of permission.

18. The administrative authorities vested with the responsibility of maintaining law and order situation in any given area are duty bound to fulfill their obligations and to ensure that the tranquillity and peace of the area is not disturbed and if there is any tension in relation to any incident or dispute, the same be reconciled and settled. Thus, they are obliged to defuse tension and not to ensure that peace prevails in the area.

19. The Fundamental Duties referred to in Part IV-A of the Constitution of India obliges every citizen which includes the administrative officers as well inter-alia to promote harmony and the spirit of common brotherhood amongst all the people of the country irrespective of religious linguistic or sectional diversities and to ensure that practices derogatory to the dignity of women are renounced.

20. The relevant part of Article 51A of the Constitution of India is quoted below-:

"51A. Fundamental duties It shall be the duty of every citizen of India-:

a.....

b.....

c.....

d.....

e. to promote harmony and the spirit of common brotherhood amongst all the people of India transcending religious, linguistic and regional or sectional diversities; to renounce practices derogatory to the dignity of women"

21. In view of the above provision, every citizen of the country has to promote harmony and the spirit of common brotherhood and for that purpose it is necessary that any action which tends to disturb the harmony be checked and nipped in the bud.

22. The petitioners submit that the use of amplifiers and loudspeakers on the mosques for 2 minutes 5 times a day would neither cause noise pollution nor would disturb the tranquillity of the area. It is an essential part of their religious practice and it has become necessary with the increasing population to give call to the people on amplifiers and loudspeakers to come and pray.

23. It is true that one can practice, profess and propagate religion as guaranteed under Article 25 (1) of the Constitution of India but the said right is not an absolute right. The right under Article 25 is a subject to the wider Article 19 (1) (a) of the Constitution and thus both of them have to be read together and construed harmoniously.

24. In **Acharaya Maharajshri**, the Court in paragraph 30 has observed as under-:

"No rights in an organized society can be absolute. Enjoyment of one's rights must be consistent with the enjoyment of rights also by others. Where in a free play of social forces it is not possible to bring about a voluntary harmony, the State has to step in to set right the imbalance between competing interests....."

25. The Court in paragraph 31 of the said very judgment has further observed as under-:

"A particular fundamental right cannot exist in isolation in a watertight compartment. One fundamental right of a person may have to coexist in harmony with the exercise of another fundamental right by others and also with reasonable and valid exercise of power by the State in the light of the Directive Principles in the interests of social welfare as a whole."

26. In **Church of God**, it was held that the rights under Articles 25 and 26 of the Constitution of India are subject to public order, morality and health. No religion prescribes or preaches that prayers are required to be performed through voice amplifiers or by beating of drums and if there is such practice, it should not adversely affect the rights of the others including that of not being disturbed.

27. A similar view has been expressed by the Supreme Court in the case of **Dr. Subramaniam Swamy** and the right to manage religious affairs has been held to be subject to other provisions of Chapter-III of the Constitution of India.

28. A Division Bench of this Court in **Sant Kumar and others** held that right to practice one's religion freely is a fundamental right under Article 25 of the Constitution of India but the said right of religion and right to privacy which is also

a fundamental right has to be read together and nobody has a right to practice religion in a way so as to invade privacy of others. The Court observing thus appealed to the public at large to refrain from using loudspeakers for various religious practices such as Akhand Ramayan, Kirtan, etc. as it causes inconvenience to public and creates noise pollution.

29. It may not be out of place to refer to a Supreme Court decision in **RE-: Noise Pollution**, wherein the Apex Court expressed opinion that the fundamental right of a person under Article 19 (1) of the Constitution of India of freedom of speech and expression are not absolute and no one can claim fundamental right to create noise by amplifying sound of his speech with the help of loudspeakers as every citizen has a fundamental right to live in peace, comfort and quietness of his house.

30. In **Farad K. Vadia**, it has been observed that "necessity of silence", "necessity of sleep", "process during sleep and rest" are all biological necessities and essentials for health and is part of human rights as noise is injurious to health.

31. It is universally acceptable today that noise adversely affects human health. It causes hearing loss or deafness, high blood pressure, depression, fatigue and even annoyance. Excessive noise has resulted in cardiac ailments, neurosis and nerves breakdown.

32. It is a cardinal principle of a exercise of equitable jurisdiction that the High Court in such exercise should maintain social balance by interfering where necessary and refusing where it is against social interest and public good.

33. In **State of Maharashtra**, it has been observed that in exercising equity jurisdiction in social interest, the Court should weigh the pros and cons of exercising the jurisdiction and to see whether the interference would cause more harmony to the society or its refusal.

34. In **Ritesh Tiwari**, the Court held that the equitable jurisdiction may be exercised to promote good faith and equity and in the larger public interest.

35. In view of the aforesaid facts and circumstances, we are of a clear opinion that this matter does not require any interference by us in exercise of our extraordinary jurisdiction as otherwise it may result in causing social imbalance.

36. Accordingly, the writ petition is dismissed with no order as to costs.

(2020)02ILR A504

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.12.2019

BEFORE
THE HON'BLE RAMESH SINHA, J.
THE HON'BLE AJIT KUMAR, J.

Writ C No. 46421 of 2006
Connected with
Writ C Cases No. 24748 of 2019 & 57082 of 2017

Chandra Prakash Sivhare ...Petitioner
Versus
Union of India & Anr. ...Respondents

Counsel for the Petitioner:
Sri Pankaj Bhatia, Sri M.I. Farooqui, Sri Archit Mandhyan, Sri Ashish Jaiswal

Counsel for the Respondents:

A.S.G.I., 2006/2008, Sri Ajai Bhanot, Sri B.N. Singh, Sri K.N. Yadav, Sri Manoj Kumar Singh

A. Civil Law-U.P. Municipal Corporation Act, 1959 – Cantonments Act, 2006 – Application – The Municipality governing the area of civil residents is a local body as constituted under the U.P. Municipal Corporation Act, 1959 – Whereas the Cantonment Board operates basically in an area defined as cantonment of the defence under the erstwhile Cantonment Act, 1924, later superseded by the Cantonments Act, 2006. (Para 9)

B. Civil Law-Municipality and Cantonment Board – Transfer of property – Effect on title of Defence Department – An extension of Municipality to such area which was earlier under the territorial limits of the Cantonment Board, if it has been excised by the Government of India, Ministry of Defence, it is the general administration of such area that would stand transferred from the Cantonment Board to the Municipality – But a land that belongs to the defence, may be under the lease or old grant by the Ministry of Defence, Government of India in favour of civilian, would not automatically get transferred either to that individual who is the occupier of the property or to the Municipal Corporation – The title shall remain with the defence department unless and until it is transferred in the name of occupier by the competent authority – Merely because the property has occupied by civilian under an old grant basis, such a grantee only has status of mere occupier and does not become the title holder of the property. (Para 9 and 15)

C. Civil Law-Public Premises (Eviction of Unauthorised occupants) Act, 1971 – Section 5B – Jurisdiction of Defence Department – Legislature has used the word 'Premises' in a generic sense, comprehending in it the land, the structure standing over it and every such other activity in forms of any fixture for the beneficial enjoyment of the premises and the public premises are such that belong to the Central Government – The property belongs to the defence department – It was a public premises for the purposes – Therefore the defence estate officer who has been assigned the duties of Presiding Officer to act under the Act, 1971 has the jurisdiction and so he rightly exercised the same in the present case. (Para 17 and 21)

Writ Petition dismissed.(E-1)

List of cases cited :-

1. Chief Executive Officer v. Surendra Kumar Vakil and others (1999) 3 SCC 555

(Delivered by Hon'ble Ajit Kumar, J.)

1. Since all the three above matters are connected and the reliefs claimed in two matters is on the basis of the pleadings raised and relief claimed in the leading writ petition bearing Writ- C No.- 46421 of 2006, all the three writ petitions are being heard and decided by this common judgment taking Writ- C No.- 46421 of 2006 as leading case.

2. Heard Sri Archit Mandhyan and Sri Ashish Jaiswal learned counsels appearing for the petitioner, Sri O.P. Gupta, learned counsel appearing for the Union of India and Sri Chandra Bhan Gupta, learned counsel appearing for the Cantonment Board.

3. By means of the present writ petition under Article 226 of the Constitution, the petitioner has questioned the order dated 22nd November, 2001 passed by the Estate Officer, Agra, Cantt. Exercising power under the Public Premises (Eviction of Unauthorised occupants) Act, 1971 (for short 'Act, 1971') and the order of the District Judge, Agra, dated 10th August, 2006, whereby appeal of the petitioner under the Act, 1971 has come to be rejected.

4. Briefly stated facts of the case are that the property in question is the land property with construction of a bungalow

so recorded as Bungalow No.- 178 situate at Namiyar Mohalla, Ajmer Road, Agra. It has been the property of the Defence department and so recorded as well as a defence property under Defence Land Register. It so happened that the territorial limits of the cantonment board were excised and the area where the bungalow situates was brought within the municipal limits of the then Municipality of Agra, admeasuring 198.303 acres approximately and, accordingly, Ministry of Defence vide Circular No.- 79 dated 9th February,1957 excised the said area from the limits of the cantonment of Agra. With the exclusion of the area including the bungalow from the territorial limits of the cantonment board, Agra, the petitioner being in possession, it appears, applied for sanction of map to raise construction over the land in question before Nagar Mahaplika Parishad, Agra and Nagar Mahapalika Parishad, Agra approved the same on 28th March, 1958. With the approval so granted by the Nagar Mahapalika Parishad, Agra, the petitioner raised construction over the same. On 26th October, 1998, the petitioner was served with a notice under the signature and seal of the Estate officer under the Act, 1971.

5. The petitioner submitted reply asking for certain papers mentioned therein so that he may contest the matter. Thereafter, the petitioner filed a detailed objection to the notice before the Prescribed Authority of Agra Cantt. and requested for recall of the notice dated 11th November, 1998 and dropping of the proceedings. When nothing happened in the matter petitioner approached this Court and this Court vide order dated 27th January, 1999 passed in CMWP No.- 3190 of 1999 directed the prescribed authority to decide the objection of the petitioner and also supply the copies of documents requested by the petitioner. Again when nothing happened, the petitioner filed another petition and this Court vide order dated 8th August, 2001 directed the respondent No.3 to decide the objection of the petitioner and pass appropriate orders after affording opportunity of hearing to the petitioner. In compliance of the above order the prescribed authority under the order dated 22th November, 2001 rejected the objection of the petitioner and held the constructions to be unauthorized without there being any approval of the competent authority and, accordingly, directed for removal of the same. The petitioner then preferred a statutory appeal against the order passed by the prescribed authority and the same has also come to be rejected.

6. Having heard learned counsel for the parties and their arguments raised across the Bar and having perused the record, what we find that the moot question for our consideration in the present case is as to whether a property already recorded as a Defence property within the erstwhile territorial limit of cantonment, would cease to be a property of Government of India, defence department, in the event, the area of the cantonment board stands excised and the area where the defence property situates, comes within the extended municipal limits of the local Municipality. In the event the answer is in affirmative, say 'Yes', the impugned orders would be quashed and in the event the answer is in negative, the impugned orders would be upheld and the petitioner would be liable to remove the unauthorized construction. Accordingly, we framed following two questions to be answered in the present petition:-

(A). Whether the bungalow No.178 situate at Namiyar Mohalla, Ajmer Road, Agra ceased to be a defence

property with the extention of the municipal limits and the land over which bungalow falls coming within the municipal limits; and

(B). Whether the defence Estate Officer acting as Prescribed Authority can exercise power under the Act, 1971 in respect of a property that falls within the municipal limits of a Municipality of Agra.

7. Now coming to the first question, we needed to trace out the history, if any pleaded, that has led to the occupation by the petitioner of the bungalow in question. Bungalow No.- 178 is admitted to the petitioner to be belonging initially to the defence department. The petitioner's claim to be in possession of the bungalow is since 1970 on-wards. Prior to the 19th February, 1957 the General Land Register, maintained by the Cantonment Board (for short 'GLR') admittedly show area as survey number in question within the cantonment board and the letter dated 30th November, 1957 issued by the Defence authority that the area where the bungalow stands stood transferred to the territorial authority of Municipality, Agra and the GLR showed entry in respect of the bungalow as occupied by private individual and the date of acquisition and possession column contains a remark "not-known". Municipal records shows that name of Shri G.D. Shiv Hare had been entered over the bungalow as tax of house receipts have been filed along with writ petition. Jal Sansthan receipt also stands in the name of Smt. G.D. Shiv Hare.

8. Nowhere it has been stated in the pleadings raised in the writ petition as to how the petitioner has entered into possession of the property. He is not the son of Mr. G.D. Shiv Hare whose name is recorded in the Municipal records with Chandra Prakash Shivhare (1981-86). So, at the most the status of the petitioner as an occupant would be of a sub-lessee/ sub-grantee. The original lessee or grantee seems to have passed away much earlier and there are no pleadings to that effect in the present writ petition. The bungalow property is admitted to the parties to be a subject matter of old grant. The petitioner not being a valid transferree from the defence department, the question is as to whether the bungalow in question ceased to be a defence property with the enforcement of the Municipality in the area. The notification states that the area ceases to be a defence area but from the perusal of the Government of India notification dated 26th December, 1961, it is very much clear that the property that was under use for non military purposes before excision, their control remains with the Ministry of Defence under Rule 2(B) of the ACR Rules. However, the minutes of Separation Committee show that the civil area notified can be transferred to the State Government free of cost but subject to certain formalities to be carried out.

9. It is not disputed that the both the Municipality as well as the Cantonment Board are the local bodies in their own rights having an operational area as per the respective Acts, under which they have been constituted. The Municipality governing the area of civil residents is a local body as in the present case constituted under the U.P. Municipal Corporation Act, 1959, an erstwhile municipality governed under the U.P. Municipalities Act, 1916 whereas the Cantonment Board operates basically in an area defined as cantonment of the defence under the erstwhile Cantonment Act, 1924, later superseded by the Cantonments Act,

2006. The landed property falling in the cantonment area may be also in occupation of a civilian if it is either under the old grant by the Government of India or under the lease of the department of the Defence. But the landed property of the cantonment which is recorded as such in the defence land register to be a defence property cannot be in the ownership of a private individual unless there is lease in perpetuity to that effect or by way of conveyance of sale. The Cantonment Act, 2006 provides for incorporation of a Cantonment Board for general administration of the land falling in the cantonment area in the same manner as the municipality in a civil area. An extension of Municipality to such area which was earlier under the territorial limits of the Cantonment Board, if it has been excised by the Government of India, Ministry of Defence, it is the general administration of such area that would stand transferred from the Cantonment Board to the Municipality or the Municipal Corporation as the case may be, but a land that belongs to the defence, may be under the lease or old grant by the Ministry of Defence, Government of India in favour of civilian, would not automatically get transferred either to that individual who is the occupier of the property or to the Municipal Corporation. The title shall remain with the defence department unless and until it is transferred in the name of occupier by the competent authority. The letter of the Under Secretary to the Government of India, Ministry of Defence written to the Director, Military Land and Cantonment explaining the excision of the civilian area from cantonment clarifies eight points. The letter in its entirety is reproduced hereunder:-

"No. 18/13/G/L & C/52/1028/ LC/ D/ (C&L)

Government of India

Ministry of Defence

New Delhi, the 7th February, 1955

To

The Director, Military Land and Cantonments

Excision of Civil areas from Cantonments

Sir,

I am directed to say that the question of terms on which assets located in the areas to be excised from cantonments may be dealt with has been under the consideration of the Government of India. It has now been decided that the following broad principles shall govern the excision of civil areas from cantonment:-

(a) Cantonments Board's assets and liabilities the area be transferred to the successor local body free of any compensation except for such financial adjustment which may be necessary in the local circumstances of each case.

(b) Income and expenditure be divided on the basis of actual income from a source, such as octroi, should normally be divided on population basis, a different method may, however, be adopted if the local conditions warrant the adoption of such a course.

(c) Government right in the leased sites etc., be transferred to the State Government, free of cost, subject to the condition that the income derived from such areas will be utilized for the resident of those areas exclusively.

(d) Vacant lands be retained for future use or eventual disposal by the Government of India.

(e) M.E.S. Properties, if any, be retained for use or eventual disposal.

(f) To report on the extent of, and terms on which the properties vesting in and belonging to the cantonment Board should be appropritioned between the two local bodies.

(g) To report on the needs of the two areas for the construction of new buildings, consequent upon the transfer of those existing to either local body, with financial effect.

(h) To report on any other matter relevant to excision in so far as financial adjustment or apportionment of assets and liabilities or assignment of easement/ ammonities is concerned.

Yours faithfully
Sd/-
Deputy Secretary to the Govt. of India"

10. From the bare reading of the aforesaid clauses given under the letter it is clearly revealed that Government right in the lease sites would be transferred to the State Government free of cost and that income derived shall be utilized for the residents of such area.

11. However, in order to make effective those transfer of the defence property to the State Government, it is required to have necessary approval of the competent authority. The letter of the Government of India, Ministry of Defence earlier issued in this regard dated 26th December, 1961 clearly stipulates following conditions:-

"2. As the lands excised from Agra Cantt. were surplus to Defence requirements, being in use for non-Military purposes before excision, their control remains with the Ministry of Defence under Rule 2(b) of the ACR Rules. The M.E.O. Agra Circle, is therefore, responsible for management of these lands under Rules 3(b) ibid and specific orders to this effect are not necessary.

3. In accordance with the minutes of the Separation Committee the M.E.O. Agra Circle, should initiate immediately proposals for:-

(a) Transfer of lease hold site inside the ex-notified civil area, to State Govt. free of cost.

(b) Conversion into free hold of all old grant and lease hold sites outside ex-notified civil area, on payment by the holders of conversion value at the rate of 25 times the current market rent in 5 easy instalments. In this connection the method followed in Sitapur Cantt. may be adopted.

(c) Disposal of vacant sites, by dividing into suitable plots, wherever necessary.

4. A site plan distinctly showing the sites involved and a statement containing GLR entries, should be furnished with each proposals."

12. From the reading of the aforesaid notification it is quite clear that although the area stood excised following extension of the municipal limits but the excision is only for the purposes of the municipal function. The rights and title do continue with the Union of India, Ministry of Defence. As in the earlier part of this order, we have discussed that the defence land register also shows that bungalow No. 178 to be in occupation of private individual but the land and bungalow do continue to be recorded as such and, accordingly, the property is a defence property. The petitioner in the entire pleadings has not disclosed as to how he

has come to occupy the land of bungalow in question. He is not able to demonstrate any lease in his favour or in favour of his predecessor-in-interest and, therefore, his continuance is only subject to approval of the defence department and any construction upon vacant land or remodeling of the house necessarily required the approval of the competent authority. Merely because Agra Municipality had sanctioned some map for construction of building over the area, does not mean that the constructions have become legal. It may be legal for the authority to have exercised power under an Act but the question is whether sanction of Map was as per the lease agreement and the application was moved by the lessee. However, in the present case map was applied by the occupier who was not beneficiary of either lease agreement or old grant and so no such exercise could have been, in the absence of consent of the owner of the property and, the entire proceedings of sanction of map would be rendered void in the absence of consent of the owner and in our considered opinion, the owner has authority to question the constructions and if found illegal get it demolished. In the present case, therefore, we are of firm view that since the land of bungalow No.178 continued to belong to the defence department and the petitioner has failed to demonstrate either from the pleadings or from the document that he is valid transferee of the property he can defend constructions that have been rendered illegal for want of necessary sanction. A transfer of an area from the cantonment to the municipality, is a mere transfer for the purposes of municipal functions from one local body to the other local body but rights and title of the property of the original owner does continue and there can be no *ipso facto* transfer of title on extension of municipal limits to the area of such property. Thus following findings of the Prescribed Authority cannot be held bad as we do not find any perversity in the same:-

(1) The land in question, sy.no.131/381, B. No. 178, Ajmer Road, Namnir Agra Cantt. is Defence land owned by the Govt. of India, Ministry of Defence.

(2) Although it was excised alongwith other area, and merged with the Municipal area vide SRO No. 312 dated 25.6.1957 but this transfer has taken effect only in r/o Municipal function. The management of lands falling with in the excised area of Agra Cantt. still remains with the Defence Estates Officer, Agra Circle, Agra Cantt.

(3) It is clear from the Govt. orders issued vide their letter No. 18/1/ G/ L&C/ 58 dated 26.12.1961 that after the excision the administrative control of the area remained with the Ministry of Defence, Govt. of India and management comes under the D.E.O. Agra Circle, Agra Cantt. Till the formalities stipulated in para 3 and 4 of the said Govt. order are completed and the transfer of these lands to the State Govt. takes place, these lands remain under the management of D.E.O. Agra Circle, Agra Cantt."

13. In taking the above view we find support in the judgment of the Apex Court in the case of **Chief Executive Officer v. Surendra Kumar Vakil and others (1999) 3 SCC 555.** In the said case a suit had been decreed of the vendors and vendees on the ground that one S.N. Mukharjee who was a occupancy holder and as such recorded in the GLR had died in the year 1972 leaving behind 11 legal heirs, who validly succeeded the property.

However, their names could not be mutated in the records over Bungalow No. 39 as they did not apply for the same. The heirs who had ultimately sold out the property in favour of the 24 persons by a registered sale deeds dated 26th February, 1983 through power of attorney holder Gopal Das Soni. The property was described as old grant of the cantonment board and so vendees were to abide by the terms and conditions on which the land was held in the name of ancestors of the vendors. The amendment deeds further came to be registered in respect of those sale deed to the effect that lease deed got wrongly transcribed as the land was of 'old grant' type. The Military Estate Officer issued notices on 3rd October, 1993 to the vendores for validating the terms and conditions of the old grant by dividing the property into four shares prior to the sanction of the competent authority and hence notices were also issued to the purchasers to show cause why action for resumption of the site be not taken against them. The plea taken by the respondents was that in view of the 'old grant' seller were having occupancy rights over the Bungalow No. 39, therefore, they validly transferred the rights to the purchasers. The Cantonment Board lost the suit and first appeal as well and so filed an appeal before the Apex Court. Apex Court repelled the arguments of the respondents and their claim on the legal principles *qua* 'old grant' and accepted the appeal vide paragraph Nos. 12, 13, 14, 15, 16, 17, 18 and 19 that run as under:-

12. Under the Cantonment Land Administration Rules, 1925 General Land Registers are being maintained in respect of Sagar Cantonment. These registers were produced before the High Court and were also produced before us. These are old registers maintained in the form prescribed by the said Rules. In these registers the property in question is shown as being held by S.N. Mukherjee on old grant basis. As explained by Mittal in the passage cited above, the tenures under which permission was given to civilians to occupy Government land in the cantonments for construction of bungalows on the condition of a right of resumption of the ground, if required, came to be know as old grant tenures. Such tenures were given in accordance with the terms of the order No.179 issued by the Governor General in Council in the year 1836. These require that the ownership of land shall remain with the Government and the land cannot be sold by the grantee. Only the house or other property thereon may be transferred. Such transfers would require consent of the officer commanding the station when the transfer is to a person not belonging to the army. In respect of old grant tenure, therefore, the Government retains the right of resumption of land.

13. In the case of Raj Singh v. Union of India, AIR 1973 Delhi 169, the Delhi High Court examined the Regulations contained in order No.179 of 1836 regarding the grant of lands situated in cantonment areas and held that the Regulations were a self-contained provision prescribing the manner of grant and resumption of land in cantonment areas. It held that the petitioner therein being a mere occupier of the land under the said Regulations, he was in the position of a licensee whose licence under the grant and under the law was revocable at the pleasure of the licensor. This judgment of the Delhi High Court was approved by this Court in Union of India v. Tek Chand (Civil Appeal No. 3525 of 1983) by its judgment and order dated 5th

of January, 1999 passed by S.P. Bharucha and V.N. Khare, JJ.

14. The respondent, however, contends that since the actual old grant was not produced in evidence by the appellants the case of the appellants that the land was held on old grant basis by Mukherjee is not proved by the appellants. This submission does not appeal to us. The respondents filed a suit claiming title over the land. If any conveyance in respect of this land had been executed at any time by the State/Military Estate Officer in favour of Mukherjee or his predecessor in title, the conveyance ought to have been produced by the person in whose favour it had been executed or his successor in title. Had a lease been granted in respect of the said land in favour of Mukherjee or his predecessor in title, the lessee or his successor in title should have produced the lease deed in his favour. Any grant in favour of the grantee would normally be in the possession of the grantee. The respondents, however, have not produced any title deeds relating to the land in question. They have only produced the document of sale from Dubey to Mukherjee and the four sale deeds from the heirs and legal representatives of Mukherjee in favour of the purchasing respondents. In none of these documents there is a clear recitation of the nature of the rights in the land held by the Vendor.

15. It is true that the appellants were also required to maintain a file/register of grants. They have not produced the file. The appellants, however, have led evidence to show that the concerned file of grants was stolen in the year 1985. They were, therefore, unable to produce the file pertaining to this grant. They do, however, have in their possession general land registers maintained under the Cantonment Land Administration Rules of 1925 in which they are required by these rules to maintain a record, inter alia, of the nature of the grant in respect of cantonment lands and the person in whose favour such grant is made. Both these registers are very old registers. They bear the endorsement of the officer who has maintained these registers in the regular course. These registers also show any subsequent changes made in respect of the lands under the relevant columns. Both these registers clearly show that the land is held on old grant basis by Mukherjee. The High Court seems to have rejected the record contained in the land grants registers on the ground that the terms of the grant have not been established because the document of grant itself has not been produced. The terms of the grant, however, are statutorily regulated under order No.179 of the Governor General in Council of 1836. The administration of lands in Cantonment areas is further regulated by the Cantonment Act, 1924 and the Cantonment Land Administration Rules of 1925. The 1836 Regulations expressly provide that the title to the land in cantonment areas cannot be transferred. But only occupancy rights can be given in respect of the land which remains capable of being resumed by the Government in the manner set out therein. There is no evidence to the contrary led by the respondents. In fact, under the amendment/admission deeds executed on 4/5.8.1983 the Vendors as well as the purchasers have stated that the site is wrongly mentioned as lease hold site instead of 'old grant' site in the four sale deeds. The mistake is being rectified by the execution of the four amending deeds clarifying that the Bungalow No.39 is held on 'old grant'. Undoubtedly, this was later retracted when cancellation deed was

executed cancelling the amendment/admission deeds. Nevertheless, all the statutory provisions clearly indicate that the land being in the cantonment area was held by Mukherjee only as an occupant/licensee and that any transfer of the bungalow and other constructions on the said land required prior approval of the defence establishment. The power of attorney holder also corresponded with the Defence establishment and asked for mutation in favour of the purchasers.

16. However, even after they were expressly informed by the appellants of the need for prior permission before transfer, as well as for any further construction on the said land, the respondents proceeded with the construction work resulting in the notice to desist issued by the appellants under Section 185 of the Cantonments Act, 1924. The said section provides that the Board may, at any time, by notice in writing, direct the owner, lessee or occupier of any land in the cantonment to stop the erection or re-erection of a building in any case in which the Board considers that such erection or re-erection is an offence under Section 184. The Board also has power to direct the alteration or demolition of such unauthorised structure. On the facts before us, this action cannot be faulted.

17. The respondents drew our attention to a decision of this Court in the case of Union of India v. Purshotam Dass Tandon and another, 1986 Supp. SCC 720, where this Court observed that the Union of India had made no effort to establish its title and the grant had not been produced. Hence the terms of the grant or the date of the grant were not known. Therefore, the Union of India could not succeed in its contention that the land in the cantonment was held on old grant basis. In the present case, however, apart from the requirements of Order No.179 of Governor General in Council, 1836, the general land register maintained under the Cantonment Land Administration Rules of 1925 has been produced which supports the contention of the appellants that the land is held on old grant basis. The appellants have also led evidence to show that the file containing grant in respect of the said property, is not available with them because it has been stolen in the year 1985. The respondents on the other hand have not produced any document of title pertaining to the said land or showing the nature of the rights of the respondents over the said land except the sale deeds referred to earlier. The stand of the respondents relating to their rights over the said land has changed from time to time. In the sale deeds executed by the Vendees in favour of the respondents, the land is described as lease hold cantonment land. This was later changed by the respondents in the amendment deeds to old grant land. In the suit, the respondents have contended that they have become the absolute owners of the said land. These bare assertions do not carry any conviction. Had there been any conveyance or lease in respect of the said lands executed in favour of the respondents or their predecessor in title, such conveyance or lease should have come from their custody. There is, therefore, no document before the Court which would show that the respondents were the absolute owners of the said land as now contended by them. The Regulations as well as the general land registers, on the other hand, which are old documents maintained in the regular course and coming from proper custody, clearly indicate that the land is held on old grant basis. This is, therefore, not a case

where the appellants had not produced any evidence in support of their contention that the land in the cantonment area was held on old grant basis by Mukherjee.

18. The respondents have drawn our attention to the decision in the case of Shri Krishan v. The Kurukshetra University, AIR 1976 SC 376 for showing that any admission made by them in ignorance of legal rights cannot bind them. This judgment does not help the respondents because the fact remains that the respondents have taken a changing stand in relation to the nature of their rights over the disputed land. The admissions, at least, indicate that the respondents were, at the material time, not sure about the exact nature of their right over the said land. Hence they have at one stage described the nature of their rights as lease hold, at another stage as old grant and at a third stage they have retracted from their admission that the land was 'old grant'. The last deed merely states that they have the same rights as their Vendees had in the said land. Looking to the nature of evidence, therefore, which was led in the present case, the High Court was not justified in coming to the conclusion that the land was not held on old grant basis by Mukherjee.

19. Therefore, since the land is held on old grant basis in the present case, the appellants are entitled to resume the land in accordance with law. In the premises the appeals are allowed, the impugned judgment and order of the High Court is set aside and the suit of the respondents is dismissed with costs."

14. The case of the petitioner is even worse. Vide paragraph 4 of the writ petition he has claimed that his ancestors were occupant of Bungalow No. 178 and possibly because of old grant only. However, he has not been able to produce any document to that effect inasmuch as he could not establish his right of succession, to wit, whether he is a direct descent of the original grantee or by way of sub-lessee or any sale agreement. He has sought to set up the claim of the entry in the name of Pyare Lal, possibly as his ancestor whose name had been entered on account of sale deed in the year 1957 but no such document has been brought on record to establish as to whether such sale was with permission of the competent authority or not. Sri G.D. Shivhare whose name finds entry in GLR, as a old grantee, the petitioner could not have obtained a better title than that of the old grantee, provided he produced any such document. Under the circumstances, therefore, the petitioner like the vendor and vendees in the above said case could not have claimed a valid right to raise constructions in the absence of proper sanction of the competent authority.

15. In view of the above we find merit in the argument advanced by the learned counsel for the respondent that merely because the property has occupied by civilian under an old grant basis, such a grantee only has status of mere occupier and does not become the title holder of the property. The petitioner has not produced any document that he has the old grant in favour of his predecessor-in-interest. He does not also show as to how he has come to occupy the property in the year 1970. At the most, therefore, he is an occupant, may be unauthorized one.

16. Now coming to the second question, it is necessary to first go through the relevant provisions of the Public Premises (Eviction of Unauthorised Occupants) Act, 1971 which is relevant

herein, to find answer to the question. Vide Section 2 of the Act, 1971 defines the premises and public premises separately. Vide Section 2 (c) and 2 (e) of the Act, 1971 are, accordingly, reproduced hereunder:-

2 (c) "premises" means any land or any building or part of a building and includes, -

(i) the garden, grounds and outhouses, if any, appertaining to such building or part of a building, and

(ii) any fittings affixed to such building or part of a building for the more beneficial enjoyment thereof;

2 (e) "public premises" means -

(1) any premises belonging to, or taken on lease or requisitioned by, or on behalf of the Central Government, and includes any such premises which have been placed by that Government, whether before or after the commencement of the Public Premises (Eviction of Unauthorised Occupants) Amendment Act, 1980 (61 of 1980), under the control of the Secretariat of either House of Parliament for providing residential accommodation to any member of the staff of that Secretariat;"

17. From a bare reading of the aforesaid provision, it is clear that Legislature has used the word 'Premises' in a generic sense, comprehending in it the land, the structure standing over it and every such other activity in forms of any fixture for the beneficial enjoyment of the premises and the public premises are such that belong to the Central Government. We have already held that land and the house standing thereupon as bungalow No.- 178 is admittedly a property belong to the defence department and so it is a defence property. Section 5A & B provide for the removal of unauthorized constructions if made over and above such land of property and Section 5B empowers the authority to remove the unauthorized construction by undertaking of demolition exercise. Section 5C also provides for sealing of the unauthorized constructions. The relevant Section 5A, 5B and 5C of the Act, 1971 are reproduced hereunder:-

"5A. Power to remove unauthorised constructions, etc.-- *(1) No person shall--*

(a) erect or place or raise any building or [any movable or immovable structure or fixture],

(b) display or spread any goods.

(c) bring or keep any cattle or other animal, on, or against, or in front of, any public premises except in accordance with the authority (whether by way of grant or any other mode of transfer) under which he was allowed to occupy such premises.

(2) Where any building or other immovable structure or fixture has been erected, placed or raised on any public premises in contravention of the provisions of sub-section (1), the estate officer may serve upon the person erecting such building or other structure or fixture, a notice requiring him either to remove, or to show cause why he shall not remove such building or other structure or fixture from the public premises within such period, not being less than seven days, as he may specify in the notice; and on the omission or refusal of such person either to show cause, or to remove such building or other structure or fixture from the public premises, or where the cause shown is not, in the opinion of the estate officer, sufficient, the estate officer may, by order, remove or cause to be removed the building or other structure or fixture from

the public premises and recover the cost of such removal from the person aforesaid as an arrear of land revenue.

(3) Where any movable structure or fixture has been erected, placed or raised, or any goods have been displayed or spread, or any cattle or other animal has been brought or kept, on any public premises, in contravention of the provisions of sub-section (1) by any person, the estate officer may, by order, remove or cause to be removed without notice, such structure, fixture, goods, cattle or other animal, as the case may be, from the public premises and recover the cost of such removal from such person as an arrear of land revenue.]

5B. Order of demolition of unauthorised construction.-- *(1) Where the erection of any building or execution of any work has been commenced, or is being carried on, or has been completed on any public premises by any person in occupation of such public premises under an authority (whether by way of grant or any other mode of transfer), and such erection of building or execution of work is in contravention of, or not authorised by, such authority, then, the estate officer may, in addition to any other action that may be taken under this Act or in accordance with the terms of the authority aforesaid, make an order, for reasons to be recorded therein, directing that such erection or work shall be demolished by the person at whose instance the erection or work has been commenced, or is being carried on, or has been completed, within such period, as may be specified in the order.*

Provided that no order under this sub-section shall be made unless the person concerned has been given by means of a notice [of not less than seven days] served in the prescribed manner, a reasonable opportunity of showing cause why such order should not be made.

(2) Where the erection or work has not been completed, the estate officer may, by the same order or by a separate order, whether made at the time of the issue of the notice under the proviso to sub-section (1) or at any other time, direct the person at whose instance the erection or work has been commenced, or is being carried on, to stop the erection or work until the expiry of the period within which an appeal against the order of demolition, if made, may be preferred under section 9.

(3) The estate officer shall cause every order made under sub-section (1), or, as the case may be, under sub-section (2), to be affixed on the outer door, or some other conspicuous part, of the public premises.

(4) Where no appeal has been preferred against the order of demolition made by the estate officer under sub-section (1) or where an order of demolition made by the estate officer under that sub-section has been confirmed on appeal, whether with or without variation, the person against whom the order has been made shall comply with the order within the period specified therein, or, as the case may be, within the period, if any, fixed by the appellate officer on appeal, and, on the failure of the person to comply with the order within such period, the estate officer or any other officer duly authorised by the estate officer in this behalf, may cause the erection or work to which the order relates to be demolished.

(5) Where an erection or work has been demolished, the estate officer may, by order, require the person concerned to pay the expenses of such demolition within such time, and in such number of instalments, as may be specified in the order.]

5C. Power to seal unauthorised constructions.-- *(1) It shall be lawful for the estate officer, at any time, before or after making an order of demolition under section 5B, to make an order directing the sealing of such erection or work or of the public premises in which such erection or work has been commenced or is being carried on or has been completed in such manner as may be prescribed, for the purpose of carrying out the provisions of this Act, or for preventing any dispute as to the nature and extent of such erection or work.*

(2) Where any erection or work or any premises in which any erection or work is being carried on has, or have been sealed, the estate officer may, for the purpose of demolishing such erection or work in accordance with the provisions of this Act, order such seal to be removed.

(3) No person shall remove such seal except--

(a) under an order made by the estate officer under sub-section (2); or

(b) under an order of the appellate officer made in an appeal under this Act.]"

18. The Estate Officer is the officer who is appointed by the Central Government under Section 3 of the Act, 1971 by the notifying such officer in the Official Gazette. Sub-section (b) of Section 3 provides the power to be exercised by such officer within the defined local limits to be notified by the Government or the categories of public premises in respect of which, the Estate Officer shall exercise powers conferred and perform the duties imposed by the State under the Act. Section 3 of the Act, 1971 in its entirety is reproduced hereunder:-

"3. Appointment of estate officers.--The Central Government may, by notification in the Official Gazette,--

(a) appoint such persons, being gazetted officers of Government 8 [or of the Government of any Union Territory] or officers of equivalent rank of the 2[statutory authority], as it thinks fit, to be estate officers for the purposes of this Act:

[Provided that no officer of the Secretariat of the Rajya Sabha shall be so appointed except after consultation with the Chairman of the Rajya Sabha and no officer of the Secretariat of the Lok Sabha shall be so appointed except after consultation with Speaker of the Lok Sabha:

Provided further that an officer of a statutory authority shall only be appointed as an estate officer in respect of the public premises controlled by that authority; and]

(b) ***define the local limits within which, or the categories of public premises in respect of which, the estate officers shall exercise the powers conferred, and perform the duties imposed, on estate officers by or under this Act."***

(emphasis added)

19. From the perusal of the aforesaid provisions, it is very much clear that not only the local limits in respect of which the power should be exercised by the State Officer but it could be also property specific. The Military Estate Officer, namely Defence Officer appointed and notified by the Central Government to exercise the power under the Act, 1971 in the present case is not disputed. What is disputed is that since area has stood transferred from the cantonment limits to the local limit, the Military Estate Officer

as such could not have exercised the power.

20. We do not find merit in the above argument for the simple reason that sub-section (b) of Section 3 not only talks of notifying the limits but also of the property. Admittedly, the bungalow No. 178 is the defence property and to that extent, therefore, it stands notified as a defence property. The notification of the 1957 by which municipal limits of Agra has been extended and the cantonment area has been excised, it equally saves the property of the Central Government particularly the defence where there is no proper exercise has been carried out transferring the property to the State Government. No document has been led, nor, anywhere it has been pleaded that the bungalow No.178 itself has stood *ipso facto* transferred with the notification of extension of municipal limits to the area where the bungalow situates.

21. Since we have already held that the property belongs to the defence department, it was a public premises for the purposes of Section 5B of the Act, 1971 and, therefore, the defence estate officer who has been assigned the duties of Presiding Officer to act under the Act, 1971 has the jurisdiction and so he rightly exercised the same in the present case. We do not find any error in the authority of the Defence Estate Officer exercising power under the Act, 1971. The question of constructions whether it would fall in the category of unauthorized use of the public premises or in contravention of conditions prescribed under the old grant, we may hold that the petitioner since has not been able to demonstrate that he had old grant in his favour and that he had otherwise been a valid lessee, any construction or alteration of the existing structure by the petitioner required prior sanction and in the event no such permission had been accorded, raising of the structure may be with the sanction of the local development authority, would not validate the development activity and the constructions made in that regard. Thus, we are of the view that the Defence State Officer, who exercised the power as Presiding Officer under the relevant provisions of the Act, 1971 rightly exercised the power and we do not find any fault at his end in the matter.

22. In view of the above the writ petition being Writ- C No.- 46421 of 2006 lacks merit and is, accordingly, dismissed and so other two writ petitions are also dismissed.

(2020)02ILR A518

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 03.01.2020

BEFORE
THE HON'BLE J.J. MUNIR, J.

Writ C No. 49756 of 2013

M/s Modi Industries Ltd., Distt: Ghaziabad ...Petitioner

Versus

Prescribed Officer, Labour Court, Distt: Agra & Anr. ...Respondents

Counsel for the Petitioner:
Sri Tarun Agrawal, Sri Shakti Swarup Nigam, Sri Alok Kumar Srivastava

Counsel for the Respondents:
C.S.C., Sri Ramgee Prasad

A. Civil Law-U.P. Industrial Dispute Act, 1947 – Section 4(k) – Labour dispute – Domestic Inquiry – Fairness – Where the

fairness of the inquiry was seriously impeached by the workman so much so that the Labour Court framed a preliminary issue to this effect – The said issue being answered in favour of the workman – The Labour Court proceeded to require the Employers to lead evidence before it in support of the charges; and, of course, in his defence by the workman too – This course of action adopted by the Labour Court was eminently right, in the opinion of this Court. (Para 15 and 16)

B. Constitution of India – Article 226 and 227 – Labour Court – Scope of Interference – Perversity in finding – There is hardly any conflict that findings of fact recorded by a Labour Court, based on admissible evidence taking a plausible view are not to be disturbed by this Court in exercise of jurisdiction under Article 226, or in the supervisory jurisdiction under Article 227 of the Constitution – Interference can only be made when the findings of the Labour Court are perverse – Else, the Labour Court is a final Court of fact and its conclusions are not be to disturbed. (Para 19)

C. Civil Law-Labour Dispute – Loss of Confidence – Relationship of Employer with workman – Once the Labour Court has found the case to be one where charges are not at all proved, the case of loss of confidence cannot be imported for the mere fancy of the Employers. (Para 23)

D. Civil Law-Labour Dispute – The Sick Industrial Companies Act, 1985 – Reinstatement – Effect of declaring the employer sick – Entitlement of workman to get Back-wages – The finding recorded by the Labour Court that the charge on which that the workman's services have been terminated, has been held by it to be baseless and false – The direction of the Labour Court with a finding of that kind cannot be said to be illegal in any manner – The only modifications that are required to be made is on account of the fact that the Employers are no longer a functional unit and have since long closed down – In the circumstances, apart from modifying the award to exclude the direction regarding reinstatement, the ends of justice would be served by requiring the Employers to pay a lump sum of Rs.5 lakhs, in lieu of the direction for reinstatement with back-wages and continuity of service. (Para 29)

Writ Petition allowed in part. (E-1)

List of cases cited:-

1. Depot Manager, A.P.S.R.T. Corporation vs. Reghuda Siva Sankar Prasad, 2007 (112) FLR 703

2. West Bokaro Colliery (TISCO LTD.) vs. Ram Pravesh Singh, (2008) 3 SCC 729: 2009 (120) FLR 1147

3. Neeta Kaplish vs. Presiding Officer, Labour Court, (1999) 1 SCC 517: 1999 SCC (L&S) 302

4. Management of Madurantakam Co-operative Sugar Mills Ltd vs. S. Viswanathan, 2005 (104) FLR 1229

5. Divisional Controller, Karnataka State Road Transport Corporation vs. M.G. Vittal Rao, (2012) 1 SCC 442

6. Indian Airlines Ltd. Vs. Prabha D. Kanan, (2006) 11 SCC 67

7. Modi Industries Ltd. vs. Additional Labour Commissioner, 1994 (1) LLJ 482

(Delivered by Hon'ble J.J. Munir, J.)

1. The petitioner M/s Modi Industries Ltd., Modi Nagar, District Ghaziabad, U.P. have preferred this petition under Article 226 of the Constitution challenging an award of the Presiding Officer, Labour Court, U.P., Agra dated 07.09.2012 (published on 11.03.2013) made in Adjudication Case No. 200 of 1991. By the said award (for short the 'impugned award') the Labour Court has held the termination of services of the second respondent-workman (for short the 'workman') by the petitioner-Employers (for short the 'Employers') with effect from

16.12.1989 to be illegal and improper, setting aside the Employers' order dated 16.12.1989 with a consequential direction that the workman, a Godown Keeper shall be reinstated in service with continuity, payment of balance of his salary during the period of his suspension from service and the entire back wages. The Employers were further ordered to pay the entire back wages within a period of one month from the date of enforcement of the award. The workman has also been awarded costs in the sum of Rs. 2500/-.

2. Apart from the respective case of parties, the facts leading to this writ petition are that the workman was employed by the Employers at their Agra Depot with effect from 5th November, 1981. He was appointed on the post of a peon. Lateron, on November the 15th, 1985, the workman was promoted to the post of a Godown Keeper. As a Godown Keeper, he was responsible for the maintenance and upkeep of the Company's Godown at Agra. These Godowns were utilized to store poly packs of *Vanaspati Ghee*. The Employers did a surprise check of their Godown on 17th February, 1988 that was carried out by one Pradeep Kumar Agarwal, a Branch Executive with the Employers. He is said to have noticed that some of the poly packs carrying *Vanaspati Ghee* were deliberately slashed by a sharp object and were damaged. The aforesaid officer of the Employers is further said to have noticed that vegetable *Ghee* had been removed from the damaged poly packs and these damaged poly packs were dumped along with other damaged poly packs, in order to show that the Godown stock was as per inventory. An inspecting official of the Employers appears to have submitted a report, recommending initiation of legal action against the workman. The Employers on the basis of the aforesaid report on 11th March, 1988 served the workman with a charge-sheet dated 20th April, 1988. The workman was charged with deliberately damaging poly packs of vegetable *Ghee* by slashing these with a sharp edged object and removal of the packaged contents for personal use or benefit.

3. It also appears that a little later on the 3rd of May, 1988, post issue of the charge-sheet, the workman was placed under suspension pending conclusion of disciplinary proceedings by a formal order to that effect issued by the Employers. The workman submitted his reply to the charge sheet on 16th May, 1988. The Employers appointed an Inquiry officer to go into the validity of the charges against the workman. One A.C. Mittal was appointed as the Inquiry Officer. The Inquiry Officer submitted his report on 31st August, 1989 to the Employers. Relying upon the findings carried in the inquiry report dated 31st August, 1989, last mentioned, the workman was dismissed from service vide order dated 16th December, 1989.

4. It was in the context of this action taken by the Employers that the workman raised an industrial dispute under Section 4-K of the U.P. Industrial Disputes Act, 1947 (for short the 'Act') on the basis of which the competent authority made a reference dated 27th September, 1991 to the Labour Court in the following terms (translated into English from Hindi vernacular):-

"Whether the act of the Employers in terminating the services of their workman Sri Vishan Chandra Agarwal s/o Sri Manohar Lal Agarwal, Godown Keeper with effect from

16.12.1989 is proper and lawful, if not to what relief/benefits the concerned workman is entitled to, and in what terms?"

5. The Labour Court registered the aforesaid reference as Adjudication Case No. 200 of 1991 and issued notice to parties. The workman filed his written statement dated 16.01.1993 whereas the Employers also filed their written statement on 16.01.1993. The workman filed his rejoinder statement dated 02.06.1993 whereas the Employers filed their rejoinder statement dated 04.06.1993. The Labour Court upon exchange of pleadings appears to have framed a preliminary issue on January the 12th, 1994 as regards the validity and procedural fairness of the domestic inquiry held. The aforesaid issue that was determined as a preliminary, reads thus:

"क्या सेवायोजकों द्वारा श्रमिक श्री विशन चन्द्र अग्रवाल के विरुद्ध की गई घरेलू जांच उचित, नियमित, वैधानिक है? यदि नहीं तो उसका प्रभाव।"

6. Both sides led evidence. On the preliminary issue regarding the fairness and regularity of the domestic inquiry framed by the Labour Court, after considering the evidence led on both sides, the Labour Court held by its order of November 14th, 2006 that the domestic inquiry conducted by the Employers was illegal and vitiated. The preliminary issue was thus answered in favour of the workman. In consequence of the aforesaid finding, the Labour Court directed parties to adduce evidence afresh before the Labour Court in support of the charge by the Employers, and by the workman, to defend himself.

7. Consequent upon the said direction both parties led evidence in support of their respective case before the Labour Court on the merits of the charges that were laid against the workman in the charge-sheet. On behalf of the Employers, one Pradeep Kumar Goyal, Branch Executive, last mentioned, testified on 19th February, 2007. He was cross examined the same day. Two other witnesses who appeared on behalf of the Employers were one Kamlendra and another Devendra. The workman took stand in the witness box on 21.09.2007 where he testified in support of his case. He was cross examined extensively at the conclusion of his examination-in-chief, the same day. After conclusion of evidence and hearing parties, the Labour Court by means of the impugned award, answered the reference in favour of the workman and against the Employers with an award in terms set out in the opening part of this judgment.

8. Aggrieved, the present writ petition has been filed by the Employers.

9. Heard Sri Shakti Swaroop Nigam, learned Senior Advocate assisted by Sri Alok Kumar Srivastava, learned Counsel for the Employers and Sri Ramgee Prasad, learned Counsel appearing on behalf of the workman.

10. The foremost fact to be considered is that the employers have charged the workman with intentional slashing of poly packs of *vanaspati ghee* and dishonest removal of the edible contents that he is alleged to have converted to his own use. He is further charged of mixing up the poly packs from which contents had been removed, with other damaged packets, in order to deceive

the Employers by a stratagem that the empty packets would be accounted for in the godown stock of damaged packets, without detection of the removed contents.

11. Now, these charges were found established during the disciplinary proceedings but post reference to the Labour Court, on determination of the preliminary issue the Labour Court did not find the inquiry to be fairly and legally done, and by an order dated 14.11.2006 passed by the Labour Court, while determining the preliminary issue regarding fairness and regularity of the inquiry, ordered the employers to prove the charges before the Labour Court; and the workman to defend. The most vital fact in issue, therefore, is whether the employers were able to establish the charges before the Labour Court on merits when inquiry into those charges was laid open before the Labour Court. Decidedly , it was for the employers whether in the domestic inquiry or before the Labour Court to establish the charge against the workman by the civil standard. In other words, the employers were required to establish the charges by preponderance of probability. The aforesaid charges against the workman have arisen in the background of allegations that emanate from personal differences between the workman and Mr. P.K. Agarwal, Branch Executive of the Employers, who reported his misconduct leading to the disciplinary proceedings. Shorn of unnecessary detail, according to the workman's version, Mr. P.K. Agarwal removed one Rakesh Kumar, an office peon in August, 1988 because he would make him run errands at home. After Rakesh Kumar was removed, Mr. P.K. Agarwal required the workman to take over those household duties of his. It is claimed by the workman that Mr. P.K. Agarwal required him to do his household chores, including washing his linen which the workman says, he declined. Thereupon, Mr. P.K. Agarwal assigned him this job in the office and deputed him as office clerk to serve at the godown, where these poly packs are stored.

12. According to the workman on 16.02.2018, which was a holiday, Mr. P.K. Agarwal visited the godown in the workman's absence and removed the contents of some of the poly packs. The consignment of *vanaspati Ghee* had to be dispatched that day to a certain Jain Sales Corporation, Agra. Mr. P.K. Agarwal ordered the workman to go to the godown on the following day, that is on 17.02.1988. On reaching the godown, the workman claims to have found the slashed poly packs regarding which he gave telephonic information to Mr. P.K. Agarwal. The workman further claims to have submitted a complaint in the matter to the sales office which is on record as Exhibit W-4. After this report by the workman, Mr. P.K. Agarwal, on the letter head of the Employers, scribed a report which is Exhibit W-5. It is claimed by the workman also that since Mr. P.K. Agarwal knew that it was his misdeed, he stayed quiet for a month about the issue. At the end of it all, the workman says that in connivance with his brother-in-law, one S.C. Goel who is the Chief Chemist, Modi Nagar Factory of the Employers, he colluded with certain officers in the head office to draw a false report against the workman, wherein the workman was framed and suspended.

13. The Labour Court while going into the proof of the charges on evidence led by the employers and weighing probabilities, considering the workman's

defence, returned a finding which reads to the following effect (in Hindi vernacular):

"उपर्युक्त के संबंध में पक्षों को सुना गया। उनके द्वारा दाखिल लिखित कथन, प्रत्युत्तर, साक्ष्य एवं अभिलेखों का अवलोकन किया गया। वादी श्रमिक के अनुसार वह गोदाम कीपर के पद पर कार्यरत रहा। आगरा सेल्स आफिस में कार्यरत श्री राकेश चपरासी को श्री प्रदीर कुमार अग्रवाल ब्रांच एक्जीक्यूटिव द्वारा वर्ष 1988 में घर का काम करने से मना करने के कारण हटा दिया। श्री राकेश को हटाने के बाद श्री प्रदीर कुमार अग्रवाल, ब्रांच एक्जीक्यूटिव द्वारा वादी से घर का काम और कपड़े धोने का काम करने के लिए कहा गया। वादी द्वारा मना कर देने पर श्री प्रदीप कुमार अग्रवाल ब्रांच एक्जीक्यूटिव नाराज हो गये और उनके द्वारा वादी श्रमिक से गोराम की जगह आफिस में काम लेने लगे और आफिस क्लर्कों से गोदाम का काम लने लगे ताकि कोई गलती होने पर वादी को फंसाया जा सके। वादी के अनुसार उसके द्वारा इसकी सूचना हेड आफिस को भी दी गयी थी। वाद में सुनवाई के दौरान प्रतिवादी सेवायोजक पक्ष द्वारा वादी श्रमिक की उक्त तथ्यात्मक साक्ष्य एवं कथन का कोई खंडन नहीं किया गया। अतः इसे सही मानने का पूर्ण औचित्य है।

वादी श्रमिक के अनुसार गोदाम की चाभियां स्वयं श्री प्रदीप कुमार अग्रवाल ब्रांच एक्जीक्यूटिव के पास रहती थी और वह जिसे चाहते थे उसे चाभियां देते थे। स्ओर मुख्य रूप से श्री प्रदीप कुमार अग्रवाल, ब्रांच एक्जीक्यूटिव की देखरेख में रहता था। प्रतिवादी साक्ष्य श्री प्रदीप कुमार अग्रवाल ब्रांच एक्जीक्यूटिव द्वारा अपनी शपथपूर्वक साक्ष्य में भी स्वीकार किया गया है कि गोदाम की चाभियां उनके पास रहती थी। दिनांक 16.02.1988 को वह गोदाम एवं बरामदें की सभी चाभियां अपने साथ घर ले आये थे। इस प्रकार तथ्यों के अवलोकन एवं विवेचन से स्पष्ट है कि गोदाम की चाभियां श्री प्रदीप कुमार अग्रवाल ब्रांच एक्जीक्यूटिव के पास रहने की स्थिति में गोदाम में रखे माल की चोरी अथवा डेमेज होने के संबंध में प्रतिवादी द्वारा वादी श्रमिक पर आरोप किस आधार पर लगाया गया है? इसका कोई तथ्यात्मक साक्ष्य एवं विवरण प्रतिवादी सेवायोजक पक्ष द्वारा वाद में सुनवाई के दौरान दाखिल/प्रस्तुत नहीं किया गया है।

वादी श्रमिक के अनुसार उसके द्वारा दिनांक 17.02.1988 को कोई थैली नहीं फाड़ी और न घी निकाला। उसके ऊपर झूठा आरोप लगाया गया है। दिनांक 16.02.1988 को श्री प्रदीप कुमार अग्रवाल ब्रांच एक्जीक्यूटिव अवकाश के दिन गोदाम गये और पोलीपैक खाली किये और उनके द्वारा उसी दिन मै0 जैन सेलस कारपोरेशन, आगरा को माल डिस्पैच कराया गया। दिनांक 17.02.1988 को श्री प्रदीप कुमार अग्रवाल ब्रांच एक्जीक्यूटिव द्वारा वादी श्रमिक को गोदाम जाने के लिए कहा तो वहां जाकर वादी ने कटे हुए पैक पाये जाने की सूचना श्री प्रदीप कुमार अग्रवाल ब्रांच एक्जीक्यूटिव को दूरभाष पर दी, किन्तु वह वहां नहीं पहुंचे। वादी के अनुसार उसी दिन सेल्स आफिस आकर रिपोर्ट की जो प्रदर्श डबलू–4 है। वाद में सुनवाई के दौरान श्री प्रदीप कुमार अग्रवाल ब्रांच एक्जीक्यूटिव द्वारा अपनी साक्ष्य में बताया गया कि वह दिनांक 16.02.1988 को पार्टियों को माल निकलवाने के लिए गोदाम गये थे और वादी श्रमिक श्री विशन चन्द्र अग्रवाल को अपने साथ नहीं ले गये थे क्योंकि उस दिन छुट्टी थी इसलिए वादी श्रमिक ड्यूटी पर नहीं था। श्री प्रदीप कुमार अग्रवाल, ब्रांच एक्जीक्यूटिव के अनुसार वह अकेले गोदाम गये थे। उनके साथ अन्य कोई कर्मचारी नहीं गया था। श्री प्रदीप कुमार अग्रवाल, ब्रांच एक्जीक्यूटिव के अनुसार उनके द्वारा कोई ऐसा तथ्य या प्रमाण प्रस्तुत नहीं किया कि दिनांक 16.02.1988 को जब गोदाम से वापस आये तो गोदाम में सही व खराब माल की मात्रायें क्या थीं? श्री प्रदीप कुमार अग्रवाल, ब्रांच एक्जीक्यूटिवद्वारा साक्ष्य में यह भी बताया गया कि उनके द्वारा श्रमिक को पोलीपैक काटते नहीं देखा। मौके पर पोलीपैक काटने का सामान कैंची, ब्लेड आदि नहीं मिला। कोई ऐसा प्रत्यक्षदीर्शी गवाह नहीं है जिसने श्रमिक को थैली काटते या माल निकालते देखा हों प्रतिवादी द्वारा पालीपैक काटकर घी निकालने/चोरी करने की घटना की कोई प्राथमिकी भी दर्ज नहीं कराई गयी। इसका भी कोई कारण नहीं बताया गया। इस प्रकार वादी श्रमिक पर दिनांक 17.02.1988 को पोलीपैक को काटकर घी निकालने, उसकी चोरी करने के लगाये गये आरोप के संदर्भ में प्रतिवादी पक्ष की

उक्त साक्ष्य एवं कथन के अवलोकन एवं विवेचन के पश्चात मैं इस मत/निष्कर्ष का हूं कि वादी श्रमिक पर दिनांक 17.2.1988 को पोलीपैक की थैलियों को काटकर उसमें से घी निकालने का लगाया गया आरोप असत्य एवं निराधार है। प्रतिवादी द्वारा दी गयी उक्त साक्ष्य एवं कथन के परिप्रेक्ष्य में वादी श्रमिक पर लगाया गया आरोप सिद्ध/प्रमाणित नहीं होता है।"

14. Sri Shakti Swaroop Nigam, learned Senior Counsel for the petitioner has assailed the findings recorded by the Tribunal on ground, amongst others, that the Labour Court cannot sit in appeal over the conclusions of the domestic inquiry. It is submitted that the Labour Court can only do a Wednesbury review or a secondary review of the findings recorded by the Inquiry Officer and may interfere where the procedure by which the decision is reached is not found to be fair, just and reasonable. However, the Labour Court cannot go into the correctness or validity of the decision itself, if the Inquiry Officer has recorded findings taking a reasonable view of the evidence on record. In support of his contention, he placed reliance upon the decision in **Depot Manager, A.P.S.R.T. Corporation vs. Reghuda Siva Sankar Prasad, 2007 (112) FLR 703.** He has also, in particular, placed reliance upon the decision of the Supreme Court in **West Bokaro Colliery (TISCO LTD.) vs. Ram Pravesh Singh, (2008) 3 SCC 729: 2009 (120) FLR 1147.** In support of the contention aforesaid, referring to their Lordships decision in **West Bokaro Colliery (TISCO LTD.)** *(supra)*, attention of this Court has been drawn to paragraphs 14, 15, 16, 17 and 18 of the report by Sri Nigam, where it is held:

"14. The Tribunal in its order on reappreciation of evidence came to the conclusion that in the absence of any independent evidence other than of fellow workmen, the charge of indecent, riotous and disorderly behaviour with superior and co-worker was not proved. Insofar as the absence from the duty is concerned, the Tribunal came to the conclusion that according to the workman, he had left the place of work at 12.25 p.m. and as the incident allegedly had taken place at 12.30 p.m., the respondent could not have reached the place of incident at 12.30 p.m. after collecting his other associates. In para 14 of its order, the Tribunal concluded that Management had failed to substantiate the charges brought against the workman beyond reasonable doubt.

15. This Court in *Divl. Controller, KSRTC (NWKRTC) v. A.T. Mane* [(2005) 3 SCC 254 : 2005 SCC (L&S) 407] held that: (SCC p. 258, para 9)

"9. From the above it is clear that once a domestic tribunal based on evidence comes to a particular conclusion, normally it is not open to the Appellate Tribunals and courts to substitute their subjective opinion in the place of the one arrived at by the domestic tribunal. In the present case, there is evidence of the inspector who checked the bus which establishes the misconduct of the respondent. The domestic tribunal accepted that evidence and found the respondent guilty. But the courts below misdirected themselves in insisting on the evidence of the ticketless passengers to reject the said finding which, in our opinion, as held by this Court in Rattan Singh [State of Haryana v. Rattan Singh, (1977) 2 SCC 491 : 1977 SCC (L&S) 298] is not a condition precedent. We may herein note that the judgment of this Court in Rattan Singh [State of Haryana v. Rattan Singh, (1977) 2 SCC 491 : 1977 SCC (L&S) 298] has since been followed

by this Court in Devendra Swamy v. Karnataka SRTC [(2002) 9 SCC 644 : 2002 SCC (L&S) 1093]."

16. In *U.P. SRTC v. Vinod Kumar* [(2008) 1 SCC 115 : (2008) 1 SCC (L&S) 1 : (2007) 13 Scale 690] this Court again observed that in the absence of a challenge to the legality or fairness of the domestic enquiry, the Court should be reluctant to either interfere with the finding recorded by the enquiry officer or the punishment awarded by the punishing authority.

17. After going through the order of the Industrial Tribunal, we are of the opinion that the Tribunal has interfered with the findings recorded by the domestic tribunal as if it was the Appellate Tribunal. There was evidence present on record regarding indecent, riotous and disorderly behaviour of the respondent towards his superiors. The Management witnesses who were present at the scene of occurrence have unequivocally deposed about the misbehaviour of the respondent towards his superiors. Their evidence has been discarded by the Tribunal by observing that in the absence of independent evidence, the statements of the workmen who were present at the scene of occurrence could not be believed. The Industrial Tribunal fell in error in discarding the evidence produced by the Management only because the independent witnesses were not produced.

18. It is nobody's case that the independent witnesses were available at the scene of occurrence and the Management had failed to produce them. It is possible that at the time of occurrence, only the workers of the Management and the persons who were trying to put up the construction unauthorisedly were the persons present and no independent evidence was available. Statements of the fellow workmen had established the misconduct of the respondent. Enquiry officer accepted the testimony of the witnesses produced by the Management who had clearly implicated the respondent. It was a legitimate conclusion which could be arrived at and it would not be open to the Industrial Tribunal to substitute the said opinion by its own opinion."

15. This Court finds that though the principle which Sri Nigam has urged is well settled but that applies to a situation where the fairness of the inquiry is not in issue. In **West Bokaro Colliery (TISCO LTD.)** *(supra)* relied upon by the learned Senior Counsel for the petitioner, shows on a perusal of paragraph 8 of the report that there the respondent had made a statement before the Labour Court that he did not want to challenge the legality, fairness or proprietary of the domestic inquiry. It was in the context of that kind of a *lis* where the Labour Court reviewed the findings recorded by the Inquiry Officer that the law in paragraphs 14 to 18 of the aforesaid decision of their Lordships has been laid down. The present is one where the fairness of the inquiry was seriously impeached by the workman somuch so that the Labour Court framed a preliminary issue to this effect, as already detailed hereinabove. The said issue being answered in favour of the workman, the Labour Court proceeded to require the Employers to lead evidence before it in support of the charges; and, of course, in his defence by the workman too.

16. This course of action adopted by the Labour Court was eminently right, in the opinion of this Court. The law governing the course to be adopted by a Labour Court in such circumstances is laid down by their Lordships of the Supreme

Court in **Neeta Kaplish vs. Presiding Officer, Labour Court, (1999) 1 SCC 517: 1999 SCC (L&S) 302,** where it is held thus:

"24. In view of the above, the legal position as emerges out is that in all cases where enquiry has not been held or the enquiry has been found to be defective, the Tribunal can call upon the management or the employer to justify the action taken against the workman and to show by fresh evidence that the termination or dismissal order was proper. If the management does not lead any evidence by availing of this opportunity, it cannot raise any grouse at any subsequent stage that it should have been given that opportunity, as the Tribunal, in those circumstances, would be justified in passing an award in favour of the workman. If, however, the opportunity is availed of and the evidence is adduced by the management, the validity of the action taken by it has to be scrutinised and adjudicated upon on the basis of such fresh evidence.

(Emphasis by Court)

25. In the instant case, the appellant had questioned the domestic enquiry on a number of grounds including that her own answers, in reply to the questions of the Presiding Officer, were not correctly and completely recorded and that the Enquiry Officer was not impartial and was biased in favour of the respondent. It was further contended that her own witnesses were not called and she was not given the opportunity to lead evidence. The Labour Court has discussed a few of these grounds but has not given any finding on the bias of the Enquiry Officer or the ground relating to incorrectly recording the statement of the appellant. The Labour Court, however, found that the enquiry was not fairly and properly held. It was after recording this finding that the Labour Court called upon the Management to lead evidence on merits which it did not do.

26. Learned counsel for the appellant (sic respondent) contended that in spite of the direction by the Labour Court to the respondent-Management to lead evidence, it was open to the Management to rely upon the domestic enquiry proceedings already held by the Enquiry Officer, including the evidence recorded by him, and it was under no obligation to lead further evidence, particularly as the Management was of the view that the charges, on the basis of the evidence already led before the Enquiry Officer, stood proved. It was also contended that under Section 11-A, the Labour Court had to rely on the "materials on record" and since the enquiry proceedings constituted "material on record", the same could not be ignored. The argument is fallacious.

27. The record pertaining to the domestic enquiry would not constitute "fresh evidence" as those proceedings have already been found by the Labour Court to be defective. Such record would also not constitute "material on record", as contended by the counsel for the respondent, within the meaning of Section 11-A as the enquiry proceedings on being found to be bad, have to be ignored altogether. The proceedings of the domestic enquiry could be, and were in fact, relied upon by the Management for the limited purpose of showing at the preliminary stage that the action taken against the appellant was just and proper and that a full opportunity of hearing was given to her in consonance with the principles of natural justice. This contention has not been accepted by the

Labour Court and the enquiry has been held to be bad. In view of the nature of objections raised by the appellant, the record of enquiry held by the Management ceased to be "material on record" within the meaning of Section 11-A of the Act and the only course open to the Management was to justify its action by leading fresh evidence as required by the Labour Court. If such evidence has not been led, the Management has to suffer the consequences."

17. It is all the more important to point out that the decision of the Labour Court to hold an inquiry itself into the charges was not challenged by the Employers, once the domestic inquiry was condemned by the Labour Court not to be one that was procedurally fair, just and reasonable. Rather, they elected to lead evidence in support of the charges before the Labour Court, where the workman defended himself. This Court is of clear opinion that in a case like the present one where the Labour Court has directed evidence on the merits of the charge to be led before it, the Labour Court is not a Tribunal confined in its role to do a secondary review. In proceedings where all evidence is led before the Labour Court by the Employers and the workman after holding the domestic inquiry to be procedurally unfair, the Labour Court assumes the role of a primary decision maker. All questions of fact, assessment of evidence and proportionality of punishment to be awarded, if any, in this kind of exercise are open to the Labour Court. In the aforesaid background the decision in **West Bokaro Colliery (TISCO LTD.)** *(supra)* and **Depot Manager, A.P.S.R.T. Corporation** *(supra)* would not be of any assistance to the Employers. The Labour Court has recorded a categorical finding of fact, on a meticulous evaluation of evidence that was led before it, that charges against the workman carried in the Employer's charge sheet, are all false and baseless. It has further been held that termination of the workman's services by the Employers, based on these unproved charges, vide order dated 16.12.1989, is illegal and unjust.

18. The findings that have led to these firm conclusions by the Labour Court have been extracted hereinabove. Those findings in no way have been demonstrated by the learned Senior Counsel for the petitioner to be perverse or based on irrelevant evidence or non-consideration of relevant materials. The Labour Court has entered into a detailed analysis of the sequence of events about the manner in which the misconduct is said to have been committed, the articles recovered from the place of occurrence, the fact that no one is an eye witness to the workman's misconduct, and many others; all relevant considerations from which the conclusions drawn by the Labour Court could reasonably be recorded.

19. It is by far the legal position, about which there is hardly any conflict that findings of fact recorded by a Labour Court, based on admissible evidence taking a plausible view are not to be disturbed by this Court in exercise of jurisdiction under Article 226, or in the supervisory jurisdiction under Article 227 of the Constitution. Interference can only be made when the findings of the Labour Court are perverse. Else, the Labour Court is a final Court of fact and its conclusions are not be to disturbed. In this connection, reference may be make to the decision of their Lordships of Hon'ble Supreme Court

in **Management of Madurantakam Co-operative Sugar Mills Ltd vs. S. Viswanathan, 2005 (104) FLR 1229**, where in paragraph 12 of the report, it is held:

"**12.** Normally, the Labour Court or the Industrial Tribunal, as the case may be, is the final court of facts in these type of disputes, but if a finding of fact is perverse or if the same is not based on legal evidence the High Court exercising a power either under Article 226 or under Article 227 of the Constitution of India can go into the question of fact decided by the Labour Court or the Tribunal. But before going into such an exercise it is necessary that the writ court must record reasons why it intends reconsidering a finding of fact. In the absence of any such defect in the order of the Labour Court the writ court will not enter into the realm of factual disputes and finding given thereon. A consideration of the impugned order of the learned Single Judge shows that nowhere he has come to the conclusion that the finding of the Labour Court is either perverse or based on no evidence or based on evidence which is not legally acceptable. Learned Single Judge proceeded as if he was sitting in a court of appeal on facts and item after item of evidence recorded in the domestic enquiry as well as before the Labour Court was reconsidered and findings given by the Labour Court were reversed. We find no justification for such an approach by the learned Single Judge which only amounts to substitution of his subjective satisfaction in the place of such satisfaction of the Labour Court."

20. In this view of the matter, this Court is of the opinion that the finding of the Labour Court holding the charges to be not proved against the workman is a sound finding that accords well with the law and evidence on record. The said finding does not require inference by this Court in exercise of jurisdiction under Article 226 of the Constitution.

21. The other contention urged by Sri Nigam is that whatever be the outcome and the findings of the Labour Court, looking to the essence of the charge that is one of theft, the findings of the domestic inquiry even if not found to be valid by the Labour Court, in principle, or in law, or even on facts, the present is a case of loss of confidence of the Employers in their workman. He submits that so far as the Employers are concerned, for their part are convinced that the workman has committed an act of theft by which he has shattered their confidence, as it is described. In the nature of things, the Employers cannot be compelled to reinstate a workman in service about whom, they by their conscience feel is a thief. In this connection Sri Nigam, again has placed reliance on the decision of the Supreme Court in **Depot Manager, A.P.S.R.T. Corporation vs. Reghuda Siva Sankar Prasad** *(supra)*, where in paragraph 19 of their Lordships' decision, it is held:

"19. The learned Judges of the High Court have also failed to appreciate that once an employee has lost the confidence of the employer, it would not be safe and in the interest of the Corporation to continue the employee in the service. ...."

22. He has further placed reliance on the decision of Supreme Court in **Divisional Controller, Karnataka State Road Transport Corporation vs. M.G.**

Vittal Rao, (2012) 1 SCC 442, where it has been held:

"25. Once the employer has lost the confidence in the employee and the bona fide loss of confidence is affirmed, the order of punishment must be considered to be immune from challenge, for the reason that discharging the office of trust and confidence requires absolute integrity, and in a case of loss of confidence, reinstatement cannot be directed. [Vide *Air India Corpn. v. V.A. Rebellow* [(1972) 1 SCC 814 : AIR 1972 SC 1343] , *Francis Klein & Co. (P) Ltd. v. Workmen* [(1972) 4 SCC 569 : AIR 1971 SC 2414] and *BHEL v. M. Chandrasekhar Reddy* [(2005) 2 SCC 481 : 2005 SCC (L&S) 282 : AIR 2005 SC 2769].]

26. In *Kanhaiyalal Agrawal v. Gwalior Sugar Co. Ltd.* [(2001) 9 SCC 609 : 2002 SCC (L&S) 257 : AIR 2001 SC 3645] this Court laid down the test for loss of confidence to find out as to whether there was bona fide loss of confidence in the employee, observing that, (SCC p. 614, para 9) *(i)* the workman is holding the position of trust and confidence; *(ii)* by abusing such position, he commits an act which results in forfeiting the same; and *(iii)* to continue him in service/establishment would be embarrassing and inconvenient to the employer, or would be detrimental to the discipline or security of the establishment. Loss of confidence cannot be subjective, based upon the mind of the management. Objective facts which would lead to a definite inference of apprehension in the mind of the management, regarding trustworthiness or reliability of the employee, must be alleged and proved. (See also *Sudhir Vishnu Panvalkar v. Bank of India* [(1997) 6 SCC 271 : 1997 SCC (L&S) 1662 : AIR 1997 SC 2249].)

27. In *SBI v. Bela Bagchi* [(2005) 7 SCC 435 : 2005 SCC (L&S) 940 : AIR 2005 SC 3272] this Court repelled the contention that even if by the misconduct of the employee the employer does not suffer any financial loss, he can be removed from service in a case of loss of confidence. While deciding the said case, reliance has been placed upon its earlier judgment in *Disciplinary Authority-cum-Regional Manager v. Nikunja Bihari Patnaik* [(1996) 9 SCC 69 : 1996 SCC (L&S) 1194].

28. An employer is not bound to keep an employee in service with whom relations have reached the point of complete loss of confidence/faith between the two. [Vide *Binny Ltd. v. Workmen* [(1972) 3 SCC 806 : AIR 1972 SC 1975], *Binny Ltd. v. Workmen* [(1974) 3 SCC 152 : 1973 SCC (L&S) 444 : AIR 1973 SC 1403] , *Anil Kumar Chakraborty v. Saraswatipur Tea Co. Ltd.* [(1982) 2 SCC 328 : 1982 SCC (L&S) 249 : AIR 1982 SC 1062] , *Chandu Lal v. Pan American World Airways Inc.* [(1985) 2 SCC 727 : 1985 SCC (L&S) 535 : AIR 1985 SC 1128] , *Kamal Kishore Lakshman v. Pan American World Airways Inc.* [(1987) 1 SCC 146 : 1987 SCC (L&S) 25 : AIR 1987 SC 229] and *Pearlite Liners (P) Ltd. v. Manorama Sirsi* [(2004) 3 SCC 172 : 2004 SCC (L&S) 453 : AIR 2004 SC 1373].]

29. In *Indian Airlines Ltd. v. Prabha D. Kanan* [(2006) 11 SCC 67 : (2007) 1 SCC (L&S) 359 : AIR 2007 SC 548] , while dealing with the similar issue this Court held that: (SCC p. 90, para 56)

"56. ...loss of confidence cannot be subjective but there must be objective facts which would lead to a definite inference of apprehension in the mind of the employer regarding trustworthiness of the employee and which must be alleged and proved."

30. *In case of theft, the quantum of theft is not important and what is important is the loss of confidence of*

employer in employee. (Vide A.P. SRTC v. Raghuda Siva Sankar Prasad [(2007) 1 SCC 222 : (2007) 1 SCC (L&S) 151 : AIR 2007 SC 152].)"

23. Once the Labour Court has found the case to be one where charges are not at all proved, the case of loss of confidence cannot be imported for the mere fancy of the Employers. In this connection the decision in **Indian Airlines Ltd. Vs. Prabha D. Kanan, (2006) 11 SCC 67,** clearly accepts the principle that loss of confidence is not something that is subjective with the employer but should be an inference based on tangible facts that may give rise to a reasonable apprehension in the employer's mind about the fidelity of the employee. It has been held in the decision in **Indian Airlines Ltd.** *(supra)* that facts that lead the employer to harbor apprehension regarding "trustworthiness of the employee ..... must be alleged and proved" [see decision in **Indian Airlines Ltd.** *(supra)*]. Thus, the contention of the learned Senior Counsel for the petitioner that the workman has been found involved in a case of slashing poly packs of *vanaspati ghee* and removing the edible contents that he converted to his own use, is a fact that is not proved on the basis of findings recorded by the Labour Court, in the adjudication made by it, on evidence led by both sides. The charge being thoroughly dispelled, this possibly cannot be a case where principle of loss of confidence can be invoked by the Employers to keep the workman out of service.

24. The last limb of Sri Nigam's submission is based on a fact asserted in the writ petition that the Employer's unit, where the workman was employed, has suffered a closure and has been declared sick under the provisions of the Sick Industrial Companies (Special Provisions) Act, 1985 (for short the "SICA'). It is submitted that before the repeal of the said Act, the Employers' industrial unit was closed down and has been declared sick with effect from 14.03.1991. As such, the petitioner cannot be reinstated in service. Refuting the aforesaid claim of the Employers, the workman in his counter affidavit, has stated in paragraph 5, that not reinstating the workman after the award has been made in his favour by the Labour Court is misplaced. It is averred that Section 22 of the SICA is not applicable to the present case, inasmuch as the said Act has been repealed and the **BIFR and AIFR** stand dissolved; all proceedings before them stand abated with effect from 01.12.2016, when the Sick Industrial Companies (Special Provisions) Repeal Act, 2003 came into force.

25. The petitioners have disputed the legal position emerging from the repeal of the SICA. The Court does not wish to go much into the effect of repeal of the said statute, as it is found to be unnecessary. Learned Counsel for the workman submits on the strength of a decision of this Court in **Modi Industries Ltd. vs. Additional Labour Commissioner, 1994 (1) LLJ 482** that the liability of an employer to pay its workman for the work done is not affected by the provisions of the SICA. In **Modi Industries Ltd. vs. Additional Labour Commissioner** *(supra)*, it has been held:

"[15] In my opinion, the aforesaid reasoning adopted by Hon'ble Supreme Court applies with full force to the facts of the present case also. The Parliament while putting Section 22 of the

Act, 1985 could never have intended that the industrial unit under the garb of sickness or for any like difficulty may be allowed to shirk its liability to pay the wages to its workers for the work they have done. Thus proceedings under Section 3 of the U.P. Act of 1978 will not be affected by Section 22 of the Act of 1985."

26. It would make difference, however, in case they are no longer a working and viable industrial unit, where the workman may be reinstated in service. Apart form the fact that the petitioners have alleged in paragraph no. 4 of the writ petition that they have been declared sick under the SICA, they have also said that their unit has closed down.

27. It is averred in paragraph no.8 of the writ petition that the unit has been declared sick on 14.03.1991. In paragraphs 5 and 9 of the writ petition, there is no specific pleading traversing the contention of the Employers that they have been declared a sick unit on 14.03.1994, or on any other date under the SICA. Thus, for a fact there is no denial by the workman that the Employers' unit has been declared sick. The pleading in answer, however, is to the effect that SICA stands repealed with effect from 01.12.2016, as detailed hereinbefore. The workman has not disputed the Employers' case in paragraph 4 of the counter affidavit that they are a unit that has closed down. The said fact is not denied for a fact and must, therefore, be held to be admitted by non-traverse. Ordering the workman to be reinstated in a unit that is closed down and non-functional, would constitute a direction impossible of execution. The direction about payment of back-wages cannot, however, be faulted.

28. The learned Senior Counsel appearing for the petitioner submits that the Employers' unit being declared sick with effect from 14.03.1991, the Employers cannot be compelled to pay back-wages beyond the said date. According to him, the back-wages have to be confined to the period 16.12.1989 to 14.03.1991, that is to say, between the date of workman's termination from service and the date when the Employers' unit was declared sick. This Court is not in agreement with the said submission advanced by the learned Senior Counsel. The said plea about the petitioners' unit going sick and its effect on the liability was not raised, and in any case never urged before the Labour Court, as would appear from a perusal of the impugned award. This plea has been taken for the first time before this Court, which cannot be gone into in the first instance here. It is for this reason, amongst others, that this Court has earlier remarked that the Court is not inclined to go much into the position about rights of parties, emerging from repeal of the SICA.

29. The question that still remains to be examined is as to what back-wages is the workman entitled to? The Labour Court has ordered reinstatement with full back-wages and continuity of service. This is in keeping with the finding recorded by the Labour Court that the charge on which that the workman's services have been terminated, has been held by it to be baseless and false. The direction of the Labour Court with a finding of that kind cannot be said to be illegal in any manner. The only modifications that are required to be made is on account of the fact that the Employers are no longer a functional unit and have since long closed down. In the circumstances, apart from modifying the

award to exclude the direction regarding reinstatement, the ends of justice would be served by requiring the Employers to pay a lump sum of Rs.5 lakhs, in lieu of the direction for reinstatement with back-wages and continuity of service, within two months of the date of this judgment.

30. In the result, this writ petition is **allowed in part.** The impugned award dated 07.09.2012 is modified to provide that in substitution of the direction to reinstate the workman with continuity of service, payment of salary for the period of suspension and the entire back-wages for the period that he remained out of service, there shall be a direction to the Employers to pay the workman a sum of Rs.5 lakhs in lump sum, within two months of the date of this judgment. In the event of default, the aforesaid sum shall carry interest reckoned at Bank Rate until realization in accordance with law. The Employers shall pay the workman costs in the sum of Rs.20,000/-.

(2020)02ILR A532

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 07.02.2020

BEFORE

THE HON'BLE RAVI NATH TILHARI, J.

Writ C No. 56378 of 2006

Ram Prasad ...Petitioner
Versus
Commissioner Moradabad Division, Moradabad & Anr. ...Respondents

Counsel for the Petitioner:
Sri T.S. Dabas, Sri Akash Gupta

Counsel for the Respondents:
C.S.C.

A. Civil Law-Arms Act, 1959 – Section 17(3) – Word 'Public peace' or 'Public safety' – Meaning – Obligation of authority – Public peace or public safety do not mean ordinary disturbance of law and order – Public safety means safety of the public at large and not safety of few persons only – The Licensing Authority is under an obligation to apply his mind to the question as to whether there was eminent danger to public peace and public safety before passing the order. (Para 29)

B. Civil Law-Arms Act, 1959 – Section 17(3) – Cancellation of Licence – Ground of pendency of criminal case – Acquittal – After acquittal the very basis of the order of cancellation vanished – The finding of the District Magistrate as affirmed by the Commissioner, that it was not in the interest of public peace and the public security that the licence remained with the petitioner/licencee, is not based on any evidence/material, except the police reports which in their turn were in view of the pendency of the criminal case against the petitioner – On mere apprehension expressed in the impugned orders that the petitioner would misuse the fire arm and would extend threat to the persons of the weaker section of the society, the arm licence could not be cancelled. (Para 36)

Writ Petition allowed. (E-1)

List of cases cited :-

1. Hari Prasad Vs. State of U.P. and others, reported in 2005 (5) AWC 4939

2. Masiuddin Vs. Commissioner, Allahabad Division, Allahabad and another reported in 1972 A.L.J. 573

3. Sheo Prasad Misra Vs. The District Magistrate Basti and others reported in 1978 Allahabad Weekly Cases, 122, (D.B.)

4. Chhanga Prasad Sahu Vs. State of U.P. and others reported in 1984 AWC 145 (FB)

5. Ilam Singh v. Commissioner, Meerut Division and others [1987 ALL. L.J. 416]

6. Habib v. State of U.P. and others [2002 (44) ACC 783]

7. Satish Singh v. District Magistrate, Sultanpur 2009 (4) ADJ 33 (LB)

8. Vishal Varshney Vs. State of U.P. and another [2009 (75) ALR 593]

9. Jageshwar Vs. State of U.P. and others 2009 (67) Allahabad Criminal Cases 157

10. Thakur Prasad Vs. State of U.P. and others reported 2013(31) LCD 1460 (LB)

11. Ram Murli Madhukar Vs. District Magistrate, Sitapur [1998 (16) LCD 905]

12. Chandrabali Tewari v. The Commissioner, Faizabad [2014 (32) LCD 1696]

13. Ghanshyam Gupta v. State of U.P. and others [2016 (34) LCD 3035]

14. Jogendra Singh vs. State of U.P. and others [2018 (8) ADJ 871]

(Delivered by Hon'ble Ravi Nath Tilhari, J.)

1. I have heard Sri Akash Gupta holding brief of Sri T.S. Dabas, learned counsel for the petitioner and Sri Rakesh Kumar Singh, learned Standing Counsel appearing for Respondent Nos. 1 and 2.

2. By means of this writ petition the petitioner has challenged the order dated 2.1.2003, passed by the District Magistrate, Rampur in Case No. 397 of 1999 under Section 17 of the Arms Act, 1959, (State Vs. Ram Prasad) (Annexure-4 to the writ petition) by which the petitioner's Fire Arms Licence No. 1332/TT of double-barrel gun No. 1595 was cancelled. The appellate order dated 24.8.2006 passed by the Commissioner, Moradabad Mandal, Moradabad dismissing the petitioner's Appeal No. 26/02-03 under Section 18 of The Arms Act, 1959 (Ram Prasad Vs. State of U.P.) District Rampur (Annexure-6 to the writ petition) is also under challenge.

3. Briefly stated the facts of the case are that the petitioner was granted licence No. 1332/TT of double-barrel gun on 22.8.1997. A criminal case, bearing Crime Case No. 181 of 1999 under Sections 323, 504, 506 IPC and Section 3(1) (X) of The Schedule Caste and Scheduled Tribe (Prevention of Atrocities) Act, 1989, P.S. Milak, District Rampur, was registered against the petitioner. In view thereof, the police of Police Station-Milak submitted a report dated 20.7.1999 to the District Magistrate/Collector, Rampur recommending cancellation of the petitioner's fire arms licence, as it was not in the public interest that the fire arm remain with the petitioner.

4. A show cause notice dated 10.8.1999 was issued to the petitioner as to why his fire arm licence be not cancelled on the aforesaid ground of pendency of criminal case.

5. The petitioner filed reply to the show cause notice, that the petitioner did not misuse the fire arm and the Criminal Case No. 181 of 1999 was lodged due to partybandi in the village, which was pending in the court. The fire arm licence was not liable to be cancelled and the show cause notice deserved to be withdrawn.

6. The District Magistrate, Rampur after considering the petitioner's reply, by order dated 2.1.2003 cancelled fire arm licence on the ground that in view of the

pendency of the criminal case against the petitioner and considering the police reports dated 5.7.1999 and 8.10.2000, it was necessary to cancel the fire arm licence in public interest and public security.

7. After the order of cancellation dated 2.1.2003, the petitioner was acquitted in Session Trial No. 559 of 2000, arising out of Crime Case No. 181 of 1999 under Sections 323, 504, 506 IPC and Section 3(1) (X) of the Scheduled Caste and Scheduled Tribe (Prevention of Atrocities) Act, 1989 by judgment dated 17.1.2003 passed by the learned Additional Sessions Judge, Court No.2, Rampur.

8. The petitioner filed appeal No. 26/02-03 (Rram Prasad Vs. State of U.P.) under Section 18 of the Arms Act, 1959 challenging the order of cancellation of fire arm licence dated 2.1.2003, before the Commissioner, Moradabad Region, Moradabad. The petitioner filed copy of the order of his acquittal dated 17.1.2003 in the aforesaid appeal.

9. The Commissioner, Moradabad Region, Moradabad dismissed the petitioner's appeal by order dated 24.8.2006 and affirmed the order of cancellation dated 2.1.2003, taking the same view as in the order dated 2.1.2003 based on the police report that if the licence was restored, the petitioner will misuse the fire arm and terrorise the person of weaker sections. With respect to the judgment of acquittal dated 17.1.2003, it held that the petitioner was acquitted as the witnesses became hostile and there was some compromise between the accused and the victim.

10. The present petition has been filed challenging the aforesaid orders dated 24.8.2006 and 2.1.2003.

11. The submission of the learned counsel for the petitioner is that mere pendency of a criminal case was no ground to cancel the petitioner's fire arm licence. He submits that at the time when the order dated 2.1.2003 cancelling the fire arm licence was passed the criminal case was pending but after the order dated 2.1.2003, the petitioner was acquitted in the criminal case by judgment of the learned Additional Sessions Judge, Court No.2, Rampur and in view of the petitioner's acquittal, the appellate authority ought to have set aside the order of cancellation. The petitioner has no previous criminal history and in Crime Case No. 181 of 1999, the fire arm was not involved.

12. The learned counsel for the petitioner has placed reliance upon the judgment of this Court in Hari Prasad Vs. State of U.P. and others, reported in 2005 (5) AWC 4939 (Allahabad).

13. On the other hand the learned Standing Counsel has argued that the order of cancellation was passed on the ground of pendency of the criminal case and even after acquittal, in view of the police reports dated 26.7.1999 and 8.10.2000, to the effect that if the fire arm licence was restored the petitioner would extend threat to the weaker sections and misuse the fire arm, the impugned orders deserve to be maintained.

14. I have considered the submissions advanced by the learned counsels for the parties and have perused the records.

15. Perusal of the impugned order dated 2.1.2003 passed by the District Magistrate shows that the fire arm licence has been cancelled on the ground that Criminal Case No. 181 of 1999 under Sections 323, 504, 506 IPC and Section 3(1) (x) of The Schedule Caste and Scheduled Tribe (Prevention of Atrocities) Act, 1989 was pending against the petitioner and in view thereof the police report was submitted that if the licence was restored the petitioner might misuse the fire arm. A perusal of the impugned appellate order also shows that the appeal has been dismissed on the ground of the police reports that the fire arm might be misused, although the petitioner was later on acquitted in the criminal case on 17.1.2003.

16. The matter which requires consideration is, whether on the ground of pendency of the criminal case the petitioner's fire arm licence could be cancelled and his appeal could be dismissed, notwithstanding his acquittal on 17.1.2003. It also requires consideration if the ground in the impugned orders that if the petitioner's fire arm licence remain with the petitioner, it would not be in the public interest and public security, are justified for cancellation and based on substantial material.

17. Section 17 of the Arms Act, 1959, deals with variation, suspension and revocation of the fire arm licence. Section 17 is reproduced as under:

"17. Variation, suspension and revocation of licences.--

(1) The licensing authority may vary the conditions subject to which a licence has been granted except such of them as have been prescribed and may for that purpose require the licence-holder by notice in writing to deliver-up the licence to it within such time as may be specified in the notice.

(2) The licensing authority may, on the application of the holder of a licence, also vary the conditions of the licence except such of them as have been prescribed.

(3) The licensing authority may by order in writing suspend a licence for such period as it thinks fit or revoke a licence--

(a) if the licensing authority is satisfied that the holder of the licence is prohibited by this Act or by any other law for the time being in force, from acquiring, having in his possession or carrying any arms or ammunition, or is of unsound mind, or is for any reason unfit for a licence under this Act; or

(b) if the licensing authority deems it necessary for the security of the public peace or for public safety to suspend or revoke the licence; or

(c) if the licence was obtained by the suppression of material information or on the basis of wrong information provided by the holder of the licence or any other person on his behalf at the time of applying for it; or

(d) if any of the conditions of the licence has been contravened; or

(e) if the holder of the licence has failed to comply with a notice under sub-section (1) requiring him to deliver up the licence.

(4) The licensing authority may also revoke a licence on the application of the holder thereof.

(5) Where the licensing authority makes an order varying a licence under sub-section (1) or an order suspending or revoking a licence under sub-section (3), it shall record in writing the reasons

therefor and furnish to the holder of the licence on demand a brief statement of the same unless in any case the licensing authority is of the opinion that it will not be in the public interest to furnish such statement.

(6) The authority to whom the licensing authority is subordinate may by order in writing suspend or revoke a licence on any ground on which it may be suspended or revoked by the licensing authority; and the foregoing provisions of this section shall, as far as may be, apply in relation to the suspension or revocation of a licence by such authority.

(7) A court convicting the holder of a licence of any offence under this Act or the rules made thereunder may also suspend or revoke the licence:
Provided that if the conviction is set aside on appeal or otherwise, the suspension or revocation shall become void.

(8) An order of suspension or revocation under sub-section (7) may also be made by an appellate court or by the High Court when exercising its powers of revision.

(9) The Central Government may, by order in the Official Gazette, suspend or revoke or direct any licensing authority to suspend or revoke all or any licences granted under this Act throughout India or any part thereof.

(10) On the suspension or revocation of a licence under this section the holder thereof shall without delay surrender the licence to the authority by whom it has been suspended or revoked or to such other authority as may be specified in this behalf in the order of suspension or revocation.

18. A bare reading of Section 17 (3) of the Arms Act makes it evident that the licencing authority may by order in writing suspend a licence for such period as he things fit or revoke a licence; (b) if the licencing authority deems it necessary for the security of public peace or for public safety to suspend or revoke the licence. These two expressions "Security of public peace" and "for public safety" are of utmost importance. The licencing authority must be satisfied of the existence of these pre conditions.

19. In **Masiuddin Vs. Commissioner, Allahabad Division, Allahabad and another reported in 1972 A.L.J. 573** this Court held in paragraph Nos. 4 and 7 as under:

"4. After a license is granted, the right to hold the license and possess a gun is a valuable individual right in a free country. The security of public peace and public safety is a valuable social interest. Section 17 shows that Parliament had decided that neither of the two valuable interests should unduly impinge on the other Section 17 seeks to establish a fair equilibrium between the two contending interests. It says: Hear the licensee first; and then cancel the license "if necessary for the security of the public peace or for public safety". True, there is no express provision for hearing. True, there is no express provision for hearing. But the nature of the right affected, the language of Sec. 17, the grounds for cancellation, the requirement of a reasoned order and the right of appeal plainly implicate a fair hearing procedure. Jai Narain Rai v. District Magistrate, Azamgarh. While cancelling a licence, the District Magistrate acts as a quasi-judicial authority.

7. A license may be cancelled, inter alia on the ground that it is "necessary for the security of the public

peace or for public safety" to do so. The District Magistrate has not recorded a finding that it was necessary for the security of the public peace or for public safety to revoke the license. The mere existence of enmity between a licensee and another person would not establish the "necessary' connection with security of public peace or public safety. There should be something more than mere enmity. There should be some evidence of the provocative utterances of the licensee or of his suspicious movements or of his criminal designs and conspiracy in reinforcement of the evidence of enmity. It is not possible to give an exhaustive list of facts and circumstances from which an inference of threat to public security or public peace may be deduced. The District Magistrate will have to take a decision on the facts of each case. But in the instant case there is nothing in his order to indicate that it was necessary for the security of the public peace or for public safety to cancel the license of the petitioner. Mere enmity is not sufficient."

20. Thus, in Masiuddin's case (*supra*) it was held that a license may be cancelled, inter alia on the ground that it is necessary for the security of the public peace or for public safety, to do so. Mere existence of enmity between the licensee and another person would not establish the necessary connection with security of public peace or public safety.

21. In **Sheo Prasad Misra Vs. The District Magistrate Basti and others reported in 1978 Allahabad Weekly Cases, 122, (D.B.)** this Court after considering Masiuddin case (*supra*) held in paragraph 4 which is reproduced as under:

4. "Learned Counsel for the petitioner contended that, while there was material before the licencing authority, viz., the District Magistrate, to show that some reports had been lodged against the petitioner, there was neither any material to warrant a conclusion that it was necessary to cancel the licence for security of public peace or public safety nor was a finding to that effect recorded. Learned Counel referred us to a decision of this Court in case of ***Masi Uddin v. Commissioner, Allahabad, 1972 ALJ 572,*** *where this Court held:*

"A licence may be cancelled, inter alia, on the ground that it is "necessary for the security of public peace or for public safety, to do so. The District Magistrate has not recorded a finding that it was necessary for the security of the public peace or for public safety to revoke the licend. The mere existence of enmity between a licencee and another person would not establish the "necessary" connection with security of the public peace or public safety."

In case before us also the District Magistrate has not recorded any finding that it was necessary to cancel the licence for the security of public peace or for public safety. All that he has done is to have referred to some applications and reports lodged against the petitioner. The mere fact that some reports had been lodged against the petitioner could not form basis for cancelling the licence. The order passed by the District Magistrate and that passed by the Commissioner cannot, therefore, be upheld on the basis of any thing contained in Sections 17(3) (b) of the Act"

22. In **Chhanga Prasad Sahu Vs. State of U.P. and others reported in 1984 AWC 145 (FB),** after noticing the provisions of Section 17 (3) of the Arms Act the Full Bench in paragraph 5 held as follows:

"A perusal of abovementioned provisions indicates that the licensing authority has been given the power to suspend or revoe an arms licence only if any of the conditions mentioned in sub-clauses (a) to (e) of sub-section (3) of Section 17 of Act exists." sub section (5) of Section 17 makes it obligatory upon the licensing authority to, while passing the order revoking/suspending an arms licence, record in writing the reasons therefore and to, on demand, furnish a brief statement thereof to the holder of the license unless it considers that it will not be in the public interest to do so."

In paragraph-9 it has been emphasised as under:-

"it is true that in order to revoke/suspend an arms licence, the licensing authority has necessarily to come to the conclusion that the facts justifying revocation/suspension of licence mentioned in grounds (a) to (e) of section 17 exist"

23. In **Ilam Singh v. Commissioner, Meerut Division and others [1987 ALL. L.J. 416]** this Court held that under Section 17(3) (b) the licencing authority may suspend or revoke a licence if it becomes necessary for the security of public peace or public safety. In this case no report was lodged against the licensee indicating that he had used the gun in the incident which led to the breach of public peace or public safety. It was held that there must be some positive incident in which the petitioner participated and used his gun which led to breach of public peace or public safety and in the absence of the use of the gun by the licencee against the security of public peace or public safety the licence of the gun could not be suspended or revoked. The relevant paragraphs 4 and 5 of the judgment in Ilam Singh (*supra*) are being reproduced as under:

"4. Having heard the learned counsel for the petitioner I am of the view that the submissions raised by the learned counsel for the petitioner cannot be said to be without substance. Section 17(3) (b) of the Arms Act enacts that licensing authority may by order in writing suspend a licence or revoke the same if it becomes necessary for the security of public peace or the public safety. When once a person has been granted a licence and he acquires a gun, it becomes one of his properties. In the present case no incident of breach of security of the public peace or public sfety at the behest of the petitioner has been pointed out. Even no report was lodged against the petitioner indicating that he used his gun in the incident which led to the breach of public peace or public safety. Even though some reports might have been lodged but that could not be said to be a sufficient reason to cancel the licence."

5. There must be some positive incident in which the petitioner participated and used his gun which led to the breach of the public peace or public safety. In the absence of the use of the gun by the petitioner against the security of public peace or public safety the licence of the gun of the petitioner was not liable either to be suspended or revoked. The licensing authority as well as the Commissioner committed errors on the face of the record in cancelling the licence of the gun held by the petitioner in utter disregard of the provisions of Section 17 (3) (b) of the Arms Act. In view of these facts the

impugned orders cannot be sustained and deserves to be quashed."

24. In **Habib v. State of U.P. and others [2002 (44) ACC 783]** this Court held that mere involvement in a criminal case cannot in any way affect the public security or public interest and the order cancelling or revoking licence of fire arm was not justified. Paragraph 3 of this judgment reads as under:

"3. The question as to whether mere involvement in a criminal case or pendency of a criminal case can be a ground for revocation of the licence under Arms Act, has been dealt with by a Division Bench of this court reported in Sheo Prasad Misra Vs. The District Magistrate, Basti and others, wherein the Division Bench relying upon the earlier decision reported in Masi Uddin v. Commissioner, Allahabad, found that mere involvement in criminal case cannot in any way affect the public security or public interest and the order cancelling or revoking the licence of fire arm has been set aside."

25. In **Satish Singh v. District Magistrate, Sultanpur 2009 (4) ADJ 33 (LB),** this Court elaborately explained what is detrimental to the security of the public peace or public safety and held that mere involvement in criminal case cannot in any way affect the public security or public interest. Paragraphs 6 and 7 of Satish Singh case (*supra*) are being reproduced as under:

"6. A plain reading of section 17 indicates that the arms licence can be cancelled or suspended on the ground that the licensing authority deems it necessary for security of the public peace or the public safety. In the present case, while passing the impugned order, neither the District Magistrate nor the appellate authority has recorded the finding as to how and under what circumstance, the possession of arms licence by the petitioner, is detrimental to the public peace or the public security and safety. Merely because criminal case is pending more so, does not seem to attract the provisions of section 17 of the Arms Act. To attract the provisions of section 17 of the Arms Act with regard to public peace, security and safety it shall always be incumbent on the authorities to record a finding that how, under what circumstances and what manner, the possession of arms licence shall be detrimental to public peace, safety and security. In absence of such finding merely on the ground that a criminal case is pending without any mitigating circumstances with regard to endanger of public peace, safety and security, the provisions contained under Section 17 of the Arms Act, shall not satisfy.

7. Needless to say that right to life and liberty are guaranteed under Article 21 of the Constitution of India and the arms licences are granted for personal safety and security after due inquiry by the authorities in accordance with the provisions contained in Arms Act, 1959. The provisions of section 17 of the Arms Act with regard to suspension or cancellation of arms licence cannot be invoked lightly in an arbitrary manner. The provisions contained under Section 17 of the Arms Act should be construed strictly and not liberally. The conditions provided therein, should be satisfied by the authorities before proceeding ahead to cancel or suspend an arms licence. We may take notice of the fact that any reason whatsoever, the crime rate is raising day

by day. The Government is not in a position to provide security to each and every person individually. Right to possess arms is statutory right but right to life and liberty is fundamental guaranteed by Article 21 of the Constitution of India. Corollary to it, it is citizen's right to possess firearms for their personal safety to save their family from miscreants. It is often said that ordinarily in a civilised society, only civilised persons require arms licence for their safety and security and not the criminals. Of course, in case the government feels that arms licence are abused for oblique motive or criminal activities, then appropriate measures may be adopted to check such mal-practice. But arms licence should not be suspended in a routine manner mechanically, without application of mind and keeping in view the letter and spirit of Section 17 of the Arms Act."

26. In the case of Satish (*supra*) due to accidental firing some one was killed. This court held that the same shall not amount to breach of public peace or tranquility. This Court also held that the authorities have to record finding based on material evidence with regard to breach of public peace and safety while cancelling the arms licence.

27. In **Vishal Varshney Vs. State of U.P. and another [2009 (75) ALR 593]** this Court held that cancellation of a fire arm licence merely on the ground of apprehension or likelihood of misuse of fire arm is illegal. In **Jageshwar Vs. State of U.P. and others 2009 (67) Allahabad Criminal Cases 157** this court held that in view of the settled law the licence under the Arms Act cannot be suspended on the ground of mere involvement in a criminal case or criminal trial or on the basis of mere apprehension of misuse of fire arm by the licensee.

28. In **Thakur Prasad Vs. State of U.P. and others reported 2013(31) LCD 1460 (LB)** this Court after referring to the earlier pronouncements in the case of **Ram Murli Madhukar Vs. District Magistrate, Sitapur [1998 (16) LCD 905]** and **Habib Vs. State of U.P., 2002 ACC 783,** held in paragraphs 10 and 11 as follows:

"10. "Public peace" or "public safety" do not mean ordinary disturbance of law and order public safety means safety of the public at large and not safety of few persons only and before passing of the order of cancellation of arm license as per Section 17 (3) of the Act the Licensing Authority is under an obligation to apply his mind to the question as to whether there was eminent danger to public peace and safety involved in the case in view of the judgment given by this court in the case of ***Ram Murli Madhukar v. District Magistrate, Sitapur [1998 916) LCD 905],*** *wherein it has been held that license can not be suspended or revoked on the ground of public interest (Jan-hit) merely on the registration of an F.I.R. and pendency of a criminal case."*

11. Further, this Court in the case of Habib v. State of U.P. 2002 ACC 783 held as under:

"The question as to whether mere Involvement in a criminal case or pendency of a criminal case can be a ground for revocation of the licence under Arms Act, has been dealt with by a Division Bench of this Court in Sheo prasad Misra Vs. District Magistrate, Basti and Others, 1978 AWC 122, wherein the Division Bench relying upon the earlier decision in Masi Uddin Vs.

Commissioner, Allahabad, 1972 ALJ 573, found that mere involvement in criminal case cannot, in any way, affect the public security or public interest and the order cancelling or revoking the licence of fire arm has been set aside. The present impugned orders also suffer from the same infirmity as was pointed out by the Division Bench in the above mentioned cases. I am in full agreement with the view taken by the Division Bench that these orders cannot be sustained and deserves to be quashed and are hereby quashed.

There is yet another reason that during the pendency of the present writ petition, the petitioner has been acquitted from the aforesaid criminal case and at present there is neither any case pending, nor any conviction has been attributed to the petitioner, as is evident from Annexure SA-I and II to the supplementary affidavit filed by the petitioner. In this view of the matter, the petitioner is entitled to have the fire-arm licence."

29. Thus, it has been held by this Court that "Public peace" or "public safety" do not mean ordinary disturbance of law and order. Public safety means safety of the public at large and not safety of few persons only. The Licensing Authority is under an obligation to apply his mind to the question as to whether there was eminent danger to public peace and public safety before passing the order under Section 17 (3) of the Act.

30. In Mewalal @ Kunnu v. Commissioner, Allahabad Division, Allahabad and another [2014 (32) LCD 576] it was held that the licence cannot be refused/suspended/cancelled merely because there is ordinary breach of law and order. Paragraph 13, 14 and 16 of the said judgment read as under:

"13. In the case of Rama Kushwaha v. State of U.P. & others, reported in 2011 (29) LCD 1045 it has been held that a license cannot be refused/suspended/cancelled merely because there is an ordinary breach of law and order.

14. The relevant paras of the aforesaid judgment are being reproduced hereinunder:

8. Relying upon Ganesh Chandra Bhatt v. District Magistrate Almora; AIR 1993 All, 291, learned Counsel for the petitioner submits that this court has held in clear words that a licence can not be refused/suspended/cancelled merely because there is an ordinary breach of law and order.

9. "Public peace' or "public safety' do not mean ordinary disturbance of law and order public safety means safety of the public at larger and not safety of few persons only. Before passing of the order in exercise of power conferred under Section 17 (3) of the Act the Licensing Authority is under an obligation to apply his mind to the question as to whether there was eminent danger to public peace and safety involved in the case.

10. In ***Ram Murli Madhukar v. District Magistrate, Sitapur [1998 (16) LCD 905],*** *this Court has held that licence cannot be suspended or revoked on the ground of public interest (Janhit).*

11. It is well settled in law that mere pendency of criminal case or apprehension of abuse of arms act are not sufficient grounds for passing the order of suspension or revocation of licence under Section 17 (3) of the Act. The question as to whether mere involvement in a criminal case or pendency of a criminal case can be a ground for revocation of licence under Arms Act, has been dealt with by a

division Bench of this Court Sheo Prasad Misra Vs. The District Magistrate, Basti and others, wherein the Division Bench relying upon the earlier decision of Msiuddin v. Commissioner, Allahabad, found that mere involvement in criminal case cannot in any way affect the public security or public interest. The law propounded in the said decisions has been subsequently followed in Habib Vs. Staate of U.P. reported in 2002 ACC 783, Ram Sanehi Vs. Commissioner, Devi Patan Division, Gonda and another.

16. In the case of Rajendra Singh v. Commissioner, Lucknow Division, Lucknow and others, reported in 2011 (29) LCD 1041 "Public Peace' or "public Safety' has been defined. The relevant paras 6 and 7 read as under:

6. "Public peace' or "public safety' do not mean ordinary disturbance of law and order public safety means safety of the public at large and not safety of few persons only. Before passing of the order in exercise of power conferred under Section 17 (3) of the Act the Licensing Authority is under an obligation to apply his mind to the question as to whether there was eminent danger to public peace annd safety involved in the case.

7. it is well settled in law that mere pendency of criminal case or apprehension of abuse of arms act are not sufficient ground for passing the order of suspension or revocation of licence under Section 17 (3) of the Act. The question as to whether mere involvement in a criminal cae or pendency of a criminal case can be a ground for revocation of licence under Arms Act, has been dealth with by a Division Bench of this court Sheo Prasad Misra v. The District Magistrate, Basti and others, wherein the Division Bench relying upon the earlier decision of Masiuddin v. Commissioner, Allahabad, found that mere involvement in criminal case cannot in any way affect the public security or public interest. The law propounded in the said decisions has been subsequently followed in Habib v. State of U.P. reported in 2002 ACC 783."

31. In **Chandrabali Tewari v. The Commissioner, Faizabad [2014 (32) LCD 1696]** this Court again held that mere pendency of criminal case is no ground to cancel fire arm licence. It has also been held that as in that case there were no allegations that the licenced gun was ever taken out by the licensee and was used in the act, the order cancelling petitioner's fire arm licence was quashed. Paragraph 12 of the said judgment is being reproduced as under:

"12. In the case reported in [2012 (79) ACC 824] Allahabad High Court, Civil Misc. Writ Petition No. 30724 of 1999 His Lordship has observed as follows:

"However, the impugned order nowhere indicates that the petitioner had used his licensed firearm or for that matter any firearm at all. The allegation in the impugned order is of physical assault (without use of firearm) and use of abusive language. Such an allegation, in my opinion cannot be the foundation of an impression by the District Magistrate that the petitioner, if allowed to retain his firearm license, would be a threat to future public peace and order."

32. In **Ghanshyam Gupta v. State of U.P. and others [2016 (34) LCD 3035]** this Court has again held that the necessary ingredients to invoke jurisdiction of the licencing authority in terms of Section 17 were clearly lacking and no finding had been returned on the

basis of materials produced in that regard by the licencing authority, which must justify passing of the order of cancellation. Paragraph 9 of the said judgment is being quoted as under:

"9. In a recent decision of Lucknow Bench of this court in Surya Narain Mishra v. Stae of U.P. and others, reported in 2015 (7) ADJ 510, similar view has been taken by this Court relying upon subsequent decisions. Para-14 of the judgment is reproduced:

"14. In the case of Raj Kumar Verma v. State of U.P., 2013 (80) ACC 231 this court in paragraph No.3 held as under:-

"The ground for issue of show-cause notice, suspension and ultimately cancellation of the licence is that one and precisely one criminal case was registered against the petitioner. The District Magistrate has also held that the petitioner has been enlarged on bail. He has gone further to observe that if the licence remained intact, the petitioner, may disturb public peace and tranquility. The same findings have been given by the Commissioner, Unmindful of the fact that this Court is repeating the law of the land, but the deaf ears of the administrative officers do not ready to succumb the law of the land. The settled law is that mere involvement in a criminal case without any finding that involvement in such criminal case shall be detrimental to public peace and tranqulity shall not create the ground for the cancellation of Armed Licence. In Ram Suchi v. Commissioner, Devipatan Division reported in 2004 (22) LCD 1643, it was held that this law was relied upon in Balram Singh Vs. Satate of U.P. 2006 (24) LCD 1359. ***Mere apprehension without substance is simply an opinion which has no legs to stand. Personal whims are not allowed to be reflected while acting as a public servant."***

33. In **Jogendra Singh vs. State of U.P. and others [2018 (8) ADJ 871]** this Court clearly held that for cancellation of a fire arm licence there had to be a definite finding that the possession of fire arm with the licensee was endangering public peace and public safety. In the absence of such finding it could safely be presumed that the licencing authority had erred in cancelling the fire arm licence. This Court also noticed that the State Government had issued guidelines which were circulated to all the District Magistrates to follow the same in the matters of cancellation/revocation of fire arm licence. The guidelines were reproduced as under:-

स्पीड पोस्ट/फैक्स/ई-मेल
संख्याः 1/2018/जन-102-छ पु0-5-2018-408/17
प्रेशक-
भगवान स्वरूप
सचिव
उत्तर प्रदेश शासन।
सेवा में,
समस्त जिला मजिस्ट्रट
उत्तर प्रदेश।

गृह (पुलिस) लखनऊ दिनांकः
अनुभाग-5 07 फरवरी 2018

विशयः- व्यक्तिगत शस्त लाइसेंसो के अनुज्ञप्तियों मे परिवर्तन-परिवर्धन, उनके निलम्बन एवं प्रतिसंहरण के संबंध मे, दिशा निर्देश।

महोदय,

आयुध अधिनियम, 1959 की धारा - 17 मे अनुज्ञप्तियों मे परिवर्तन-परिवर्धन, उनके निलम्बन एवं प्रतिसंहरण के संबंध मे व्यवस्था

दी गयी है। उपरोक्त के अतिरिक्त मा0 सर्वोच्च न्यायालय एवं मा0 उच्च न्यायालय द्वारा भी समयकश् पर तत्सम्बन्ध मे विस्तश्त आदेश पारित किये गये है। गृह (पुलिस) अनुभाग-5 के शासनादेश संख्या-271 आर/छः-पु0-5-91-573/01, दिनांक 25.02.1991 द्वारा आग्नेयास्त्र लाइसेंसों का निलम्बन/निरस्तीकरण व शासनादेश संख्या-3017 आर/छः-पु0-5-99, दिनांक 15.05.1999 द्वारा व्यक्तिगत शस्त्र लाइसेंस(R) का दुरूप्रयोग रोकने के संबंध मे निर्देश दिये गये है।

2. उक्त के दृश्टिगत मुझे यह कहने का निर्देश हुआ है कि व्यक्तिगत शस्त्र लाइसेसों के अनुज्ञप्तियों मे परिवर्तन-परिवर्धन, उनके निलम्बन एवं प्रतिसंहरण के संबंध में निम्नानुसार कार्यवाही सुनिश्चित किया जाय-

(1) जिला मजिस्ट्रट/लाइसेसिग प्राधिकारी लिखित आदेश द्वारा अग्नेयास्त्र अनुज्ञप्ति का सुनिश्चित कालावधि के लिए निलम्बित कर सकता है या अनुज्ञप्ति को प्रतिसंहरित कर सकता है।

(2) उपरोक्त निलम्बन/प्रतिसंहरण तभी किया जाएगा जब जिला मजिस्ट्रट/लाइसेसिग प्राधिकारी को यह समाधान हो जाए कि-

(क) अनुज्ञप्तिधारी किसी विधि के अंतर्गत आयुध रखने हेतु प्रतिशिद्ध है या विकश्तचित्त है या किन्ही अन्य कारणों से आयुध अधिनियम मे अनुज्ञप्ति के अयोग्य है, अथवा

(ख) जब जिला मजिस्ट्रट/लाइसेसिग प्राधिकारी लोकशांति की सुरक्षा या "लोकक्षेत्र" के लिए अनुज्ञप्ति को निलम्बित या प्रतिसंहरित करने के युक्तियुक्त आधार पाता है, आवश्यक समझता है अथवा

(ग) जबकि यह प्रमाण हो कि अनुज्ञप्ति गलत जानकारी के आधार पर प्राप्त की गई है, अथवा

(घ) जबकि अनुज्ञप्ति की किसी शर्त का उल्लंघन किया गया है, अथवा

(ड़) जबकि अनुज्ञप्ति धारक को अपना शस्त्र परिदत्त करने का निर्देश दिया गया हो और उसके द्वारा शस्त्र का परिदान न किया गया हो।

(3) अनुज्ञप्ति प्राधिकारी को अनंत समय के लिए शस्त्र अनुज्ञप्ति निलंबित अथवा प्रतिसंहरित (निरस्त) नहीं करनी चाहिए। अनुज्ञप्ति के निलम्बन अथवा प्रतिसंहरण की अवधि सुनिश्चित होनी चाहिए।

(4) अनुज्ञप्ति प्राधिकारी को लाइसेंस निलंबित अथवा निरस्त करने का अधिकार आयुध अधिनियम की धा मजिस्टे्ट रा 17 (3) के अंतर्गत प्रदत्त है और उक्त कार्यवाही करने से पूर्व अनुज्ञप्तिधारी को सुने जाने का अवसर प्रदान किया जाना आवश्यक है।

(5) अनुज्ञप्ति प्राधिकारी मामले के तथ्यों और परिस्थितियों पर विचार करते हुए यदि यह उचित पाते हैं कि प्रकरण में तात्कालिक प्रभाव से आयुध अनुज्ञप्ति का अनुज्ञप्ति प्राधिकारी द्वारा परिदान किया जाना आवश्यक है तो ऐसा करने का आदेश अभिलिखित किया जाये।

(6) मात्र किसी आपराधिक मामले का लम्बित रहना शस्त्र अनुज्ञप्ति निरस्त/निलम्बित करने का पर्याप्त आधार नहीं है। यहाॅ यह भी स्पश्ट करना समीचीन है कि मात्र एक आपराधिक प्रकरण के लम्बित होने के आधार पर भी विशिश्ट मामलों में आयुध अनुज्ञप्ति को निलंबित/निरस्त किया जा सकता है, परंतु अनुज्ञप्ति प्राधिकारी को ऐसा करने के पर्याप्त आधार अपने आदेश में अभिलिखित किये जाय। यह भी आवश्यक है कि ऐसे आधार अभिलिखित करते समय यह स्पश्ट उल्लिखित किया जाय कि अनुज्ञप्ति प्राधिकारी को समाधान हो गया कि प्रश्नगत आपराधिक प्रकरण की प्रकृति ऐसी है कि वह आमजन और समाज की लोकशांति एवं लोक़क्षेम के प्रतिकूल है और यदि अनुज्ञप्तिधारी को

अनुज्ञप्ति रखने दी गई तो लोकशांति व लोकक्षेम पर प्रतिकूल प्रभाव पड़ेगा।

(7) यदि किसी शस्त्र अनुज्ञप्ति के निलंबन या प्रतिसंहरण की कार्यवाही आपराधिक वाद के आधार पर की गई हैं तो यदि उक्त आपराधिक अभियोग, दोशमुक्ति में परिवर्तित हो जाता हैं तो शस्त्र निलम्बन/निरस्त्रीकरण के आदेश का औचित्य भी समाप्त हो जाता है, परंतु यदि उक्त अभियेाग राज्य द्वारा अपील योग्य पाया जाए एवं उक्त प्रकरण की अपील की जाए तो राज्य को उक्त दोशमुक्ति के आदेश की अपील के निर्णय तक अनुज्ञप्तिधारी की शस्त्र अनुज्ञप्ति निलंबित/प्रतिसंहरित रह सकती है। अतः ऐसे प्रकरण जहाॅ जिला मजिस्टे◌ट के समक्ष दोशमुक्ति के अभिकथन द्वारा अपने शस्त्र अनुज्ञप्ति निलंबन/निरस्त्रीकरण की कार्यवाही को अपास्त करने की प्रार्थना की जाए, वहाॅ जिला मजिस्टे◌ट यह जानकारी करना सुनिश्चित करेंगे कि प्रकरण में कोई राज्य अपील योजित/प्रस्तावित तो नहीं की गई हैं? तथा उसके उपरान्त ही किसी निर्णय पर पहुचेंगे।

(8) जहाॅ पर अनुज्ञप्ति प्राधिकारी द्वारा यह समाधान किया जा रहा है कि अनुज्ञप्तिधारी का कृत्य लोकशांति और लोकक्षेम के प्रतिकूल है तो इसका तात्पर्य कानून व्यवस्था बिगड़ने की सामान्य परिस्थितियां¢ से नहीं समझा जाएगा, अपितु लोकशांति और लोकक्षेम प्रभावित होना तथा समाज पर व्यापक असर से तात्पर्यित है।

(9) शस्त्र निरस्त्रीकरण की कार्यवाही लम्बित रहने अथवा कोई आपराधिक विचारण लम्बित रहने के दौरान अनुज्ञप्तिधारी शस्त्र रखने के लिए अधिकार स्वरूप माॅग नहीं कर सकता हैं क्योंकि शस्त्र अनुज्ञप्ति एक अधिकार नहीं मात्र एक सुविधा है।

(10) अनुज्ञप्ति प्राधिकारी/जिला मजिस्टे◌ट अपने तात्विक समाधान के लिए पुलिस, अभियोजन एवं अन्य एजेंसियों से आख्या आहूत कर सकता है। इसके साथ ही जिला मजिस्टे◌ट द्वारा प्रकरण से संबंधित सभी सुसंगत अभिलेख पर विचार करने तथा मजिस्टे◌ट अनुज्ञप्तिधारी की पारिवारिक पश्ठभूमि, उसके पूर्व आपराधिक कश्त्य और उसका आपराधिक इतिहास को विचार में लेने के उपरांत ही समुचित आदेश पारित किया जाय।

(11) अनुज्ञप्ति प्राधिकारी/जिला मजिस्टे◌ट आयुध अधिनियम की धारा 17 के उपबंधों के अंतर्गत यह समाधान होने पर कि कोई अनुज्ञप्तिधारी किसी गंभीर अपराध में सम्मिलित होने, दोशसिद्ध होने या किसी अन्य आनुशांगिक कारण, जिसे वो तात्विक रूप से उचित पाता हो, के आधार पर अनुज्ञप्तिकारी को अनुज्ञप्ति धारण करने के लिए अयोग्य व्यक्ति की श्रेणी में पाता है तो वह शस्त्र अनुज्ञप्ति को निलंबित/प्रतिसंहरित कर सकता है।

(12) अग्नेयास्त्रों के लाइसेंस सुरक्षा की दश्ष्टि से स्वीकश्त किये जाते हैं। इनका प्रयोग शादी-विवाह अथवा सार्वजनिक स्◌ाि◌ानों पर प्रदर्शन नहीं किया जाना चाहिए। ऐसा किये जाने से जनता में भय का वातावरण व्याप्त होता है। जो व्यक्ति शस्त्रों का प्रयोग प्रदर्शन हेतु अथवा जनता में भय व्याप्त करते हुए पाए जाएॅ, उनके शस्त्र लाइसेंस की शर्त संख्या 5 का उल्लंघन करने के आरोप में एवं शस्त्र अधिनियम की धारा 17 (3) (ख), (घ), (ड़) के अधीन तत्काल निरस्त करते हुए विधिक कार्यवाही की जा सकती है।

(13) यदि लाइसेंसिंग अधिकारी के समक्ष सामग्री है और उन्हें यह स्पश्ट हो जाता है कि लाइसेंसी के पास शस्त्र रहने से शांति एवं जनसुरक्षा खतरे में पड़ सकती है, तो वह (लाइसेंसिंग अधिकारी) उक्त तथ्यों को अभिलिखित करने के उपरांत सीधे अथवा किसी जाॅच अथवा लाइसेंसी की सुनवाई का अवसर दिये बिना लाइसेंस निलम्बित/निरस्त

कर सकते हैं, परंतु उन मामलों में जिनमें लाइसेंसिंग अधिकारी को यह स्पश्ट है कि लाइसेंसी के पास शस्त्र रहने से जनशान्ति या जनसुरक्षा खतरे में पड़ सकती है और सही स्थित की जानकारी हेतु जाॅच लंबित हो तो ऐसी जाॅच के दौरान लाइसेंस निरस्त नहीं किया जा सकता है।

(14) आयुध अधिनियम की धारा 17 के अंतर्गत किसी कार्यवाही को प्रचलित करने से पहले जिला मजिस्टे"ट/अनुज्ञप्ति प्राधिकारी के लिए यह आवश्यक है कि वह अपने समक्ष प्रस्तुत पत्रावली पर अनुज्ञप्तिधारी की शस्त्र अनुभाग से मूल पत्रावली में संलग्न शस्त्र आवेदन, शपथपत्र, आख्या एवं सुसंगत दस्तावेजों का सूक्ष्म अध्ययन कर लें, ताकि यह सुनिश्चित किया जा सके कि अनुज्ञप्तिधारी द्वारा गलत तथ्यों के आधार पर शस्त्र आवेदन तो नहीं किया गया है या किसी शर्त का उल्लंघन तो नहीं किया गया है?

(15) उपरोक्त निर्देशों के अतिरिक्त आयुध अधिनियम-1959, आयुध नियमावली-2016 समय समय पर माननीय सर्वोच्च न्यायालय एवं माननीय उच्च न्यायालय इलाहाबाद द्वारा पारित आदेशों, भारत सरकार एवं राज्य सरकार द्वारा समयकभ् पर निर्गत निर्देशों का भी सम्यक अनुपालन किया जाए एवं यदि उक्त का अनुज्ञप्तिधारी द्वारा उल्लंघन पाया जाता है तो उसके शस्त्र अनुज्ञप्ति के निलंबन/निरस्तीकरण की विधि सम्मत कार्यवाही सुनिश्चित की जाय।

3. इस संबंध में मा0 न्यायालय द्वारा निम्नलिखित वादों (1) सी0पी0 साहू बनाम उत्तर प्रदेश राज्य 1984 ए0डब्लू0सी0 145,(2) कैलाश नाथ बनाम उत्तर प्रदेश राज्य 1985 ए0डब्लू0सी0 493, (3) हरप्रसाद बनाम उत्तर प्रदेश राज्य 2005 (5) ए0डब्लू0सी0 4939 तथा (4) नेशनल कैपिटल टेरिटरी आॅफ डेलही बनाम उमेश कुमार 2008 (3) एस0सी0सी0 क्रिमिनल 490 में पारित निर्णयों का सम्यक् अवलोकन करने के उपरान्त उमें दिये गये निर्देशों का पालन करते हुए ही कोई निर्णय लिया जाए।

4. कृपया उक्त निर्देशों का कड़ाई से अनुपालन सुनिश्चित किया जाए।""

34. In **Hari Prasad Vs. State of U.P. and others** (*supra*) judgments cited by learned counsel for the petitioner this Court held in paragraph Nos. 4 and 5 as under:-

"4. It is apparent from the record that the aforesaid finding is perverse and against the record as the petitioner has already been acquitted in Case Crime No. 170/93. The non-cognizance report No. 242/96 dated 7.9.1996 under Sections 252 and 504 I.P.C. was also not investigated. Involvement and pendency of a case crime is no ground for cancellation of fire-arm licence. It is settled law, that after acquittal the very basis for cancellation of the arms licence stands vitiated. In this regard reference of the decision rendered in ***Lalji v. Commisioner, Kanpur and Anr. MANU/UP.0661/1999*** *has been made.*

5. The question as to whether mere involvement in a criminal cae or pendency of a criminal case can be a ground for revocation of the licence under Section 17 of the Arms Act has been considered by a Division Bench of this Court in ***Sheo Prasad Misra v. The District Magistrate Basti and others, 1979 (16) ACC 6 (Sum)*** *wherein the Division Bench relied upon an earlier decision in* ***Masi Uddin v. Commissioner, Allahabad, 1972 ALJ 573.*** *In both the aforesaid cases it has been held mere involvement in a criminal case cannot in any way affect the public security or public interest. In view of this proposition of law the order*

cancelling or revoking the licence of the petitioner or the aforesaid ground of involvement and pendency of a criminal case is not tenable."

35. From the aforesaid judgments some of the following propositions of law may be summarized as under:

(i) Right to hold fire arm licence granted by the authorities in accordance with the provisions contained in the Arms Act, 1959 is a valuable right of an individual.

(ii) Licencing authority has the power to suspend or revoke an arm's licence only if any of the conditions mentioned in Sub-Clauses (a) to (e) of Sub Section (3) of Section 17 of the Arms Act exists.

(iii) The provisions of Section 17 of the Act cannot be invoked lightly in an arbitrary manner.

(iv) The licencing authority has to satisfy itself if it is necessary for the security of public peace or for public safety to suspend or revoke the licence.

(v) Such satisfaction of the licencing authority must be expressed in the order and must be based on relevant material.

(vi) Public peace or public safety do not mean ordinary disturbance of law and order. Public safety means safety of the public at large and not of few persons only.

(vii) Mere involvement or pendency of a criminal case does not, of its own, necessarily affect public peace or public safety. The licencing authority in each case has to record a finding as to how and under what circumstances the possession of the arm licence is detrimental to the public peace or public safety.

(viii) On mere apprehension of misuse of fire arm or that the licencee would extend threat to the persons of the weaker section, the arm licence cannot be cancelled. There must be some positive incident in which the licencee participated or used his arm, leading to breach of public peace or public security.

(ix) After acquittal of the licencee from the criminal case, the very basis of cancellation of arm licence is vanished.

36. In the present case the petitioner's licence was cancelled by the District Magistrate on the ground of pendency of criminal case against him. The petitioner was later on acquitted of the criminal case by order dated 17.1.2003. A perusal of the order of acquittal does not show the use of fire arm. After acquittal the very basis of the order of cancellation vanished. The finding of the District Magistrate as affirmed by the Commissioner, that it was not in the interest of public peace and the public security that the licence remained with the petitioner/licencee, is not based on any evidence/material, except the police reports which in their turn were in view of the pendency of the criminal case against the petitioner. On mere apprehension expressed in the impugned orders that the petitioner would misuse the fire arm and would extend threat to the persons of the weaker section of the society, the arm licence could not be cancelled.

37. I do not find any substance in the submission advanced by learned Standing Counsel in support of the impugned orders, in view of the above discussion.

38. The writ petition deserves to be allowed and is hereby allowed. The orders

impugned are quashed. However, quashing of the impugned orders would not result in revival of the petitioner's fire arm licence automatically. The petitioner may apply for arm licence afresh under the Arms Act, 1959 read with Arms Rules, 2016 before the Licencing Authority, along with a certified copy of this Judgment, if so desires, to have the arm licence. If any such application is filed before the licencing authority within a period of 30 days, the same shall be considered and decided expeditiously by the licencing authority strictly in accordance with law but the licencing authority shall not refuse the arm licence on the ground of the impugned orders which have been quashed by this judgment.

39. Writ petition is allowed. No orders as to costs.

(2020)02ILR A548

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 07.02.2020

BEFORE

THE HON'BLE RAVI NATH TILHARI, J.

Writ C No. 56380 of 2006

Raghuveer Singh ...Petitioner
Versus
Commissioner Moradabad Division, Moradabad & Anr. ...Respondents

Counsel for the Petitioner:
Sri T.S. Dabas, Sri Akash Gupta

Counsel for the Respondents:
C.S.C.

A. Civil Law-Arms Act, 1959 – Section 17(3) – Word 'Public peace' or 'Public safety' – Meaning – Obligation of authority – Public peace or public safety do not mean ordinary disturbance of law and order – Public safety means safety of the public at large and not safety of few persons only – The Licensing Authority is under an obligation to apply his mind to the question as to whether there was eminent danger to public peace and public safety before passing the order. (Para 29)

B. Civil Law-Arms Act, 1959 – Section 17(3) – Cancellation of Licence – Ground of pendency of criminal case – Acquittal – After acquittal the very basis of the order of cancellation vanished – The finding of the District Magistrate as affirmed by the Commissioner, that it was not in the interest of public peace and the public security that the licence remained with the petitioner/licencee, is not based on any evidence/material, except the police reports which in their turn were in view of the pendency of the criminal case against the petitioner – On mere apprehension expressed in the impugned orders that the petitioner would misuse the fire arm and would extend threat to the persons of the weaker section of the society, the arm licence could not be cancelled. (Para 36)

Writ Petition allowed. (E-1)

List of cases cited :-

1. Hari Prasad Vs. State of U.P. and others, reported in 2005 (5) AWC 4939

2. Masiuddin Vs. Commissioner, Allahabad Division, Allahabad and another reported in 1972 A.L.J. 573

3. Sheo Prasad Misra Vs. The District Magistrate Basti and others reported in 1978 Allahabad Weekly Cases, 122, (D.B.)

4. Chhanga Prasad Sahu Vs. State of U.P. and others reported in 1984 AWC 145 (FB)

5. Ilam Singh v. Commissioner, Meerut Division and others [1987 ALL. L.J. 416]

6. Habib v. State of U.P. and others [2002 (44) ACC 783]

7. Satish Singh v. District Magistrate, Sultanpur 2009 (4) ADJ 33 (LB)

8. Vishal Varshney Vs. State of U.P. and another [2009 (75) ALR 593]

9. Jageshwar Vs. State of U.P. and others 2009 (67) Allahabad Criminal Cases 157

10. Thakur Prasad Vs. State of U.P. and others reported 2013(31) LCD 1460 (LB)

11. Ram Murli Madhukar Vs. District Magistrate, Sitapur [1998 (16) LCD 905]

12. Chandrabali Tewari v. The Commissioner, Faizabad [2014 (32) LCD 1696]

13. Ghanshyam Gupta v. State of U.P. and others [2016 (34) LCD 3035]
14. Jogendra Singh vs. State of U.P. and others [2018 (8) ADJ 871]

(Delivered by Hon'ble Ravi Nath Tilhari, J.)

1. I have heard Sri Akash Gupta holding brief of Sri T.S. Dabas, learned counsel for the petitioner and Sri Rakesh Kumar Singh, learned Standing Counsel appearing for Respondent Nos. 1 and 2.

2. By means of this writ petition the petitioner has challenged the order dated 2.1.2003, passed by the District Magistrate, Rampur in Case No. 397 of 1999 under Section 17 of the Arms Act, 1959, (State Vs. Raghuveer Singh) (Annexure-4 to the writ petition) by which the petitioner's Fire Arms Licence No. 1240/TT of double-barrel gun No. 7882 was cancelled. The appellate order dated 24.8.2006 passed by the Commissioner, Moradabad Mandal, Moradabad dismissing the petitioner's Appeal No. 26/02-03 under Section 18 of The Arms Act, 1959 (Ram Prasad Vs. State of U.P.) District Rampur (Annexure-6 to the writ petition) is also under challenge.

3. Briefly stated the facts of the case are that the petitioner was granted licence No. 1240/TT of double-barrel gun on 2.9.1995. A criminal case, bearing Crime Case No. 181 of 1999 under Sections 323, 504, 506 IPC and Section 3(1) (X) of The Schedule Caste and Scheduled Tribe (Prevention of Atrocities) Act, 1989, P.S. Milak, District Rampur, was registered against the petitioner. In view thereof, the police of Police Station-Milak submitted a report dated 20.7.1999 to the District Magistrate/Collector, Rampur recommending cancellation of the petitioner's fire arms licence, as it was not in the public interest that the fire arm remain with the petitioner.

4. A show cause notice dated 10.8.1999 was issued to the petitioner as to why his fire arm licence be not cancelled on the aforesaid ground of pendency of criminal case.

5. The petitioner filed reply to the show cause notice, that the petitioner did not misuse the fire arm and the Criminal Case No. 181 of 1999 was lodged due to partybandi in the village, which was pending in the court. The fire arm licence was not liable to be cancelled and the show cause notice deserved to be withdrawn.

6. The District Magistrate, Rampur after considering the petitioner's reply, by order dated 2.1.2003 cancelled fire arm licence on the ground that in view of the pendency of the criminal case against the petitioner and considering the police reports dated 5.7.1999 and 8.10.2000, it was necessary to cancel the fire arm licence in public interest and public security.

7. After the order of cancellation dated 2.1.2003, the petitioner was

acquitted in Session Trial No. 559 of 2000, arising out of Crime Case No. 181 of 1999 under Sections 323, 504, 506 IPC and Section 3(1) (X) of the Scheduled Caste and Scheduled Tribe (Prevention of Atrocities) Act, 1989 by judgment dated 17.1.2003 passed by the learned Additional Sessions Judge, Court No.2, Rampur.

8. The petitioner filed appeal No. 25/02-03 (Raghuveer Singh Vs. State of U.P.) under Section 18 of the Arms Act, 1959 challenging the order of cancellation of fire arm licence dated 2.1.2003, before the Commissioner, Moradabad Region, Moradabad. The petitioner filed copy of the order of his acquittal dated 17.1.2003 in the aforesaid appeal.

9. The Commissioner, Moradabad Region, Moradabad dismissed the petitioner's appeal by order dated 24.8.2006 and affirmed the order of cancellation dated 2.1.2003, taking the same view as in the order dated 2.1.2003 based on the police report that if the licence was restored, the petitioner will misuse the fire arm and terrorise the person of weaker sections. With respect to the judgment of acquittal dated 17.1.2003, it held that the petitioner was acquitted as the witnesses became hostile and there was some compromise between the accused and the victim.

10. The present petition has been filed challenging the aforesaid orders dated 24.8.2006 and 2.1.2003.

11. The submission of the learned counsel for the petitioner is that mere pendency of a criminal case was no ground to cancel the petitioner's fire arm licence. He submits that at the time when the order dated 2.1.2003 cancelling the fire arm licence was passed the criminal case was pending but after the order dated 2.1.2003, the petitioner was acquitted in the criminal case by judgment of the learned Additional Sessions Judge, Court No.2, Rampur and in view of the petitioner's acquittal, the appellate authority ought to have set aside the order of cancellation. The petitioner has no previous criminal history and in Crime Case No. 181 of 1999, the fire arm was not involved.

12. The learned counsel for the petitioner has placed reliance upon the judgment of this Court in Hari Prasad Vs. State of U.P. and others, reported in 2005 (5) AWC 4939 (Allahabad).

13. On the other hand the learned Standing Counsel has argued that the order of cancellation was passed on the ground of pendency of the criminal case and even after acquittal, in view of the police reports dated 26.7.1999 and 8.10.2000, to the effect that if the fire arm licence was restored the petitioner would extend threat to the weaker sections and misuse the fire arm, the impugned orders deserve to be maintained.

14. I have considered the submissions advanced by the learned counsels for the parties and have perused the records.

15. Perusal of the impugned order dated 2.1.2003 passed by the District Magistrate shows that the fire arm licence has been cancelled on the ground that Criminal Case No. 181 of 1999 under Sections 323, 504, 506 IPC and Section 3(1) (x) of The Schedule Caste and Scheduled Tribe (Prevention of Atrocities)

Act, 1989 was pending against the petitioner and in view thereof the police report was submitted that if the licence was restored the petitioner might misuse the fire arm. A perusal of the impugned appellate order also shows that the appeal has been dismissed on the ground of the police reports that the fire arm might be misused, although the petitioner was later on acquitted in the criminal case on 17.1.2003.

16. The matter which requires consideration is, whether on the ground of pendency of the criminal case the petitioner's fire arm licence could be cancelled and his appeal could be dismissed, notwithstanding his acquittal on 17.1.2003. It also requires consideration if the ground in the impugned orders that if the petitioner's fire arm licence remain with the petitioner, it would not be in the public interest and public security, are justified for cancellation and based on substantial material.

17. Section 17 of the Arms Act, 1959, deals with variation, suspension and revocation of the fire arm licence. Section 17 is reproduced as under:

"17. Variation, suspension and revocation of licences.--

(1) The licensing authority may vary the conditions subject to which a licence has been granted except such of them as have been prescribed and may for that purpose require the licence-holder by notice in writing to deliver-up the licence to it within such time as may be specified in the notice.

(2) The licensing authority may, on the application of the holder of a licence, also vary the conditions of the licence except such of them as have been prescribed.

(3) The licensing authority may by order in writing suspend a licence for such period as it thinks fit or revoke a licence--

(a) if the licensing authority is satisfied that the holder of the licence is prohibited by this Act or by any other law for the time being in force, from acquiring, having in his possession or carrying any arms or ammunition, or is of unsound mind, or is for any reason unfit for a licence under this Act; or

(b) if the licensing authority deems it necessary for the security of the public peace or for public safety to suspend or revoke the licence; or

(c) if the licence was obtained by the suppression of material information or on the basis of wrong information provided by the holder of the licence or any other person on his behalf at the time of applying for it; or

(d) if any of the conditions of the licence has been contravened; or

(e) if the holder of the licence has failed to comply with a notice under sub-section (1) requiring him to deliver up the licence.

(4) The licensing authority may also revoke a licence on the application of the holder thereof.

(5) Where the licensing authority makes an order varying a licence under sub-section (1) or an order suspending or revoking a licence under sub-section (3), it shall record in writing the reasons therefor and furnish to the holder of the licence on demand a brief statement of the same unless in any case the licensing authority is of the opinion that it will not be in the public interest to furnish such statement.

(6) The authority to whom the licensing authority is subordinate may by order in writing suspend or revoke a licence on any ground on which it may be suspended or revoked by the licensing authority; and the foregoing provisions of this section shall, as far as may be, apply in relation to the suspension or revocation of a licence by such authority.

(7) A court convicting the holder of a licence of any offence under this Act or the rules made thereunder may also suspend or revoke the licence:
Provided that if the conviction is set aside on appeal or otherwise, the suspension or revocation shall become void.

(8) An order of suspension or revocation under sub-section (7) may also be made by an appellate court or by the High Court when exercising its powers of revision.

(9) The Central Government may, by order in the Official Gazette, suspend or revoke or direct any licensing authority to suspend or revoke all or any licences granted under this Act throughout India or any part thereof.

(10) On the suspension or revocation of a licence under this section the holder thereof shall without delay surrender the licence to the authority by whom it has been suspended or revoked or to such other authority as may be specified in this behalf in the order of suspension or revocation.

18. A bare reading of Section 17 (3) of the Arms Act makes it evident that the licencing authority may by order in writing suspend a licence for such period as he things fit or revoke a licence; (b) if the licencing authority deems it necessary for the security of public peace or for public safety to suspend or revoke the licence. These two expressions "Security of public peace" and "for public safety" are of utmost importance. The licencing authority must be satisfied of the existence of these pre conditions.

19. In **Masiuddin Vs. Commissioner, Allahabad Division, Allahabad and another reported in 1972 A.L.J. 573** this Court held in paragraph Nos. 4 and 7 as under:

"4. After a license is granted, the right to hold the license and possess a gun is a valuable individual right in a free country. The security of public peace and public safety is a valuable social interest. Section 17 shows that Parliament had decided that neither of the two valuable interests should unduly impinge on the other Section 17 seeks to establish a fair equilibrium between the two contending interests. It says: Hear the licensee first; and then cancel the license "if necessary for the security of the public peace or for public safety". True, there is no express provision for hearing. True, there is no express provision for hearing. But the nature of the right affected, the language of Sec. 17, the grounds for cancellation, the requirement of a reasoned order and the right of appeal plainly implicate a fair hearing procedure. Jai Narain Rai v. District Magistrate, Azamgarh. While cancelling a licence, the District Magistrate acts as a quasi-judicial authority.

7. A license may be cancelled, inter alia on the ground that it is "necessary for the security of the public peace or for public safety" to do so. The District Magistrate has not recorded a finding that it was necessary for the security of the public peace or for public safety to revoke the license. The mere existence of enmity between a licensee and

another person would not establish the "necessary' connection with security of public peace or public safety. There should be something more than mere enmity. There should be some evidence of the provocative utterances of the licensee or of his suspicious movements or of his criminal designs and conspiracy in reinforcement of the evidence of enmity. It is not possible to give an exhaustive list of facts and circumstances from which an inference of threat to public security or public peace may be deduced. The District Magistrate will have to take a decision on the facts of each case. But in the instant case there is nothing in his order to indicate that it was necessary for the security of the public peace or for public safety to cancel the license of the petitioner. Mere enmity is not sufficient."

20. Thus, in Masiuddin's case (*supra*) it was held that a license may be cancelled, inter alia on the ground that it is necessary for the security of the public peace or for public safety, to do so. Mere existence of enmity between the licensee and another person would not establish the necessary connection with security of public peace or public safety.

21. In **Sheo Prasad Misra Vs. The District Magistrate Basti and others reported in 1978 Allahabad Weekly Cases, 122, (D.B.)** this Court after considering Masiuddin case (*supra*) held in paragraph 4 which is reproduced as under:

4. "Learned Counsel for the petitioner contended that, while there was material before the licencing authority, viz., the District Magistrate, to show that some reports had been lodged against the petitioner, there was neither any material to warrant a conclusion that it was necessary to cancel the licence for security of public peace or public safety nor was a finding to that effect recorded. Learned Counel referred us to a decision of this Court in case of ***Masi Uddin v. Commissioner, Allahabad, 1972 ALJ 572,*** *where this Court held:*

"A licence may be cancelled, inter alia, on the ground that it is "necessary for the security of public peace or for public safety, to do so. The District Magistrate has not recorded a finding that it was necessary for the security of the public peace or for public safety to revoke the licend. The mere existence of enmity between a licencee and another person would not establish the "necessary" connection with security of the public peace or public safety."

In case before us also the District Magistrate has not recorded any finding that it was necessary to cancel the licence for the security of public peace or for public safety. All that he has done is to have referred to some applications and reports lodged against the petitioner. The mere fact that some reports had been lodged against the petitioner could not form basis for cancelling the licence. The order passed by the District Magistrate and that passed by the Commissioner cannot, therefore, be upheld on the basis of any thing contained in Sections 17(3) (b) of the Act"

22. In **Chhanga Prasad Sahu Vs. State of U.P. and others reported in 1984 AWC 145 (FB),** after noticing the provisions of Section 17 (3) of the Arms Act the Full Bench in paragraph 5 held as follows:

"A perusal of abovementioned provisions indicates that the licensing

authority has been given the power to suspend or revoe an arms licence only if any of the conditions mentioned in sub-clauses (a) to (e) of sub-section (3) of Section 17 of Act exists." sub section (5) of Section 17 makes it obligatory upon the licensing authority to, while passing the order revoking/suspending an arms licence, record in writing the reasons therefore and to, on demand, furnish a brief statement thereof to the holder of the license unless it considers that it will not be in the public interest to do so."

In paragraph-9 it has been emphasised as under:-

"it is true that in order to revoke/suspend an arms licence, the licensing authority has necessarily to come to the conclusion that the facts justifying revocation/suspension of licence mentioned in grounds (a) to (e) of section 17 exist"

23. In **Ilam Singh v. Commissioner, Meerut Division and others [1987 ALL. L.J. 416]** this Court held that under Section 17(3) (b) the licencing authority may suspend or revoke a licence if it becomes necessary for the security of public peace or public safety. In this case no report was lodged against the licensee indicating that he had used the gun in the incident which led to the breach of public peace or public safety. It was held that there must be some positive incident in which the petitioner participated and used his gun which led to breach of public peace or public safety and in the absence of the use of the gun by the licencee against the security of public peace or public safety the licence of the gun could not be suspended or revoked. The relevant paragraphs 4 and 5 of the judgment in Ilam Singh (*supra*) are being reproduced as under:

"4. Having heard the learned counsel for the petitioner I am of the view that the submissions raised by the learned counsel for the petitioner cannot be said to be without substance. Section 17(3) (b) of the Arms Act enacts that licensing authority may by order in writing suspend a licence or revoke the same if it becomes necessary for the security of public peace or the public safety. When once a person has been granted a licence and he acquires a gun, it becomes one of his properties. In the present case no incident of breach of security of the public peace or public sfety at the behest of the petitioner has been pointed out. Even no report was lodged against the petitioner indicating that he used his gun in the incident which led to the breach of public peace or public safety. Even though some reports might have been lodged but that could not be said to be a sufficient reason to cancel the licence."

5. There must be some positive incident in which the petitioner participated and used his gun which led to the breach of the public peace or public safety. In the absence of the use of the gun by the petitioner against the security of public peace or public safety the licence of the gun of the petitioner was not liable either to be suspended or revoked. The licensing authority as well as the Commissioner committed errors on the face of the record in cancelling the licence of the gun held by the petitioner in utter disregard of the provisions of Section 17 (3) (b) of the Arms Act. In view of these facts the impugned orders cannot be sustained and deserves to be quashed."

24. In **Habib v. State of U.P. and others [2002 (44) ACC 783]** this Court held that mere involvement in a criminal case cannot in any way affect the public

security or public interest and the order cancelling or revoking licence of fire arm was not justified. Paragraph 3 of this judgment reads as under:

"3. The question as to whether mere involvement in a criminal case or pendency of a criminal case can be a ground for revocation of the licence under Arms Act, has been dealt with by a Division Bench of this court reported in Sheo Prasad Misra Vs. The District Magistrate, Basti and others, wherein the Division Bench relying upon the earlier decision reported in Masi Uddin v. Commissioner, Allahabad, found that mere involvement in criminal case cannot in any way affect the public security or public interest and the order cancelling or revoking the licence of fire arm has been set aside."

25. In **Satish Singh v. District Magistrate, Sultanpur 2009 (4) ADJ 33 (LB),** this Court elaborately explained what is detrimental to the security of the public peace or public safety and held that mere involvement in criminal case cannot in any way affect the public security or public interest. Paragraphs 6 and 7 of Satish Singh case (*supra*) are being reproduced as under:

"6. A plain reading of section 17 indicates that the arms licence can be cancelled or suspended on the ground that the licensing authority deems it necessary for security of the public peace or the public safety. In the present case, while passing the impugned order, neither the District Magistrate nor the appellate authority has recorded the finding as to how and under what circumstance, the possession of arms licence by the petitioner, is detrimental to the public peace or the public security and safety. Merely because criminal case is pending more so, does not seem to attract the provisions of section 17 of the Arms Act. To attract the provisions of section 17 of the Arms Act with regard to public peace, security and safety it shall always be incumbent on the authorities to record a finding that how, under what circumstances and what manner, the possession of arms licence shall be detrimental to public peace, safety and security. In absence of such finding merely on the ground that a criminal case is pending without any mitigating circumstances with regard to endanger of public peace, safety and security, the provisions contained under Section 17 of the Arms Act, shall not satisfy.

7. Needless to say that right to life and liberty are guaranteed under Article 21 of the Constitution of India and the arms licences are granted for personal safety and security after due inquiry by the authorities in accordance with the provisions contained in Arms Act, 1959. The provisions of section 17 of the Arms Act with regard to suspension or cancellation of arms licence cannot be invoked lightly in an arbitrary manner. The provisions contained under Section 17 of the Arms Act should be construed strictly and not liberally. The conditions provided therein, should be satisfied by the authorities before proceeding ahead to cancel or suspend an arms licence. We may take notice of the fact that any reason whatsoever, the crime rate is raising day by day. The Government is not in a position to provide security to each and every person individually. Right to possess arms is statutory right but right to life and liberty is fundamental guaranteed by Article 21 of the Constitution of India. Corollary to it, it is citizen's right to

possess firearms for their personal safety to save their family from miscreants. It is often said that ordinarily in a civilised society, only civilised persons require arms licence for their safety and security and not the criminals. Of course, in case the government feels that arms licence are abused for oblique motive or criminal activities, then appropriate measures may be adopted to check such mal-practice. But arms licence should not be suspended in a routine manner mechanically, without application of mind and keeping in view the letter and spirit of Section 17 of the Arms Act."

26. In the case of Satish (*supra*) due to accidental firing some one was killed. This court held that the same shall not amount to breach of public peace or tranquility. This Court also held that the authorities have to record finding based on material evidence with regard to breach of public peace and safety while cancelling the arms licence.

27. In **Vishal Varshney Vs. State of U.P. and another [2009 (75) ALR 593]** this Court held that cancellation of a fire arm licence merely on the ground of apprehension or likelihood of misuse of fire arm is illegal. In **Jageshwar Vs. State of U.P. and others 2009 (67) Allahabad Criminal Cases 157** this court held that in view of the settled law the licence under the Arms Act cannot be suspended on the ground of mere involvement in a criminal case or criminal trial or on the basis of mere apprehension of misuse of fire arm by the licensee.

28. In **Thakur Prasad Vs. State of U.P. and others reported 2013(31) LCD 1460 (LB)** this Court after referring to the earlier pronouncements in the case of **Ram Murli Madhukar Vs. District Magistrate, Sitapur [1998 (16) LCD 905]** and **Habib Vs. State of U.P., 2002 ACC 783,** held in paragraphs 10 and 11 as follows:

"10. "Public peace" or "public safety" do not mean ordinary disturbance of law and order public safety means safety of the public at large and not safety of few persons only and before passing of the order of cancellation of arm license as per Section 17 (3) of the Act the Licensing Authority is under an obligation to apply his mind to the question as to whether there was eminent danger to public peace and safety involved in the case in view of the judgment given by this court in the case of ***Ram Murli Madhukar v. District Magistrate, Sitapur [1998 916) LCD 905],*** *wherein it has been held that license can not be suspended or revoked on the ground of public interest (Jan-hit) merely on the registration of an F.I.R. and pendency of a criminal case."*

11. Further, this Court in the case of Habib v. State of U.P. 2002 ACC 783 held as under:

"The question as to whether mere Involvement in a criminal case or pendency of a criminal case can be a ground for revocation of the licence under Arms Act, has been dealt with by a Division Bench of this Court in Sheo prasad Misra Vs. District Magistrate, Basti and Others, 1978 AWC 122, wherein the Division Bench relying upon the earlier decision in Masi Uddin Vs. Commissioner, Allahabad, 1972 ALJ 573, found that mere involvement in criminal case cannot, in any way, affect the public security or public interest and the order cancelling or revoking the licence of fire arm has been set aside. The present impugned orders also suffer from the same

infirmity as was pointed out by the Division Bench in the above mentioned cases. I am in full agreement with the view taken by the Division Bench that these orders cannot be sustained and deserves to be quashed and are hereby quashed.

There is yet another reason that during the pendency of the present writ petition, the petitioner has been acquitted from the aforesaid criminal case and at present there is neither any case pending, nor any conviction has been attributed to the petitioner, as is evident from Annexure SA-I and II to the supplementary affidavit filed by the petitioner. In this view of the matter, the petitioner is entitled to have the fire-arm licence."

29. Thus, it has been held by this Court that "Public peace" or "public safety" do not mean ordinary disturbance of law and order. Public safety means safety of the public at large and not safety of few persons only. The Licensing Authority is under an obligation to apply his mind to the question as to whether there was eminent danger to public peace and public safety before passing the order under Section 17 (3) of the Act.

30. In Mewalal @ Kunnu v. Commissioner, Allahabad Division, Allahabad and another [2014 (32) LCD 576] it was held that the licence cannot be refused/suspended/cancelled merely because there is ordinary breach of law and order. Paragraph 13, 14 and 16 of the said judgment read as under:

"13. In the case of Rama Kushwaha v. State of U.P. & others, reported in 2011 (29) LCD 1045 it has been held that a license cannot be refused/suspended/cancelled merely because there is an ordinary breach of law and order.

14. The relevant paras of the aforesaid judgment are being reproduced hereinunder:

8. Relying upon Ganesh Chandra Bhatt v. District Magistrate Almora; AIR 1993 All, 291, learned Counsel for the petitioner submits that this court has held in clear words that a licence can not be refused/suspended/cancelled merely because there is an ordinary breach of law and order.

9. "Public peace' or "public safety' do not mean ordinary disturbance of law and order public safety means safety of the public at larger and not safety of few persons only. Before passing of the order in exercise of power conferred under Section 17 (3) of the Act the Licensing Authority is under an obligation to apply his mind to the question as to whether there was eminent danger to public peace and safety involved in the case.

10. In ***Ram Murli Madhukar v. District Magistrate, Sitapur [1998 (16) LCD 905],*** *this Court has held that licence cannot be suspended or revoked on the ground of public interest (Janhit).*

11. It is well settled in law that mere pendency of criminal case or apprehension of abuse of arms act are not sufficient grounds for passing the order of suspension or revocation of licence under Section 17 (3) of the Act. The question as to whether mere involvement in a criminal case or pendency of a criminal case can be a ground for revocation of licence under Arms Act, has been dealt with by a division Bench of this Court Sheo Prasad Misra Vs. The District Magistrate, Basti and others, wherein the Division Bench relying upon the earlier decision of Msiuddin v. Commissioner, Allahabad, found that mere involvement in criminal case cannot in any way affect the public security or public interest. The law propounded in the said decisions has been subsequently followed in Habib Vs. Staate

of U.P. reported in 2002 ACC 783, Ram Sanehi Vs. Commissioner, Devi Patan Division, Gonda and another.

16. In the case of Rajendra Singh v. Commissioner, Lucknow Division, Lucknow and others, reported in 2011 (29) LCD 1041 "Public Peace' or "public Safety' has been defined. The relevant paras 6 and 7 read as under:

6. "Public peace' or "public safety' do not mean ordinary disturbance of law and order public safety means safety of the public at large and not safety of few persons only. Before passing of the order in exercise of power conferred under Section 17 (3) of the Act the Licensing Authority is under an obligation to apply his mind to the question as to whether there was eminent danger to public peace annd safety involved in the case.

7. it is well settled in law that mere pendency of criminal case or apprehension of abuse of arms act are not sufficient ground for passing the order of suspension or revocation of licence under Section 17 (3) of the Act. The question as to whether mere involvement in a criminal cae or pendency of a criminal case can be a ground for revocation of licence under Arms Act, has been dealth with by a Division Bench of this court Sheo Prasad Misra v. The District Magistrate, Basti and others, wherein the Division Bench relying upon the earlier decision of Masiuddin v. Commissioner, Allahabad, found that mere involvement in criminal case cannot in any way affect the public security or public interest. The law propounded in the said decisions has been subsequently followed in Habib v. State of U.P. reported in 2002 ACC 783."

31. In **Chandrabali Tewari v. The Commissioner, Faizabad [2014 (32) LCD 1696]** this Court again held that mere pendency of criminal case is no ground to cancel fire arm licence. It has also been held that as in that case there were no allegations that the licenced gun was ever taken out by the licensee and was used in the act, the order cancelling petitioner's fire arm licence was quashed. Paragraph 12 of the said judgment is being reproduced as under:

"12. In the case reported in [2012 (79) ACC 824] Allahabad High Court, Civil Misc. Writ Petition No. 30724 of 1999 His Lordship has observed as follows:

"However, the impugned order nowhere indicates that the petitioner had used his licensed firearm or for that matter any firearm at all. The allegation in the impugned order is of physical assault (without use of firearm) and use of abusive language. Such an allegation, in my opinion cannot be the foundation of an impression by the District Magistrate that the petitioner, if allowed to retain his firearm license, would be a threat to future public peace and order."

32. In **Ghanshyam Gupta v. State of U.P. and others [2016 (34) LCD 3035]** this Court has again held that the necessary ingredients to invoke jurisdiction of the licencing authority in terms of Section 17 were clearly lacking and no finding had been returned on the basis of materials produced in that regard by the licencing authority, which must justify passing of the order of cancellation. Paragraph 9 of the said judgment is being quoted as under:

"9. In a recent decision of Lucknow Bench of this court in Surya Narain Mishra v. Stae of U.P. and others, reported in 2015 (7) ADJ 510, similar

view has been taken by this Court relying upon subsequent decisions. Para-14 of the judgment is reproduced:

"14. In the case of Raj Kumar Verma v. State of U.P., 2013 (80) ACC 231 this court in paragraph No.3 held as under:-

"The ground for issue of show-cause notice, suspension and ultimately cancellation of the licence is that one and precisely one criminal case was registered against the petitioner. The District Magistrate has also held that the petitioner has been enlarged on bail. He has gone further to observe that if the licence remained intact, the petitioner, may disturb public peace and tranquility. The same findings have been given by the Commissioner, Unmindful of the fact that this Court is repeating the law of the land, but the deaf ears of the administrative officers do not ready to succumb the law of the land. The settled law is that mere involvement in a criminal case without any finding that involvement in such criminal case shall be detrimental to public peace and tranqulity shall not create the ground for the cancellation of Armed Licence. In Ram Suchi v. Commissioner, Devipatan Division reported in 2004 (22) LCD 1643, it was held that this law was relied upon in Balram Singh Vs. Satate of U.P. 2006 (24) LCD 1359. Mere apprehension without substance is simply an opinion which has no legs to stand. Personal whims are not allowed to be reflected while acting as a public servant."

33. In **Jogendra Singh vs. State of U.P. and others [2018 (8) ADJ 871]** this Court clearly held that for cancellation of a fire arm licence there had to be a definite finding that the possession of fire arm with the licensee was endangering public peace and public safety. In the absence of such finding it could safely be presumed that the licencing authority had erred in cancelling the fire arm licence. This Court also noticed that the State Government had issued guidelines which were circulated to all the District Magistrates to follow the same in the matters of cancellation/revocation of fire arm licence. The guidelines were reproduced as under:-

स्पीड पोस्ट/फैक्स/ई-मेल

संख्याः 1/2018/जन-102-छ पु0-5-2018-408/17

प्रेशक-

भगवान स्वरूप

सचिव

उत्तर प्रदेश शासन।

सेवा में,

समस्त जिला मजिस्ट्रट

उत्तर प्रदेश।

गृह (पुलिस) लखनऊ दिनांकः

अनुभाग-5 07 फरवरी 2018

विशयः- व्यक्तिगत शस्त लाइसेंसो के अनुज्ञप्तियों मे परिवर्तन-परिवर्धन, उनके निलम्बन एवं प्रतिसंहरण के संबंध मे, दिशा निर्देश।

महोदय,

आयुध अधिनियम, 1959 की धारा -17 मे अनुज्ञप्तियों मे परिवर्तन-परिवर्धन, उनके निलम्बन एवं प्रतिसंहरण के संबंध मे व्यवस्था दी गयी है। उपरोक्त के अतिरिक्त मा0 सर्वोच्च न्यायालय एवं मा0 उच्च न्यायालय द्वारा भी समयकश् पर तत्सम्बन्ध मे विस्तशत आदेश पारित किये गये है। गृह (पुलिस) अनुभाग-5 के शासनादेश संख्या-271 आर/छः-पु0-5-91-573/01, दिनांक 25.02.1991 द्वारा आग्नेयास्त्र लाइसेंसों का निलम्बन/निरस्तीकरण व शासनादेश संख्या-3017 आर/छः-पु0-5-99, दिनांक 15.05.1999 द्वारा व्यक्तिगत शस्त्र

लाइसेंस(R) का दुरूप्रयोग रोकने के संबंध मे निर्देश दिये गये है।

2. उक्त के दृष्टिगत मुझे यह कहने का निर्देश हुआ है कि व्यक्तिगत शस्त्र लाइसेसों के अनुज्ञप्तियों मे परिवर्तन-परिवर्धन, उनके निलम्बन एवं प्रतिसंहरण के संबंध में निम्नानुसार कार्यवाही सुनिश्चित किया जाय-

(1) जिला मजिस्ट्रट/लाइसेसिग प्राधिकारी लिखित आदेश द्वारा अग्नेयास्त्र अनुज्ञप्ति का सुनिश्चित कालावधि के लिए निलम्बित कर सकता है या अनुज्ञप्ति को प्रतिसंहरित कर सकता है।

(2) उपरोक्त निलम्बन/प्रतिसंहरण तभी किया जाएगा जब जिला मजिस्ट्रट/लाइसेसिग प्राधिकारी को यह समाधान हो जाए कि-

(क) अनुज्ञप्तिधारी किसी विधि के अंतर्गत आयुध रखने हेतु प्रतिशिद्ध है या विकश्तचित्त है या किन्ही अन्य कारणों से आयुध अधिनियम मे अनुज्ञप्ति के अयोग्य है, अथवा

(ख) जब जिला मजिस्ट्रट/लाइसेसिग प्राधिकारी लोकशांति की सुरक्षा या "लोकक्षेत्र" के लिए अनुज्ञप्ति को निलम्बित या प्रतिसंहरित करने के युक्तियुक्त आधार पाता है, आवश्यक समझता है अथवा

(ग) जबकि यह प्रमाण हो कि अनुज्ञप्ति गलत जानकारी के आधार पर प्राप्त की गई है, अथवा

(घ) जबकि अनुज्ञप्ति की किसी शर्त का उल्लंघन किया गया है, अथवा

(ड़) जबकि अनुज्ञप्ति धारक को अपना शस्त्र परिदत्त करने का निर्देश दिया गया हो और उसके द्वारा शस्त्र का परिदान न किया गया हो।

(3) अनुज्ञप्ति प्राधिकारी को अनंत समय के लिए शस्त्र अनुज्ञप्ति निलंबित अथवा प्रतिसंहरित (निरस्त) नहीं करनी चाहिए। अनुज्ञप्ति के निलम्बन अथवा प्रतिसंहरण की अवधि सुनिश्चित होनी चाहिए।

(4) अनुज्ञप्ति प्राधिकारी को लाइसेंस निलंबित अथवा निरस्त करने का अधिकार आयुध अधिनियम की धा मजिस्टे°ट रा 17 (3) के अंतर्गत प्रदत्त है और उक्त कार्यवाही करने से पूर्व अनुज्ञप्तिधारी को सुने जाने का अवसर प्रदान किया जाना आवश्यक है।

(5) अनुज्ञप्ति प्राधिकारी मामले के तथ्यों और परिस्थितियों पर विचार करते हुए यदि यह उचित पाते हैं कि प्रकरण में तात्कालिक प्रभाव से आयुध अनुज्ञप्ति का अनुज्ञप्ति प्राधिकारी द्वारा परिदान किया जाना आवश्यक है तो ऐसा करने का आदेश अभिलिखित किया जाये।

(6) मात्र किसी आपराधिक मामले का लम्बित रहना शस्त्र अनुज्ञप्ति निरस्त/निलम्बित करने का पर्याप्त आधार नहीं है। यहाॅ यह भी स्पश्ट करना समीचीन है कि मात्र एक आपराधिक प्रकरण के लम्बित होने के आधार पर भी विशिश्ट मामलों में आयुध अनुज्ञप्ति को निलंबित/निरस्त किया जा सकता है, परंतु अनुज्ञप्ति प्राधिकारी को ऐसा करने के पर्याप्त आधार अपने आदेश में अभिलिखित किये जाय। यह भी आवश्यक है कि ऐसे आधार अभिलिखित करते समय यह स्पश्ट उल्लिखित किया जाय कि अनुज्ञप्ति प्राधिकारी को समाधान हो गया कि प्रश्नगत आपराधिक प्रकरण की प्रकृति ऐसी है कि वह आमजन और समाज की लोकशांति एवं लोक़क्षेम के प्रतिकूल है और यदि अनुज्ञप्तिधारी को अनुज्ञप्ति रखने दी गई तो लोकशांति व लोकक्षेम पर प्रतिकूल प्रभाव पड़ेगा।

(7) यदि किसी शस्त्र अनुज्ञप्ति के निलंबन या प्रतिसंहरण की कार्यवाही आपराधिक वाद के आधार पर की गई हैं तो यदि उक्त आपराधिक अभियोग, दोशमुक्ति में परिवर्तित हो जाता हैं तो शस्त्र निलम्बन/निरस्त्रीकरण के आदेश का औचित्य

भी समाप्त हो जाता है, परंतु यदि उक्त अभियोग राज्य द्वारा अपील योग्य पाया जाए एवं उक्त प्रकरण की अपील की जाए तो राज्य को उक्त दोशमुक्ति के आदेश की अपील के निर्णय तक अनुज्ञप्तिधारी की शस्त्र अनुज्ञप्ति निलंबित/प्रतिसंहरित रह सकती है। अतः ऐसे प्रकरण जहाॅ जिला मजिस्टेªट के समक्ष दोशमुक्ति के अभिकथन द्वारा अपने शस्त्र अनुज्ञप्ति निलंबन/निरस्त्रीकरण की कार्यवाही को अपास्त करने की प्रार्थना की जाए, वहाॅ जिला मजिस्टेªट यह जानकारी करना सुनिश्चित करेंगे कि प्रकरण में कोई राज्य अपील योजित/प्रस्तावित तो नहीं की गई हैं? तथा उसके उपरान्त ही किसी निर्णय पर पहुचेंगे।

(8) जहाॅ पर अनुज्ञप्ति प्राधिकारी द्वारा यह समाधान किया जा रहा है कि अनुज्ञप्तिधारी का कृत्य लोकशांति और लोकक्षेम के प्रतिकूल है तो इसका तात्पर्य कानून व्यवस्था बिगड़ने की सामान्य परिस्थितियां¢ से नहीं समझा जाएगा, अपितु लोकशांति और लोकक्षेम प्रभावित होना तथा समाज पर व्यापक असर से तात्पर्यित है।

(9) शस्त्र निरस्त्रीकरण की कार्यवाही लम्बित रहने अथवा कोई आपराधिक विचारण लम्बित रहने के दौरान अनुज्ञप्तिधारी शस्त्र रखने के लिए अधिकार स्वरूप माॅग नहीं कर सकता हैं क्योंकि शस्त्र अनुज्ञप्ति एक अधिकार नहीं मात्र एक सुविधा है।

(10) अनुज्ञप्ति प्राधिकारी/जिला मजिस्टेªट अपने तात्विक समाधान के लिए पुलिस, अभियोजन एवं अन्य एजेंसियों से आख्या आहूत कर सकता है। इसके साथ ही जिला मजिस्टेªट द्वारा प्रकरण से संबंधित सभी सुसंगत अभिलेख पर विचार करने तथा मजिस्टेªट अनुज्ञप्तिधारी की पारिवारिक पश्ठभूमि, उसके पूर्व आपराधिक कश्त्य और उसका आपराधिक इतिहास को विचार में लेने के उपरांत ही समुचित आदेश पारित किया जाय।

(11) अनुज्ञप्ति प्राधिकारी/जिला मजिस्टेªट आयुध अधिनियम की धारा 17 के उपबंधों के अंतर्गत यह समाधान होने पर कि कोई अनुज्ञप्तिधारी किसी गंभीर अपराध में सम्मिलित होने, दोशसिद्ध होने या किसी अन्य आनुशांगिक कारण, जिसे वो तात्विक रूप से उचित पाता हो, के आधार पर अनुज्ञप्तिकारी को अनुज्ञप्ति धारण करने के लिए अयोग्य व्यक्ति की श्रेणी में पाता है तो वह शस्त्र अनुज्ञप्ति को निलंबित/प्रतिसंहरित कर सकता है।

(12) अग्नेयास्त्रों के लाइसेंस सुरक्षा की दश्श्टि से स्वीकश्त किये जाते हैं। इनका प्रयोग शादी-विवाह अथवा सार्वजनिक स्ाि◌ानों पर प्रदर्शन नहीं किया जाना चाहिए। ऐसा किये जाने से जनता में भय का वातावरण व्याप्त होता है। जो व्यक्ति शस्त्रों का प्रयोग प्रदर्शन हेतु अथवा जनता में भय व्याप्त करते हुए पाए जाएॅ, उनके शस्त्र लाइसेंस की शर्त संख्या 5 का उल्लंघन करने के आरोप में एवं शस्त्र अधिनियम की धारा 17 (3) (ख), (घ), (ड़) के अधीन तत्काल निरस्त करते हुए विधिक कार्यवाही की जा सकती है।

(13) यदि लाइसेंसिंग अधिकारी के समक्ष सामग्री है और उन्हें यह स्पश्ट हो जाता है कि लाइसेंसी के पास शस्त्र रहने से शांति एवं जनसुरक्षा खतरे में पड़ सकती है, तो वह (लाइसेंसिंग अधिकारी) उक्त तथ्यों को अभिलिखित करने के उपरांत सीधे अथवा किसी जाॅच अथवा लाइसेंसी की सुनवाई का अवसर दिये बिना लाइसेंस निलम्बित/निरस्त कर सकते हैं, परंतु उन मामलों में जिनमें लाइसेंसिंग अधिकारी को यह स्पश्ट है कि लाइसेंसी के पास शस्त्र रहने से जनशान्ति या जनसुरक्षा खतरे में पड़ सकती है और सही स्थित की जानकारी हेतु जाॅच लंबित हो तो

ऐसी जाॅच के दौरान लाइसेंस निरस्त नहीं किया जा सकता है।

(14) आयुध अधिनियम की धारा 17 के अंतर्गत किसी कार्यवाही को प्रचलित करने से पहले जिला मजिस्टे*ट/अनुज्ञप्ति प्राधिकारी के लिए यह आवश्यक है कि वह अपने समक्ष प्रस्तुत पत्रावली पर अनुज्ञप्तिधारी की शस्त्र अनुभाग से मूल पत्रावली में संलग्न शस्त्र आवेदन, शपथपत्र, आख्या एवं सुसंगत दस्तावेजों का सूक्ष्म अध्ययन कर लें, ताकि यह सुनिश्चित किया जा सके कि अनुज्ञप्तिधारी द्वारा गलत तथ्यों के आधार पर शस्त्र आवेदन तो नहीं किया गया है या किसी शर्त का उल्लंघन तो नहीं किया गया है?

(15) उपरोक्त निर्देशों के अतिरिक्त आयुध अधिनियम-1959, आयुध नियमावली-2016 समय समय पर माननीय सर्वोच्च न्यायालय एवं माननीय उच्च न्यायालय इलाहाबाद द्वारा पारित आदेशों, भारत सरकार एवं राज्य सरकार द्वारा समयकभ् पर निर्गत निर्देशों का भी सम्यक अनुपालन किया जाए एवं यदि उक्त का अनुज्ञप्तिधारी द्वारा उल्लंघन पाया जाता है तो उसके शस्त्र अनुज्ञप्ति के निलंबन/निरस्तीकरण की विधि सम्मत कार्यवाही सुनिश्चित की जाय।

3. इस संबंध में मा0 न्यायालय द्वारा निम्नलिखित वादों (1) सी0पी0 साहू बनाम उत्तर प्रदेश राज्य 1984 ए0डब्लू0सी0 145,(2) कैलाश नाथ बनाम उत्तर प्रदेश राज्य 1985 ए0डब्लू0सी0 493, (3) हरप्रसाद बनाम उत्तर प्रदेश राज्य 2005 (5) ए0डब्लू0सी0 4939 तथा (4) नेशनल कैपिटल टेरिटरी आॅफ डेलही बनाम उमेश कुमार 2008 (3) एस0सी0सी0 क्रिमिनल 490 में पारित निर्णयों का सम्यक् अवलोकन करने के उपरान्त उमें दिये गये निर्देशों का पालन करते हुए ही कोई निर्णय लिया जाए।

4. कृपया उक्त निर्देशों का कड़ाई से अनुपालन सुनिश्चित किया जाए।""

34. In **Hari Prasad Vs. State of U.P. and others** (*supra*) judgments cited by learned counsel for the petitioner this Court held in paragraph Nos. 4 and 5 as under:-

"4. It is apparent from the record that the aforesaid finding is perverse and against the record as the petitioner has already been acquitted in Case Crime No. 170/93. The non-cognizance report No. 242/96 dated 7.9.1996 under Sections 252 and 504 I.P.C. was also not investigated. Involvement and pendency of a case crime is no ground for cancellation of fire-arm licence. It is settled law, that after acquittal the very basis for cancellation of the arms licence stands vitiated. In this regard reference of the decision rendered in ***Lalji v. Commisioner, Kanpur and Anr. MANU/UP.0661/1999*** *has been made.*

5. The question as to whether mere involvement in a criminal cae or pendency of a criminal case can be a ground for revocation of the licence under Section 17 of the Arms Act has been considered by a Division Bench of this Court in ***Sheo Prasad Misra v. The District Magistrate Basti and others, 1979 (16) ACC 6 (Sum)*** *wherein the Division Bench relied upon an earlier decision in* ***Masi Uddin v. Commissioner, Allahabad, 1972 ALJ 573.*** *In both the aforesaid cases it has been held mere involvement in a criminal case cannot in any way affect the public security or public interest. In view of this proposition of law the order cancelling or revoking the licence of the petitioner or the aforesaid ground of involvement and pendency of a criminal case is not tenable."*

35. From the aforesaid judgments some of the following propositions of law may be summarized as under:

(i) Right to hold fire arm licence granted by the authorities in accordance with the provisions contained in the Arms Act, 1959 is a valuable right of an individual.

(ii) Licencing authority has the power to suspend or revoke an arm's licence only if any of the conditions mentioned in Sub-Clauses (a) to (e) of Sub Section (3) of Section 17 of the Arms Act exists.

(iii) The provisions of Section 17 of the Act cannot be invoked lightly in an arbitrary manner.

(iv) The licencing authority has to satisfy itself if it is necessary for the security of public peace or for public safety to suspend or revoke the licence.

(v) Such satisfaction of the licencing authority must be expressed in the order and must be based on relevant material.

(vi) Public peace or public safety do not mean ordinary disturbance of law and order. Public safety means safety of the public at large and not of few persons only.

(vii) Mere involvement or pendency of a criminal case does not, of its own, necessarily affect public peace or public safety. The licencing authority in each case has to record a finding as to how and under what circumstances the possession of the arm licence is detrimental to the public peace or public safety.

(viii) On mere apprehension of misuse of fire arm or that the licencee would extend threat to the persons of the weaker section, the arm licence cannot be cancelled. There must be some positive incident in which the licencee participated or used his arm, leading to breach of public peace or public security.

(ix) After acquittal of the licencee from the criminal case, the very basis of cancellation of arm licence is vanished.

36. In the present case the petitioner's licence was cancelled by the District Magistrate on the ground of pendency of criminal case against him. The petitioner was later on acquitted of the criminal case by order dated 17.1.2003. A perusal of the order of acquittal does not show the use of fire arm. After acquittal the very basis of the order of cancellation vanished. The finding of the District Magistrate as affirmed by the Commissioner, that it was not in the interest of public peace and the public security that the licence remained with the petitioner/licencee, is not based on any evidence/material, except the police reports which in their turn were in view of the pendency of the criminal case against the petitioner. On mere apprehension expressed in the impugned orders that the petitioner would misuse the fire arm and would extend threat to the persons of the weaker section of the society, the arm licence could not be cancelled.

37. I do not find any substance in the submission advanced by learned Standing Counsel in support of the impugned orders, in view of the above discussion.

38. The writ petition deserves to be allowed and is hereby allowed. The orders impugned are quashed. However, quashing of the impugned orders would not result in revival of the petitioner's fire arm licence automatically. The petitioner may apply for arm licence afresh under the Arms Act,

1959 read with Arms Rules, 2016 before the Licencing Authority, along with a certified copy of this Judgment, if so desires, to have the arm licence. If any such application is filed before the licencing authority within a period of 30 days, the same shall be considered and decided expeditiously by the licencing authority strictly in accordance with law but the licencing authority shall not refuse the arm licence on the ground of the impugned orders which have been quashed by this judgment.

39. Writ petition is allowed. No orders as to costs.

(2020)02ILR A564

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 14.01.2020

BEFORE
THE HON'BLE MANOJ KUMAR GUPTA, J.

Writ C No. 62221 of 2012

UPSRTC Etawah ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri M.M. Sahai

Counsel for the Respondents:
C.S.C., Sri Ranjeet Kumar Mishra

A. Departmental enquiry - - employee found guilty - hence removed - award made against the petitioner- right of the petitioner - opportunity to provide counter evidences, violated - order of the respondent quashed - award to be made after providing an opportunity of hearing.

Held, The Petitioner-Corporation (U.P.S.R.T.C.), having already reserved it's right to provide for counter evidence in case of a disciplinary enquiry finding them at fault. The petitioner was deprived of any such opportunity and the respondents in a hasty manner proceeded to pass the impugned order which stands as a manifest error of law. Hence, the impugned award cannot be sustained and is hereby quashed. The matter is remitted back to the Tribunal for deciding the same afresh in accordance with law in the light of the observations made in the judgement.

Cases cited

1. Delhi Cloth & General Mills Co. v. Ludh Budh Singh, 1972 (3) SCR 29.

2. Shankar Chakravarti v. Britannia Biscuit Co. Ltd. and Another, AIR 1979 SC.

3. Kurukshetra University v. Prithvi Singh, AIR 2018 SC 973.

(Delivered by Hon'ble Manoj Kumar Gupta, J.)

1. The instant petition is directed against the award dated 12.12.2011 passed by Industrial Tribunal (3) U.P., Kanpur on a reference made to it under the U.P. Industrial Disputes Act, 1947. The reference was whether the termination of service of Babu Ram, employee of the petitioner-Corporation on 28.11.2002 was proper and valid and if not, the relief to which the workman was entitled to. The reference has been answered in favour of the workman. As the workman had died on 17.10.2014 i.e., during pendency of the proceedings, therefore, he has been given relief of continuity in service till 17.10.2004 after holding the removal order dated 28.11.2002 to be illegal. The petitioner-Corporation has been directed to pay full back wages till the date of death of the workman.

2. The facts in brief are that Babu Ram (now represented by his son,

respondent No.3), was working as driver with the petitioner-Corporation. While he was driving Bus No.UP-75A/3279 belonging to the petitioner-Corporation, it met with an accident on Agra-Tundla Highway. In the said accident, one Awdhesh Kumar Yadav died. In a claim petition filed before the Motor Accident Claims Tribunal, by heirs and legal representatives of Awdhesh Kumar Yadav bearing No.108 of 1996 against the petitioner-Corporation, in which Babu Ram was arrayed as respondent No.2, it was held that the accident was an outcome of rash and negligent driving of the bus by Babu Ram and not any contributory negligence of the deceased. In sequel thereto, the petitioner-Corporation initiated departmental enquiry against Babu Ram. Babu Ram participated in the disciplinary enquiry. Ultimately, the enquiry officer submitted his report opining that Babu Ram was not responsible for the accident. The Regional Manager, who is the disciplinary authority, did not agree with the enquiry officer. He issued a show cause notice dated 30.1.2002 to Babu Ram stating his disagreement with the report of the enquiry officer while placing reliance on the judgement of Motor Accident Claims Tribunal. He was required to show cause as to why the loss caused to the Corporation as a result of rash and negligent driving be not recovered from him and why his services be not dispensed with. Babu Ram replied to the said notice on 27.5.2002. The Regional Manager after considering the enquiry report and the reply furnished by Babu Ram to the show cause notice and other evidence held Babu Ram guilty of the charges framed against him and directed for recovery of a sum of Rs.2,34,000/- from him and also for his removal from service. Babu Ram being aggrieved thereby sought reference of the dispute to the Industrial Tribunal and in pursuance whereof the impugned award was passed.

3. The Tribunal has held that the departmental enquiry held by the Corporation was in violation of principles of natural justice in as much as the show cause notice issued to Babu Ram disagreeing with the recommendations made by the enquiry officer does not contain any reason. According to the Tribunal, the reliance placed upon the award of the Motor Accident Claims Tribunal in disagreeing with the report of the enquiry officer was not a valid reason, as the said award was very much in existence when the enquiry officer submitted his report. The show cause notice should have contained other reasons. It has further been held that before inflicting major punishment, Babu Ram should have been given opportunity to submit his defence in writing and lead oral evidence but which was not granted to him and consequently there was violation of principles of natural justice. The order of removal, was therefore, held to be illegal and the reference answered in favour of the workman.

4. Learned counsel for the petitioner submitted that the findings recorded by the Tribunal are wholly illegal and perverse. It is pointed out that the show cause notice issued to Babu Ram on 30.1.2002 by the disciplinary authority contained specific reason to the effect that the court in its award found him guilty of rash and negligent driving. It is submitted that the finding recorded by the Tribunal that the show cause notice does not disclose any reason for disagreement with the opinion of the enquiry officer is thus wholly perverse and against the record. His

further submission is that at the stage of second show cause notice against proposed punishment, there is no requirement of permitting the delinquent to lead oral evidence. Thus the view taken by the Tribunal is manifestly illegal. It is also urged that the petitioner-Corporation in paragraph 17 of the written statement reserved its right to prove charges before the Tribunal in case any fault is found with the departmental enquiry. Even if disciplinary enquiry held by the Corporation was discarded by the Tribunal, it ought to have given opportunity to the petitioners to lead evidence to prove the charge but in great haste it proceeded to pass the impugned award without affording such opportunity.

5. *Per contra*, learned counsel for respondent No.3 submitted that the departmental enquiry was initiated by the petitioner-Corporation almost three years after the accident took place. He further submitted that the enquiry officer had absolved Babu Ram of the charges levelled against him and consequently order of removal passed by the disciplinary authority was wholly illegal. He further submitted that the findings recorded by the Tribunal in relation to violation of principles of natural justice are findings of facts.

6. I have considered the submissions of learned counsel for the parties and perused the record.

7. The disciplinary authority, after receipt of enquiry report given by the enquiry officer admittedly issued show cause notice dated 30.1.2002 to Babu Ram. The show cause notice specifically records that he is in disagreement with the opinion of the enquiry officer. The reason being that the Motor Accident Claims Tribunal in its award had found him guilty of rash and negligent driving. Babu Ram was also called upon to show cause as to why he should not be removed from service and why the loss caused to the Corporation to the tune of Rs.2,34,000/- be not recovered from him. It was followed by another notice dated 6.5.2002 in which also his explanation against proposed punishment was called for. The notice dated 30.1.2002 specifically contains reason for not agreeing with the recommendation made by the enquiry officer. The delinquent was thus fully aware of the fact that the disciplinary authority was not in agreement with the recommendation made by the enquiry officer and also the reason for disagreement. This also is the object of issuance of show cause notice when the disciplinary authority is in disagreement with the recommendation made by the enquiry officer. Such requirement stands fully achieved by the show cause notice issued to Babu Ram. The mere fact that the material, i.e. the award of the Motor Accident Claims Tribunal relying on which the disciplinary officer had disagreed with the recommendation made by the enquiry officer, was also available at the stage enquiry officer submitted his report, would not preclude the disciplinary authority to place reliance on such material. Moreover, there is no legal requirement that at the stage of second show cause notice against proposed punishment, any fresh enquiry be held by permitting the delinquent to lead oral evidence, as observed by the Tribunal.

8. Thus on both scores, I am of the considered onion that the findings returned by the Tribunal in relation to violation of principles of natural justice are not

sustainable in law. Moreover, even if the disciplinary enquiry was found to be vitiated on the ground of violation of principles of natural justice, it is now well settled that where the employer has reserved its right to prove the charges before the Tribunal, the Tribunal is bound to give opportunity to the employer to lead evidence. The legal position in this regard was settled by the Supreme Court in **Delhi Cloth & General Mills Co. v. Ludh Budh Singh, 1972 (3) SCR 29** by holding as follows :-

*"**(4)** When a domestic enquiry has been held by the management and the management relies on the same, it is open to the latter to request the Tribunal to try the validity of the domestic enquiry as a preliminary issue and also ask for an opportunity to adduce evidence before the Tribunal, if the finding on the preliminary issue is against the management. However elaborate and cumbersome the procedure may be, under such circumstances, it is open to the Tribunal to deal, in the first instance, as a preliminary issue the validity of the domestic enquiry. If its finding on the preliminary issue is in favour of the management, then no additional evidence need be cited by the management. But, if the finding on the preliminary issue is against the management, the Tribunal will have to give the employer an opportunity to cite additional evidence and also give a similar opportunity to the employee to lead evidence contra, as the request to adduce evidence had been made by the management to the Tribunal during the course of the proceedings and before the trial has come to an end. When the preliminary issue is decided against the management and the latter leads evidence before the Tribunal, the position, under such circumstances, will be, that the management is deprived of the benefit of having the finding of the domestic Tribunal being accepted as prima facie proof of the alleged misconduct. On the other hand, the management will have to prove, by adducing proper evidence, that the workman is guilty of misconduct and that the action taken by it is proper. It will not be just and fair either to the management or to the workman that the Tribunal should refuse to take evidence and thereby ask the management to make a further application, after holding a proper enquiry, and deprive the workman of the benefit of the Tribunal itself being satisfied, on evidence adduced before it, that he was or was not guilty of the alleged misconduct.*

***(5)** The management has got a right to attempt to sustain its order by adducing independent evidence before the Tribunal. But the management should avail itself of the said opportunity by making a suitable request to the Tribunal before the proceedings are closed. If no such opportunity has been availed of, or asked for by the management, before the proceedings are closed, the employer can make no grievance that the Tribunal did not provide such an opportunity. The Tribunal will have before it only the enquiry proceedings and it has to decide whether the proceedings have been held properly and the findings recorded therein are also proper.*

***(6)** If the employer relies only on the domestic enquiry and does not simultaneously lead additional evidence or ask for an opportunity during the pendency of the proceedings to adduce such evidence, the duty of the Tribunal is only to consider the validity of the domestic enquiry as well as the finding recorded therein and decide the matter. If*

the Tribunal decides that the domestic enquiry has not been held properly, it is not its function to invite suo motu the employer to adduce evidence before it to justify the action taken by it."

9. The above principles of law was reiterated with approval in **Shankar Chakravarti v. Britannia Biscuit Co. Ltd. and Another, AIR 1979 SC 1653** by a three Judges' Bench of the Supreme Court in following words :-

".....After an exhaustive review of the decisions bearing on the question and affirming the ratio in R.K. Jain's case (1972 Lab IC 13) this Court extracted the emerging principles from the review of decisions. Propositions 4, 5 and 6 would be relevant for the present discussion."

10. In a recent judgement of the Supreme Court in **Kurukshetra University v. Prithvi Singh, AIR 2018 SC 973,** the Supreme Court did not approve the approach of the Labour Court where it proceeded to answer the reference in favour of the workman, after holding that the departmental enquiry stood vitiated on account of violation of principles of natural justice without granting the employer opportunity to lead evidence to prove the charges. The relevant observations made by the Supreme Court are extracted below :-

"24. We are constrained to observe that first, the Labour Court committed an error in not framing a "preliminary issue" for deciding the legality of domestic enquiry and second, having found fault in the domestic inquiry committed another error when it did not allow the appellant to lead independent evidence to prove the misconduct/ charge on merits and straightaway proceeded to hold that it was a case of illegal retrenchment and hence the respondents' termination is bad in law.

31. The Labour Court will now afford the appellant (employer) an opportunity to lead evidence to prove the misconduct alleged by them in the written statement against the respondent and depending upon the findings, which the Labour Court would record on the issue of misconduct, the issue of termination would be decided in the light of what we have observed supra."

11. In the instant case also, albeit the petitioner-Corporation having reserved its right to prove the charges by leading evidence before the Tribunal in case the disciplinary enquiry was found to be vitiated, no such opportunity was given to the petitioner-Corporation, but in great haste it straight away proceeded to allow the reference resulting in manifest error of law.

12. For all the reasons mentioned above, the impugned award cannot be sustained and is hereby quashed. The matter is remitted back to the Tribunal for deciding the same afresh in accordance with law in the light of the observations made above.

13. The petition stands allowed accordingly.

(2020)02ILR A568

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 28.01.2020

BEFORE
THE HON'BLE ASHOK KUMAR, J.

Writ C No. 62814 of 2017

Deepak Kumar ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Kamal Kumar Singh, Sri Kamal Nayan, Sri Kunal Shah, Sri Ram Prakash Dwivedi

Counsel for the Respondents:
C.S.C.

क. 'kL«k अधिनियम, 1959 – धारा 17 एवं 18 – लाइसेन्स निरस्तीकरण – जिलाधिकारी द्वारा पारित आदेश की वैधानिकता – आयुक्त द्वारा पूर्व में सम्यक तरीके से अपील में आदेश पारित किया गया – पत्रावली पर कोई आख्या नहीं, जिसके आधार पर कहा जा सके कि याची से लोकशान्ति भंग का खतरा है – पुलिस आख्या को जिलाधिकारी ने तोड़ मरोड़ कर प्रस्तुत किया है – जिलाधिकारी का आदेश प्रथम दृ टया अपीलीय न्यायालय द्वारा पारित आदेश का उल्लंघन है। (पैरा 30, 31, 39 एवं 51)

A. Civil Law-Arms Act, 1959 – Section 17 and 18 – Cancellation of Licence – Legality of the order passed by District Magistrate – Earlier the Commissioner passed the justified order in appeal – There is no report in the record, on the basis of which it can be said that there is threat to public peace by the petitioner – Police Report is presented by the District Magistrate by twisting the same – The order of District Magistrate is prima facie violative of the order passed by the appellate court. (Para 30, 31, 39 and 51)

ख. न्यायिक प्रक्रिया – न्यायिक अनुशासन – अवर न्यायालय का क्षेत्राधिकर – यह सुस्थापित है कि सम्यक न्यायालय द्वारा कोई निर्देश दिए जाने पर अवर न्यायालय का क्षेत्राधिकार सिर्फ उक्त निर्देश का अनुपालन करने तक सीमित है न कि अन्यथा। (पैरा 42)

B. Civil Law-Judicial process – Judicial Discipline – Jurisdiction of lower court – It is well settled that after the direction being passed by the court in accordance with law, the jurisdiction of the lower court remain only to comply with the same direction, nothing else. (Para 36)

Writ Petition allowed (E-1)

उल्लेखित पूर्व निर्णय:-

1- कुबेर सिंह व अन्य बनाम दिग्विजय सिंह व अन्य ए.आई. आर. 1968 इला0 126

2- के.टी. सुरेश कुमार बनाम पी. कुन्हप्पा नायर एवं अन्य (1999) 2 एस.सी.सी. 711

3- राम चरन बनाम उ0 प्र0 सरकार व अन्य

4- रिट सी नं0 – 62813 व र्ा 2017 जय प्रकाश उर्फ राजू बनाम उ0 प्र0 सरकार व तीन अन्य दिनांकित 12.03. 2019

(Delivered by Hon'ble Ashok Kumar, J.)

1. याची के विद्वान अधिवक्ता श्री कुनाल शाह एवं विपक्षी के विद्वान अधिवक्ता अपर मुख्य स्थायी अधिवक्ता श्री पी०के०गिरि को विस्तृत रूप से सुना व पत्रावली का अवलोकन किया।

2. प्रस्तुत याचिका के माध्यम से याची द्वारा आयुक्त, चित्रकूट धाम मण्डल, बान्दा के आदेश दिनांक 28.11.2017 एवं जिलाधिकारी, चित्रकूट के आदेश दिनांक 17.01.2017 को यह कहते हुए चुनौती दी कि उक्त दोनों आदेश पूर्णतः अवैधानिक व असंगत हैं अतएव निरस्त होने योग्य हैं।

3. संक्षेप में प्रस्तुत याचिका के तथ्य इस प्रकार हैं कि याची दीपक कुमार पुत्र रमाशंकर, निवासी ग्राम बेराउर, पुलिस स्टेशन चित्रकूट को विपक्षी संख्या- 3 जिलाधिकारी, चित्रकूट द्वारा 315 बोर शस्त्र रायफल नं०- एबी 1100227 जिसका कि शस्त्र लाइसेन्स संख्या- 1964/2011 है, दिनांक 03 जून, 2011 के आदेश के अनुपालन में प्रदान किया गया था।

4. याची के विद्वान अधिवक्ता द्वारा यह कथन किया गया कि याची दीपक कुमार अपने परिवार के भरण-पोंषण हेतु जिला रायबरेली में

नौकरी कर रहे हैं तथा दिनांक 17.12.2012 को याची व एक अन्य व्यक्ति जय प्रकाश उर्फ राजू के विरुद्ध धारा 27/30 शस्त्र अधिनियम के अन्तर्गत प्रथम सूचना रिपोर्ट पंजीकृत की गई।

5. उक्त प्रथम सूचना रिपोर्ट में यह विवरण दिया गया कि जय प्रकाश उर्फ राजू एक दबंग एवं शातिर किस्म का अपराधी है तथा वह मूलतः थाना सलोन जनपद अमेठी का निवासी है जिसके विरुद्ध एक मुकदमा अपराध संख्या 645/2012, धारा 307 आई०पी०सी० के अन्तर्गत पंजीकृत है।

6. प्रथम सूचना रिपोर्ट में यह विवरण दिया गया कि उक्त जय प्रकाश उर्फ राजू के साथ याची एक चार पहिया वाहन में बैठकर (टवेरा गाड़ी) तहसील गेट के निकट से जा रहा था। उक्त टवेरा गाड़ी की खिड़कियों के बाहर रायफल की नालें निकालकर वह अपनी रायफल का प्रदर्शन कर रहा था जिससे जनता में भय व्याप्त हो गया था जो कि शस्त्र अनुज्ञाशर्तों का उल्लंघन है।

7. प्रथम सूचना रिपोर्ट अन्तर्गत धारा 27/30, आयुद्ध अधिनियम के परिप्रेक्ष्य में याची को गिरफ्तार किया गया तत्पश्चात याची का शस्त्र लाइसेन्स निलम्बित किया गया।

8. शस्त्र लाइसेन्स का निरस्तीकरण आदेश दिनांक 28.07.2014 को जिलाधिकारी, चित्रकूट द्वारा पारित किया गया।

9. उक्त निरस्तीकरण आदेश दिनांक 28.07.2014 से क्षुब्ध होकर याची द्वारा न्यायालय आयुक्त, चित्रकूटधाम मण्डल, बान्दा के समक्ष धारा 18 आयुद्ध अधिनियम के अन्तर्गत अपील प्रस्तुत की गई।

10. आयुक्त, चित्रकूटधाम मण्डल, बान्दा द्वारा याची द्वारा प्रस्तुत अपील को स्वीकार करते हुए अवर न्यायालय (जिलाधिकारी) द्वारा पारित आदेश दिनांक 28.07.2014 को निरस्त किया गया तथा निम्न टिप्पणियों के साथ पुनः जाँच कराकर प्रकरण का निस्तारण विधिक रूप से करने का आदेश पारित किया गया:-

"मैंने उभय पक्षों के उक्त तर्कों पर गम्भीरता पूर्वक विचार करते हुए अपील पत्रावली एवं अवर न्यायालय की पत्रावली तथा अवर न्यायालय के प्रश्नगत आदेश का सम्यक अवलोकन व परिशीलन किया, जिससे स्पष्ट है कि अपीलकर्ता द्वारा अपने लाइसेंसी शस्त्र द्वारा किसी प्रकार की फायरिंग आदि करके अपने शस्त्र का दुरुपयोग किया जाना नहीं पाया जाता है। शस्त्र लेकर मात्र गाड़ी में बैठना शस्त्र का दुरुपयोग व लाइसेंस की शर्तों का उल्लंघन व शस्त्र का प्रदर्शन कर जनता में भय व्याप्त किया जाना नहीं माना जा सकता है, जब तक कि लाइसेंसी अपराधिक प्रकृति का व्यक्ति साबित न हो। अपीलकर्ता का कहना है कि पुलिस आख्या अपीलकर्ता का शस्त्र निरस्तीकरण हेतु राजनैतिक दबाव में प्रेषित की गयी है, जिसके सम्बन्ध में अपीलकर्ता को अवर न्यायालय में समुचित सुनवाई का अवसर प्राप्त नहीं हुआ है।"

11. आयुक्त, चित्रकूटधाम मण्डल, बान्दा के आदेश दिनांक 05.05.2016 के अनुपालन में जिलाधिकारी, चित्रकूट द्वारा पुलिस अधीक्षक, चित्रकूट से आख्या प्राप्त की गई जिसे कि पुलिस अधीक्षक, चित्रकूट द्वारा दिनांक 23 जून, 2016 को प्रेषित किया गया।

12. पुलिस अधीक्षक, चित्रकूट की आख्या दिनांक 23 जून, 2016 के मुख्य अंश निम्नवत है:-

"उक्त सन्दर्भ में सादर अवगत कराना है कि प्रभारी निरीक्षक राजापुर की जाँच आख्या से प्राप्त कि गयी। शस्त्र अनुज्ञापी दीपक कुमार पुत्र श्री रमाशंकर निवासी बेराउर थाना राजापुर जनपद-चित्रकूट के विरुद्ध थाना अभिलेखानुसार अपराधिक इतिहास शून्य है। क्षेत्र में आम शोहरत ठीक बतायी जाती है, विपक्षी उपरोक्त के विरुद्ध जनपद-अमेठी थाना सलौन में निम्न अभियोग पंजीकृत है

01. मु०अ०सं०-814/12 धारा-27/30 आर्म्स एक्ट थाना सलौन, जनपद-अमेठी।

उपरोक्त सम्बन्ध में प्रभारी निरीक्षक राजापुर की आख्या से पाया गया है कि शस्त्र धारक द्वारा शस्त्र का दुरुपयोग किये जाने की संभावना से इनकार नही किया जा सकता है। निलम्बन आदेश वापस करने की संस्तुति नही की जाती है।

आख्या सादर अवलोकनार्थ प्रेषित है।"

13. याची के विद्वान अधिवक्ता द्वारा इस न्यायालय का ध्यान पुलिस अधीक्षक, रायबरेली द्वारा प्रेषित आख्या की ओर आकर्षित किया गया जिसे कि जिलाधिकारी, जनपद चित्रकूट द्वारा माँगा गया था।

14. पुलिस अधीक्षक, रायबरेली द्वारा निम्न टिप्पणी के साथ अपनी आख्या दिनांक 24 नवम्बर, 2016 को प्रेषित की गई:-

"उपरोक्त संदर्भ में सादर अवगत कराना है कि प्रश्नगत प्रकरण के सम्बन्ध में क्षेत्राधिकारी सलोन से आख्या प्राप्त की गयी, जिनकी आख्या के साथ प्रभारी निरीक्षक सलोन जनपद रायबरेली की आख्या संलग्नकर आवश्यक कार्यवाही हेतु सादर अवलोकनार्थ प्रेषित है।"

15. पुलिस अधीक्षक, रायबरेली ने अपनी आख्या में यह स्पष्टतः लिखा है कि प्रभारी निरीक्षक सलोन, जनपद रायबरेली (जिस स्थान में याची कार्यरत है) द्वारा उन्हें उक्त संदर्भ में अपनी निम्न आख्या दिनांक 17 नवम्बर, 2016 को प्रेषित की:-

"सेवा में,

श्रीमान जी निवेदन इस प्रकार है कि अभि० दीपक कुमार पुत्र रमाशंकर नि० बेराउर थाना राजापुर जिला चित्रकूट के विरुद्ध थाना हाजा पर दि० 17.12.2012 के मु०अ०सं०-814/2012 धारा 27/30 आर्म्स एक्ट का वादी एस.एच.ओ. श्री जंग बहादुर थाना प्रभारी सलोन के तरफ से पंजीकृत कराया गया था। जिसमें अभि० उपरोक्त के विरुद्ध रजि० 8 में देखने पर कोई अन्य अपराध पंजीकृत नही अभि० उपरोक्त की जांच अन्य थानो से व गृह जनपद चित्रकूट से जांच कराने की आवश्यकता है। श्रीमान जी रिपोर्ट सेवा में अग्रसारित है।

रिपोर्ट सेवा में प्रेषित है।"

16. उपरोक्त रिपोर्ट को प्राप्त होने के उपरान्त जिलाधिकारी, चित्रकूट ने आयुक्त, चित्रकूटधाम मण्डल, बान्दा द्वारा प्रतिप्रेषित वाद का पुनः निर्धारण दिनांक 17.01.2017 के आदेश के माध्यम से किया गया।

17. जिलाधिकारी, चित्रकूट ने अपने आदेश दिनांक 17.01.2017 में यह स्पष्टतः अंकन किया है कि अपीलीय न्यायालय के आदेश के क्रम में उपरोक्त वाद पुनर्स्थापित कर पुनः उनके द्वारा विचारणीय है एवं यह कि अपीलीय न्यायालय के उक्त आदेश में इंगित बिन्दुओं पर जाँच आख्या उपलब्ध कराये जाने हेतु पुलिस अधीक्षक, रायबरेली व चित्रकूट को निर्देशित किया गया। जिलाधिकारी, चित्रकूट द्वारा सम्यक विचारोपरान्त अपने आदेश दिनांक 17.01.2017 में निम्न तथ्यों का विवरण दिया गया:-

"पुलिस अधीक्षक द्वारा थानाध्यक्ष सलोन की दिनांक 15.01.2013 को उपलब्ध करायी रिपोर्ट के अनुसार मु०अ०सं०-645/12 के अभियुक्त के साथ शस्त्र लाइसेंस का प्रदर्शन करने के तत्समय भी विपक्षी के विरुद्ध मु०अ०सं०- 814/12 धारा 27/30 आर्म्स एक्ट पंजीकृत था, जिसके आधार पर इस न्यायालय द्वारा पारित आदेश दिनांक 28.07.2014 के अन्तर्गत विपक्षी का उक्त शस्त्र लाइसेंस निरस्त कर दिया गया था परन्तु इस न्यायालय के उक्त आदेश के विरुद्ध योजित अपील में आयुक्त महोदय द्वारा पारित आदेश दिनांक 05.05.2016 के अन्तर्गत इस न्यायालय का उक्त आदेश निरस्त कर दिया तथा शस्त्रधारक के आचरण व उसकी आम शोहरत, अपराधिक इतिहास एवं शस्त्रधारक के पास शस्त्र लाइसेंस बने रहने पर उसके निवास के क्षेत्र व कार्यक्षेत्र अमेठी व रायबरेली के लोग अपने आपको भयभीत व असुरक्षित महसूस करेंगे या सुरक्षित महसूस करेंगे, के सम्बन्ध में जाँच कराकर प्रकरण को पुनः विधिक रूप से निस्तारित किये जाने हेतु निर्देश आयुक्त महोदय द्वारा निर्देश दिये गये। मा० अपीलीय न्यायालय के उक्त निर्देश के क्रम में पुलिस अधीक्षक रायबरेली व चित्रकूट की प्राप्त उक्त जाँच आख्याओं के अन्तर्गत अवगत कराया गया है कि शस्त्र शस्त्रधारक के विरुद्ध थाना सलोन पर मु०अ०सं०- 814/12 धारा 27/30 आर्म्स एक्ट पंजीकृत है इस प्रकार प्रश्नगत लाइसेंसी शस्त्र के दुरुपयोग के सम्बन्ध में ही शस्त्र धारक उपरोक्त के विरुद्ध उक्त मुकदमा अपराध पंजीकृत है, ऐसी स्थिति में शस्त्र धारक की आम सोहरत अच्छी न होने एवं शस्त्र का दुरुपयोग होने को दृष्टिगत रखते हुए लाइसेंस को बहाल किये जाने की संस्तुति पुलिस अधीक्षक द्वारा नहीं की गयी है।"

18. ऊपरलिखित उक्त तथ्यों के विचरण पश्चात एवं पुलिस अधीक्षक, रायबरेली व पुलिस अधीक्षक, चित्रकूट द्वारा उपलब्ध कराई गई आख्याओं को दृष्टिगत रखने के उपरान्त जिलाधिकारी चित्रकूट द्वारा याची का शस्त्र लाइसेंस इस निष्कर्ष के साथ निरस्त किया गया कि याची के विरुद्ध एक अपराध मुकदमा पंजीकृत है एवं उसके पास शस्त्र लाइसेंस के बने रहने से लोक शान्ति एवं लोक सुरक्षा को खतरा है।

19. जिलाधिकारी के आदेश दिनांक 17.01.2017 के विरुद्ध याची द्वारा पुनः धारा 18 शस्त्र अधिनियम के अन्तर्गत अपील आयुक्त, चित्रकूटधाम मण्डल, बान्दा के सम्मुख प्रस्तुत की गई।

20. उपरोक्त अपील का निर्णय आयुक्त, चित्रकूटधाम मण्डल, बान्दा द्वारा दिनांक 28 नवम्बर, 2017 को किया गया जिस निर्णय से याची का शस्त्र लाइसेन्स निरस्तीकरण आदेश जिलाधिकारी द्वारा दिनांक 17.01.2017 को सुसंगत ठहराया गया जिसके विरुद्ध याची द्वारा प्रस्तुत याचिका अनुच्छेद 226 भारत के संविधान के अन्तर्गत प्रस्तुत की गई।

21. याची के विद्वान अधिवक्ता द्वारा यह कथन किया गया कि जिलाधिकारी, चित्रकूट द्वारा जो आदेश 17.01.2017 को पारित किया गया वह आदेश आयुक्त, चित्रकूटधाम मण्डल, बान्दा द्वारा पारित प्रतिप्रेषित आदेश दिनांक 05.05.2016 का घोर उल्लंघन है तथा जो निर्देश आयुक्त, चित्रकूटधाम मण्डल, बान्दा द्वारा अपने प्रतिप्रेषित आदेश दिनांक 05.05.2016 के द्वारा दिये गये थे, जिलाधिकारी द्वारा उक्त निर्देशों की घोर अवहेलना करते हुए याची का शस्त्र लाइसेंस पुनः निरस्त किया गया।

22. याची के विद्वान अधिवक्ता द्वारा अपने कथन में यह कहा गया कि जिस अपराध

संख्या 645/2012 का विवरण जिलाधिकारी द्वारा अपने आदेश में दिया गया है उससे याची का कदापि कोई सम्बन्ध नहीं है व यह कि पुलिस आख्या दिनांक 16.06.2016 (आख्या की सही तिथि 23.06.2016), जो कि पुलिस अधीक्षक, चित्रकूट द्वारा प्रेषित की गई है में याची के विरुद्ध कोई अपराधिक इतिहास का विवरण नहीं दिया गया है तथा यह स्वीकार किया गया है कि याची की शोहरत खराब नहीं है।

23. याची के विद्वान अधिवक्ता द्वारा यह कथन किया गया कि पुलिस आख्या पुलिस अधीक्षक, रायबरेली दिनांक 26.10.2016 के अनुसार भी याची के विरुद्ध कोई अपराधिक इतिहास नहीं पाया गया और न ही जनशान्ति सुरक्षा के विरुद्ध कोई साक्ष्य प्रस्तुत किया गया।

24. याची के विद्वान अधिवक्ता द्वारा दिनांक 24 नवम्बर, 2016 को पुलिस अधीक्षक, रायबरेली द्वारा प्रेषित आख्या की ओर मेरा ध्यान आकर्षित किया गया जिसमें क्षेत्राधिकारी सलोन, रायबरेली द्वारा प्रेषित आख्या दिनांक 17 नवम्बर, 2016 का विवरण है।

25. याची के विद्वान अधिवक्ता द्वारा यह कहा गया कि याची के विरुद्ध सिवाय अपराध संख्या 814/12 अन्तर्गत धारा 27/30 शस्त्र अधिनियम, के अलावा कोई और अन्य अपराधिक मुकदमा कभी भी पंजीकृत नहीं हुआ है व यह कि याची एक सामाजिक व्यक्ति है जो अपने परिवार के भरण-पोंषण हेतु जिला रायबरेली के एक प्रतिष्ठान में सेवारत है।

26. याची के विद्वान अधिवक्ता का कथन है कि कभी भी किसी व्यक्ति द्वारा याची के विरुद्ध जनशान्ति सुरक्षा व व्यक्तिगत सुरक्षा से सम्बन्धित कोई शिकायत किसी भी थाने अथवा मजिस्ट्रेट के सम्मुख की है।

27. अन्त में याची के विद्वान अधिवक्ता ने अपने कथन में यह कहा कि जिलाधिकारी, चित्रकूट द्वारा आयुक्त, चित्रकूटधाम मण्डल, बान्दा के स्पष्ट निर्देशों का जानबूझकर उल्लंघन किया है।

28. याची के विद्वान अधिवक्ता द्वारा पुनः मेरा ध्यान आयुक्त, चित्रकूटधाम मण्डल, बान्दा के निर्णय दिनांक 05.05.2016 की ओर आकर्षित किया गया जिसके अवलोकन से यह सुस्थापित होता है कि आयुक्त, चित्रकूटधाम मण्डल, बान्दा द्वारा अवर न्यायालय (जिलाधिकारी, चित्रकूट) को यह स्पष्ट निर्देश के साथ वाद प्रतिप्रेषित किया गया था कि वे इस तथ्य की गहराई से छानबीन करा लें की याची का आचरण व उसकी आम शोहरत अपराधिक प्रवृत्ति के व्यक्ति की तो नहीं है तथा याची के पास शस्त्र लाइसेंस बने रहने पर उसके निवास के क्षेत्र व उसके कार्य क्षेत्र अमेठी व रायबरेली के लोग अपने आप को भयभीत या असुरक्षित या सुरक्षित महसूस करेंगे ।

29. उक्त स्पष्ट प्रतिप्रेषित आदेश द्वारा आयुक्त, चित्रकूटधाम मण्डल, बान्दा ने जिलाधिकारी, चित्रकूट को स्पष्टतः दो बिन्दुओं पर जाँच करने का निर्देश दिया था परन्तु जिलाधिकारी, चत्रकूट द्वारा प्रतिप्रेषित वाद का निर्धारण करते समय पुलिस अधीक्षक, रायबरेली एवं पुलिस अधीक्षक, चित्रकूट व क्षेत्राधिकारी, सलोन, रायबरेली द्वारा प्रेषित आख्याओं को लगभग पूर्णतः नजर अन्दाज किया साथ ही यह गलत निष्कर्ष निकाला कि थानाध्यक्ष सलोन की आख्या दिनांक 15.01.2013 के अनुसार मुकदमा अपराध सं० 645/2012 के साथ शस्त्र लाइसेंस का

प्रदर्शन करने के कारण याची के विरुद्ध धारा 27/30 शस्त्र अधिनियम के अन्तर्गत केस पंजीकृत किया गया।

30. यहाँ यह देखना उपयुक्त होगा कि जिलाधिकारी, चित्रकूट द्वारा याची के सम्बन्ध में दिये गये निर्देश कि यदि वह शस्त्र लाइसेंस धारक बना रहेगा तो क्या वह उसके निवास क्षेत्र व उसके कार्य क्षेत्र अमेठी व रायबरेली के लोग उससे भयभीत व असुरक्षित महसूस करेंगे अथवा नहीं, इस पर जिलाधिकारी चित्रकूट द्वारा किसी प्रकार की कोई टिप्पणी न करते हुए पुलिस अधीक्षक, रायबरेली एवं पुलिस अधीक्षक, चित्रकूट की आख्याओं को तोड़ मरोड़ कर पेश करते हुए याची के विरुद्ध निर्णय दिनांक 17.01.2017 पारित किया गया।

31. जिलाधिकारी, चित्रकूट का उक्त निर्णय दिनांक 17.01.2017 प्रथम दृष्ट्या आयुक्त, चित्रकूटधाम मण्डल, बान्दा के द्वारा प्रतिप्रेषित आदेश एवं सुस्पष्ट निर्देशों का पूर्णतः उल्लंघन है अर्थात यह कि जिलाधिकारी, चित्रकूट द्वारा आयुक्त, चित्रकूटधाम मण्डल, बान्दा के आदेश का अनुपालन न कर आयुक्त के आदेश की घोर अवमानना व उपेक्षा की गई है अतएव जिलाधिकारी, चित्रकूट द्वारा पारित आदेश दिनांक 17.01.2017 निरस्त होने योग्य है।

32. जिलाधिकारी द्वारा पारित उक्त आदेश दिनांक 17.01.2017 के विरुद्ध जो अपील याची द्वारा आयुक्त, चित्रकूटधाम मण्डल, बान्दा के सम्मुख धारा 18 शस्त्र अधिनियम के अन्तर्गत योजित की गई वह अपील आयुक्त, चित्रकूटधाम मण्डल, बान्दा द्वारा अपने आदेश दिनांक 28 नवम्बर, 2017 को यह कहते हुए निरस्त की गई कि अपील बलहीन है।

33. याची के विद्वान अधिवक्ता द्वारा अपने कथन में आयुक्त, चित्रकूटधाम मण्डल, बान्दा द्वारा पारित अन्तिम आदेश दिनांक 28.11.2017 की ओर इस न्यायालय का ध्यान आकर्षित किया गया।

34. आयुक्त, चत्रकूटधाम मण्डल, बान्दा द्वारा अपने आदेश दिनांक 28.11.2017 में निम्न विवरण दिया गया:-

"उभयपक्षों के तर्को / तथ्यों के अवलोकन के उपरान्त अवर न्यायालय की पत्रावली व प्रश्नगत आदेश का विधिवत परिशीलन कर विचार किया गया। अपीलीय न्यायालय के आदेश दिनांक 05.05.2016 में दिये गये निर्देशानुसार अधीनस्थ न्यायालय द्वारा प्रश्नगत कार्यवाही प्रारम्भ की गयी। पुलिस अधीक्षक, रायबरेली से प्राप्त आख्या दिनांक 24.11.2016 के अनुसार अपीलार्थी के विरुद्ध थाना-सलोन जनपद-रायबरेली में मु०अ०सं०- 814/12 अन्तर्गत धारा 27/33 आर्म्स एक्ट पंजीकृत है। पुलिस अधीक्षक, चित्रकूट से प्राप्त आख्या दिनांक 23.06.2016 के अन्तर्गत 'शस्त्र अनुज्ञापी के विरुद्ध मु०अ०सं०- 814/12 थाना-सलोन में पंजीकृत है, थाना-राजापुर जनपद चित्रकूट में अपराधिक इतिहास शून्य है, आमसोहरत ठीक बतायी जाती है, शस्त्रधारक द्वारा शस्त्र के दुरुपयोग किये जाने की संभावना से इंकार नहीं किया जा सकता है, निलम्बन आदेश वापस करने की संस्तुति नहीं की जाती है इस विरोधाभाषी आख्या से सन्तुष्ट न होकर पुनः पुलिस अधीक्षक चित्रकूट से स्पष्ट आख्या उपलब्ध कराये जाने के निर्देश अधीनस्थ न्यायालय द्वारा दिये गये। इस पर पुलिस अधीक्षक, चित्रकूट द्वारा पुनः आख्या दिनांक 05.01.2017 उपलब्ध करायी गयी जिसके साथ संलग्न उप निरीक्षक, थाना-राजापुर की आख्या दिनांक 14.12.2016 में उल्लिखित है कि मु०अ०सं०- 814/12 थाना-

सलोन में पंजीकृत है। आवेदक ने अपने शस्त्र का दुरुपयोग किया है। आवेदक आपराधिक प्रवृत्ति का है जिसकी आम सोहरत ठीक नहीं है, के आधार पर अधीनस्थ न्यायालय ने यह पाया कि अपीलार्थी के पास शस्त्र लाइसेंस बने रहने से लोकशान्ति एवं लोकसुरक्षा को खतरा है जिसके कारण अपीलकर्ता का शस्त्र लाइसेंस निरस्त किया गया है। अपीलार्थी के विरुद्ध पंजीकृत अपराधिक मामला, आम सोहरत अच्छी न होना एवं अपीलार्थी के पास शस्त्र लाइसेंस बने रहने से लोकशान्ति एवं लोकसुरक्षा को खतरा होना शस्त्र लाइसेंस की शर्तो का स्पष्ट उल्लंघन है, के दृष्टिगत अपीलार्थी के शस्त्र लाइसेंस को बहाल किया जाना औचित्यपूर्ण नहीं है। अतः अपील बलहीन होने के कारण निरस्त किये जाने योग्य है।"

35. उपरोक्त विवरण के परिशीलनोपरान्त यह पूर्णतः स्पष्ट होता है कि आयुक्त, चित्रकूटधाम मण्डल, बान्दा द्वारा उपरोक्त निर्णय पारित करते समय अपने पूर्वाधिकारी (आयुक्त, चित्रकूटधाम मण्डल, बान्दा) के निर्णय दिनांक 05.05.2016 एवं उक्त निर्णय के स्पष्ट निर्देशों का सम्यक परीक्षण नहीं किया गया तथा यह कि आयुक्त, चित्रकूटधाम मण्डल, बान्दा द्वारा जिलाधिकारी, चित्रकूट द्वारा पारित आदेश दिनांक 17.01.2017 को मूल रूप से प्रतिस्थापित कर याची की अपील को यह कहते हुए कि अपील बलहीन है अतएव निरस्त की जाती है, कहकर खारिज किया गया।

36. यहाँ इस न्यायालय का यह कहना उपयुक्त नहीं होगा कि आयुक्त, चित्रकूटधाम मण्डल, बान्दा द्वारा अपने अन्तिम आदेश दिनांक 28 नवम्बर, 2017 को पारित करते समय पत्रावली का सम्यक परीक्षण नहीं किया व व्यक्तिगत अनुभव व दृष्टिकोण को प्रकट करने में वह असफल रहे।

37. याची के विद्वान अधिवक्ता द्वारा इस न्यायालय का ध्यान आयुद्ध अधिनियम, 1959 की धारा-17 की उपधारा-3 की ओर आकर्षित किया गया जो निम्नवत है:-

"17. अनुज्ञप्तियों में फेरफार, उनका निलम्बन और प्रतिसंहरण-(3) *अनुज्ञापन प्राधिकारी लिखित आदेश द्वारा अनुज्ञप्ति को ऐसी कालावधि के लिये, जैसी वह ठीक समझे, निलम्बित कर सकेगा या अनुज्ञप्ति को प्रतिसंहृत कर सकेगा-*

(क) *यदि अनुज्ञापन प्राधिकारी का समाधान हो जाय कि अनुज्ञप्ति का धारक, किसी आयुध या गोलाबारूद को अर्जित करने, अपने कब्जे में रखने या वहन करने से इस अधिनियम या किसी अन्य तत्समय - प्रवृत्त विधि द्वारा प्रतिषिद्ध है या विकृत - चित्त का है या इस अधिनियम के अधीन अनुज्ञप्ति के लिए किसी कारण से अयोग्य है; अथवा*

(ख) *यदि अनुज्ञापन प्राधिकारी अनुज्ञप्ति को निलंबित करना या प्रतिसंहृत करना लोकशान्ति की सुरक्षा के लिये या लोकक्षेम के लिये आवश्यक समझे; अथवा*

(ग) *यदि अनुज्ञप्ति तात्विक जानकारी दबाकर उसके लिये आवेदन करने के समय अनुज्ञप्ति के धारक द्वारा या उसकी ओर से किसी अन्य व्यक्ति द्वारा दी गई गलत जानकारी के आधार पर अभिप्राप्त की गई थी; अथवा*

(घ) *यदि अनुज्ञप्ति की शर्तों में से किसी का भी उल्लंघन किया गया है; अथवा*

(ङ) *यदि अनुज्ञप्ति का धारक अनुज्ञप्ति का परित्याग की अपेक्षा करने वाली उपधारा (1) के अधीन सूचना का अनुपालन करने में असफल रहा है।"*

38. उपरोक्त उपधारा (3) धारा 17 के अवलोकन से यह सुस्पष्ट होता है कि याची के

विरुद्ध उपधारा 3(ख) के अन्तर्गत ही कार्यवाही की जा सकती है।

39. यहाँ यह कहना सर्वथा उपयुक्त होगा कि प्रस्तुत वाद में याची के विरुद्ध न तो लोकशान्ति की सुरक्षा न ही लोकक्षेम हेतु किसी भी अधिकारी द्वारा कोई आख्या प्रस्तुत की गई अतएव जिलाधिकारी एवं आयुक्त के आदेश किन्ही भी परिस्थितियों में अनुकूल नहीं हैं।

40. याची के विद्वान अधिवक्ता श्री कुनाल शाह द्वारा अपने कथन के समर्थन में इलाहाबाद उच्च न्यायालय के निर्णय **कुबेर सिंह व अन्य बनाम द्रिग्विजय सिंह व अन्य ए.आई.आर 1968 इला० 126** के प्रस्तर 29 एवं 30 पर विचार करने की प्रार्थना की गई।

41. प्रस्तर 29 में माननीय न्यायालय द्वारा **कालूराम बनाम मेहताब बाई** के वाद का परीक्षण कर उसे पुनर्स्थापित किया।

42. प्रस्तर 30 में भी उक्त सम्बन्ध में विचरण किया गया तथा यह सुस्थापित किया गया कि यदि कोई सम्यक न्यायालय स्पष्ट निर्देश देते हुए वाद को प्रतिप्रेषित करता है तब उस स्थिति में अवर न्यायालय का क्षेत्राधिकार सिर्फ उक्त निर्देशों के अनुपालन तक ही सीमित है न कि अन्यथा।

43. यहाँ उपरोक्त निर्णय कुबेर सिंह के प्रस्तर 29 एवं 30 को पुनर्स्थापित किया जाना आवश्यक है:-

"29. Kaluram v. Mehtab Bai, AIR 1959 Madh Pra 181 is a case laying down that any matter expressly or impliedly decided by the order of remand cannot be reopened after remand. Similarly, in Bai Bai v. Mahadu Marati, AIR 1960 Bom 543, the giving of anticipatory and provisional reasoning in respect of matter of an issue not decided by the trial court, given in support, of the finding on the preliminary issue decided by the trial court, was held not to be final. This case thus makes a differentation between a finding, decision or direction given in the case and mere observations made in support of the orde of remand. The last case brought to my notice is of Laxman Shivashankar v. Saraswati, AIR 1961 Bom 218. This merely lays down which findings recorded in a suit have the force of res judicata. No detailed comments need be made on the scope of Section 11 of the CPC or the principle of res judicata. It can simply be observed that every observation made does not operate as res judicata. It invariably depends on the facts and cirumstances of the case whether a finding recorded can or cannot be reagitated at a subsequent stage or in another suit.

30. The consistent view of all the High; Courts therefore, is that any finding, decision or direction given in the order of remand is final and cannot be re-opened in the same proceeding before the same Court or before any other Court. This principle is applicable to not only findings, decisions or directions expressly recorded in the case, but also to such findings, decisions or directions which can, by implication, be deemed to have been recorded. Similarly, if any point is not raised before the remand and the point is such which would have made the remand unnecessary, such point cannot be permitted to be raised at a subsequent stage, otherwise there would be no finality to any proceeding. However, all the observations made in a case cannot be placed in the same category as a finding, decision or direction. It very often happens that the remand of the case may be

necessary not on one ground but on many, and for purposes of remand the party may raise only one point, and not all. Any comments made on the point raised cannot, therefore, be interpreted to mean that the other points were given up for ever, or cannot be raised during the re-hearing after remand."

44. याची के विद्वान अधिवक्ता द्वारा अपने कथन के समर्थन में माननीय उच्चतम न्यायालय के निर्णय **के. टी. सुरेश कुमार बनाम पी. कुन्हप्पा नायर एवं अन्य (1999)2 एस.सी.सी. 711** के प्रस्तर 4 की ओर इस न्यायालय का ध्यान आकर्षित किया गया।

45. प्रस्तर 4 निम्नवत है:-

"4. Even that apart, when the appellate authority has remanded the matter by order dated 28.03.1979, a definite finding was made that the first order of the Land Tribunal dismissing the second application cannot be sustained because the dismissal of the first application was only on the ground that it was not maintainable. The said order of remand dated 28.03.1979 has become final since the same was not challenged before any superior court. Hence, the finding in the remand order is binding on the parties. This is another ground for our conclusion that the second application is not barred by the principle of res judicata."

46. याची के विद्वान अधिवक्ता द्वारा अपने कथन के समर्थन में एक अन्य निर्णय **राम चरन बनाम उ०प्र० सरकार व अन्य** की ओर मेरा ध्यान आकर्षित किया एवं उक्त वाद के प्रस्तर 13 को प्रस्तुत किया गया जो निम्नवत है:-

"13. In Ram Murti Madhukar v. District Magistrate, Sitapur, 1998 (16) LCD 905, in paragraphs 8 and 9 of the said report this Court has held as follows:-

"8. It is also well-settled in law that mere pendency of criminal case or apprehension of abuse of Arms Act, are not sufficient ground for passing of the order of suspension or revocation of licence under Section 17 of the Act. A reference in this regard may be made to the decision of this Court in Ganesh Chandra Bhatt v. D.M. Almora, AIR 1993 All 291.

9. It is also well-settled in law that before passing of the order of suspension or revocation, under Clause (b) of sub-section (3) of Section 13 of the Act, the licensing authority must apply its mind to the question as to whether there was eminent danger to public peace and safety involved in the case. License cannot be suspended or revoked on the ground of Jan Hit.""

47. अन्त में याची के विद्वान अधिवक्ता द्वारा इस न्यायालय के द्वारा निर्णित वाद **रिट सी नं०- 62813 वर्ष 2017 जय प्रकाश उर्फ राजू बनाम उ०प्र० सरकार व तीन अन्य दिनांकित 12.03.2019** की ओर मेरा ध्यान आकर्षित किया गया।

48. उक्त वाद जय प्रकाश उर्फ राजू में इस न्यायालय द्वारा यह निर्णित करते हुए याचिका स्वीकृत की गई कि जो निर्णय लाइसेंसिंग अथारिटी द्वारा दिया गया है वह सर्वथा पुलिस आख्या से भिन्न है एवं यह कि यदि याची को शस्त्र लाइसेंस दिया जाता है तब उस परिस्थिति में लोकशान्ति एवं लोकसुरक्षा के सम्बन्ध में कोई भी विवरण नहीं दिया गया है।

49. विपक्षी के विद्वान अधिवक्ता द्वारा जिलाधिकारी, चित्रकूट एवं आयुक्त, चित्रकूटधाम मण्डल, बान्दा द्वारा पारित आदेश दिनांक 17.01.2017 एवं 28.11.2017 का समर्थन किया गया एवं यह कहा गया कि उक्त आदेश पूर्णतः विधिक है एवं आयुक्त द्वारा पारित पहले के आदेश दिनांक 05 मई, 2016 के अनुपालन में ही पारित किये गए हैं।

50. यहाँ यह कहना समाचीन होगा कि उपरोक्त जय प्रकाश उर्फ राजू भी उस चार पहिया वाहन टवेरा में याची के साथ उपस्थित था एवं अपने शस्त्र को गाड़ी की खिड़की के बाहर किये हुए था एवं यह कि उक्त जय प्रकाश भी उपरोक्त मु० सं 814/12 में सह-अभियुक्त था जिसकी याचिका इस न्यायालय द्वारा उसके पक्ष में दिनांक 12.03.2019 को निर्णित की गयी है।

51. सम्यक विचारोपरान्त एवं प्रस्तुत निर्णयों के अवलोकन के पश्चात मैं प्रस्तुत याचिका में बल पाता हूँ।

52. प्रस्तुत याचिका **स्वीकार** की जाती है तथा जिलाधिकारी, चित्रकूट द्वारा पारित आदेश दिनांक 17.01.2017 एवं आयुक्त, चित्रकूटधाम मण्डल, बान्दा द्वारा पारित आदेश दिनांक 28.11.2017 को निरस्त किया जाता है एवं यह आदेशित किया जाता है कि यदि याची के विरुद्ध कोई अन्य अपराधिक मुकदमा कायम न हो तो याची को अविलम्ब समस्त औपचारिकताएं पूर्ण करने के पश्चात दो माह के अन्दर शस्त्र लाइसेंस प्रदान किया जाए।

(2020)02ILR A578

REVISIONAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 07.01.2020

BEFORE

THE HON'BLE ALOK MATHUR, J.

Sales/Trade Tax Revision No. 118 of 2010

M/s Delhi Textiles ...Revisionist
Versus
Commissioner, Commissioner Tax, U.P., Lucknow ...Opposite Party

Counsel for the Revisionist:
Sri N.C. Gupta

Counsel for the Opposite Party:
C.S.C.

A. Sales/Trade Tax - Penalty - Section 15A(1)(o) - Trade Tax Act, 1948 - driver inadvertently forgot to carry the relevant documents during transit - the machine was not in working condition - it was returned back - no sale took place - the documents were subsequently produced before the assessing authority - no intention to evade tax made out.

Revision Allowed. (E-10)

List of cases cited: -

1. Commissioner of Sales Tax V. S/S Haring India Limited, Mohan Nagar, Ghaziabad 1988 UPTC 1343

2. M/s Polyplex Corporation Limited V. Commissioner of Trade Tax 2003 NTN (Vol. 23) 1061

(Delivered by Hon'ble Alok Mathur, J).)

1. Heard Sri N.C. Gupta, learned counsel for the revisionist as well as Sri Bipin Kumar Pandey, learned Standing Counsel for the respondent.

2. By means of this revision the revisionist has challenged the order dated 02.01.2010, passed by the Commercial Tax Tribunal, whereby the second appeals preferred by the revisionist as well as the revenue have been rejected and the

Tribunal had up held imposition of penalty as modified by the First Appellate Authority. This revision relates to assessment year 2005-06.

3. Facts of the case in brief are that the revisionist is a partnership form engaged in the business of manufacture and sale of textiles and is registered under Section 8-A of the U.P. Trade Tax Act, 1948 (hereinafter referred to as the "Act, 1948") as well as under the Central Sales Tax Act. The revisionist has given order for supply of the machine for cloth procesing to M/s Disha Enterprises Delhi and therefore, the aforesaid machine was purchased by M/s Disha Enterprises Delhi from M/s Romex Machine, TTC Area Thaney, Mumbai, Maharashtra. The said machine was booked by Vishal Haryana Road Lines and same was transported by vehicle alongwith bill no. 52, dated 08.03.2006, which was in the name of M/s Disha Enterprises, A-9 West Jyoti Nagar, 100 Feet Road, delhi and thereafter the same for delivery to the revisionist, for which M/s Disha Enterprises issued bill no. 0347, dated 13.03.2006 and bill no. 832000 and along with that import declaration Form No. 1520870.

4. Contention of revisionist is that the driver of the vehicle inadvertently left behind the papers of M/s Disha Enterprises and Form relating to import of the machine from the State of Delhi to the State of Uttar Pradesh and at the relevant point of time had only paper of import of machine from Maharashtra to Delhi. The officers of the revenue intercepted the vehicle on 13.03.20065 and the goods were detained due to the fact that the vehicle was not carrying all the papers and declaration form as required under the law. Admittedly, an amount of Rs.1,99,923/- was deposited as security and goods were released.

5. The assessing authority issued show cause notice to the revisionist and passed an order imposing penalty by means of order dated 10.10.2007 under Section 15A(1)(o) of the Act, 1948, for Rs.1,99,923/-.

6. Aggrieved by the order of the assessing authority, the revisionist preferred an appeal under Section 9 of the Act, 1948 against the penalty order. The First Appellate Authority partly allowed the appeal of the revisionist and reduced the penalty to Rs.99,223/- by means of order dated 6th March, 2009.

7. Against the order of the First Appellate Authority, the revisionist as well as the revenue preferred second appeal before the Trade Tax Tribunal *(hereinafter referred to as "the Tribunal")*. The Tribunal rejected both the appeals. Hence this revision.

8. Learned counsel for the revisionist vehemently urged that it was only due to inadvertence that the driver of the vehicle was not carrying the relevant documents and the same were duly produced before the assessing authority and therefore, there was no intention on the part of the revisionist to evade tax, and therefore, penalty under Section 15A of the Act, 1948, could not have been imposed. It has further been submitted on behalf of revisionist that subsequently the machine was not found in working condition and the same was returned back to M/s Disha Enterprises, New Delhi and therefore in fact there was no sale. It is further submitted that the machine in question was being purchased for production for non

taxable goods and in the light of the various provisions of the Act, 1948, the transaction i.e. purchase of the machine in question was not taxable and therefore there was no loss of revenue to the State Government and looking into the entire facts of the case it cannot be said that there was any intention to evade tax.

9. The First Appellate Authority, looking into the aforesaid facts reduced the penalty to Rs.99,923/-.

10. Learned Standing Counsel has submitted that the second appeals preferred by the revisionist as well as revenue were rejected by the Tribunal, up holding the order of the First Appellate Authority.

11. Heard learned counsel for the parties and perused the record.

12. The assessing authority has imposed penalty on the revisionist only on account of the fact that the driver of the vehicle on which the goods in question were being transported, was not carrying the relevant Form-31/documents prescribed for inter-State sale which was mandatory for the revisionist to carry. The Assessing Authority has concluded that there was clear intention on the part of revisionist to evade tax, inasmuch as there were full chances that the said Form being misused by the revisionist by subsequently using he same for importing machines on subsequent occasion, and therefore, in exercise of power under Section 15A of the Act, 1948, penalty was imposed.

13. The revisionist has submitted that he had filed a detailed explanation indicating that the said transaction was not taxable and it is only due to human error that the driver was not carrying the relevant documents and subsequently the declaration Form-31 and other relevant documents were produced before the assessing authority at the very first instance. Thus, there was no intention to evade tax.

14. The First Appellate Authority accepted the submissions of the revisionist and only on this score reduced the penalty amount. Being aggrieved by the findings recorded by the First Appellate Authority, the revenue preferred second appeal before the Tribunal. It is relevant to note that the Tribunal rejected the appeal preferred by the revenue and has not interfered with the findings of fact recorded by the First Appellate Authority in this regard, inasmuch as, the Tribunal has also up held the finding of First Appellate Authority that the machine when not found in working condition was returned back, meaning thereby that the revisionist could not had gained any thing from the said transaction.

15. The only reason for up holding the reduced penalty is a finding recorded by the Tribunal that by not carrying the relevant documents indicates the intention of the revisionist to evade tax.

16. Considering the entire facts and circumstances of the case, it is clear that the First Appellate Authority has recorded findings of fact that the goods were being imported for production of non taxable goods and therefore import of said machine is not liable to be taxed. Secondly, that the said machine was not found in working condition and therefore the same was returned to M/s Disha Enterprises, therefore there was no sale on which such penalty can be imposed.

17. Aforesaid facts, in the opinion of this Court, should have been considered by the Tribunal in their proper perspective and in case explanation given by the revisionist are accepted, then it is clear that it indicates that there was no intention to evade tax. Though the Tribunal was not relying on any document which may have given rise of any occasion for the assessing authority to initiate such proceedings,but looking into the fact that the revisionist at the very first instance produced the entire documents before the assessing authority, indicates that the revisionist fulfilled all the conditions as prescribed under the Act, 1948 and even then penalty has been imposed by the assessing authority.

18. Learned counsel for the revisionist has placed reliance on the judgment in the case of **Commissioner of Sales Tax Vs. S/S Haring India Limited, Mohan Nagar, Ghaziabad, 1988 UPTC 1343**, wherein the Court in para 8 of the judgment has observed as under :

"8. The provisions of Section 28-A (6) as it stood at the material time have been a subject matter of consideration by a Division Bench of this Court in Jain Shudh Vanaspati Ltd. Ghaziabad v. State of U.P. and others, 1983 UPTC (1) 198. Commenting upon the provision contained in Section 28-A as it stands after enactment of U.P. Act No. 33 of 1979, with which we are concerned, it was observed as under :

"The provision contained in Section 28-A as it stands after enactment of U.P. Act No. 33 of 1979 are materially different. It cannot be said that there is any assumption underlying therein that the goods to which the provision of Section 28-A applies has actually been sold inside the State and the section does not authorise the sales tax authorities either to seize the said goods or to penalise the importer thereof on any such assumption. Its present basis is the attempt to evade tax. The power to detain the goods and levy penalty in respect thereof cannot be exercised merely for the reason that the said goods were not accompanied by the requisite documents or that the documents accompanying them were false. This power can be exercised only if the goods detained are not accompanied by the requisite documents or that the documents accompanying themm are false and if there is material before the detaining authority to indicate that the goods are being imported in an attempt to evade assessment or payment of tax due or likely to be due under the Act."

At another place it was again observed as under :

"These provisions make it absolutely clear that the power to seize and detain the goods under sub-section (6) of Section 28-A cannot be exercised merely because the goods, when they reach the check post, were not accompanied by the declaration form contemplated by Section 28-A(1). The real occasion to detain the goods under sub-Section (6) arises only if the goods are not accompanied by the requisite documents and thee is material before the Check Post Officer on which he can reasonably record a satisfaction that the person importing the goods was attempting to evade assessment or payment of sales tax due or likely to be due."

19. The revisionist has further relied upon the judgment passed by the Uttrakhand High Court in the case of **M/s Polyplex Corporation Limited Vs. Commissioner of Trade Tax, 2003 NTN**

(Vol. 23) 1061, where the Court has relied on various judgment passed by this Court has concluded that there should be clear finding of fact by the concerned authority that the goods were been transported with intention to evade tax due or likely to be due under the Act and unless such a finding is recorded no penalty can be imposed.

20. Considering the submissions of learned counsel for the parties as well as various legal pronouncements discussed above, it is clear that there was no clear finding recorded by the authorities concerned to the effect that there was intention to evade tax under the Act. The finding of fact recorded by the Tribunal have not been rebutted by the revenue and therefore they have attained finality.

21. It is clear that the machine in question was found not in working condition and has been returned back and even otherwise no concluded transaction took place on which penalty could have been imposed by the revenue.

22. In the light of the above, the revision succeeds and impugned order dated 02.01.2010, passed by the Tribunal is hereby set aside.

23. The revision stands **allowed**.

(2020)02ILR A582

REVISIONAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 29.01.2020

BEFORE
THE HON'BLE RAJAN ROY, J.

Civil Revision No. 104 of 2019

Waqf Nawab Amjad Ali Khan
...Revisionist
Versus
The Waqf Tribunal At Lucknow & Anr.
...Opposite Party

Counsel for the Revisionist:
Syed Ajaz Haider Rizvi, Mohd. Husain Rizvi

Counsel for the Opposite Party:
Bhola Singh Patel, Pravin Kumar Verma

A. Waqf Act, 1995-Section 83-Application under section 83 of the Act rejected-relief of eviction of defendant tenant -and for recovery of rent, arrears and damages-not maintainable-held civil court is the remedy-section 83 has been ammended-ammendment not taken note in impugned order-Tribunal is empowered for determining the issue-impugned order quashed-Revision allowed.

Held, In view of the amended provision Tribunals are empowered for determination of any dispute, question or other matter relating to a waqf or waqf property, eviction of a tenant or determination of rightsand obligations of the lessor and the lessee of such property, under the Act, 1995. The ammended provision has not been taken noteby the Tribunal and it has erred in relying upon decisions which are not based on the ammended provision but are based on the provision existing prior to the amendment. (Para 6)

List of cases cited:-

1. Ramesh Gobindram (dead) through Lrs. vs. Sugra Humayun Mirza Waqf, (2010) 8 SCC 726

2. Faseela m. vs. Munnerul Islam Madrasa Committee and another ; (2015) 3 SCC (Civ) 419

3. Haji Ali Akbar vs. Waqf Alal-Allah/Alal Khair aqf-W.P. no. 330/2019

4. Punjab Wakf Board vs. Sham Singh Harike, (2019) 4 SCC 698 **(refferred)**

(Delivered by Hon'ble Rajan Roy, J.)

1. Heard learned counsel for the parties as well as Sri Q.H. Rizvi, learned Advocate who assisted the Court in the matter.

2. The challenge herein is to an order dated 04.10.2019 passed by U.P. Waqf Tribunal, Lucknow in Misc. Suit No. 20 of 2019; Waqf Nawab Amjad Ali Khan Vs. Mohd. Afzal by which application of the revisionist under Section 83 has been rejected on the ground that relief of eviction of defendant-tenant from Waqf property and for recovery of rent, arrears and damages is not maintainable before the Waqf Tribunal and for this relief the petitioner-applicant would have to approach the Civil Court, as, the suit is not covered by the disputes specified in Section 6 and 7 of U.P. Waqf Act, 1995. Accordingly, applying Order VII Rule 10 CPC the Waqf Tribunal has returned the plaint to the petitioner for presentation before the proper Court.

3. In taking this view the Tribunal has been persuaded by the decisions of the Supreme Court reported in ***(2010) 8 SCC 726; Ramesh Gobindram (dead) through LRs. Vs. Sugra Humayun Mirza Waqf, (2015) 3 SCC (Civ) 419; Faseela M. Vs. Munnerul Islam Madrasa Committee and Anr.*** and a decision of the Allahabad High Court in the case of ***Haji Ali Akbar Vs. Waqf Alal-Allah/Alal Khair Waqf*** rendered on 24.01.2019 in ***Petition No. 330 of 2019***.

4. On a bare perusal of the aforesaid decisions the Court finds that all the said decisions pertain to a factual scenario existing prior to the amendment in Section 83 of the Waqf Act, 1995 by Act No. 27 of 2013 and the proceedings in question had been initiated prior to the said amendment. By the Act 27 of 2013 the following provision has been substituted as Section 83(1):-

"(1) The State Government shall, by notification in the Official Gazette, constitute as many Tribunals as it may think fit, for the determination of any dispute, question or other matter relating to a waqf or waqf property, eviction of a tenant or determination of rights and obligations of the lessor and the lessee of such property, under this Act and define the local limits and jurisdiction of such Tribunals."

5. The amending Act of 2013 has come into effect w.e.f. 01.11.2013 as per Notification dated 29.10.2013 which reads as under:-

"In exercise of the powers conferred by sub-section (2) of Section 1 of the Wakf (Amendment) Act, 2013 (No. 27 of 2013), the Central Government hereby appoints the 1st day of November, 2013 as the date on which the provisions of the said Act shall come into force."

6. In view of the amended provision Tribunals are empowered for determination of any dispute, question or other matter relating to a waqf or waqf property, eviction of a tenant or determination of rights and obligations of the lessor and the lessee of such property, under the Act, 1995. The amended provision has not been taken note of by the Tribunal and it has erred in relying upon decisions which are not based on the amended provision but are based on the provision existing prior to the amendment.

7. The Waqf Tribunal at Lucknow has been constituted by Notification dated

03.03.2014 subsequent to the aforesaid amendment of 2013.

8. Reference may also be made to Paragraph 45 to 47 of a recent decision of the Supreme Court reported in **(2019) 4 SCC 698; Punjab Wakf Board Vs. Sham Singh Harike** which was placed before the Court by Sri Q.H. Rizvi which read as under:-

"45. Section 83 sub-section (1) has been substituted by Act 27 of 2013. Substituted sub-section (1) is as follows:

*"83. **Constitution of Tribunals, etc.** - (1) The State Government shall, by notification in the Official Gazette, constitute as many Tribunals as it may think fit, for the determination of any dispute, question or other matter relating to a waqf or waqf property, eviction of a tenant or determination of rights and obligations of the lessor and the lessee of such property, under this Act and define the local limits and jurisdiction of such Tribunals."*

46. Section 83 sub-section (1) specifically includes eviction of a tenant or determination of rights or obligations of the lessor and lessee of such property.

47. In both the suits giving rise to these appeals the suits were filed much before the amendment of Section 83 by Act 27 of 2013. We, thus, in the present case have to interpret Section 83 as it existed prior to the above Amendment, 2013."

9. In the aforesaid case the Supreme Court was judging the validity of legal proceedings initiated prior to the amendment of 2013, as such, though it took notice of the amendment of 2013, it considered the pre amendment provisions.

10. Section 85 of the Act, 1995 relating to Bar of jurisdiction of Civil Court is as under:-

*"85. **Bar of jurisdiction of civil courts.**- No suit or other legal proceeding shall lie in any civil court, revenue court and any other authority in respect of any dispute, question or other matter relating to any waqf, waqf property or other matter which is required by or under this Act to be determined by a Tribunal."*

11. In this regard Para 53 of the decision of the Supreme Court in **Punjab Wakf Board** (supra) is relevant and it is as under:-

"53. Coming to Section 83 which relates to bar of jurisdiction in civil court, the relevant words are "any dispute, question or other matter relating to a wakf or wakf property" which is required by or under this Act to be determined by the Tribunal. Thus, bar of jurisdiction of civil court is confined only to those matters which are required to be determined by the Tribunal under this Act. Thus, the civil court shall have jurisdiction to entertain the suit and proceedings which are not required by or under the 1995 Act to be determined. Thus, answering the question of jurisdiction, question has to be asked whether the issue raised in the suit or proceeding is required to be decided under the 1995 Act by the Tribunal, under any provision or not. In the event, the answer is affirmative, the bar of jurisdiction of civil court shall operate."

12. On being confronted with the aforesaid legal position consequent to amendment of Section 83 w.e.f. 01.11.2013, the learned counsel for the opposite parties could not show that the legal position was otherwise.

13. In view of the above, the order dated 04.10.2019 is hereby quashed. The proceedings shall now stand revived before the Waqf Tribunal and shall be considered and disposed of as per law with expedition.

14. This Court appreciates the valuable assistance provided by Sri Q. H. Rizvi, learned Advocate in the matter.

15. The revision under Section 83(9) of the Act, 1995 is **allowed** in the aforesaid terms.

16. The Senior Registrar of this Court at Lucknow shall communicate this order to the Waqf Tribunal at Lucknow.

(2020)02ILR A585

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 07.02.2020

BEFORE
THE HON'BLE BALA KRISHNA NARAYANA, J.
THE HON'BLE PRADEEP KUMAR SRIVASTAVA, J.

Criminal Appeal No. 90 of 1986

Pahalwan Singh & Ors.
...Appellants (In Jail)
Versus
State ...Opposite Party

Counsel for the Appellants:
Sri Raghuvansh Mishra, Sri Arun Kumar Singh, Sri Rahul Misra, Sri Harish Chandra Tiwari A.C., Sri Raghubir Saran Agrawal

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

A. Criminal Law-Indian Penal Code-Section 302/34 -Appeal against conviction.

The law is well settled that the testimony of a witness cannot be discredited only on the ground that the witnesses are related or interested. The only requirement is that the testimony of such witness should be scrutinized cautiously and carefully. (Para 35)

It would be hard to believe that the close relatives shall leave the real culprit and shall implicate innocent persons falsely simply because they have enmity with the accused persons. (Para 48)

If the direct testimony of eye witnesses is reliable, the same cannot be rejected on the basis of hypothetical medical evidence, and the ocular evidence, if reliable, should be preferred over medical evidence. (Para 57)

The settled principle is that if there is some difference of such nature between the ocular testimony and medical evidence, ocular testimony being direct evidence will be preferred over the medical evidence. Both the eye-witnesses have clearly proved the time of death as they have stated that when the accused persons ran away after committing the offence. (Para 59)

Motive is not a sine qua non for the commission of a crime. Moreover, it takes a back seat in a case of direct ocular account of the commission of the offence by a particular person. In a case of direct evidence the element of motive does not play such an important role so as to cast any doubt on the credibility of the prosecution witnesses even if there be any doubt raised in this regard. Failure to prove motive or absence of evidence on the point of motive would not be fatal to the prosecution case when the other reliable evidence available on record unerringly establishes the guilt of the accused. (Para 64)

In a case of direct evidence the element of motive does not play such an important role as to cast any doubt on the credibility of the prosecution witnesses even if there be any doubts raised in this regard. If the eye-witnesses are trustworthy, the motive attributed for the commission of crime may not be of much relevance. Failure to prove motive or absence of evidence on the point of motive would not be fatal to the prosecution case when the other reliable evidence available on

record unerringly establishes the guilt of the accused. (Para 69)

Minor contradictions, inconsistencies, embellishments or improvements on trivial matters which do not affect the core of the prosecution case, should not be made a ground on which the evidence can be rejected in its entirety. (Para 77)

Undoubtedly, delay in lodging FIR does not make the complainant's case improbable when such delay is properly explained. (Para 81)

It is settled law that the FIR is not supposed to contain all details of prosecution version. It is spontaneously written what comes in the mind of informant. The only requirement is that at the time of lodging FIR, the informant should state all those facts which normally strike to mind and help in assessing the gravity of the crime or identity of the culprit briefly. (Para 83)

The injuries found on the body of the deceased person find support from the medical evidence by which the date and time of causing the injuries is very much corroborated. There is no substantial contradiction or discrepancies in the evidence of the prosecution and some of the minor contradiction and discrepancies which have been discussed above goes to establish the reliability of the witnesses and that also shows that they are not tutored. Thus, the witnesses examined by prosecution are natural, credible and trustworthy. (Para 86)

Criminal Appeal rejected. (E-2)

List of cases cited:-

1. Bhagwan Jagannath Markad Vs. St. of Mah., (2016) 10 SCC 537,

2. Mukesh v St. of NCT of Delhi, AIR 2017 SC 2161,

3. Bharwada Bhoginbhai Hirjibhai v. St. of Guj. AIR 1983 SC 753,

4. Ugar Ahir v. St. of Bihar, AIR 1965 SC 277,

5. St. of UP v Anil Singh, 1988 (Supp.) SCC 686,

6. Harijana Thirupala v. Public Prosecutor, High Court of AP, (2002) 6 SCC 470,

7. Krishna Mochi v. St. of Bihar, (2002) 6 SCC 81,

8. Dalip Singh v. St. of Punj. (1954) SCR 145,

9. Masalti V. St. of U.P. (AIR 1965 SC 202),

10. Darya Singh v St. of Punj., AIR 1965 SC 328,

11. St. of UP v Kishanpal (2008) 16 SCC 73,

12. Appa v. St. of Guj., AIR 1988 SC 698,

13. State of AP v S. Rayappa (2006) 4 SCC 512,

14. Pulicherla Nagaraju @ Nagaraja Reddy v. St. of AP (2007) 1 SCC (Cri) 500,

15. Satbir Singh v St. of UP, (2009) 13 SCC 790,

16. M.C. Ali 18 v. St. of Kerala, AIR 2010 SC 1639,

17. Himanshu v. St. (NCT of Delhis, (2011) 2 SCC 36,

18. Bhajan Singh and others Vs. St. of Har.,(2011) 7 SCC 421,

19. Jayabalan v U.T. of Pondicherry; 2010(68) ACC 308 (SC),

20. Dharnidhar v St. of UP, (2010) 7 SCC 759,

21. Ram Bharosey v. St. of UP AIR 2010 SC 917,

22. Balraje @ Trimbak v St. of Maha., (2010) 6 SCC 673,

23. Jalpat Rai v St. of Har. AIR 2011 SC 2719,

24. Waman v St. of Maha. AIR 2011 SC 3327,

25. Shyam Babu v St. of UP, AIR 2012 SC 3311,

26. Dhari & Others v St. of UP, AIR 2013 SC 308,

27. Ganapathi v St. of Tamilnadu, AIR 2018 SC 1635,

28. Rupinder Singh Sandhu vs St. of Punj., (2018) 16 SCC 475,

29. Mahavir Singh Vs. St. of Har., (2014) 6 SCC 716,

30. Suresh Chandra Bahri Vs. St. of Bihar, JT 1994 (4) SC 309,

31. Modis Medical Jurisprudence and Toxicology, 22nd Edition, pages 246, 247,

32. Solanki Chimanbhai Ukabhai vs State of Gujrat, AIR 1983 SC 484,

33. Abdul Sayeed vs St. of MP, 2010 (10) SCC 259,

34. Krishnan Vs. St., AIR 2003 SC 2978,

35. Thamman Kumar v. St. of U.T. of Chandigarh, AIR 2003 SC 3975,

37. Abdul Sayeed Vs. St. of M.P, (2010) 10 SCC 259,

38. Rakesh Vs. St. of UP, 2012 (76) ACC 264 (SC),

39. Sadhu Saran Singh Vs. St. of UP, (2016) 4 SCC 357,

40. Dayal Singh Vs. St. of Uttaranchal, AIR 2012 SC 3046,

41. Ram Swaroop v St. of U.P., 2000 (40) ACC 432 (SC),

42. Ramjee Rai v St. of Bihar, 2007 (57) ACC 385 (SC),

43. Abu Thakir v State; AIR 2010 SC 2119,

44. St. of U.P. v Nawab Singh; AIR 2010 SC 3638,

45. Bipin Kumar Mondal v St. of W.B, 2005 SCC (Criminal) 33,

46. Shivraj Bapuray Jadhav v St. of Kar., (2003) 6 SCC 392,

47. Thaman Kumar v St. of U.T. of Chandigarh; (2003) 6 SCC 380,

48. St. of H.P. vs. Jeet Singh, (1999) 4 SCC370,

49. Badam Singh v. St. of M.P., AIR 2004 SC 26,

50. Sheo Shankar Singh v St. of Jharkhand; 2011(74) ACC 159 (SC),

51. Ravinder Kumar v St. of Punj., 2001 (2) JIC (SC),

52. St. of H.P. v Jeet Singh; (1999) 4 SCC 370,

53. Pannayar v St. of T.N. by Inspector of Police; AIR 2010 SC 85,

54. G. Prashwanath v St. of Kar., AIR 2010 SC 2914,

55. Jagdish v St. of M.P., 2009 (67) ACC 295 (SC),

56. Ujjagar Singh v St. of Punj., AIR 2008 SC (Supp) 190,

57. Gopi Ram v St. Of UP, 2006 (55) ACC 673 SC,

58. St. of UP v Nawab Singh; 2005 SCC (Criminal) 33,

59. Shivraj Bapuray Jadhav v St. of Kar., (2003) 6 SCC 392,

60. R.R. Reddy v St. of AP, AIR 2006 SC 1656,

61. Sucha Singh v St. of Punj., AIR 2003 SC 1471,

62. St. of Rajasthan v Arjun Singh AIR 2011 SC 3380,

63. Varun Chaudhry v St. of Raj. AIR 2011 SC 72,

64. Babu Lodhi v St. of UP (1987) 2 SCC 352,

65. Saddik Vs. St. of Guj., (2016) 10 SCC 663,

66. Nathu Singh v St. of MP, 1974 Cri. L J 11,

67. Pramod Kumar Vs. St. (GNCT) of Delhi, AIR 2013 SC 3344

68. Govindaraju alias Govinda Vs. St. of Shri Ramapuram P.S., AIR 2012 SC 1292,

69. Ayaaubkhan v St. of Mah., AIR 2013 SC 58,

70. Jagdish vs St. of UP, 1996 (33) ACC 495,

71. St. of UP vs Lakhan Singh, 2014 (86) ACC 82 (All) (DB),

72. Rupinder Singh Sandhu vs St. of Punj., (2018) 16 SCC 475,

73. State of U.P. v. Naresh; 2011 (75) ACC 215) (SC),

74. Gosu Jayarami Reddy and another Vs. St. of A.P., (2011) 3 SCC(Cri) 630,

75. Parsu Ram Pandey v/s St. of Bihar AIR 2004 SC 5068,

76. Shivappa v. St. of Kar.; AIR 2682,

77. Ramchandaran v. St. of Kerala AIR 2011 SC 3581,

78. Mukesh Vs. St. for NCT of Delhi, AIR 2017 SC 2161,

79. Bhagwan Jagannath Markad Vs. St. of Maha., (2016) 10 SCC 53,

80. Meharaj Singh v. St. of UP, (1994) 5 SCC 188,

81. Kishan Singh through LRs v. Gurpal Singh (2010) 8 SCC 775,

82. Jarnail Singh Vs. St. of Punj., 2009 (6) Supreme 526.

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

1. This criminal appeal has been filed against the judgment dated 03.1.1986 in Sessions Trial No. 66 of 1984, State Vs. Pahalwan & others, passed by 1st Additional Sessions Judge, Jhansi by which the appellants Pahalwan Singh, Nathu Singh, Brij Kishore alias Pappu and Har Narain have been convicted and sentenced under Section 302/34 IPC for life imprisonment.

2. During pendency of appeal, appellant no. 3 Brij Kishore alias Pappu and appellant no. 4-Har Narain died and vide order dated 25.1.2018 of this Court, their appeal has been abated.

3. The appellant no. 2 Nathu Singh despite every process being issued did not appear nor he was arrested nor there was any trace of his sureties and hence vide order dated 04.7.2019 of this Court, Sri Rahul Mishra, Advocate has been appointed as Amicus Curiae to argue on behalf of appellant no. 2 Nathu Singh. Again by order dated 19.8.2019, Sri Harish Chandra Tiwari has been appointed as Amicus Curiae in place of Sri Rahul Mishra.

4. Brief facts of the case are that an FIR was lodge by Lakhan Lal Yadav at PS Prem Nagar on 03.2.1984 at 6.50 AM alleging that he resides in House No. 299, Nainagarh. On 03.2.1984 at about 5.30 AM his father Amrat Lal had gone to the latrine to ease himself, the informant was feeding his buffalo and thereafter, he also went to latrine to ease himself where he saw in the light of his torch that accused Pahalwan armed with a Sabbal (an iron rod used for digging), Har Narain, Brij Kishore and Nathu Singh armed with lathi in their hands were beating his father. The informant shouted for help whereupon, his younger brother Ram Sewak and several other persons reached there. Seeing them, the accused persons ran away from the place. All the accused persons were identified by the witnesses in the light of torch. They found that Amrat Lal was

already died. The deceased Amrat Lal and accused Ram Charan are real brothers and accused Pahalwan is son-in-law of accused Ram Charan. Accused Pahalwan was dismissed from his railway service and he believed that on the complaint of Amrat Lal, the action was taken against him and because of that he was having enmity with Amrat Lal. Accused Ram Charan had hatched a conspiracy for his murder and after conspiracy in order to create defence of alibi, he got admitted himself in a hospital. The informant had seen the accused Ram Charan on 02.2.1984 at about 5.00 PM and he suspected that Ram Charan had conspired in murder of Amrat Lal. The accused persons are relatives and close associates of each other and they committed murder of Amrat Lal.

5. On the basis of this report, the offence was registered by the police. The inquest report was prepared and the postmortem of dead body was conducted. The accused persons were arrested and blood stained *Tahmad* of accused Brij Kishore alias Pappu was recovered from his possession at his instance, whereas when accused Pahalwan was arrested, he was wearing blood stained Bushirt and Pant. On his instance, the blood stained *Sabbal* was also recovered. All these articles were taken into possession by the police and were sent for chemical examination. The statements of witnesses were recorded by the Investigating Officer and after completion of investigation, charge sheet was submitted against accused Ram Charan, Brij Kishore alias Pappu, Pahalwan, Har Narain, Nathu and Veer Singh for the offence under section 302/120-B IPC.

6. The charges were framed against accused Pahalwan, Brij Kishore alias Pappu, Har Narain and Nathu for the offence under section 302 read with section 34 IPC and against accused Ram Charan and Veer Singh for the offence under section 120-B read with section 302 IPC. The accused persons denied the charges and claimed trial.

7. The prosecution examined PW-1 Lakhan Lal (informant) has proved written report as Ext. Ka-1 and as eye witness he gave statement with regard to the commission of offence. He has also proved the letter of Amrat Lal sent to S.P. Jhansi Ext. Ka-2 along with certificate of posting Ext. Ka-3, letter of Amrat Lal sent to Divisional Railway Manager dated 17.8.1982 Ext. Ka-4, letter of Amarat Lal sent to Divisional Railway Manager dated 11.11.1982 Ext. Ka-5, memo of torch Ext. Ka-6, Lota as material Ext. 1, two pants, two jarkins and one shirt of deceased as material Ext. 2 to 6, the Tahmad of Brij Kishore and the pant and shirt of Pahalwan as material Ex. 7, 9 and 10 and the Sabbal which was used by the accused Pahalwan as weapon for offence Ext.-8. PW-2 Ram Sewak Yadav is an eye witness. PW-3 Atar Singh is the witness of memo of Lota Ext. Ka-7, memo of blood stained and plain earth Ext. Ka-8, container of blood stained and plain earth material Ext. 12 & 13. PW-4 Sabarjeet Singh is the witness of recovery of Tahmad and has proved recovery memo Ext. Ka-9. PW-5 Jahangir is the witness of recovery of blood stained Sabbal who has also proved during cross-examination an application Ext. Kha-1, affidavit Ext. Kha-2, his signature on Ext. Kha-3 and signature and stamp of Stamp Reporter Ext. Kha-4. PW-6 Dr Dhirendra Saxena has proved the postmortem report as Ext. Ka-11. PW-7 Dr. R.C. Jain, Medical Officer, St. Jude's Hospital, Jhansi has proved the paper with regard to

treatment of accused Ram Charan as Ext. Ka-12 and Ka-13. PW-8 Dr. P.C. Gupta, Medical Officer, District Hospital, Jhansi has similarly proved the bed head ticket of Ram Charan as Ext. Ka-14 and discharge slip as Ext. Ka-15. PW-9 SI Ram Awtar Chaturvedi PS Kotwali is the witness of arrest of accused persons, recovery memo Ext. Ka-16 and material Ext. 9 & 10. PW-10 SI Hari Shanker Sachan has proved the inquest report Ext. Ka-17, Naksha Lash Ext. Ka-18 and the Challan Lash Ext. Ka-19, letter to C.M.O. Ext. Ka-20, memo of clothes of deceased Ext. Ka-21. He has also proved the recovery memo of blood stained and plain earth, pant and shirt of accused Pahalwan. He has further proved GD Report Ext. Ka-23 and Ka-24. PW-11 SI Vaijnath Mishra has conducted the investigation, who has proved GD Ext. Ka-26, recovery memo of blood stained Tahmad of Brij Kishore Ext. Ka-9 and recovery memo of blood stained Sabbal Ext. Ka-.10 He has also proved site map Ext. Ka-27 as well as place of recovery of Tahmad Ext. Ka-28 and place of recovery of Sabbal Ext. Ka-29. He further proved memo Ext. Ka-32 and charge sheet Ex. Ka-33 and the GD Entry Ext. Ka-34, medical examination report Ext. Ka-35 along with other recovered articles from accused persons.

8. The statement of accused persons was recorded under section 313 Cr.P.C. and in their statement, they have admitted the relationship of accused Ram Charan with the deceased, but it has been denied that accused Pahalwan was residing with Ram Charan. Reovery of blood stained Tahmad, blood stained Sabbal, pant and shirt has also been denied. The accused persons have stated that they have been falsely implicated due to enmity. Accused Nathhu has stated that he has been falsely implicated because of enmity with one Dashrath, accused Har Narain stated that he was arrested from his house which is situated about 16-17 km away from the place of occurrence and he has been falsely implicated on account of relationship with Ram Charan. Accused Ram Charan has stated that he was ill on the date of incident and was admitted in a hospital and because of enmity, he has been falsely implicated. Accused Veer Singh has stated that he has been falsely implicated as there is no evidence against him. No defence evidence was given from the side of accused persons.

9. After hearing learned counsel for the accused persons and learned D.G.C. (Criminal) and after perusing the record, the learned trial court acquitted Ram Charan and Veer Singh from the charges and convicted the appellants.

10. Aggrieved by said judgement, this appeal has been filed on the ground that conviction is against the weight of evidence on record and against the law and the sentence awarded is too severe.

11. Heard Sri Rahul Mishra assisted by Sri Raghuvansh Mishra, learned counsel for appellant no. 1, Sri H.C. Tiwari, Amicus Curiae for appellant no. 2 and learned A.G.A. for the State.

12. The submission of the learned counsel/Amicus Curiae for the appellants is that both the eyewitnesses examined by the prosecution are real brothers and sons of the deceased and are partisan witnesses and because of inimical relations, they have given false evidence against accused-appellants. Their testimony is contradictory and they have made improvements. The place of occurrence is

not proved and the presence of alleged eyewitnesses is highly doubtful on the place and at the time of occurrence. Two accused persons have been acquitted on the basis of same evidence and the incriminatory articles shown to have been recovered from the accused are planted and false.

13. On the contrary, the learned AGA has submitted that FIR has been lodged promptly naming the accused persons, two eyewitnesses have supported the prosecution version and the learned trial court has rightly convicted and sentenced the accused-appellants on the basis of evidence on record.

14. The only question which is required to be addressed and determined in this appeal is whether the conclusion of guilt arrived at by the learned trial court and the sentence awarded is legal and sustainable under law and suffers from no infirmity and perversity.

15. The prosecution examined PW-1 Lakhan Lal who proved written report as Ext. Ka-1 and as eye witness he gave statement with regard to the commission of offence. He has also proved the letter of Amrat Lal sent to S.P. Jhansi showing his apprehension that accused might cause harm to him which is Ext. Ka-2 along with certificate of posting Ext. Ka-3, letter of Amrat Lal sent to Divisional Railway Manager, dated 17.8.1982 Ext. Ka-4, letter of Amarat Lal sent to Divisional Railway Manager dated 11.11.1982 Ext. Ka-5 and memo of torch Ext. Ka-6. He has also identified Lota as material Ext. 1, two pants, two jarkins and one shirt of deceased as material Ext. 2 to 6, the Tahmad of Brij Kishore and the pant and shirt of Pahalwan as material Ext.- 7, 9 and 10 and the Sabbal which was used by the accused Pahalwan as weapon for offence material Ext.- 8. He has further stated that the accused Ramcharan is the brother of deceased Amratlal, accused Brij Kishore is son, accused Veer Singh is brother-in-law, Nathu is nephew (bhanja), accused Pahalwan is son-in-law of accused Ramcharan, whereas accused Har Narain is brother-in-law of accused Brij Kishore. PW-1 has stated that about one and three months before, at about 5-5.30 AM, his father Amrat Lal had gone to ease himself. After sometimes, he also went to ease himself. He heard some sound and in the light of torch, he saw that the accused persons Pahalwan having sabbal in hand, Nathu, Har Narain and Brij Kishore having lathi in their hands, were beating his father. He cried whereupon his younger brother Ramsewak and others reached there. The accused persons ran away from there. They went nearer and found Amrat Lal dead. He lodged FIR by giving a written report which was inscribed by one Dashrath on his dictation. The witness has further stated that about 3 years before accused Pahalwan committed marpeet with his father about which his father sent a complaint to SP and other authorities. His father also complained to the Railway Authorities about accused Pahalwan on the basis of which, he was removed from service. On account of this enmity, his father was killed by the accused persons.

16. PW-2 Ramsewak has also stated that on the shout of his brother, he reached there and saw the accused persons beating his father. Accused Pahalwan was having sabbal and others were having lathi in there hands. He saw this in the light of torch of his brother Lakhan. He found his father dead thereafter. He has also stated

that accused Ramcharan had enmity with deceased and because of that and on his instigation the accused persons killed his father.

17. PW-3 Atar Singh is the witness of memo of Lota Ext. Ka-7, memo of blood stained and plain earth Ext. Ka-8, container of blood stained and plain earth material Ext. 12 & 13 and has stated that all these exhibits were taken into possession by police from the place of occurrence and memo was prepared on which he signed as witness.

18. PW-4 Sabarjeet Singh is the witness of recovery of Tahmad and has proved recovery memo Ext. Ka-9.

19. PW-5 Jahangir is the witness of recovery of blood stained Sabbal who has also proved during cross-examination an application Ext. Kha-1 and affidavit Ext. Kha-2, his signature on Ext. Kha-3 and signature and stamp of Stamp Reporter Ext. Kha-4.

20. PW-6 Dr Dhirendra Saxena has proved the postmortem report as Ext. Ka-11 and has stated that on 4.2.1984, while posted as Radiologist in the District Hospital, Jhansi, conducted postmortem of the dead body of Amrat Lal at 4 PM who was brought by the police constables Subhash Chandra and Shamim Ahamad. The deceased was aged about 44 years and his death took place one and half day before.

External Examination

Following injuries were found on the dead body:

1. One lacerated wound 4 cm x 2 cm x brain deep on the left of forehead just above left eyebrow on its medial half, horizontal and clotted blood present.

2. Lacerated wound 3 cm x 1 cm x brain deep 3 cm above from injury no. 1 on the left side of forehead, oblique just above lateral half of left eyebrow. Clotted blood present.

3. Lacerated wound 6 cm x 3 cm x brain deep on left side of forehead 3 cm above injury no. 1, oblique, clotted blood.

4. Lacerated wound 9 cm x 6 cm x brain deep on the left side of head, oblique, 5 cm above left ear, brain matter coming out clotted blood adhere places.

5. Lacerated wound 4 cm x 1 cm x bone deep on the left on the left mastoid area, oblique 2 ½ cm behind left ear. Clotted blood present.

6. Lacerated wound 3 ½ cm x 1 cm x bone deep on the back of left ear, oblique, clotted blood present. 2 cm above injury no. 5.

7. Lacerated wound 3 cm x 1 cm x bone deep, oblique at the back of left ear, 2 cm above injury no. 6.

8. Lacerated wound 3 cm x ½ cm tearing left ear pinna, clotted blood present.

9. Lacerated wound 3 cm x ½ cm tearing left ear lobule, clotted blood present.

10. Abrasion 6 cm x 1 cm on the back Rt forearm 2 cm above wrist, oblique.

Rigor mortis was present in lower limb. Greenish discolouration on lower part of abdomen. Abdomen distended slightly and foul gas coming out on opening. Bones of left side of skull including frontol, parietal, temporal and occipital are fractured in multiple pieces, tearing the meninges and depressed and lodged in brain. Scalp hair walled with dry clotted blood.

Internal Examination

Multiple fracture of left frontal, parietal, temporal and occipital bones depressed and in pieces. Membranes badly torn on left side. Brain crushed and coming out on left side. Left anterior middle and posterior and cranial fossae are fractured. About 50 gm yellow liquid present in abdomen. In small intestine, pasty material adhere to the walls. large intestine half full faecal matter. In the opinion of the doctor, death was caused due to injury to brain as a result of ante-mortem injuries. The doctor has stated that the deceased died on 3.2.1984 at about 5-5 ½ AM. Injury no 1 to 9 was possible by blunt object like lathi and sabbal, if used like lathi. Injury no 10 was possible by friction on hard surface. PW-6 has stated that the injuries to deceased was sufficient to cause death.

21. PW-7 Dr. R.C. Jain, Medical Officer, St. Judus Hospital, Jhansi has proved the paper with regard to treatment of accused Ram Charan as Ext. Ka-12 and Ka-13. He has stated that Ramcharan was admitted in the Hospital on 2.2.1984 because of fever, cough and headache from a week.

22. PW-8 Dr. P.C. Gupta, Medical Officer, District Hospital, Jhansi has similarly proved the bed head ticket of Ram Charan as Ext. Ka-14 and discharge slip as Ext. Ka-15.

23. PW-9 SI Ram Awtar Chaturvedi PS Kotwali is the witness of arrest of accused Pahalwan who has stated that the accused tried to run away. He was wearing blood stained shirt and pant and the same was taken into possession and sealed and memo was prepared. The witness has proved the recovery memo as Ext. Ka-16 and material Ext. 9 pant & 10 shirt.

24. PW-10 SI Hari Shanker Sachan has proved the inquest report Ext. Ka-17, Naksha Lash Ext. Ka-18 and the Challan Lash Ext. Ka-19, letter to C.M.O. Ext. Ka-20, memo of clothes of deceased Ext. Ka-21. He has also proved the recovery memo of blood stained and plain earth, pant and bushirt of accused Pahalwan. He has further proved GD Report Ext. Ka-23 and Ka-24. The witness has stated that on 3.2.1984, he reached on spot with SO and prepared inquest report. The place where the dead body was lying was very dirty and not appropriate, and therefore, the dead body was shifted in the open ground situated nearby in front of the house of Baldeo and Nanhe Khan. Five witnesses were appointed as panch and in their presence the inquest report was prepared and dead body was sealed. Necessary form and letters were prepared for postmortem and the same was handed over to constables. He has further stated that the lota of deceased (a kind of pot for carrying water) mat. Ext.1 was also found there which was taken into possession, sealed and memo was prepared. Blood stained and plain earth was lifted from the place of occurrence, sealed and memo was prepared. All these articles were deposited in the PS on the same day at 3.35 PM vide GD no. 27 Ext. Ka-22. The witness is also a witness of arrest of accused Pahalwan and the recovery of blood stained shirt and pant he was wearing which were sealed and memo prepared and broght and deposited in the PS on the same day on 4.50 PM vide GD report Ext. Ka-23. He has further stated that on the same day at about 6.30 PM accused Veersingh was arrested and brought to PS and an

endorsement to that effect was made in the GD.

25. PW-11 SI Vaijnath Mishra has conducted the investigation, who has proved GD Ext. Ka-26, recovery memo of blood stained Tahmad of Brij Kishore Ext. Ka-9 and recovery memo of blood stained Sabbal material Ext. Ka-10. He has also proved site map Ext. Ka-27 as well as place of recovery of Tahmad Ext. Ka-28 and place of recovery of Sabbal Ext. Ka-29. He further proved memo Ext. Ka-32 and charge sheet Ex. Ka-33 and the GD Entry Ext. Ka-34, medical examination report Ext. Ka-35 along with other recovered articles from accused persons. The witness has also proved check FIR which was prepared on the basis of written report and the GD in which an endorsement to that effect was made. On his direction, inquest report was prepared. He arrested accused Brij Kishore on 10.30 AM from Hardol chabutara on 3.2.1984 and on the same day accused Ramcharan was admitted in St. Jude's Hospital, who on being inquired, said that he is not well and therefore, after getting him discharged, he was sent to Civil Hospital. On being asked, accused Brij Kishore said that he can get his tahamad recovered he was wearing at the time of incident. He took him to his house and got recovered the same which he had concealed below his bedding. The same was sealed and memo was prepared. He also took statements of witnesses Sarjeet, Ramsewak and other witnesses. He inspected place of occurrence and prepared site map. The torch of Lakhanlal was taken in possession and after preparing memo, the same was duly returned to him. The recovered articles and accused Brij Kishore was admitted in Police Station. He also examined accused Pahalwan in the Police Station who made statement that he has concealed the weapon which was used in commission of offence and on his instance, IO got the sabbal recovered from Raidas Temple chabutara from below the sand. The sabbal was sealed which is Ext.-8 and memo was prepared which is Ext. Ka-10. Of both recoveries, he prepared site map and sealed articles were deposited in Police Station. He also examined accused Veer Singh and other witnesses in the Police Station itself. Accused Nathu surrendered on 8.2.1984 in the court who was examined in jail. Treatment papers of accused Ramcharan was obtained and after completing investigation, charge-sheet was submitted by him. He has further stated that incriminating articles recovered from the place of occurrence and during investigation was sent for chemical examination.

26. The learned counsel for the appellants has submitted that the two witnesses of fact PW-1 Lakhan Lal Yadav and PW-2 Ramsewak Yadav have been wrongly relied upon by the learned trial court and they could not be believed as they are real sons of deceased and highly interested witnesses. There presence at the place of occurrence is doubtful at the time of incident as there is material contradiction, discrepancy and improvements in their statement. It has been stated by PW-1 that on his shout, his brother PW-2 and other 3-4 persons of the locality reached there, but none of such persons has been made witness nor any of them has been examined.

27. We have considered the above arguments in the light of evidence on record. Only PW-1 has stated that with PW-2, some persons of locality reached

there. PW-2 has not stated as such. In the cross-examination, PW-1 has said that he did not recognize who were the persons reaching there. He has further said that he is not able to say whether they reached there when accused were beating his father or soon after the incident. He has further stated that after one or two hours, he saw some persons coming there. PW-2 has positively stated that except him, none reached there hearing the shout of his brother. It is pertinent to mention that in the charge-sheet, the IO has not shown any other eyewitness which means that either none came there at the time of incident or even if came, did not offer to be witness. It may be mentioned that people avoid becoming witness and giving evidence in such kind of cases. Life is complicated and none wants it to be more complicated. The submission with regards to non-examination or non-availability of independent witness is concerned, it is hardly relevant in view of unimpeachable testimony of PW-1 and PW-2 who have fully supported the prosecution version. In **Bhagwan Jagannath Markad Vs. State of Maharashtra, (2016) 10 SCC 537** and **Mukesh v State of NCT of Delhi, AIR 2017 SC 2161**, it has been held that if a witness examined in the court is otherwise found reliable and trustworthy, the fact sought to be proved by that witness need not be further proved through other witnesses though there may be other witnesses available who could have been examined but were not examined. Non-examination of material witness is not a mathematical formula for discarding the weight of the testimony available on record however natural, trustworthy and convincing it may be. It is settled law that non-examination of eye-witness cannot be pressed into service like a ritualistic formula for discarding the prosecution case with a stroke of pen. Court can convict an accused on statement of sole witness even if he is relative of the deceased and non examination of independent witness would not be fatal to the case of prosecution.

28. The witnesses have been put to rigorous cross-examination on the point of deceased whether eased out or easing when killed, he got the opportunity to wear his pant and wash himself, where he eased out in the joint latrine or outside, whether his latrine was found there and his private part was found to have been washed, who pulled up his pant, whether the deceased was wearing underwear or LANGOT (a kind of underwear), whether his latrine got pasted on his clothes and the like, and on this basis, attempt has been made to show contradiction in the statement of witnesses. In a criminal incident like this, such contradiction or discrepancy is insignificant and meaningless, as it is not possible for witnesses to keep focus on such silly things while beholding a crime, particularly when the target of such crime is one's father himself.

29. The Supreme Court in **Bharwada Bhoginbhai Hirjibhai v. State of Gujarat AIR 1983 SC 753** has laid down following principles to appreciate the testimony of eyewitnesses:

"(1) By and large a witness cannot be expected to possess a photographic memory and to recall the details of an incident. It is not as if a video tape is replayed an the mental screen. (2) Ordinarily it so happens that a witness is overtaken by events, The witness could not have anticipated the occurrence which so often has an element of surprise. The mental faculties therefore cannot be

expected to be attuned to absorb the details. (3) The powers of observation differ from person to person. What one may notice, another may not. An object or movement might emboss its image on one person's mind, whereas it might go unnoticed on the part of another. (4) By and large people cannot accurately recall a conversation and reproduce the very words used by them or heard by them. They can only recall the main purport of the conversation. It is unrealistic to expect a witness to be a human tape recorder. (5) In regard to exact time of an incident, or the time duration of an occurrence, usually, people make their estimates by guesswork on the spur of the moment at the time of interrogation. And one cannot expect people to make very precise or reliable estimates in such matters. Again, it depends on the time-sense of individuals which varies from person to person. (6) Ordinarily a witness cannot be expected to recall accurately the sequence of events which take place in rapid succession or in a short time span. A witness is liable to get confused, or mixed up when interrogated later on. (7) A witness, though wholly truthful, is liable to be overawed by the Court atmosphere and the piercing cross-examination made by counsel and out of nervousness mix up facts, get confused regarding sequence of events, or fill up details from imagination on the spur of the moment. The sub-conscious mind of the witness sometimes so operates on account of the fear of looking foolish or being disbelieved though the witness is giving a truthful and honest account of the occurrence witnessed by him - perhaps it is a sort of a psychological defence mechanism activated on the spur of the moment."

The Supreme Court, therefore, held:

"Discrepancies which do not go to the root of the matter and shake the basic version of the witnesses, therefore cannot be annexed with undue importance. More so when the all important "probabilities-factor" echoes in favour of the version narrated by the witnesses."

30. In **Ugar Ahir v. State of Bihar, AIR 1965 SC 277**, it held:

"The maxim falsus in uno, falsu in omnibus (false in one thing, false in everything) is neither a sound rule of law nor a rule of practice. Hardly one comes across a witness whose evidence does not contain a grain of untruth or at any rate exaggerations, embroideries or embellishments. It is, therefore, the duty of the court to scrutinise the evidence carefully and, in terms of the felicitous metaphor, separate the grain from the chaff. But, it cannot obviously disbelieve the substratum of the prosecution case or the material parts of the evidence and reconstruct a story of its own out of the rest."

31. In **State of UP v Anil Singh, 1988 (Supp.) SCC 686**, it has been held by the Supreme Court that a Judge does not preside over a criminal trial merely to see that no innocent man is punished. A Judge also presides to see that a guilty man does not escape from punishment. One is as important as the other. Both are public duties which the judge has to perform. Again, in **Harijana Thirupala v. Public Prosecutor, High Court of AP, (2002) 6 SCC 470**, it has been ruled as under:

"..In appreciating the evidence the approach of the court must be integrated not truncated or isolated. In other words, the impact of the evidence in

totality on the prosecution case or innocence of the accused has to be kept in mind in coming to the conclusion as to the guilt or otherwise of the accused. In reaching a conclusion about the guilt of the accused, the court has to appreciate, analyse and assess the evidence placed before it by the yardstick of probabilities, its intrinsic value and the animus of witnesses."

32. In **Krishna Mochi v. State of Bihar, (2002) 6 SCC 81**, the Supreme Court of India again laid emphasis on realistic approach to be adopted by the criminal courts while appreciating evidence in criminal trial and said:

"The court while appreciating the evidence should not lose sight of these realities of life and cannot afford to take an unrealistic approach by sitting in an ivory tower. I find that in recent times the tendency to acquit an accused easily is galloping fast. It is very easy to pass an order of acquittal on the basis of minor points raised in the case by a short judgement so as to achieve the yardstick of disposal. Some discrepancy is bound to be there in each and every case which should not weigh with the court so long it does not materially affect the prosecution case. In case discrepancies pointed out are in the realm of pebbles, the court should tread upon it, but if the same are boulders, the court should not make an attempt to jump over the same. These days when crime is looming large and humanity is suffering and the society is so much affected thereby, duties and responsibilities of the courts have become much more. Now the maxim "let hundred guilty persons be acquitted, but not a single innocent be convicted" is, in practice, changing the world over and courts have been compelled to accept that "society suffers by wrong convictions and it equally suffers by wrong acquittals". I find that this Court in recent times has conscientiously taken notice of these facts from time to time."

33. Learned counsel for the appellants has submitted that the alleged witnesses produced by the prosecution are family members, as such, they are interested witnesses. The conviction of the appellants is primarily based on the statement of these witnesses, and therefore, is liable to be set-aside. On the contrary, learned counsel appearing for the State has argued that there was sufficient documentary and expert evidence on record. The natural witnesses who were present at the spot at the time of occurrence were examined by the prosecution. The version of the eyewitnesses cannot be doubted. Their presence on the place of occurrence was natural and they had no reason to falsely implicate all or any of the accused in the case. It is contended that the version of the eyewitnesses is fully supported by the medical/forensic evidence, recovery of incriminatory articles and the statement of the Investigating Officer.

34. So far as the issue of related and interested witnesses is concerned, it has been submitted that both the fact witnesses are related witnesses and because of enmity there is all possibility that in order to frame the accused persons for the charge they have given evidence against them. It is not disputed that both the eyewitnesses are real brothers and sons of the deceased. But this cannot be a reason to disbelieve their testimony. Both lived with the deceased in the same house and in the same locality where the criminal

incident took place. Their presence at the scene of occurrence is natural. The submission of the learned counsel for the appellant is that both these witnesses are related and highly interested witnesses as they are the real brothers and the deceased was their father. The plea of defence of false implication on account of enmity and family dispute has been rightly disbelieved by the learned trial court in absence of any cogent evidence. Moreover, these accused persons were close relatives and family members, or closely associated with them, and there is no reason why they will be falsely implicated by complainant side.

35. So far as first part of the argument with regards to the testimony of interested witness is concerned, there is no hard and fast rule that family members can never be true witnesses of the occurrence and they will always depose falsely before the Court. It always depends upon the facts and circumstances of a given case. The law in this regard is well settled that the testimony of a witness cannot be discredited only on the ground that the witnesses are related or interested. The only requirement is that the testimony of such witness should be scrutinized cautiously and carefully. Thus, the only requirement regarding evidence of related witnesses, under law, is that their evidence should be scrutinized with extra care and caution. But their evidence cannot be discarded only on the ground of their relationship.

36. The appreciation of evidence of related witnesses has been discussed by the Supreme Court in its various judgements. In **Dalip Singh v. State of Punjab (1954) SCR 145**, while rejecting the argument that witnesses who are close-relatives of the victim should not be relied upon, the Court held as under:

"A witness is normally to be considered independent unless he or she springs from sources which are likely to be tainted and that usually means unless the witness has cause, such as enmity against the accused, to wish to implicate him falsely. Ordinarily, a close relative would be the last to screen the real culprit and falsely implicate an innocent person. It is true, when feelings run high and there is personal cause for enmity, that there is a tendency to drag in an innocent person against whom a witness has a grudge along with the guilty, but foundation must be laid for such a criticism and the mere fact of relationship far from being a foundation is often a sure guarantee of truth. However, we are not attempting any sweeping generalisation. Each case must be judged on its own facts. Our observations are only made to combat what is so often put forward in cases before us as a general rule of prudence. There is no such general rule. Each case must be limited to and be governed by its own facts."

37. In **Masalti V. State of U.P. (AIR 1965 SC 202)** Supreme Court Observed:

"But it would, we think, be unreasonable to contend that evidence given by witnesses should be discarded only on the ground that it is evidence of partisan or interested witnesses. ... The mechanical rejection of such evidence on the sole ground that it is partisan would invariably lead to failure of justice."

38. The Supreme Court has also taken the view that related witness does not necessarily mean or is equivalent to an interested witness. A witness may be called interested only when he or she derives some benefit from the result of

litigation; a decree in a civil case, or in seeing a person punished in a criminal trial. In **Darya Singh v State of Punjab, AIR 1965 SC 328, followed by State of UP v Kishanpal (2008) 16 SCC 73**, the Court held as under:

"On principle, however, it is difficult to accept the plea that if a witness is shown to be a relative of the deceased and it is also shown that he shared the hostility of the victim towards the assailant, his evidence can never be accepted unless it is corroborated on material particulars."

39. Again, in **Appa v. State of Gujarat, AIR 1988 SC 698**, the Court has observed:

"Experience reminds us that civilized people are generally insensitive when crime is committed even in their presence. They withdraw from both, victim and vigilant. They keep themselves away from the Court. They take crime as a civil dispute. This kind of apathy of general public is indeed unfortunate but it is everywhere whether in village life or town and city. One cannot ignore this handicap. Evidence of witnesses has to be appreciated keeping in view such ground realities. Therefore, the Court instead of doubting the prosecution case where no independent witness has been examined must consider the broad spectrum of the prosecution version and then search for the nugget of truth with due regard to probability, if any suggested by the accused."

40. Similar view was taken in **State of AP v S. Rayappa (2006) 4 SCC 512**, where the court observed that it is now almost a fashion that public is reluctant to appear and depose before the court especially in criminal cases and the cases for that reason itself are dragged for years and years. The Court stated the principle as follows:

" ....by now, it is a well-established principle of law that testimony of a witness otherwise inspiring confidence cannot be discarded on the ground that he being a relation of the deceased is an interested witness. A close relative who is a very natural witness cannot be termed as interested witness. The term interested postulates that the person concerned must have some direct interest in seeing the accused person being convicted somehow or the other either because of animosity or some other reasons."

41. Further, in **Pulicherla Nagaraju @ Nagaraja Reddy v. State of AP (2007) 1 SCC (Cri) 500**, the Supreme Court has held as under:

"In this case, we find that the trial court had rejected the evidence of PW1 and PW2 merely because they were interested witnesses being the brother and father of the deceased. But it is well settled that evidence of a witness cannot be discarded merely on the ground that he is either partisan or interested or closely related to the deceased, if it is otherwise, found to be trustworthy and credible. It only requires scrutiny with more care and caution, so that neither the guilty escape nor the innocent wrongly convicted. If on such careful scrutiny, the evidence is found to be reliable and probable, it can be acted upon. If it is found to be improbable or suspicious, it ought to be rejected. Where the witness has a motive to falsely implicate the accused, his

testimony should have corroboration in regard to material particulars before it is accepted."

42. Similarly, in **Satbir Singh v State of UP, (2009) 13 SCC 790**, the Court has held as under:-

"It is now a well-settled principle of law that only because the witnesses are not independent ones may not by itself be a ground to discard the prosecution case. If the prosecution case has been supported by the witnesses and no cogent reason has been shown to discredit their statements, a judgment of conviction can certainly be based thereupon……"

43. The aforementioned observation of **Masalti (supra)** has been affirmingly quoted in subsequent judgements. Thus, for instance, in **M.C. Ali v. State of Kerala:: AIR 2010 SC 1639; and Himanshu v. State (NCT of Delhis, (2011) 2 SCC 36, Bhajan Singh and others Vs. State of Haryana; (2011) 7 SCC 421**, it was laid down that evidence of a related witness can be relied upon provided it is trustworthy. Such evidence is required to be carefully scrutinised and appreciated before reaching to a conclusion on the conviction of the accused in a given case.

44. Again, in **Jayabalan v U.T. of Pondicherry; 2010(68) ACC 308 (SC)**, the Supreme Court has made following observation:

"We are of the considered view that in cases where the court is called upon to deal with the evidence of the interested witnesses, the approach of the court, while appreciating the evidence of such witnesses must not be pedantic. The court must be cautious in appreciating and accepting the evidence given by the interested witnesses but the court must not be suspicious of such evidence. The primary endeavour of the court must be to look for consistency. The evidence of a witness cannot be ignored or thrown out solely because it comes from the mouth of a person who is closely related to the victim."

45. **Dharnidhar v State of UP, (2010) 7 SCC 759** referred the above observation of **Jaya Balan (supra)** and held that there is no hard and fast rule that family members can never be true witnesses to the occurrence and that they will always depose falsely before the Court. It will always depend upon the facts and circumstances of a given case. Similar view was taken by this Court in **Ram Bharosey v. State of UP AIR 2010 SC 917**, where the Court stated the dictum of law that a close relative of the deceased does not, per se, become an interested witness. An interested witness is one who is interested in securing the conviction of a person out of vengeance or enmity or due to disputes and deposes before the Court only with that intention and not to further the cause of justice. The law relating to appreciation of evidence of an interested witness is well settled, according to which, the version of an interested witness cannot be thrown over- board, but has to be examined carefully before accepting the same. Thus the statements of the alleged interested witnesses can be safely relied upon by the Court in support of the prosecution's story. But this needs to be done with care and to ensure that the administration of criminal justice is not undermined by the persons, who are closely related to the deceased. When their statements find corroboration by other

witnesses, expert evidence and the circumstances of the case clearly depict completion of the chain of evidence pointing out to the guilt of the accused, then we see no reason why the statement of so called `interested witnesses' cannot be relied upon by the Court.

46. Again, in **Balraje @ Trimbak v State of Maharashtra, (2010) 6 SCC 673**, it has been held that when the eye-witnesses are stated to be interested and inimically deposed against the accused, it would not be proper to conclude that they would shield the real culprit and rope in innocent person. The truth or otherwise of the evidence has to be weighed pragmatically. The Court would be required to analyse the evidence of related witnesses and those witnesses who are inimical towards the accused. But if after careful analysis and scrutiny of their evidence, the version given by the witnesses appears to be clear, cogent and credible, there is no reason to discard the same.

47. Subsequently, in **Jalpat Rai v State of Haryana AIR 2011 SC 2719 and Waman v State of Maharashtra AIR 2011 SC 3327**, it was observed that the over-insistence on witnesses having no relation with the victims often results in criminal justice going away. The testimony of a witness in a criminal trial cannot be discarded merely because the witness is a relative or family member of the victim of the offence. In such a case, court has to adopt a careful approach in analysing the evidence of such witness and if the testimony of the related witness is otherwise found credible, accused can be convicted on the basis of testimony of such related witness. This view has been reiterated in **Shyam Babu v State of UP, AIR 2012 SC 3311, Dhari & Others v State of UP, AIR 2013 SC 308** and **Bhagwan Jagannath Markad (supra).** Recently, in **Ganapathi v State of Tamilnadu, AIR 2018 SC 1635**, the Court found no force in the argument that the conviction based on the evidence of family members in a murder trial is not sustainable. In **Rupinder Singh Sandhu vs State of Punjab, (2018) 16 SCC 475**, it has been reiterated by the Supreme Court that relationship by itself will not render the witness untrustworthy. The Supreme Court laid down as below:

"Relationship is not a factor to affect credibility of a witness. It is more often than not that a relation would not conceal the actual culprit and make allegations against an innocent person. Foundation has to be laid if plea of false implication is made. In such cases, the court has to adopt a careful approach and analyse evidence to find out whether it is cogent and credible. ..... A witness is normally to be considered independent unless he or she springs from sources which are likely to be tainted and that usually means unless the witness has cause, such as enmity against the accused, to wish to implicate him falsely. Ordinarily, a close relative would be the last to screen the real culprit and falsely implicate an innocent person. It is true, when feelings run high and there is personal cause for enmity, that there is a tendency to drag in an innocent person against whom a witness has a grudge along with the guilty, but foundation must be laid for such a criticism and the mere fact of relationship far from being a foundation is often a sure guarantee of truth."

48. Thus, in view of aforementioned decisions of the Supreme Court, it is now a settled position of law that the statements of the interested witnesses can be safely relied upon by the court in support of the prosecution story. But this needs to be done with care and to ensure that the administration of criminal justice is not undermined by the persons who are closely related to the deceased. When their statements find corroboration by other evidence, expert evidence and the circumstances of the case clearly depict completion of the chain of evidence pointing out to the guilt of the accused, then there is no reason as to why the statement of so-called 'interested witnesses' cannot be relied upon by the Court. It would be hard to believe that the close relatives shall leave the real culprit and shall implicate innocent persons falsely simply because they have enmity with the accused persons.

49. Now applying the principles discussed above, we find it true that PW-1 and PW-2 are the real brothers and son of the deceased. But, there is nothing in their statements which can create any amount of doubt, although, both have been cross-examined at length on every point very minutely. Both sides are close relatives and there is no reason for the witnesses to falsely implicate the accused persons in the said incident if the crime was committed by someone else. On the contrary, the accused persons did have enmity with deceased as on his complaint, Pahalwan was removed from service and he was son in law of accused Ramcharan and other accused persons are his son or closely related or associated. Both the eye-witnesses knew the accused persons who were beating the deceased and they recognized them in the light of torch. The time of incident is the time when people go out for easing. The presence of the deceased and PW-1 is not unnatural. PW-2 reached there on hearing the shout of PW-1. Both identified the accused persons and have also stated that accused Pahalwan was assaulting by sabbal and others were assaulting by lathi. There is no unnatural variation in their testimony so far as commission of the offence by accused-appellants is concerned. Both the witnesses were hardly 19 and 17 years in age respectively and belong to a very humble background and in such an age, it is not possible for them to plant and frame falsely the accused-appellants in such a crime, who were close relatives and had no personal grudge against them individually, except that their father was not in good terms with the accused Pahalwan. On critical analysis of their statements, we find that their account as eyewitness cannot be disbelieved and the learned trial court has rightly found them reliable and trustworthy.

50. It has been further mentioned by the learned counsel to the appellant that the deceased and his family were living elsewhere and therefore the presence of deceased and particularly, PW-1 and PW-2 is unnatural as the incident has been alleged to have taken place early in the morning. In support of this argument, a reference has been taken of the statement of PW-1 where he has stated that they started living in Awas Vikas Colony. From the very statement of PW-1, it is clear that the witness has stated "aap kab ki baat kar rahe hai" (of when you are talking) and then he has stated that prior to the incident when Pahalwan beat his father, they all with his father shifted to Awas Vikas Colony. This witness has clearly stated during his examination-in-chief that about

two years nine months before, Pahalwan committed marpeet with his father about which a complaint was given to SP, Jhansi which is Ext. Ka-2. The above referred statement by the learned counsel can be related to this incident. It has been specifically stated by both the eyewitnesses that both the sides lived in the same locality and both the sides had joint latrine. The defence should have clarified from PW-1 whether they shifted for ever or not in view of the qualifying sentence "aap kab ki baat kar rahe hai." In **Mahavir Singh Vs. State of Haryana, (2014) 6 SCC 716**, it has been laid down that in case the question is not put to the witness in cross-examination who could furnish explanation on a particular issue, the correctness or legality of the said fact/issue could not be questioned. Moreover, it has been never the case of either side that the deceased and his family lived elsewhere. PW-1 has stated in detail about the houses in that locality and has also said that his house and house of accused Ramcharan is attached and behind the houses, there is open land through which one has to go to the said latrine. Thus, we do not find any substance in this argument.

51. Next limb of argument is the time of death and it has been argued with reference to the post-mortem report and statement of doctor that the deceased must have died in the midnight, much prior to the incident alleged by the prosecution. In his statement during cross-examination, the doctor has stated that it was more probable that the death might have taken place in the midnight at 12-01 AM as his bladder was empty and rectum was half filled. He has stated that if the deceased had not urinated, the bladder should have been full and if not eased, rectum should be full. Yellowish liquid indicates that the deceased might have taken some liquid substance just before death.

52. The law on the point of alleged discrepancies between ocular testimony and medical/post-mortem report needs to be discussed in brief here to arrive at correct conclusion. In **Suresh Chandra Bahri Vs. State of Bihar, JT 1994 (4) SC 309** the Supreme Court referred **"Modis Medical Jurisprudence and Toxicology, 22nd Edition, pages 246, 247** which reads as under :

"Digestive conditions vary in individuals up to 2.5-6 hours depending upon healthy state of body, consistency of food motility of the stomach, osmotic pressure of the stomach contents, quantity of food in the duodenum, surroundings in which food is taken, emotional factors and residual variations and only very approximate time of death can be given."

53. In **Solanki Chimanbhai Ukabhai vs State of Gujrat, AIR 1983 SC 484**, it has been laid down:

"Ordinarily, the value of medical evidence is only corroborative. It proves that the injuries could have been caused in the manner alleged and nothing more. The use which the defence can make of the medical evidence is to prove that injuries could possibly have been caused in the manner alleged and thereby discredit the eye-witnesses. Unless, however, the medical evidence in its turn goes so far that it completely rules out all possibilities whatsoever of injuries taking place in the manner alleged by eye-witnesses, the testimony of eye-witnesses cannot be thrown out on the ground of alleged

inconsistency between it and the medical evidence."

54. In **Abdul Sayeed vs State of MP, 2010 (10) SCC 259** in which the above passage from **Solanki (supra)** has been quoted affirmingly to lay down:

"Thus, the position of law in cases where there is contradiction between medical evidence and ocular evidence can be crystallised to the effect that though the ocular testimony of a witness has greater evidentiary value vis-a-vis medical evidence, when medical evidence makes the ocular testimony improbable, that becomes a relevant factor in the process of evaluation of evidence. However, where medical evidence goes so far that it completely rules out all possibility of the ocular evidence being true, the ocular evidence may be disbelieved.".

55. In **Krishnan Vs. State, AIR 2003 SC 2978**, the supreme court considered the question how to reconcile where medical opinion suggesting alternative possibilities than ocular testimony? The court has observed:

" The ocular evidence being cogent, credible and trustworthy, minor variance, if any, with the medical evidence are not of any consequence. It would be erroneous to accord undue primacy to the hypothetical answers of medical witnesses to exclude the eye-witnesses' account which had to be tested independently. It is trite that where the eye witnesses' account is found credible and trustworthy, medical opinion pointing two alternative possibilities is not accepted as conclusive. Eye-witnesses account would require a careful independent assessment and evaluation for their credibility which should not be adversely prejudged making any other evidence, including medical evidence, as the sole touchstone for the test of such credibility."

56. Similarly, in **Thamman Kumar v. State of Union Territory of Chandigarh, AIR 2003 SC 3975**, the Supreme Court has explained the legal principle on the point by making following observation:

"There may be a case where there is total absence of injuries, which are normally caused by a particular weapon. There is another category where though the injuries found on the victim are of the type, which is possible by the weapon of assault, but the size and dimension of the injuries do not exactly tally with the size and dimension of the weapon. The third category can be where the injuries found on the victim are such which are normally caused by the weapon of assault but are not found on that portion of the body where they are deposed to have been caused by the eye-witnesses. The same kind of inference cannot be drawn in three categories of apparent conflict in oral and medical evidence enumerated above. In the first category it may legitimately be inferred that the oral evidence regarding assault having been made from a particular weapon is not truthful. However, in the second category and third category no such inference can straight-way be drawn. The manner and method of assault, the position of the victim, the resistance offered by him, the opportunity available to the witnesses to see the occurrence like their distance, presence of light and many other similar factors will have to be taken into consideration in judging the reliability of the ocular testimony."

57. The above view has been referred and quoted with approval in subsequent judgements. Thus, in **Abdul Sayeed Vs. State of M.P, (2010) 10 SCC 259 Rakesh Vs. State of UP, 2012 (76) ACC 264 (SC) and Sadhu Saran Singh Vs. State of UP, (2016) 4 SCC 357**, it has been held that if the direct testimony of eye witnesses is reliable, the same cannot be rejected on the basis of hypothetical medical evidence, and the ocular evidence, if reliable, should be preferred over medical evidence. Opinion given by a medical witness (doctor) need not be the last word on the subject. It is of only advisory character. Such an opinion shall be tested by the court. If the opinion is bereft of logic or objectivity, the court is not obliged to go by that opinion. If one doctor forms one opinion and another doctor forms a different opinion on the same fact, it is open to the Judge to adopt the view which is more objective or probable. Similarly if the opinion given by one doctor is not consistent with the probability, the court has no liability to go by the opinion merely because it is said by the doctor. Of course, due weight must be given to the opinions given by persons who are experts in the particular subject. Ocular evidence would have primacy unless established to be totally irreconcilable with the medical evidence. Testimony of ocular witness has greater evidentiary value.

58. The Supreme Court, while dealing with the medical evidence vis-a-vis eye-witness testimony, in **Dayal Singh Vs. State of Uttaranchal, AIR 2012 SC 3046**, has made observation that courts normally look at expert evidence with a greater sense of acceptability but it is equally true that the courts are not absolutely guided by the report of the experts especially if such reports are perfunctory, unsustainable and are the result of a deliberate attempt to misdirect the prosecution. Where the eye witness account is found credible and trustworthy, medical opinion pointing to alternative possibilities may not be accepted as conclusive. The expert witness is expected to put before the court all materials inclusive of the data which induced him to come to the conclusion and enlighten the court on the technical aspect of the case by examining the terms of science, so that the court, although not an expert, may form its own judgement on those materials after giving due regard to the expert's opinion because once the expert opinion is accepted it is not the opinion of the Medical Officer but that of the court. The skill and experience of an expert is the ethos of his opinion which itself should be reasoned and convincing. If the view of the expert has to find due weightage in the mind of the court, it has to be well authored and convincing.

59. In view of above, we are of the view that semi digested food found during post-mortem of the deceased person cannot be a decisive factor in the circumstances of the case to create doubt with regards to timing of death. The deceased was a railway employee and the daily routine, eating and sleeping habit of such person is governed by what duty he was performing at the time of death. It may also be noticed that many persons usually take tea or some liquid before going to ease out. It may also be noticed that because of uncertainty in the daily routine and the eating habit, constipation etc, it is always possible that rectum may not be clear in one time. Only on the basis that the doctor found rectum half filled at the time of post-mortem, it is not sufficient

to show that the incident took place at a time much before what has been alleged by the prosecution. Moreover, the settled principle is that if there is some difference of such nature between the ocular testimony and medical evidence, ocular testimony being direct evidence will be preferred over the medical evidence. Both the eye-witnesses have clearly proved the time of death as they have stated that when the accused persons ran away after committing the offence, they went closer to their father and found that he was dead. No reason has been advanced from the side of appellants to create doubt on the ocular version on this point.

60. Two eyewitnesses have supported the version of the prosecution so far as the time and date of the offence is concerned. the statement of the doctor that death might have occurred in the mid night appears to be a mistaken statement and if read as a whole no importance can be attached to it and the time of occurrence appears to have been established to be at about 5 to 5-½ AM on 03.02.1984. The medical evidence in this case is not of that nature which completely rules out all possibility of ocular evidence being true or renders it false.

61. This appears to be a strange statement given by the doctor that death of deceased might have occurred in mid night as in his examination-in-chief, he has clearly stated that the deceased must have died on the date of incident at about 5-5-½ AM as injury was sufficient to cause death. Moreover, the two eye-witnesses who have been examined by the prosecution have clearly stated that the incident took place on 03.02.1984 at about 5 to 5-½ AM. So far as the discrepancy in the statement of the doctor is concerned, it is well settled that doctor can never be absolutely certain on point of time of duration of injuries and death. In **Ram Swaroop v State of U.P., 2000 (40) ACC 432 (SC)**, the Supreme Court has held that the doctor can never be absolutely certain on point of time so far as duration of injuries and death are concerned. In **Ramjee Rai v State of Bihar, 2007 (57) ACC 385 (SC)**, it has been further held that the medical science has not reached such perfection so as to enable a medical expert to categorically indicate the exact timing of death.

62. Another submission is that the injuries to the deceased are on his left part of body and mostly on the upper side and the prosecution has alleged that the deceased was beaten by accused persons surrounding him at the place. Moreover, the place of occurrence is situated at a very narrow place and it is not possible to hit the deceased by lathi and sabbal as it may hit the accused-appellants themselves. Moreover, if four accused persons were beating the deceased, he must have sustained injuries all over the body and not on the left side of his head. It is noteworthy that nine out of ten injuries found on the body of deceased in post-mortem is on the left side of his head covering ear, scalp and forehead. This submission is neither significant nor relevant as it is clear from the testimony of both the witnesses that they saw accused persons beating the deceased by lathi and sabbal. PW-1 Lakhan Lal has stated that from the place he saw the incident, he found his father lying zig zag and two accused persons were beating from opposite side with their face towards the witness, third was standing on the side of his father's leg whereas the fourth was in the right side towards him. Meaning

thereby, all the four were involved in beating and commission of crime. This is no argument that if all the injuries are on left side of head, some of the accused must have been falsely implicated. On the contrary, it shows that the accused persons hit on head rapidly and repeatedly to ensure the death of the deceased in all probability. The brain of the deceased coming out from his head due to injury also supports this fact.

63. The other aspect is of motive for the incident. Learned counsel for appellants has submitted that there was no motive behind causing injury while learned counsel for State has submitted that there was a dispute with regard to removal of accused Pahalwan from his railway service. This was the cause and motive for the commission of offence. It has further been submitted by learned counsel for state that there is direct evidence and in that case, motive loses its importance and the case has to be examined on the basis of evidence on record.

64. In a number of decisions, like **Abu Thakir v State; AIR 2010 SC 2119, State of U.P. v Nawab Singh; AIR 2010 SC 3638, Bipin Kumar Mondal v State of West Bengal; 2005 SCC (Criminal) 33, Shivraj Bapuray Jadhav v State of Karnataka; (2003) 6 SCC 392, Thaman Kumar v State of Union Territory of Chandigarh; (2003) 6 SCC 380, State of H.P. vs. Jeet Singh; (1999) 4 SCC370**, it has been repeatedly held by the Supreme Court that motive is not a sine qua non for the commission of a crime. Moreover, it takes a back seat in a case of direct ocular account of the commission of the offence by a particular person. In a case of direct evidence the element of motive does not play such an important role so as to cast any doubt on the credibility of the prosecution witnesses even if there be any doubt raised in this regard. If the eye-witnesses are trustworthy, the motive attributed for the commission of crime may not be of much relevance. Failure to prove motive or absence of evidence on the point of motive would not be fatal to the prosecution case when the other reliable evidence available on record unerringly establishes the guilt of the accused.

65. In **Badam Singh v. State of Madhya Pradesh; AIR 2004 SC 26**, it has been remarked by the Court that, even though existence of motive loses significance when there is reliable ocular testimony, in a case where the ocular testimony appears to be suspect, the existence or absence of motive acquires some significance regarding the probability of the prosecution case. In any case, we find with reference to judgements in **Sheo Shankar Singh v State of Jharkhand; 2011(74) ACC 159 (SC), Ravinder Kumar v State of Punjab; 2001 (2) JIC (SC), State of H.P. v Jeet Singh; (1999) 4 SCC 370; Pannayar v State of Tamil Nadu by Inspector of Police; AIR 2010 SC 85** that the legal position regarding proof of motive as an essential requirement for bringing home the guilt of the accused is fairly well settled by a long line of decisions of the Court. These decisions have made a clear distinction between cases where prosecution relies upon circumstantial evidence on the one hand and those where it relies upon the testimony of eye-witnesses on the other. In the former category of cases proof of motive is given the importance it deserves, for proof of a motive itself constitutes a link in the chain

of circumstances upon which the prosecution may rely. Proof of motive, however, goes into the background in cases where the prosecution relies upon an eye-witness account of the occurrence.

66. Though not necessarily required as the case in hand is based on direct evidence of eyewitnesses, it is pertinent to mention that there may be cases based on circumstantial evidence where absence of motive may become insignificant to establish guilt. In **G. Prashwanath v State of Karnataka; AIR 2010 SC 2914, Jagdish v State of M.P.; 2009 (67) ACC 295 (SC) and Ujjagar Singh v State of Punjab; AIR 2008 SC (Supp) 190**, it has been observed by the Supreme Court that it is true that in a case of circumstantial evidence motive does have extreme significance but to say that in the absence of motive, the conviction based on circumstantial evidence cannot, in principle, be made is not correct. Motive provides foundational material. But absence of motive is not of much consequence when chain of proved circumstances is complete to exclusively lead to the hypothesis of guilt.

67. We find that the Supreme Court has clearly opined in various decisions, such as **Gopi Ram v St. Of UP, 2006 (55) ACC 673 SC, State of UP v Nawab Singh; 2005 SCC (Criminal) 33, Shivraj Bapuray Jadhav v State of Karnataka; (2003) 6 SCC 392, R.R. Reddy v State of AP, AIR 2006 SC 1656, Sucha Singh v State of Punjab; AIR 2003 SC 1471, State of Rajasthan v Arjun Singh AIR 2011 SC 3380, Varun Chaudhry v State of Rajasthan AIR 2011 SC 72** that the prosecution case could not be denied on the ground of alleged absence or insufficiency of motive. Motive is insignificant in cases of direct evidence of eyewitnesses. Failure to prove motive or absence of evidence on the point of motive would not be fatal to the prosecution case when the other reliable, truthful and acceptable evidence is available on record sufficient to establish the guilty of accused persons.

68. It has been contended on behalf of the appellants that the prosecution has failed to prove any motive for the commission of the crime and in absence of clear and emphatic motive, the order of conviction is liable to be set-aside and the accused persons are entitled for acquittal. This submission is, firstly, based on misreading of the record and secondly it is devoid of any merits. The evidence on record indicates that the relation between the parties were quite strained on account of the termination of railway service of accused Pahalwan on the complaint of the deceased. At earlier occasion also, accused Pahalwan committed marpeet with deceased and the family shifted to some other place for sometimes. Be that as it may, it is not always necessary for the prosecution to establish a definite motive for the commission of the crime. It will always be relatable to the facts and circumstances of a given case. It will not be correct to say as an absolute proposition of law, that the existence of a strong or definite motive is a sine qua non for holding an accused guilty of a criminal offence. It is not correct to say that absence of motive essentially results in the acquittal of an accused if he is otherwise found to be guilty. In **Babu Lodhi v State of UP (1987) 2 SCC 352**, the Court took the view that insofar as the adequacy of motive is concerned, it is not a matter which can be accurately weighed on the scales of a balance.

69. We are of the view that when there is sufficient direct evidence regarding the commission of offence, the question of motive should go away from the mind of the Court. Motive is a double edged weapon and the key question for consideration in cases based on direct evidence remains whether the prosecution had convincingly and satisfactorily established the guilt of all or any of the accused beyond reasonable doubt by adducing reliable and cogent evidence. As such, the proof of the existence of a motive is not necessary for a conviction for any offence. In the recent judgement of **Saddik Vs. State of Gujarat, (2016) 10 SCC 663**, it has been held that motive is not a sine qua non for the commission of a crime. Moreover, it takes a back seat in a case of direct ocular account of the commission of the offence by a particular person. In a case of direct evidence the element of motive does not play such an important role as to cast any doubt on the credibility of the prosecution witnesses even if there be any doubts raised in this regard. If the eye-witnesses are trustworthy, the motive attributed for the commission of crime may not be of much relevance. Failure to prove motive or absence of evidence on the point of motive would not be fatal to the prosecution case when the other reliable evidence available on record unerringly establishes the guilt of the accused.

70. It is pertinent to mention that where case is based on direct evidence it is not incumbent for the prosecution to allege or prove motive. It can, however, be pointed out that in this instant case, the motive was very much present with the accused persons. There was enmity as on the basis of complaint made by the deceased person accused Pahalwan was removed from service and earlier also accused Pahalwan committed marpeet with the deceased and the family was forced to shift to some other place. Moreover, from the perusal of the FIR, it is clear that motive has been alleged and the witnesses have proved it. It has been alleged in the FIR that there was enmity between deceased and accused Ramcharan and Pahalwan as Pahalwan lost his railway service on the complaint of deceased. In the statement, it has come that prior to incident also, Pahalwan committed marpeet with the deceased. Therefore, the learned trial court has rightly concluded that there was existing and immediate motive for the offence and it was not necessary for the prosecution to prove the service of Pahalwan and termination order by filing doccuments.

71. The ocular testimony finds further support from the recovery of sabbal on the instance of accused Pahalwan, recovery of blood stained tahmad on the instance of co-accused Brij Kishore, the blood stained shirt pant of accused Pahalwan and the blood stained earth recovered from the spot. The recovered articles were sent for chemical examination, the report thereof is Ext. Ka-35. The submission of the learned counsel is that the recovered items were planted and sabbal and tahamad was not recovered on their instance. The perusal of forensic report shows that 1. sabbal, 2. tahamad of accused Brijkishore, 3. pant & 4. shirt of accused Pahalwan and 5. jacket, 6. shirt, 7. jarsi, 8., 9. pants of deceased and 10. blood stained earth were sent for chemical examination. It is pertinent to mention that on item no. 1 to 8, human blood was found and on item no. 2 to 6 and 8, group A blood was found and it is noteworthy that the blood on above items tallied and it

goes to establish that the blood stains on tahamad and pant shirt of accused tallied with the blood of the deceased. The defence has not given any explanation how the blood stains of deceased came on their tahamad, shirt and pants which they were wearing at the time of incident. It is also pertinent to mention that accused Brij Kishore and Pahalwan were arrested on the very date of incident and tahamad was recovered at the instance of Brij Kishore and accused Pahalwan was wearing the pant shirt at the time of arrest. The sabbal which was recovered at the instance of accused Pahalwan was blood stained but the blood was disintegrated and therefore, the blood group was not determined. The reason is understood as the same was recovered from below the sand.

72. The recovery was made by police before before PW-1 Lakhan Lal, PW-4 Sabarjeet and PW-5 Jahangir and these witnesses and police witness of recovery have proved recovery in their statements. The site map of place of recovery has been prepared and proved by police witnesses. The recovered articles have been produced and proved by witnesses during trial. There is no discrepancy on that point in their statements. The learned counsel has tried to discredit PW-4 on the basis that he is father of Dashrath who has been shown to be inscriber of FIR in the list of witnesses in the charge-sheet and was shown to have been present there at the time of incident. But, PW-4 has stated that Dashrath did not tell him about incident. He has also stated falsely about any criminal case pending against him. Even if it is so, it is not sufficient to discredit PW-4 and he has also stated that he lived separately from Dashrath. In respect of PW-5 before whom sabbal was recovered, it has been submitted by the learned counsel that he had given affidavit during investigation that no such recovery was made and as such PW-5 could not have been relied upon by the learned trial court. The learned trial court has taken the view that even if it was so, the police witnesses have proved the recovery and in view of the judgement of the Supreme Court in **Nathu Singh v State of MP, 1974 Cri. L J 11**, their testimony cannot be discarded for the reason that they are police witnesses and it has not been shown that the police had some enmity with accused. Further judgements such as **Pramod Kumar Vs. State (GNCT) of Delhi, AIR 2013 SC 3344** and **Govindaraju alias Govinda Vs. State of Shri Ramapuram P.S., AIR 2012 SC 1292** also affirm this view in which it has been held that the testimony of police personnel should be treated in the same manner as testimony of any other witness. There is no principle of law that without corroboration by independent witnesses, the testimony of police personnel cannot be relied on. The presumption that a person acts honestly applies as much in favour of a police personnel as of other persons and it is not a proper judicial approach to distrust and suspect them without good reasons. As a rule it cannot be stated that Police Officer can or cannot be sole eye witness in criminal case. Statement of Police Officer can be relied upon and even form basis of conviction when it is reliable, trustworthy and preferably corroborated by other evidence on record.

73. We are of the view that there is no error or perversity in the approach of the learned trial court. This instant case is based on direct evidence and the eyewitnesses saw the accused using sabbal for assaulting the deceased and the recovery has been made from a public

place on the date of incident itself. Moreover, blood stains on tahamad and pant shirt of the group of deceased provides additional support to the direct evidence. The recovery of sabbal has been also proved by PW-5 Jahangir who has stated that on the instance of accused, said sabbal was recovered before him and memo of recovery was prepared on which he signed. So far as his affidavit is concerned which was given by him during investigation denying such recovery is no evidence as the witness has denied the same and has stated that his statement before the court is correct, and also in view of judgement of the Supreme Court in **Ayaaubkhan v State of Maharashtra, AIR 2013 SC 58**, where it has been held that affidavits have got no evidentiary value as the affidavits are not included in the definition of "evidence" in S. 3 of the Evidence Act.

74. The defence has disputed the place of occurrence and some omission has been pointed out in the site map prepared by IO and it has been submitted that the lane where the incident has been alleged to have taken place is so narrow that it is not possible for four persons to hit the deceased by lathi and sabbal. With reference to inquest report, the learned counsel for the appellant has submitted that in the beginning of the inquest report the officer who has prepared inquest report has shown the dead body in front of the door of Baldeo Nanhe. From the perusal of the site map, it is clear that the IO has shown where the dead body was found and from where the witnesses saw the incident. From the place, lota of deceased was also taken in possession and blood stained and plain earth was lifted. The Supreme Court in **Jagdish vs State of UP, 1996 (33) ACC 495**, has held that the IO is expected to show in the map what he has observed on spot. Other details based on saying of some persons are not needed to be mentioned as per legal requirement. This view has been further affirmed by this court in **State of UP vs Lakhan Singh, 2014 (86) ACC 82 (All) (DB)**. During investigation, PW-11 IO prepared site-map in the presence of informant on the same day. The incident took place close to the latrine which has been shown in the site map. The houses on both sides of lane has been shown. It was not possible for the IO to ascertain where the deceased eased out and the latrine near the dead body was of the deceased or not. All the fact witnesses have also stated that the incident took place out side the latrine in the lane. In the written report Ext. Ka-1, it has been stated that the informant saw the accused persons beating his father there. That apart, the officer who has prepared inquest report has found the dead body at the same place and the police shifted the dead body to the open ground as the place where the dead body was found was very dirty. Hence, the place of occurrence has been established by prosecution and the arguments of the defence has got no force on the point of place of occurrence.

75. Inquest report of deceased was prepared by PW-10 after taking the dead bodies into possession from the place of occurrence. From perusal of inquest reports, it appears that the police team reached there on 6.50 AM and by 9.00 AM the dead body was duly sealed and after preparing inquest reports the dead bodies were handed over to constables Subhash and Shamim as deposed by him along with papers, necessary for submitting the same for post-mortem. For preparing inquest report, 5 *Panches* were nominated by PW-10. The *panches* were Bhagwandas,

Hariram Yadav, Jangi, Chotelal and Sushil. The dead body was lying in the lane and the place was very dirty and therefore, the dead body was shifted in the open ground situated nearby in front of the house of Baldeo and Nanhe. The dead body was lying flat with eyes closed mouth half opened. On face, blood was clotted and bleeding. The deceased was wearing woolen pant, woolen inner, woolen jacket and jarsi and white shirt. 7 injuries were found including 6 lacerated wound around head and ear in the left side. In respect of the dead body the authority preparing inquest report and *Panches* were of the opinion that the deceased died because of injuries. The dead body was sealed and after preparing necessary papers, was handed over to the constable to take the dead body to the district hospital for post-mortem. The inquest reports have been duly proved by PW-10. Thus, there is nothing in this regard which can create any doubt on prosecution version to the benefit of the defence.

76. It can also be pointed out that defect in investigation, if any, cannot give any advantage to the defence unless such defect goes to the very root of the prosecution version. In **Rupinder Singh Sandhu vs State of Punjab, (2018) 16 SCC 475**, it has been remarked by the supreme court that even if there is lapse in investigation, the same cannot be used to give advantage to accused person in cases where prosecution has led credible evidence, as it is difficult to determine that the investigative defect occurred due to general inefficiency of system or deliberated to shield the accused. In our considered view, the defect pointed out on behalf of the defence appears to be very minor and insignificant in nature and no force can be attached to that part of the argument.

77. The learned counsel for the appellants has mentioned certain discrepancy and contradiction in the testimony of witnesses with regards to who reached first and other persons of the locality reached there or not. With regards to presence of other witnesses, discrepancy has been pointed out. From what distance, the witness saw the incident and whether there was enough light, from what angle accused persons assaulted the deceased and caused injury and the like. It needs to be pointed out that where own father of the two eyewitnesses was the victim, in such a horrendous situation, the witnesses are not supposed to be perfectionist to give the exact account of the incident. Some sort of contradiction, improvement, embellishment is bound to occur in the statement. As laid down in **State of U.P. v. Naresh; 2011 (75) ACC 215) (SC)**, in all criminal cases, normal discrepancies are bound to occur in the depositions of witnesses due to normal errors of observation, namely, errors of memory due to lapse of time or due to mental disposition such as shock and horror at the time of occurrence. Minor contradictions, inconsistencies, embellishments or improvements on trivial matters which do not affect the core of the prosecution case, should not be made a ground on which the evidence can be rejected in its entirety. The Court has to form its opinion about the credibility of the witness and record a finding as to whether his deposition inspires confidence.

78. In **Gosu Jayarami Reddy and another Vs. State of Andhra Pradesh; (2011) 3 SCC(Cri) 630**, it was observed that Courts need to be realistic in their expectation from the witnesses and go by what would be reasonable based on

ordinary human conduct with ordinary human frailties of memory and power to register events and their details. A witness who is terrorized by the brutality of the attack cannot be disbelieved only because in his description of who hit the deceased on what part of the body there is some mix-up or confusion.

79. Further, in **Parsu Ram Pandey v/s State of Bihar AIR 2004 SC 5068, Shivappa v. State of Karnataka; AIR 2682, Ramchandaran v/s State of Kerala AIR 2011 SC 3581**, it was held that minor discrepancies or some improvements would not justify rejection of the testimonies of the eye-witnesses, if they are otherwise reliable. Some discrepancies are bound to occur because of the sociological background of the witnesses as also the time gap between the date of occurrence and the date on which they give their depositions in Court. In **Mukesh Vs. State for NCT of Delhi, AIR 2017 SC 2161 and Bhagwan Jagannath Markad Vs. State of Maharashtra, (2016) 10 SCC 53**, it was reiterated that minor contradictions in the testimonies of the Prosecution Witness are bound to be there and in fact they go to support the truthfulness of the witnesses.

80. A prompt F.I.R. lends credence to the prosecution case because a prompt F.I.R. eliminates all the chances of cooking up of a false story. In **Meharaj Singh v. State of UP, (1994) 5 SCC 188** while emphasizing the importance of recording a prompt FIR, the Supreme Court observed as under:

"FIR in a criminal case and particularly in murder case is a vital and valuable piece of evidence for the purpose of appreciating evidence led at the trial. The object of insisting upon prompt lodging of the FIR is to obtain earliest information regarding the circumstance in which the crime was committed, including the names of the actual culprits and the parts played by them, the weapons, if any, used, as also the names of the eye witnesses if any. Delay in lodging FIR often result in embellishment, which is a creature of an afterthought. On the account of delay, the FIR not only gets bereft of the advantage of spontaneity, danger also creeps in of the introduction of a coloured version of exaggerated story."

81. Similarly in **Kishan Singh through LRs v. Gurpal Singh (2010) 8 SCC 775**, the Supreme Court held that prompt and early reporting of the occurrence by the informant with vivid details gives assurance regarding truth of its version. In case there is some delay in recording the FIR the complainant must give an explanation for the same. Undoubtedly, delay in lodging FIR does not make the complainant's case improbable when such delay is properly explained.

82. Law expects a prompt first information report because it eliminates all the chances of coming up of a coloured version. In this instant case, the first information report was lodged with utmost promptness naming the accused persons and virtually there was no delay in lodging the same. A prompt first information report eliminates the chances of false implication and the fact that there is no delay in lodging FIR in this case, gives additional support to the prosecution version.

83. It has been also argued that the FIR lodged by the informant does not mention that the informant heard some sound (khatar-patar), nor about joint latrine or the name of other persons who reached there, saw the incident and

identified the accused persons. It has also not been mentioned that at the time of incident, the deceased was in the latrine or easing out side and there are other omissions also. We are of the view that an FIR is not required to provide every detail of prosecution version. Those facts and details which are discovered during investigation are not supposed to be visualised by the informant at the time of lodging of FIR. It is settled law that the FIR is not supposed to contain all details of prosecution version. It is spontaneously written what comes in the mind of informant. It is not supposed to be guided by any legal advice and it is required to provide the brief of criminal happening and error and omission makes it more natural and genuine. It has been held in **Bhagwan Jagannath Markad (supra) and Jarnail Singh Vs. State of Punjab, 2009 (6) Supreme 526** that the FIR is not the encyclopedia of all the facts relating to crime. The only requirement is that at the time of lodging FIR, the informant should state all those facts which normally strike to mind and help in assessing the gravity of the crime or identity of the culprit briefly.

84. In the statement under Section 313 Cr.P.C. the accused appellants had stated that they have been falsely implicated due to enmity. There is direct evidence of eye witnesses that all the appellants caused injury. Nothing has been stated in the statement as to under what circumstances the deceased died and why the eye witnesses are giving evidence against the appellants. It was also argued by the counsel to the appellants that in the facts and circumstances of the case, this is possible that the deceased was killed by someone else and the appellants were falsely implicated. We do not find any force in this argument. The learned trial court rightly concluded that there is direct evidence of the eye witnesses who had seen the occurrence which finds corroboration from the medical evidence and incriminatory articles. Thus imaginary theory propounded by the defence is not acceptable. There is no evidence nor any report that anybody else has caused injuries.

85. Learned trial court has examined the contentions of the appellant on the basis of evidence on record and with reference to relevant case law applicable to the facts and circumstances of this case and has found that in the circumstances under which the present incident occurred and was narrated by the witnesses during the examination before the Court, it is not probable to involve the accused on false ground. Further, it was also concluded by the learned trial court that the witnesses were knowing, both the victim and the accused, and there evidence would be material and could not be criticized on the ground that they were interested witnesses. It was also held that if witnesses examined in the Court are otherwise found reliable and trustworthy, the fact sought to be proved by that witness need not be further proved through other witnesses though there may be other witnesses available who could have been examined but were not examined. Learned trial court has assessed the prosecution witnesses and found that nothing came out from the examination-in-chief or cross examination which may discredit the testimony of the witnesses.

86. From the above discussion we are of the view that the learned trial court rightly concluded that the prosecution has been able to prove the charges beyond

shadow of any doubt. Excluding the accused persons who have been acquitted, the number of the convicted accused persons/appellants has been four and two eyewitnesses have stated the whole incident in a very natural and spontaneous way. It is also clear that the FIR for the horrifying occurrence was lodged without any delay and even if for the sake of argument there was any delay, the same has been reasonably explained by the prosecution witnesses and circumstances of the case. The injuries found on the body of the deceased person find support from the medical evidence by which the date and time of causing the injuries is very much corroborated. Medical evidence clearly indicates that injuries were possible by lathi and sabbal which were assigned to the accused persons and because of injuries the deceased must have died immediately as the brain was coming out from the head. The place of occurrence has been fully established. There is no substantial contradiction or discrepancies in the evidence of the prosecution and some of the minor contradiction and discrepancies which have been discussed above goes to establish the reliability of the witnesses and that also shows that they are not tutored. Thus, the witnesses examined by prosecution are natural, credible and trustworthy.

87. As such, in view of the above discussion, the surviving accused-appellants namely **Pahalwan** and **Nathu Singh** have been rightly convicted for the offence under section 302/34 IPC. All these convicted persons have been awarded life imprisonment which is liberal option of punishment under section 302 IPC.

88. In our considered view, the judgement/finding of the learned trial court is sound and based on settled principles of law and the sentence awarded to the accused persons is adequate. There is no illegality or perversity in the judgement of the trial court, nor there is any misreading and wrong appreciation of the evidence on record. Therefore, we are of the view that the learned trial court has very rightly convicted the accused-appellants and adequately awarded sentence. The appeal has got no force and is liable to be dismissed.

89. The **appeal is dismissed**.

90. Appellants Pahalwan and Nathu Singh are directed to surrender before the learned trial court forthwith where from they will be sent to jail to undergo the sentence.

91. Amicus Curiae Sri Harish Chandra Tiwari, Advocate shall be paid Rs. Ten Thousands only for the assistance and legal service provided by him in conducting this appeal for the accused-appellant Nathu Singh.

92. Lower court record be transmitted back to the court below. Office is directed to send a copy of this order to the court below for communication and compliance.

(2020)02ILR A615

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 13.01.2020

BEFORE
THE HON'BLE BACHCHOO LAL, J.
THE HON'BLE NARENDRA KUMAR JOHARI, J.

Criminal Appeal No. 96 of 1996

Sunil & Ors. ...Appellants (In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Appellants:
Sri Apul Mishra, Sri A.P. Mathur, Sri P.N. Mishra, Sri R.M. Pandey, Sri Raj Kumar Mishra, Sri V.P. Srivastava, Sri Rajneesh Pratap Singh, Sri S.P.S. Raghav

Counsel for the Opposite Party:
Sri G.S. Chaturvedi, Sri Ravindra Rai, Sri Amit Daga, Sri Arun Kumar Sharma, Sri Ashok Kumar Rai, D.G.A.

A. Criminal Law-Indian Penal Code - Sections 148, 302, 395, 506 - Appeal against conviction.

Their testimonies are not reliable. Considering the evidence of PW- 1 and PW- 2 in totality, no substantial variation or discrepancy is found regarding happening of occurrence or place of occurrence. The statements of witnesses Pw- 1 & Pw- 2 are supported and corroborated by post-mortem report and other prosecution papers. Their statements are also corroborated by the evidence of PW- 7 Doctor S.M. Gupta. There is no contradiction in their testimonies on the core of prosecution case. If some inconsistency is found, that do not affects the prosecution case substantially. (Para 39)

It is to be considered that spot map was prepared by I.O. on the pointing of complainant, as witness Pw- 1 has mentioned in cross examination. This fact has also been mentioned by I.O. in case diary which is available on record (back page of Paper No. 33 Kha/3 dated 12.04.1994) and the witness Pw- 1 has not been cross examined by counsels of accused persons on the above shortcomings of spot map. In the light of above dictum of Hon'ble Apex Court, I.O. cannot be asked about not showing the place of accused persons and eye witnesses. (Para 52)

If I.O. has not prepared spot map on scale or there was any fault of investigation in sketching the spot map it can be treated as latches of I.O., which does not affects the case of prosecution adversely, where direct, ocular and reliable evidence is available on record. (Para 53)

If eye-witnesses of occurrence are reliable and trustworthy then in that case no corroborative evidence is needed and conviction can be based on the evidence of even sole reliable eye-witness. (Para 54)

Admittedly the F.I.R. was lodged by complainant after that conversation with his wife but there is no detail of robbed articles in F.I.R. He has also mentioned in his evidence that accused persons had given threat to his wife and servant. (Para 56)

Considering the evidence on record, surrounding circumstances and keeping in mind that no looted articles were recovered from the pointing out of accused persons or from their residence at the time of proceeding of attachment which took place under the Provisions of Section 83 of Cr.P.C, the occurrence of robbery is not established. Prosecution has failed to prove the occurrence of robbery beyond reasonable doubt against accused persons. (Para 58)

No error of law as well as in appreciation of fact and evidence is found in impugned judgement. Therefore, conviction and sentence of appellants under Section 302/148 I.P.C. is affirmed. It is further concluded that since the prosecution could not prove the charge of Section 395 I.P.C. against appellants, hence appellants are acquitted from the charge of Section 395 I.P.C. (Para 59)

Criminal Appeal allowed. (E-2)

List of cases cited:-

1. Meharaj Singh Vs. St. of U.P. 1994 SCC (Cri.) 1391,

2. Radha Mohan Singh alias Lal Saheb and others Vs. St. of U.P. 2006 CRI. L. J. 1121,

3. Jai Shree Yadav Vs. St. of U.P. 2004 SAR (Criminal) 748,

4. Amar Singh Vs. Balwinder Singh and others 2003 (46) ACC 619 (SC),

5. Narendra and others Vs. St. of U.P. 2006 (3) JIC 681 (All),

6. Kuria & Another Vs. St. of Raj. AIR 2013 SC 1085,

7. Shivappa and others Vs. St. of Kar. 2008 CRI. L. J. 2992,

8. Munshi Prasad and others Vs. St. of Bihar 2002 SCC (Cri) 175,

9. Bijoy Singh and another Vs. St. of Bihar 2002 CRI. L. J. 2623,

10 .Jagjit Singh Alias Jagga Vs. St. of Punj. (2005) 3 SCC 689,

11. Harbeer Singh Vs. Sheespal and others (2016) 16 SCC 418,

12. Sidhartha Vashisht Alias Manu Sharma Vs. State (N.C.T. of Delhi) 2010 (69) ACC 833,

13. Amar Singh Vs. Balwinder Singh and others 2003 (46) ACC 619,

14. Ashok Kumar Chaudhary and others Vs. St. of Bihar (2008) 12 SCC 173,

15. Kuria and another Vs. St. of Raj. (2012) 10 SCC 433,

16. Uma Shankar Vs. St. of U.P. 2015 (89) ACC 421,

17. Gulam Sarbar Vs. St. of Bihar (Now Jharkhand) (2014) 3 SCC 401,

18. Rohtash Kumar Vs. St. of Har., Criminal Appeal No. 896 of 2011,

19. Bipin Kumar Mondal Vs. St. of W.B. (2010) 12 SCC 91,

20. Balram Singh Vs. St. of Punj. 2003 AIR (SC) 2213,

21. Baboolal Vs. St. of U.P. 2001 SCC (Cri) 1484,

22. St. of Punj. Vs. Hakam Singh Appeal (Crl.) No. 130 of 2000,

23. Gopal Singh Vs. St. of Uttarakhand (2013) 7 SCC 545,

24. Ram Bali Vs. St. of U.P. 2004 (2) JIC 168 (SC),

25. Baleshwar Mandal and another Vs. St. of Bihar 1997 JIC 1030 (SC),

26. Tori Singh and another Vs. St. of U.P. AIR 1962 SC 399,

27. Allarakha K. Mansuri Vs. St. of Guj. 2002 SCC (Cri) 519,

28. Ved Ram & Ors. Vs. St. of U.P. 2004 (2) JIC 17,

29. Namdeo Vs. St. of Maha. Criminal Appeal No. 914 of 2006,

30. Seeman Alias Veeranam Vs. St. by Inspector of Police 2005 CRI. L. J. 2618,

31. Jai Shree Yadav Vs. St. of U.P. 2004 SAR (Cri.) 748,

32. Krishna Mochi and Others Vs. St. of Bihar etc. 2002 (2) J.Cr.C 123,

(Delivered by Hon'ble Narendra Kumar Johari, J.)

1. The instant appeal has been filed against the judgement and conviction order of appellants passed by Special Judge/Additional Sessions Judge, Aligarh in Sessions Trial No. 699 of 1994, Crime No. 105 of 1994, under Sections 148, 302, 395, 506 I.P.C., P.S.- Sikandrarau, District- Aligarh.

2. By the impugned order learned Sessions Judge has convicted accused appellants Sunil Ballu, Dhannu, Avadesh, Ram Das, Ram Datt and Kanhai Lal under

Sections 148, 302, 395 I.P.C. The Court has sentenced appellants for two years rigorous imprisonment under Section 148 I.P.C., life imprisonment under Section 302 I.P.C. and 10 years rigorous imprisonment and Rs. 5,000/- as fine to each appellants under Section 395 I.P.C. It has also been ordered that in case of default in payment of fine they will undergo rigorous imprisonment of two years. The court has acquitted all the appellants under Section 506 I.P.C.

3. During the pendency of appeal appellant no. 6- Ram Das and appellant no. 7- Ram Datt have died, consequently the appeal has been abated for them.

4. The fact of the case, as per prosecution, in brief is as under- complainant Ram Gopal has given a written application *(tahrir)* to S.H.O., P.S.- Sikandrarau, District- Aligarh dated 12.04.1994 that today at about 7.15 a.m. after defecation he was returning from forest to his home as he reached near goddess temple he saw that his neighbours Sunil, Ballu, Dhannu, Avadhesh, Kanhai Lal, Ram Das and Ram Datt opened fire on his son Satish with intention to kill him. His son was worshipping in the temple at that time. Due to fire-arm injury his son died on spot. Many persons including Rameshwer and Ghanshyam heard the sound of fire and his shouting. When complainant raised his voice and started running towards his house to save his life the aforesaid accused persons pursued him. They entered in his house and robbed his licencee gun, jewellery and cash by threatening his wife and servant. After committing robbery they fled away by giving threats of life.

5. On the basis of above *tahrir*, the F.I.R. was lodged against above persons under Section 396 I.P.C. at P.S.- Sikandrarau, District- Aligarh on 12.04.1994 at 9.30 a.m. as Crime No. 105 of 1994, under Sections 148, 302, 395 and 506 I.P.C, accordingly G.D. entry was made.

6. The investigation of offence was started by Sub-inspector Narendra Pal Singh with S.I. S.N. Rakesh. They reached on spot along with police force. The inquest report was prepared by Sub-inspector S.N. Rakesh and sealed dead body of deceased Satish was sent for post-mortem with constables S.P. Dube and Kailash Singh. The investigating officer collected blood-stained and plain soil from the spot. He prepared recovery memo of *Hawan Kund and Lota*. He enquired about the occurrence from persons present on spot. He further took the statement of witnesses and prepared spot map.

7. During the investigation he recovered the weapons 2 *kattas* (countrymade pistols) and cartridges on the pointing out of accused Sunil and Ballu. After completion of investigation the charge-sheet against accused persons has been filed by investigating officer under Sections 302, 395, 397 I.P.C. After appearance of accused persons, charges were framed against them under Sections 148, 302, 395, 506 I.P.C. They denied the charges, accordingly trial proceeded.

8. As documentary evidence prosecution has filed original *tahrir* (Ex. Ka- 1), chick F.I.R. (Ex. Ka- 2), chick report Crime No. 204, of 1994 (Ex. Ka- 3), inquest report (Ex. Ka- 4), Chalan Nas (Ex. Ka- 5), Sample Seal (Ex. Ka- 6), letter to C.M.O. (Ex. Ka- 7), photo dead body (Ex. Ka- 8), spot map (Ex. Ka- 9), recovery memo blood-stain and plain soil (Ex. Ka- 10), recovery memo of *lota and hawan kund* (Ex. Ka- 11), search memo of accused persons (Ex. Ka- 12), charge-sheet (Ex. Ka- 13), recovery of weapon

(Ex. Ka- 14), P.M.R. (Ex. Ka- 15). Apart from that the prosecution has produced to Ram Gopal Sharma (first informant and eye witness) as PW- 1, Ghanshyam as PW- 2 (eye witness), Smt. Raj Rani (mother of deceased who was present at the time of robbery in house) as PW- 3. Constable Kailash Singh (who carried the dead body of deceased from place of occurrence to mortuary) as PW- 4. Constable Surendra Singh (Chick and G.D. writer) as PW- 5. Ex-sub-inspector N.P. Singh (investigating officer) as PW- 6. Doctor S.M. Gupta (who carried post-mortem) as PW- 7. Sub-inspector Vinod Shukla (investigating officer) as PW- 8.

9. The statement of accused persons was recorded under Section 313 Cr.P.C. and all the incriminating materials/circumstances were put to them one by one in shape of incidence. The accused persons denied each allegations levelled against them by stating either incorrect or they don't know, however, they admitted that they belong to village of complainant and they are his neighbours. The accused persons further stated that in the village quarrel took place amongst children that is why they have been falsely implicated by complainant. The accused Kanhai replied that at the time of occurrence he was on his duty at School Kuthila.

10. Learned Sessions Judge after appreciating all the evidences and submissions made by the public prosecutor and defence counsel convicted and sentenced appellants as has been referred hereinabove. Aggrieved by the judgement and sentenced accused/appellants preferred the present appeal.

11. Learned counsel for the appellants has submitted that the appellants have wrongly been convicted. The F.I.R. lodged by complainant is anti-timed, place of occurrence has been changed. Witnesses of prosecution who adduced their oral statement as witnesses of fact are not trustworthy. There are contradictions in their statement, investigating officer has recorded the statement of witnesses with inordinate delay. The position of accused person and places from where witnesses have seen the occurrence, has not been shown in site plan. The witness who was named in F.I.R., has not been produced. There is no F.S.L. report regarding the blood-stained soil. Police has not recovered all the weapons as mentioned in F.I.R. Motive for offence has not been proved. Prosecution has failed to prove his case against appellants beyond reasonable doubt. The judgement of trial court is against the principles of law. Appellants are entitled to be acquitted.

12. Per contra, learned counsel for the complainant and learned A.G.A. has replied that accused persons have committed the offence of murder with pre-planning. It was day light murder. The occurrence has been witnessed by eye-witnesses. The statement of eye-witnesses is well supported by medical evidence. Witnesses of prosecution are reliable and trustworthy. Weapons used in occurrence have been recovered on the pointing out of accused appellants. Motive of offence is proved. F.I.R. is prompt. There is no proof of anti-time F.I.R. If there is any defect in investigation, it does not affect the prosecution case adversely, particularly in the light of cogent and trustworthy evidence. There is no substantial contradiction in testimony of eye witnesses. Common object of accused persons/appellants is proved. The appellants have rightly been convicted by the learned sessions judge. Prosecution has proved his case against appellants beyond reasonable doubt. Order of sessions judge

does not suffer from any illegality or infirmity. The appeal is liable to be dismissed.

We have considered the rival submissions advanced by learned counsel for the parties and perused the record.

13. **F.I.R.**

In first information report, date and time of occurrence has been shown as 12.04.1994 at 7.15 a.m., whereas the F.I.R. has been lodged on same day at 9.30 a.m. The distance of police station from the place of occurrence has been shown as 19 kms. The complainant is Ram Gopal Sharma (PW-1) and scriber of *tahrir* is Ashok Kumar Sharma. Deceased was son of complainant. In his oral statement, complainant mentioned at Page- 7 that after the occurrence he stayed their for 45 minutes. Further at Page- 6 he has mentioned that for lodging the F.I.R. he had gone by his own tractor. The way by which went for police station, takes one hour to reach police station. Witness Pw- 1 has further stated in his evidence at Page- 5 that he got written the application for F.I.R. at Sikandrarau by Ashok Kumar. He met him at bus-stand- Sikandrarau. The paper was given by Ashok Kumar as he was ever in law practice and due to the reason he preferred to get *tahrir* written by him. At present, Ashok Kumar is not doing practice. Accordingly, conclusion arrives that after occurrence which took place at 7.15 a.m., complainant moved from the place of occurrence by 8.00 a.m. for lodging F.I.R. It took one hour reach at police station- Sikandrarau and in the meantime, few 12 to 20 minutes would have been consumed in draftig of application *(tahrir)*. As it has been stated by witness Pw- 1 in his evidence. Hence, if the F.I.R. of the occurrence has been lodged at 9.30 a.m. then in that case, it cannot be said that F.I.R. has been lodged with any inordinate delay.

Whether F.I.R. was Anti-timed

14. It has been argued by learned counsel for the appellants that the aforesaid F.I.R. has been lodged anti-time. In the meantime complainant planned to implicate appellants falsely as accused, due to enmity of children quarrel which had taken place in village. In fact, the deceased had gone in forest for defecation where he was killed by some unknown persons and complainant carried his dead body in the goddess temple and falsely implicated appellants. Learned counsel has pointed out that the inquest report does not contain Crime Number, Sections of I.P.C., weapons used in occurrence and name of accused persons, whereas the above entries are necessary to be mentioned in inquest report to check any manipulation like registration of F.I.R. anti-timed and to avoid any false implication of accused persons. In support of his argument learned counsel for appellants has quoted Para- 11 of case law **Meharaj Singh Vs. State of U.P. 1994 SCC (Cri.) 1391**, which is reproduced as under:-

"11. According to PW 3 Kamlesh, the deceased had left the house at 7.00 a.m. He would, therefore, have taken his food before leaving the house because it is not the prosecution case. that food was served to him while he was in the fields. Death, according to the medical witness, could have occurred within about 2 or 2 1/2 hours from the time the deceased had taken food on account of the presence of 150 gms of semi-digested food in the stomach of the deceased. According to PW 3, however the occurrence took place at about 11.30 a.m. which would imply that the deceased took his food later

and did not leave his house at 7.00 a.m. but at about 9.30 a.m. That is nobody's case. The effort on the part of Kamlesh PW 3 to show that the occurrence took place at 11.30 a.m. appears to have been made because she wanted to back up the prosecution story by stating that the FIR had been lodged promptly at 12.45 p.m. by Makhar Singh and that she had seen the occurrence. According to the prosecution case PW 8, the investigating officer, left for the place of occurrence after the case had been registered at the police station but we find that in the inquest report which was prepared by PW 8 Sultan Singh, the investigating officer at the spot, the number of the FIR or the crime No. has not been given. Even the heading of the case, does not find mention in the inquest report. No explanation has been furnished for the omission of these vital matters from the inquest report. Was it because no FIR had actually been registered at the time as alleged by the prosecution and PW 8 had reached the spot and, after, some consultations and deliberations it came into existence? In this connection it is also relevant to note that copy of the FIR was not even sent to the medical officer along with the inquest report and the dead body for postmortem. The explanation of PW 8 for not sending the copy of the FIR or mentioning the name of the case or the crime No. in the inquest report is wholly unacceptable and the High Court erred in accepting the ipse dixit of Sultan Singh PW 8. It deserves to be noticed that in the inquest report even the name of the accused has not been mentioned. It also does not contain the names of the eyewitnesses or the gist of the statement of the eyewitnesses. It does not reveal as to how many shots had been fired or how many weapons had been used. The inquest report is not signed by any of the eyewitnesses, although the investigating officer has categorically asserted that Kamlesh and Shiv Charan were present at the place of occurrence when he visited and he recorded their statements. If he had actually recorded their statements, there is no reason why the details which we have found missing from the Inquest report should not have been there. There is yet another factor which is very relevant. The prosecution led no evidence to show as to when did the copy of the FIR, special report, which was required to be despatched under the statutory provisions of Section 154 CrPC read with Section 157 CrPC promptly, to the Magistrate was actually despatched. There is no evidence either to show as to when the copy of the FIR was received by the Magistrate. PW 8 has remained singularly silent on this aspect of the case. According to PW 3, the Police Inspector had taken her thumb impression at the site, but the prosecution has withheld that document from scrutiny of the courts, for reasons best known to it. The argument of Mr Tewatia, the learned Senior Counsel that since no FIR had been registered till the investigating officer arrived at the spot and conducted the inquest proceedings, the thumb impression of PW 3 was taken by the police on a document which was required to be used as an FIR, cannot be said to be without any merit. It was the duty of PW 8 to explain as to on which document he had obtained the thumb impression of the widow of the deceased at the spot and produce that document for scrutiny of the courts. He did not do so."

15. According to law it is not necessary to mention Crime No., Sections, name of accused persons and weapons used in offence in the inquest report. The language used by legislation in Section

174 of Cr.P.C. clearly indicates the scope of inquest report. There is printed proforma for preparation of inquest report which contains no column for the said entries. The provisions of 174 Cr.P.C., is reproduced as under:-

"174 (1) When the officer in charge of a police station or some other police officer specially empowered by the State Government in that behalf receives information that a person has committed suicide, or has been killed by another or by an animal or by machinery or by an accident, or has died under circumstances raising a reasonable suspicion that some other person has committed an offence, he shall immediately give intimation thereof to the nearest Executive Magistrate empowered to hold inquests, and, unless otherwise directed by any rule prescribed by the State Government, or by any general or special order of the District or Sub-divisional Magistrate, shall proceed to the place where the body of such deceased person is, and there, in the presence of two or more, respectable inhabitants of the neighbourhood, shall make an investigation, and draw up a report of the apparent cause of death, describing such wounds, fractures, bruises, and other marks of injury as may be found on the body, and stating in what manner, or by what weapon or instrument (if any), such marks appear to have been inflicted.

(2) The report shall be signed by such police officer and other persons, or by so many of them as concur therein, and shall be forthwith forwarded to the District Magistrate or the Sub-divisional Magistrate.

(3) When--

(i) the case involves suicide by a woman within seven years of her marriage; or

(ii) the case relates to the death of a woman within seven years of her marriage in any circumstances raising a reasonable suspicion that some other person committed an offence in relation to such woman; or

(iii) the case relates to the death of a woman within seven years of her marriage and any relative of the woman has made a request in this behalf; or

(iv) there is any doubt regarding the cause of death; or

(v) the police officer for any other reason considers it expedient so to do, he shall, subject to such rules as the State Government may prescribe in this behalf, forward the body, with a view to its being examined, to the nearest Civil Surgeon, or other qualified medical man appointed in this behalf by the State Government, if the state of the weather and the distance admit of its being so forwarded without risk of such putrefaction on the road as would render such examination useless.

(4) The following Magistrates are empowered to hold inquests, namely, any District Magistrate or Sub-divisional Magistrate and any other Executive Magistrate specially empowered in this behalf by the State Government or the District Magistrate."

16. On the above point of argument Hon'ble Apex Court has held in the case of **Radha Mohan Singh alias Lal Saheb and others Vs. State of U.P. 2006 CRI. L. J. 1121** that there is no requirement in law of mentioning the details of the F.I.R., names of accused or names of eye-witness, the relevant Para of dictum is reproduced as under:-

"13.In Podda Narayana v. State of A.P. AIR 1975 SC 1252, it was held that the proceedings under Section 174 have a very limited scope. The object of the proceedings is merely to ascertain whether

a person has died under suspicious circumstances or an unnatural death and if so what is the apparent cause of the death. The question regarding the details as to how the deceased was assaulted or who assaulted him or under what circumstances he was assaulted is foreign to the ambit and scope of the proceedings under S.174. Neither in practice nor in law was it necessary for the police to mention those details in the inquest report. It is, therefore, not necessary to enter all the details of the overt acts in the inquest report. Their omission is not sufficient to put the prosecution out of Court. In Shakila Khader v. Nausher Gama, AIR 1975 SC 1324, the contention raised that non-mention of a person's name in the inquest report would show that he was not a eye- witness of the incident was repelled on the ground that an inquest under Section 174, Cr.P.C. is concerned with establishing the cause of death and only evidence necessary to establish it need be brought out. The same view was taken in Eqbal Baig v. State of Andhra Pradesh, AIR 1987 SC 923, that the non-mention of name of an eye-witness in the inquest report could not be a ground to reject his testimony. Similarly, the absence of the name of the accused in the inquest report cannot lead to an inference that he was not present at the time of commission of the offence as the inquest report is not the statement of a person wherein all the names (accused and also the eye-witnesses) ought to have been mentioned. The view taken in Podda Narayana v. State of A.P. (supra) was approved by a three-Judge Bench in Khujji @ Surendra Tiwari v. State of Madhya Pradesh, AIR 1991 SC 1853, and it was held that the testimony of an eye-witness could not be discarded on the ground that their names did not figure in the inquest report prepared at the earliest point of time. The nature and purpose of inquest held under Section 174, Cr.P.C. was also explained in Amar Singh v. Balwinder Singh, 2003 (2) SCC 518. In the said case the High Court had observed that the fact that the details about the occurrence were not mentioned in the inquest report showed that the investigating officer was not sure of the facts when the inquest report was prepared and the said feature of the case carried weight in favour of the accused. After noticing the language used in Section 174, Cr.P.C. and earlier decisions of this Court it was ruled that the High Court was clearly in error in observing as aforesaid or drawing any inference against the prosecution. Thus, it is well settled by a catena of decisions of this Court that the purpose of holding an inquest is very limited, viz. to ascertain as to whether a person has committed suicide or has been killed by another or by an animal or by machinery or by an accident or has died under circumstances raising a reasonable suspicion that some other person has committed an offence. There is absolutely no requirement in lawof mentioning the details of the FIR, names of the accused or the names of the eye-witnesses or the gist of their statement nor it is required to be signed by any eye-witness. In Meharaj Singh v. State of U.P. (supra) the language used by the legislature in Section 174, Cr.P.C. was not taken note of nor the earlier decisions of this Court were referred to and some sweeping observations have been made which are not supported by the statutory provision. We are, therefore, of the opinion that the observations made in paras 11 and 12 of the reports do not represent the correct statement of law and they are hereby over-ruled. The challenge laid to the prosecution case by Shri Jain on the basis

of the alleged infirmity or omission in the inquest report has, therefore, no substance and cannot be accepted."

17. On the same point the Hon'ble Apex Court in case of **Jai Shree Yadav Vs. State of U.P. 2004 SAR (Criminal) 748** has held in Para- 17 which is reproduced as under:-

"17. The next contention in this regard is that the requisition sent by PW-8 to PW-4, the doctor, to conduct post mortem did not accompany all the particulars found in the inquest report and the complaint like the particulars of the case, the weapon used and the names of the accused persons etc. which according to the learned counsel for the accused indicates that when the dead body was sent for post mortem the investigating agency did not know the full particulars of the case. We do not think that these omissions, if any, would lead to the conclusion that the FIR is anti-timed. It is a settled principle in law that though it is necessary to give the gist of the information collected during the course of inquest proceedings and from the material available in the FIR to the doctor conducting the post mortem, it is not necessary to give all the particulars as contained in either of the above said documents. This is clear from the judgment of this Court in the case of Mahendra Rai vs. Mithilesh Rai & Ors. (1997 10 SCC 605)."

18. In the case of **Amar Singh Vs. Balwinder Singh and others 2003 (46) ACC 619 (SC)** Hon'ble Apex Court has held in Para- 11 that

"11. The High Court has also held that the details about the occurrence were not mentioned in the inquest report which showed that the investigating officer was not sure of the facts when the inquest report was prepared and this feature of the case carried weight in favour of the accused. We are unable to accept this reasoning of the High Court. The provision for holding of an inquest and preparing an inquest report is contained in Section 174 Cr.P.C. The heading of the Section is "Police to enquire and report on suicide, etc." Sub-section (1) of this Section provides that when the officer in charge of a police station or some other police officer specially empowered by the State Government in that behalf receives information that a person has committed suicide, or has been killed by another or by an animal or by machinery or by an accident, or has died under circumstances raising a reasonable suspicion that some other person has committed an offence, he shall immediately give information to the nearest Executive Magistrate and shall proceed to the place where the body of such deceased person is, and there, in the presence of two or more respectable inhabitants of the neighbourhood, shall make an investigation, and draw up a report of the apparent cause of death describing such wounds, fractures, bruises, and other marks of injury as may be found on the body and stating in what manner, or by what weapon or instrument (if any), such marks appear to have been inflicted. The requirement of the section is that the police officer shall record the apparent cause of death describing the wounds as may be found on the body and also the weapon or instrument by which they appear to have been inflicted and this has to be done in the presence of two or more respectable inhabitants of the neighbourhood. The Section does not contemplate that the manner in which the

incident took place or the names of the accused should be mentioned in the inquest report. The basic purpose of holding an inquest is to report regarding the apparent cause of death, namely whether it is suicidal, homicidal, accidental or by some machinery, etc. The scope and purpose of Section 174 Cr.P.C. was explained by this Court in Podda Narayana & Ors. v. State of Andhra Pradesh, AIR 1975 SC 1252 and it will be useful to reproduce the same.

"The proceedings under Section 174 have a very limited scope. The object of the proceedings is merely to ascertain whether a person has died under suspicious circumstances or an unnatural death and if so what is the apparent cause of the death. The question regarding the details as to how the deceased was assaulted or who assaulted him or under what circumstances he was assaulted is foreign to the ambit and scope of the proceedings under Section 174. Neither in practice nor in law was it necessary for the police to mention those details in the inquest report.

It is therefore not necessary to enter all the details of the overt acts in the inquest report. Their omission is not sufficient to put the prosecution out of Court."

19. The co-ordinate Bench of this Court has held in the case of **Narendra and others Vs. State of U.P. 2006 (3) JIC 681 (All)** that:-

"28. It is also contended by the learned counsel for the appellant that the crime number and sections in the inquest report was mentioned in different ink and the title of the case was not mentioned in other police papers which were dispatched along with the inquest report. We do not find any substance in this submission because on this ground it cannot be said that the First Information Report was not in existence at the time of preparation of inquest report. The First Information Report was one of the enclosures mentioned in the inquest report, name of complainant was mentioned in the inquest report and it was also that death was due to fire-arm injury. There is no provision for mentioning the title of the case in all police papers. The crime numbers and sections are already mentioned in all relevant papers."

20. Learned counsel for the appellants has further placed reliance on case **Meharaj Singh Vs. State of U.P. *(Supra)*** and argued that the copy of F.I.R. was not sent to medical officer along with dead body for post-mortem. Therefore, the case of prosecution becomes doubtful. It appears that learned counsel for appellants could not inspect the inquest report Ex. Ka- 4, properly, as Page No.- 3 of inquest report contains the entry that copy of F.I.R. has also been sent to mortuary along with dead body of deceased. Police Form No.- 13 (Ex. Ka- 5) also shows the entry of Doctor, wherein it has been mentioned that post-mortem papers has been received at 8.00 a.m. Witness PW- 4 has deposed that the concerning papers have been delivered in police line by constable- S.P. Dubey and he had carried the papers from police line to mortuary, further he has denied the suggestion that all the papers were not available at the time of post-mortem, hence, the argument has no substance that the copy of F.I.R. was not annexed with inquest report. The recovery memo of blood-stained soil was prepared when I.O. reached on place of occurrence for the first time on 12.04.1994 i.e. at the time of investigation. The said recovery

memo (Ex. Ka- 10) contains the Crime No. 105 of 1994 and Section 396 I.P.C. It has not been disputed by the appellant that the said recovery memo (Ex. Ka- 10) was prepared by I.O. at that time.

21. Learned counsel for the appellant has further submitted that there is overwriting in timing as mentioned in inquest report for starting and concluding the inquest report. Learned counsel for the complainant has replied that there is no overwriting in timing for lodging F.I.R. as mentioned in inquest report. There may be difference of timing in wrist watch or slip of pen. The overwriting in figure (of timing) regarding starting and concluding the inquest report does not co-relates with any doubtful fact. Although, S.I. S.N. Rakesh has not been produced in evidence by prosecution and the inquest report has been proved by witness PW- 6 S.I. Narendra Pal Singh as he was present at the time of preparation of inquest report and the entries in the report has been made by S.I. S.N. Rakesh on dictation of PW-6. The witness Pw- 6 (I.O.) in his evidence, in cross-examination by counsel for accused Sunil, has denied the suggestion in clear words that "it is wrong to say that inquest report has not prepared at the time shown in the report." He further stated that it is wrong to say that "at the time of preparation of inquest report, the copy of F.I.R. was not available with him." In reply of the question the witness Pw- 6 stated in his cross-examination that nowhere in inquest report (Ex. Ka- 4) Crime No. and Sections has been written. He has also accepted that he has not mentioned name of accused persons and weapon used in offence. According to Section 145 of Evidence Act it has not been asked by the aforesaid witness that why the above entries have not been made in the aforesaid report. He has not been asked to explain the reason about such non-enty. Witness PW- 6 also denied that the timing mentioned in Ex. Ka- 4 for concluding the inquest report there is no overwriting. He has also denied that at the time of preparing inquest report he was not having the copy of F.I.R. It has been held by Hon'ble Supreme Court in the case of **Kuria & Another Vs. State of Rajasthan AIR 2013 SC 1085** that-

"21. For instance PW15, in his cross-examination, had stated before the Court that Laleng had twisted the neck of the deceased. According to the accused, it was not so recorded in his statement under Section 161, Exhibit D/2 upon which he explained that he had stated before the police the same thing, but he does not know why the police did not take note of the same. Similarly, he also said that he had informed the police that the four named accused had dragged the body of the deceased and thrown it near the hand pump outside their house, but he does not know why it was not so noted in Exhibit D/2. There are some variations or insignificant improvements in the statements of PW3 and PW7. According to the learned counsel appearing for the appellants, these improvements are of such nature that they make the statement of these witnesses unbelievable and unreliable. We are again not impressed with this contention. The witnesses have stated that they had informed the police of what they stated under oath before the court, but why it was not so recorded in their statements under Section 161 recorded by the Investigating Officer would be a reason best known to the Investigating Officer. Strangely, when the Investigating Officer, PW16, was being cross-examined, no such question was put

to him as to why he did not completely record the statements of the witnesses or whether these witnesses had made such afore-mentioned statements. Improvements or variations of the statements of the witnesses should be of such nature that it would create a definite doubt in the mind of the court that the witnesses are trying to state something which is not true and which is not duly corroborated by the statements of the other witnesses. That is not the situation here. These improvements do not create any legal impediment in accepting the statements of PW3, PW4, PW7 and PW15 made under oath. This Court has repeatedly taken the view that the discrepancies or improvements which do not materially affect the case of the prosecution and are insignificant cannot be made the basis for doubting the case of the prosecution. The courts may not concentrate too much on such discrepancies or improvements. The purpose is to primarily and clearly sift the chaff from the grain and find out the truth from the testimony of the witnesses. Where it does not affect the core of the prosecution case, such discrepancy should not be attached undue significance. The normal course of human conduct would be that while narrating a particular incident, there may occur minor discrepancies. Such discrepancies may even in law render credential to the depositions. The improvements or variations must essentially relate to the material particulars of the prosecution case. The alleged improvements and variations must be shown with respect to material particulars of the case and the occurrence. Every such improvement, not directly related to the occurrence, is not a ground to doubt the testimony of a witness. The credibility of a definite circumstance of the prosecution case cannot be weakened with reference to such minor or insignificant improvements. Reference in this regard can be made to the judgments of this Court in Kathi Bharat Vajsur and Another v. State of Gujarat [(2012) 5 SCC 724], Narayan Chetanram Chaudhary and Another v. State of Maharashtra [(2000) 8 SCC 457], D.P. Chadha v. Triyugi Narain Mishra and Others [(2001) 2 SCC 205], Sukhchain Singh v. State of Haryana and Others [(2002) 5 SCC 100]."

Therefore, the argument advanced by learned counsel for appellants has no force.

22. Learned counsel for appellants further pointed out that witness PW- 4 constable 1459 Kailash Singh, who had gone with the I.O. at the time of investigation, has mentioned in his evidence that he had gone at the place of occurrence at about quarter to 00.09 with S.I. S.N. Rakesh and N.P. Singh, whereas F.I.R. has been shown to be lodged at 9.30 a.m. Therefore, it can be said that F.I.R. has not been lodged at the time which has been shown in chick report. Learned counsel for the complainant has submitted that there might have been differences of watches and timing. The said part of statement of witness Pw- 4 is not supported with any evidence or circumstances. The evidence of witnesses should be scrutinized as a whole. Neither witness PW- 4 has been asked to explain the discrepancy in timing nor witness PW- 5 (who had written chick F.I.R. and made G.D. entry on 12.04.1994 at 9.30 a.m.) has been confronted with the above part of statement of witness PW- 4. Apart from that neither any question was asked to Ram Gopal (Pw-1) in his cross-examination regarding anti-timed F.I.R. nor any doubtful circumstance come into

light which may indicate towards any such doubt. Therefore, it cannot be inferred that F.I.R. of occurrence has been lodged anti-timed. The argument advanced by learned counsel for the appellants on above point finds no place.

Place of occurrence-

23. Learned counsel for the appellants has submitted that the temple where it has been said that occurrence took place is false. Accused persons were 7 in number whereas the gate of temple, as mentioned by witness PW- 1 is only 3 or 4 feet wide. Its inner surface area has been shown only 5x5 square feet. Therefore, it is not possible for 7 accused persons to enter in temple and fire on deceased simultaneously. It might would be possible that deceased- Satish was killed by some unknown persons early in the morning while he had gone forest for defecation and complainant carried his dead body from forest to temple and implicated appellants falsely due to trifle enmity. This is also possible that in night some unknown dacoits came to the house of complainant and during the said occurrence, when deceased tried to fire on dacoits, they killed him and robbed the money, gun, jewellery etc., as alleged by complainant in F.I.R, and only due to local enmity appellants have been implicated by complainant by planting dead body of his son in temple.

24. Witness PW- 1 has stated at Page No. 1 and at Page No. 2 in his cross-examination that accused started firing from the *chabutra* of temple. Accordingly, witness PW- 2 has deposed at Page No.- 1 of his evidence that all the accused fired on deceased from *chabutra* of temple nowhere the aforesaid witnesses PW- 1 and PW- 2 have admitted that accused had fired on deceased by entering inside the temple room. Post-mortem report of deceased is on record as (Ex. Ka- 15), which has been proved by witness PW- 7 Doctor S.M. Gupta. The fact has been mentioned in evidence of witness PW- 1 that infront of the gate, the Idol of Goddess is situated and at the time of occurrence his son Satish was engaged in worship of the Goddess Durga. Naturally, his back would have been infront of the gate. Injuries Nos. 3, 4 and 5 have been shown as fire-arm injury on back *(scapula)* of deceased which indicates that as accused persons reached infront of the gate, immediately they started firing on deceased Satish who received aforesaid injuries on his back. Satish would have been worshipping by folding his leg in sitting position. As he received the injury of fire-arm on his back. He fell down on floor from his back side. The situation also indicates that as he received fire-arm injury on his back. Immediately, he might have turned towards back to see offenders but due to damage of internal organs by projectiles of fire-arm, he immediately fell down. His head was found towards east side. As he fell down the assailants fired on his abdomen by close range. Consequently, he received injuries nos. 1 and 2, therefore, the nature of injury also supports the statements of witnesses PW- 1 and PW- 2 and the conclusion finds place that deceased was attacked by fire-arms from outside the temple's gate i.e., from *chabutra* of temple.

25. So far as the point of argument of learned counsel for appellants, regarding death of deceased during his defecation in forest, is concerned, the temple of Goddess has been shown in the abadi area of village. Appellants could not produce a single witness which may indicate that

deceased- Satish was murdered in forest and his body was carried by complainant in temple. Blood-stained soil has also been recovered from place of occurrence i.e. from temple only. Naturally the above five fire-arm injuries on the body of Satish, will produce profuse bleeding but nowhere in surrounding area, any blood-stain was found by I.O., except from the floor of temple. The point of argument that in night dacoity might have been taken place in the house of complainant wherein Satish was murdered by some unknown dacoits is not forcerull as the witness PW- 7 has stated in his statement that at the time of post-mortem there were some fecal matters in large intestine of deceased. If deceased would have been murdered in night his large intestine would have been filled with fecal matters. Witness Pw- 7 has also opined that the death of Satish is probable at 7.00 a.m. on 12.04.1994. Although the witness has stated in his cross-examination that difference of three hours in time of death is probable but as per medical jurisprudence the said probability is general that depends on so many factors which requires specific proof. Normally in village life people wake up early in the morning particularly, in the season of summer but no one has seen to complainant carrying body of deceased from his residence to temple. Therefore, the aforesaid argument advanced by learned counsel for the appellants finds no place.

Credibility of witness-

26. Learned counsel for the appellants further argued that witness PW-1 Ram Gopal is father of deceased, in his statement witness PW- 1 has mentioned the fact that after witnessing the occurrence of firing by accused persons on his son, he ran towards his house. He did not try to save his son rather he ran towards his house to save his own life. Normally said behaviour of witness Pw-1 is contrary to behaviour of a father. A father will always try to save life of his son even at the cost of his own life. Apart form that Witness PW- 2 is close relative of first wife of deceased. He also resides in another village named Mau. He has not seen the occurrence and due to close relation with deceased he has given false evidence in collusion with witness PW- 1.

27. Undoubtedly witness PW- 1 is father of deceased. Considering evidence of witness Pw- 1 as a whole, the facts and circumstances indicates that when he was returning from defecation he saw that 7 persons with *Kattas* (country-made pistol) in their hands reached at temple and started firing on his son immediately. In his cross-examination at Page- 5 the witness PW- 1 has stated that all the accused opened fire on his son within 2-3 seconds. Witness Pw- 1 was not carrying any weapon at that time. On the other hand, there were 7 persons with deadly weapons in their hands. Therefore, the apprehension might had been developed in his mind that accused persons may kill him also as he was father of deceased. Therefore, he ran towards his house by shouting voice for help, just to save his own life. It was natural behaviour of witness PW- 1. The occurrence of firing took place within few seconds, he had seen accused persons from the distance 10 to 12 steps away from *chabutra* of temple, immediately accused persons opened the firing on his son as they reached on *chabutra*. Therefore, there was no occasion for witness PW- 1 to save his son. Having regard to manner in which an occurrence took place, the reaction of witnesses differs from person to person. It

has been held by Hon'ble Apex Court in Para- 17 of case **Shivappa and others Vs. State of Karnataka 2008 CRI. L. J. 2992**, that:-

"17. We may notice the salient features of the prosecution case. The learned Sessions Judge did not arrive at any specific finding as to why the conduct of the witnesses was such which would lead to a total distrust to the prosecution witnesses. All the members of the family were at one place. Two married daughters, namely, PW-11 Nimbevva, and PW-12, Shantavva came to the village, as there was a Jatra festival of the village Diety, Lakkavva.

Accused persons who were 11 in number came variously armed. They not only killed the deceased but also threatened the two family members with death as a result whereof they fled to the jungle.

PW-9, Shivappa fled to his firm land. They did not dare come back in the night. If having regard to the manner in which the occurrence took place, the witnesses became dumbfounded and could not shout, the same by itself, in our opinion, would not lead to the conclusion that they were wholly untrustworthy. In fact, their conduct, having regard to the nature of the offence, appears to be more probable."

28. Further argument of learned counsel for appellants is that, PW-1 Ram Gopal is interested and relative witness. The testimony of witness Pw- 1 cannot be discarded solely on this ground, what is required is that, statement of such witness should be scrutinised more cautiously and carefully with totality of his evidence. It has been held by the Hon'ble Apex Court in the case **Munshi Prasad and others Vs. State of Bihar 2002 SCC (Cri) 175** in Para- 10 (ii), which is reproduced as under:-

"10 (ii). A complaint focussed that except the interested witnesses none else from the nearby residential areas has been examined - this is so : it is the quality of the evidence and not the quantity, which is required. The crux of the issue being has the prosecution been able to bring home the charges with the evidence available on record - if the evidence on record is otherwise satisfactory in nature and can be ascribed to be trustworthy, an increase in number of witnesses cannot be termed to be a requirement for the case. The two independent witnesses have also been grouped in the group of interested witnesses, which is neither acceptable nor worthy of acceptance and in any event the same does not have the support from the available records. Apart there from PWs. 1, 2 and 3, they may be related to each other but that does not mean and imply total rejection of the evidence : interested they may be but in the event they are so - it is the predominant duty of Court to be more careful in the matter of scrutiny of the evidence of these interested witnesses and it on such a scrutiny it is found that the evidence on record is otherwise trustworthy, question of rejection of the same on the ground of being interested witnesses would not arise. As noticed above, it is the totality of the evidence, which matters and if the same creates a confidence of acceptably of such an evidence, question of rejection on being ascribed as 'interested witness' would not be justifiable. In the wake of the aforesaid, thus the second plea of rejection of evidence of prosecution witnesses cannot be sustained."

29. Considering the entire evidence of witness PW- 1, there seems consistency regarding the occurrence and circumstances. Witness Pw- 1 has been cross-examined in length but no fact came in the light otherwise.

30. Learned counsel for appellants has also put the argument that as per prosecution case, all the accused persons were carrying weapons in their hands and they pursued and chased complainant upto his house even they entered in his house with weapons but neither they fired on witness Pw- 1 nor they fired on any other member of his family. Learned counsel for the informant replied that there may be two reasons, firstly, all the accused were carrying *Kattas* (country-made pistols) in their hand which could fire only single shot. There was no occasion for accused persons to reload their *Kattas* (country-made pistols), as they were in running position and they immediately just after firing on deceased started pursuing to witness PW- 1, secondly, accused persons were having enmity with deceased Satish only, as he was one of the witness in the case of prior occurrence of murder of one Ram Singh, in which they were named as accused. Accused persons were residing in neighbourhood of complainant with his family. Therefore, they have not fired either on PW-1 or on any other family members of witness PW- 1. In fact, they pursued PW- 1 just to keep away the other village persons just to save their own lives from any attack in retaliation and to manage their escape. Argument advanced by learned counsel for the complainant on above point seems forceful.

31. So far as evidence witness PW- 2 Ghanshyam is concerned, counsel for appellants has submitted that first wife of deceased was cousin sister of daughter-in-law of witness PW- 2. In his cross-examination witness PW- 2 has denied about above relationship as suggested by counsel for defence. There is nothing on record which could show that witness PW-2 was in any relation with deceased. His evidence reveals that he was a resident of adjacent village Mau. At the time of occurrence he was going Manikpur by his tractor for ploughing the field of Rohan Singh. The witness has stated in his evidence that his village Mau is on western side of village- Akhtiarpur and village- Manikpur situates at the distance of 2 k.m. towards north from his village. In between Mau and Manikpur village Akhtiarpur is situated. He has further stated in his evidence that he was going Manikpur through village Akhtiarpur. There was only one bridge earlier but at present there are two bridges. One smaller and one larger. At present the tractors cannot go by smaller bridge. He has specifically mentioned in his evidence at Page- 5 that "at present" the tractors cannot pass from small bridge. He has denied the suggestion that the present ways were existed at the time of occurrence also. There is nothing on record which could indicate that at the time of occurrence, a tractor was unable to pass on smaller bridge. No evidence is on record regarding the fact or circumstances that the movement of witness PW- 2 with his tractor was not possible from Mau to Manikpur via Akhtiarpur at that time. Witness PW- 2 was going from south to north through the passage shown adjacent to place of occurrence that is Goddess temple. Witness Pw- 2 has stated in his evidence that he had seen accused person when they were firing on deceased Satish, at the distance of 25 steps from south. As he seen the occurrence of firing, his tractor

which was driven by his son Amit was stopped. He has further stated that all the accused persons opened fire simultaneously.

32. Learned counsel for the appellants further argued that the witness PW- 2 has been planted by complainant. He was never eye-witness of occurrence. It reveals from perusal of F.I.R. that the informant has mentioned his name as eye-witness. He has mentioned the name of another eye-witnesses Rameshwer with his parentage and Ghanshyam Sharma but he has not mentioned the parentage of Ghanshyam Sharma. If witness PW- 2 would have been the witness of complainant's pocket his father's name would have also been mentioned in F.I.R. There is nothing on record which could show that witness PW- 2 was having any enmity with accused persons. He was also not a resident of village Akhtiarpur. Therefore, no reason comes in the light for witness Pw- 2 to give false evidence against accused persons.

33. Learned counsel for the appellants has submitted that statement of witness Pw- 2 has been recorded by investigating officer under Section 161 Cr.P.C. with inordinate delay i.e. after 13 days of occurrence. Therefore, it can be said that he was planted by complainant as eye-witness, and only on the sole ground his evidence is liable to be discarded. In support of his argument learned counsel has submitted the case law **Bijoy Singh and another Vs. State of Bihar 2002 CRI. L. J. 2623**, which is reproduced as under:-

"9 (ii) Statement of Sanuj Singh (PW5) was not recorded till 4th September, 1991. No reasonable explanation has been assigned for not recording the vital and important statement of PW5 who was concededly injured in the occurrence. The delay has been tried to be explained on the ground of his being unconscious when brought to the Hospital at Sarmera. Assuming that PW5 was unconscious or under shock at the time when brought in the Hospital, there is nothing on the record to show that he continued to be unconscious thereafter or the investigating officer tried to find out about his health or his mental condition to make the statement. Dr.Anjani Kumar (PW9) who examined PW5 at Primary Health Centre, Sarmera has stated that he examined the patient and sent the DO slip to the police station. He noted the injuries on the person of PW5 but states that "I have also not mentioned in the report regarding the condition of the patient". In his cross examination he has stated that in the injury report it is not mentioned as to whether the injured was conscious or not. Dr.Shanker Kumar Jha, (PW11), who was Medical Officer in Sadar Hospital, Biharsharif where Sanuj Singh (PW5) was taken from Primary Health Centre, Sarmera for treatment has stated that in the bed-head ticket of Sanuj Singh it is stated that he was conscious. In reply to a question as to whether doctor at Primary Health Centre, Sarmera had sent him a report as to whether the patient was unconscious, the witness had replied, "such reports are not sent normally. No report of such type was received by me". The nature of the injuries on the person of Sanuj Singh (PW5), as noticed by Dr.Anjani Kumar (PW9) would also indicate that the injured could not have remained unconscious for such a long period. The injuries found are lacerated injury on the forehead, left side of the scalp, bruise on the forehead, bruise on

the left hand above wrist joint etc., and also multiple small irregular wounds on lateral aspect of left side of buttock and also small irregular wounds on left side of back and left forearm. The delay in recording the statement of Sanuj Singh (PW5), the most material witness has cast a cloud of suspicion on its credibility in so far as involvement of persons other than Jawahar Singh (A-2) and Upender Singh (A-3) are concerned. In cases of party factions and group rivalries there is a tendency on the part of the prosecution witnesses to implicate some innocent persons also along with the guilty ones. Generally in such cases the witnesses of the prosecution cases are prone to exaggerating the culpability of the actual assailants and to extend the participation in the occurrence of some possible innocent members of the opposite party as well. In such cases, as noticed earlier, a duty is cast upon the court to sift the evidence and after a close scrutiny with proper care and caution to come to a judicial conclusion as to who out of the accused persons can be considered to have actually committed the offence. This Court in Deep Chand v. State of Haryana [1996 (3) SCC 890 pointed out that the maxim "falsus in uno falsus in omnibus" is not a sound rule to apply in the conditions in this country and, therefore, it is the duty of the court in cases where a witness has been found to have given unreliable evidence in regard to certain particulars, to scrutinise the rest of his evidence with care and caution. If the remaining evidence is trustworthy and the substratum of the prosecution case remains intact, then the court should uphold the prosecution case to that extent. To the same effect is the judgment of this Court in Ranbir & Ors. v. State of Punjab [AIR 1973 SC 1409]. We are, therefore, of the opinion that non recording of the statement of Sanuj Singh (PW5) for about 9 days left the said witness with no option but to make statement according to the already tailored FIR. Though his testimony is trustworthy and cannot be totally brushed aside, yet after sifting the grain out of the chaff we find the exaggerated version regarding the involvement of accused persons except A-2 and A-3."

33. He has further cited case laws on the same point **Jagjit Singh Alias Jagga Vs. State of Punjab (2005) 3 SCC 689** in Para- 30 which is reproduced as under:-

"30. This has to be viewed in the light of the fact that her statement was recorded by the Investigating Officer for the first time three days after the occurrence, and her statement was recorded by the Judicial Magistrate six days after the occurrence. The courts below have taken the view that delay in examining her has caused no prejudice to the defence. Counsel for the appellant, submitted that this period was utilized by the prosecution for tutoring the witness, and therefore the delay of three days in her examination under Section 161 Cr. P.C. is significant No explanation is forthcoming as to why she was not examined for three days when the Investigating Office knew that a statement of her's had been recorded by the doctor on 30th August, 1996. The Trial Court took the view that since she was under a shock she was not in a position to make a statement and, therefore, her statement was recorded later. This is clearly erroneous because the case of the prosecution is that she regained consciousness on 30th August, 1996 and, thereafter, she was fully conscious. The

evidence of Dr. Bhupinder Singh, PW-7 who gave a certificate of her fitness to make a statement is also to the same effect. The reasoning of the Trial Court that the victim, PW-6, was under a great shock and was not in a position to make the statement, cannot be sustained. Neither the Trial Court nor the High Court cared to closely examine the evidence on record to find out whether there was any evidence on record to prove that the appellant was known to PW-6 or that PW-6 had any reason to know his name so as to be able to identify him by name. The explanation furnished by PW-6 five years after the occurrence, that she knew the appellant because he happened to be the son of Amar Singh at whose tune well her grandparents resided, is unacceptable particularly, in view of the fact that there is no evidence to establish that she had ever earlier seen the appellant and in none of the three statements made by her earlier the name of Amar Singh is mentioned. The delay in examining her in the course of investigation also creates a serious doubt in the absence of any explanation for her late examination after three days, when admittedly she was the sole eye witness who was also injured in the course of the occurrence. We are, therefore, of the view that though she may have witnessed the occurrence, she did not know the appellant by name as she had no opportunity of knowing or seeing him earlier, and that she has involved the appellant at the instance of her father, who was the person who suggested the involvement of the appellant when her statement Ex.PW-6/A was being recorded."

He also cited the case law **Harbeer Singh Vs. Sheespal and others (2016) 16 SCC 418**, Para- 15, 16 & 17 which is reproduced as under:-

"15. We have given careful consideration to the submissions made by the parties and we are inclined to agree with the observations of the High Court that PW3 and PW9 were not witnesses to the alleged conspiracy between the accused persons since not only the details of the conversation given by these two prosecution witnesses were different but also their presence at the alleged spot at the relevant time seems unnatural in view of the physical condition of PW9 and the distance of Sheeshpal's Dhani from Sikar road. Besides, it appears that there have been improvements in the statements of PW3. The Explanation to Section 162 Cr.P.C. provides that an omission to state a fact or circumstance in the statement recorded by a police officer under Section 161 Cr.P.C., may amount to contradiction if the same appears to be significant and otherwise relevant having regard to the context in which such omission occurs and whether any omission amounts to a contradiction in the particular context shall be a question of fact. Thus, while it is true that every improvement is not fatal to the prosecution case, in cases where an improvement creates a serious doubt about the truthfulness or credibility of a witness, the defence may take advantage of the same. [See Ashok Vishnu Davare Vs. State Of Maharashtra,(2004) 9 SCC 431; Radha Kumar Vs. State of Bihar (now Jharkhand), (2005) 10 SCC 216; Sunil Kumar Sambhudayal Gupta (Dr.) & Ors. Vs. State of Maharashtra, (2010) 13 SCC 657 and Baldev Singh Vs. State of Punjab, (2014) 12 SCC 473]. In our view, the High Court had rightly considered these omissions as material omissions amounting to contradictions covered by the Explanation to Section 162 Cr.P.C. Moreover, it has also come in evidence that there was a delay of 15-16 days from

the date of the incident in recording the statements of PW3 and PW9 and the same was sought to be unconvincingly explained by reference to the fact that the family had to sit for shock meetings for 12 to 13 days. Needless to say, we are not impressed by this explanation and feel that the High Court was right in entertaining doubt in this regard.

16. As regards the incident of murder of the deceased, the prosecution has produced six eye-witnesses to the same. The argument raised against the reliance upon the testimony of these witnesses pertains to the delay in the recording of their statements by the police under Section 161 of Cr.P.C. In the present case, the date of occurrence was 21.12.1993 but the statements of PW1 and PW5 were recorded after two days of incident, i.e., on 23.12.1993. The evidence of PW6 was recorded on 26.12.1993 while the evidence of PW11 was recorded after 10 days of incident, i.e., on 31.12.1993. Further, it is well-settled law that delay in recording the statement of the witnesses does not necessarily discredit their testimony. The Court may rely on such testimony if they are cogent and credible and the delay is explained to the satisfaction of the Court. [See Ganeshlal Vs. State of Mahrashtra, (1992) 3 SCC 106; Mohd. Khalid Vs. State of W.B., (2002) 7 SCC 334; Prithvi (Minor) Vs. Mam Raj & Ors., (2004) 13 SCC 279 and Sidhartha Vashisht @ Manu Sharma vs. State (NCT of Delhi), (2010) 6 SCC 1].

17. However, Ganesh Bhavan Patel Vs. State Of Maharashtra, (1978) 4 SCC 371, is an authority for the proposition that delay in recording of statements of the prosecution witnesses under Section 161Cr.P.C., although those witnesses were or could be available for examination when the Investigating Officer visited the scene of occurrence or soon thereafter, would cast a doubt upon the prosecution case. [See also Balakrushna Swain Vs. State Of Orissa, (1971) 3 SCC 192; Maruti Rama Naik Vs. State of Mahrashtra, (2003) 10 SCC 670 and Jagjit Singh Vs. State of Punjab, (2005) 3 SCC 68]. Thus, we see no reason to interfere with the observations of the High Court on the point of delay and its corresponding impact on the prosecution case."

witness PW- 2 is named witness in F.I.R. He also has put his signature in Panchnama (inquest report) as Punch. F.I.R. has been lodged promptly and his signature on Punchnama indicated that he was very well present at the spot when the I.O. visited for the first time at place of occurrence for investigation. There is no any other persons of his name in the village. Witness PW- 2 has stated in his evidence that he has seen the occurrence of firing while he was going towards Manikpur. Witness Pw- 6 N.P. Singh (the I.O.) has stated in his cross-examination at Page- 13 that the fact had come in his knowledge on 12.04.1994 that Ghanshyam was eye-witness of occurrence. He has further stated that he has recorded his statement on 25.04.1994. He has explained the reason for such delay that at that time i.e. on 12.04.1994 other work regarding investigation was more important, therefore, neither he asked nor recorded the statement of witness Ghanshyam. He further stated that at that time preparation of inquest report, and arrange to send dead body of deceased for mortuary, spot inspections, search of accused person etc. were more important. On the other hand, witness PW- 2 has also explained the reason of delay in recording his statement under Section 161 Cr.P.C. (at Page- 9 of

his evidence) that in morning after witnessing the occurrence he had gone back to his village and again, after 15 minutes, with pradhan and up-pradhan of his village he came back to Akhtiyarpur. After some time when he reached again, Ram Gopal went police station to lodge F.I.R. At Page- 14 of his evidence witness PW- 6 has stated that the reason for recording statement of Ghanshyam (PW-2) on 25.04.1994 is that witness (Ghanshyam) could not be found, as he has mentioned in case diary also. Admittedly, witness PW- 2 was not a resident of village rather he was a resident of village- Mau. Perusal of case diary indicates that in meantime I.O. was engaged in other works of investigation like recording the statements of Malti w/o Satish, eye-witness Rameshwer (named in F.I.R.), search of accused person, recording statement of accused persons Kanhai and Ram Das (who had surrendered in court), applying for order under Section 82-83 of Cr.P.C. against accused persons, proceeding of attachment, search of accused persons thereafter on 25.04.1994 he recorded the statement of Raj Rani, Pawan Kumar and Ghanshyam (Pw-2). There is no evidence on record which may indicate the reason that witness Pw- 2 was falsely planted by complainant as eye-witness, particularly when he has been named in F.I.R. and as his presence has been shown at the time of preparation of inquest report. Therefore, it appears that witness PW- 6 has explained properly the reason for non-recording the statement of PW- 2 on the date of occurrence. The reason so given by I.O. is supported by the evidence of witness PW-2 itself.

34. On the point of recording statement of witness under Section 161 Cr.P.C. at later stages it has been held by Hon'ble Apex Court in the case of **Sidhartha Vashisht Alias Manu Sharma Vs. State (N.C.T. of Delhi) 2010 (69) ACC 833**, Para- 61, which is reproduced as under:-

"61. The defence seeks to discredit the statement of PW-1 Deepak Bhojwani on two counts, firstly that statement is recorded after 14 days and secondly, there are various improvements, in his statement. It is next contended by the defence to believe this man is to disbelieve Beena Ramani. According to him, the prosecution did not know even on 14.05.1999 the details of their story and thus resulting in various improvements in the testimony of this witness, in the witness box. This contention of the defence looses sight of the fact that much prior to 14.05.1999 Manu Sharma had surrendered on 06.05.1999 and had made his disclosures and thus there could be no question of not knowing the facts on 14.05.1999. Had the witnesses been planted, the witnesses would have rendered a parrot like testimony. PW-1 has explicitly stated that on 30.04.1999 he had told the police at the Apollo Hospital all that he knew. This being the case, it cannot be said that the testimony of the witness should be thrown out for the delay in recording the statement by the Police. Clearly, PW-1 was not an eye witness, this fact must have been realized by PWs-100 and 101, therefore, they felt no urgency in addressing this aspect of the investigation i.e., recording of the statement of PW-1. It is stated by the State that as there were number of witnesses to be examined the said examination continued for days. Witnesses Parikshit Sagar and Andleep Sehgal were also examined on 14.05.1999. Further the presence of Deepak Bhojwani

can also not be belied in view of the testimony of Sahana Mukherjee PW- 29 and Sabrina Lal PW-73. In any case, any defect by delay in examination of witnesses in the manner of investigation cannot be a ground to condemn the witness. Further Section 162, Cr.P.C. is very clear that it is not mandatory for the police to record every statement. In other words, law contemplates a situation where there might be witnesses who depose in Court but whose previous statements have not been recorded."

35. Learned counsel for the appellants has further argued that witness PW- 2 was a chance witness and evidence of chance in such heinous offence like murder should be discarded. In support of his argument learned counsel for appellants has relied on case law **Harbeer Singh Vs. Sheespal and others** (Supra). Record indicates that learned counsel for defence has not disputed that the way from where Ghanshyam was going towards Manikpur with his tractor was a shorter way as it has been shown in spot map. Counsel for defence has not disputed the fact also that witness PW- 2 was not doing the work of ploughing on rent by his tractor. To negate the fact, as stated by witness Pw- 2 the defence has not produced Rohan Singh, the resident of Village- Manikpur where witness PW- 2 was going to plough his field by his tractor. Therefore, in absence of any evidence contrary, the presence of witness Pw- 2 at the time of occurrence seems probable. His statement should not be thrown out merely on the ground that he was a chance witness, particularly when his statement is supported by evidence of witnesses Pw-1, Pw- 6, and medical evidence.

36. It has also been argued by the learned counsel for the appellants that there was another witness, named Rameshwer who has been shown in F.I.R., he was a public witness but prosecution withheld him to produce him in evidence, therefore, an adverse inference must be drawn against the prosecution version. In support of his contention learned counsel has submitted case law **Mehraj Singh Vs. State of U.P. (Supra)**, which is reproduced as under:-

"14. It is interesting in this connection also to note that Satkari PW 5 named Resham also as an eyewitness. The High Court rightly held Satkari to be a chance witness also but the prosecution has not explained as to why Resham who was alleged to be an eyewitness has not been examined. According to Balbir PW 2, Jog Raj was also an eyewitness. He too has not been examined. Shiv Charan PW 4, also named Resham and Jog Raj as eyewitnesses. Thus, it appears to us that a concerted effort was made by the prosecution witnesses to introduce Resham and Jog Raj as false eyewitnesses in the case but since they have not been examined, it would be fair to draw a presumption, that they perhaps were not prepared to support the false case. The High Court while setting aside the order of acquittal did not deal with these various infirmities."

37. It has to be noticed that witness Rameshwer whose name has been mentioned in F.I.R. as one of the eye-witness, is the resident of same village. Accused persons also belong to same village. They have committed the offence of murder in day light in present case. They had also caused murder of one Ram Singh earlier in which, deceased was named as witness. Therefore, by any threat or fear of accused persons, if aforesaid named witness Rameshwer did not prefer to give his evidence then in that case, it

cannot be said that prosecution has wilfully withhold such witness to be examined. According to law, number of witness is not material rather quality of evidence matters. Even a single witness is sufficient to establish the case if he is trustworthy and according to legal norms, proves the case. It has been held by Hon'ble Apex Court in the case of **Amar Singh Vs. Balwinder Singh and others 2003 (46) ACC 619**, in Para- 15, which is reproduced as under:-

"15. Another reason given by the High Court for acquitting the accused-respondents is that two other injured witnesses, namely, Kashmira Singh and Pritam Singh and one Ramesh, whose name was mentioned in the FIR, were not examined. Shri Ashwani Kumar, learned senior counsel appearing for the accused-respondents has vehemently urged that the purpose of a criminal trial is not to support the prosecution theory but to investigate the offence and to determine the guilt or innocence of the accused and the duty of the public prosecutor is to represent the administration of justice and therefore the testimony of all the available eye witnesses should be before the Court and in support of this contention he has placed reliance on State of U.P. & Anr. v. Jaggo alias Jagdish & Ors. AIR 1971 SC 1586. It is true that the witnesses essential to the unfolding of the narrative on which the prosecution is based must be called by the prosecution, whether effect of their testimony is for or against the case of the prosecution. However, that does not mean that everyone who has witnessed the occurrence, whatever their number be, must be examined as a witness. The prosecution in the present case had examined three eye-witnesses who were all injured witnesses. The mere fact that Kashmira Singh and Pritam Singh were not examined cannot lead to an inference that the prosecution case was not correct. The aforesaid two witnesses had been given up by the prosecution on the ground that they had been won over by the accused. These two persons are not family members of the first informant Amar Singh and it is quite likely that they did not want to get involved in any dispute between the first informant and his sons on the one hand and the accused on the other hand as they had no interest in the land belonging to Jangir Dass Sadh which was being earlier cultivated by Gurdial Singh, father of A-1 and A-2 but had been taken an year earlier by the first informant Amar Singh. The contention raised by learned counsel fails to take notice of Section 134 of the Evidence Act which provides that no particular number of witnesses shall in any case be required for the proof of any fact. A similar contention has been repelled by this Court in a very illustrating judgment in Vadivelu Thevar v. State of Madras AIR 1957 SC 614 and it will be useful to take note of para 11 of the report, which reads as under :

".The contention that in a murder case, the court should insist upon plurality of witnesses, is much too broadly stated. The Indian Legislature has not insisted on laying down any such exceptions to the general rule recognised in S.134, which by laying down that "no particular number of witnesses shall, in any case, be required for the proof of any fact" has enshrined the well recognised maxim that "Evidence has to be weighed and not counted." It is not seldom that a crime has been committed in the presence of only one witness, leaving aside those cases which are not of uncommon occurrence, where determination of guilt depends entirely on circumstantial

evidence. If the Legislature were to insist upon plurality of witnesses, cases where the testimony of a single witness only could be available in proof of the crime, would go unpunished. ."

38. In the case law **Ashok Kumar Chaudhary and others Vs. State of Bihar (2008) 12 SCC 173**, it has been held by Hon'ble Apex Court that-

"7. We are not impressed with the argument. Though it is true that the incident having taken place near the market around 6 p.m. on 17th July, 1988, the prosecution should have attempted to secure public witnesses who had witnessed the incident, but at the same time one cannot lose sight of the ground realities that the members of the public are generally insensitive and reluctant to come forward to report and depose about the crime even though it is committed in their presence. In our opinion, even otherwise it will be erroneous to lay down as a rule of universal application that non examination of a public witness by itself gives rise to an adverse inference against the prosecution or that the testimony of a relative of the victim, which is otherwise credit-worthy, cannot be relied upon unless corroborated by public witnesses."

39. Learned counsel for the appellants has further stated that there are discrepancies in the statement of witnesses of fact, hence their testimonies are not reliable. Considering the evidence of PW-1 and PW- 2 in totality, no substantial variation or discrepancy is found regarding happening of occurrence or place of occurrence. Both the witnesses have named accused persons in their evidence for firing on deceased. Witness Pw- 2 has stated in his cross-examination that the distance of his village from Akhtiyarpur is 1 km. and as village relation he recognizes to complainant and his son as well as accused persons. The statements of witnesses Pw- 1 & Pw- 2 are supported and corroborated by post-mortem report and other prosecution papers. Their statements are also corroborated by the evidence of PW- 7 Doctor S.M. Gupta. There is no contradiction in their testimonies on the core of prosecution case. If some inconsistency is found, that do not affects the prosecution case substantially. Those contradictions are natural and probable. In the case of **Munshi Prasad and others Vs. State of Bihar (Supra)** it has been held in Para- 10 (I), that:-

"10. *(i)..... Incidentally, be it noted that while appreciating the evidence of a witness, minor discrepancies on trivial matters without affecting the core of the prosecution case, ought not to prompt the court to reject evidence in its entirety. If the general tenor of the evidence given by the witness and the trial court upon appreciation of evidence forms opinion about the credibility thereof, in the normal circumstances the Appellate Court would not be justified to review it once again without justifiable reasons. It is the totality of the situation, which has to be taken note of, and we do not see any justification to pass a contra note, as well, on perusal of the evidence on record. In this context reference may be made to two decisions of this Court. The first being the State of U.P. v. M.K. Anthony, [1985] 1 SCC 505 as also a later one in the case of Leela Ram v. State of Haryana, (1999) 9 SCC 525. Needless to record that difference in some minor detail, which does not otherwise affect the core of the prosecution case,*

may be there but that by itself would not prompt the Court to reject the evidence on minor variations and discrepancies. In Leela Ram (supra), this Court observed in paragraph 10 of the report."

40. In case law **Shivappa and others Vs. State of Karnataka (Supra)**, Hon'ble Apex Court has held in Para- 26, that:-

"26. *No villager even informed the Police. At least some of them could have done so. PW-11, Nimbewwa, in her evidence categorically stated that immediately after the occurrence, the electricity went off. The telephones were also not working. She also stated that no transport was available. It would, therefore, be too much to expect that those young ladies would walk 11 kilometers on foot in the dead of night to lodge the First Information Report. PW-21, Gurubai, made a statement that the Police came at about 8 am in the morning on the next day. Evidently, it was an inadvertent statement as in her examination in chief, she categorically stated that PW-11, Nimbewwa and PW-12, Shantavva left the village for lodging a First Information Report at 8.00 am in the morning. This cannot be a ground for disbelieving them. Minor discrepancies or some improvements also, in our opinion, would not justify rejection of the testimonies of the eye-witnesses, if they are otherwise reliable. Some discrepancies are bound to occur because of the sociological background of the witnesses as also the time gap between the date of occurrence and the date on which they give their depositions in court."*

41. The witnesses of fact, have undergone a lengthy cross-examination by counsel for defence, who were the legal experts. Therefore, some contradictions are bound to occur. It has been held by Hon'ble Supreme Court in the case of **Jai Shree Yadav Vs. State of U.P. (Supra)**, in Para- 21, that:-

"21. It is also true that PW1 was not available to the Police for nearly 10 days after the incident but the explanation given by this witness is quite plausible that his family was afraid for his safety hence he went to his in-laws' place and remained there and it is only when things settled down he decided to come out and give a statement to the Police. The possibility of his fear of retaliation is supported by the evidence of PW-8 I.O. who stated that there was tension in the village and at the time of funeral of the deceased he had to make Police bandobust which indicates the possibility of PW-1's apprehension and his consequent non-availability to the investigating agency. There is one other aspect of this case which will have to be borne in mind while considering the evidence of PW-1. His name has been mentioned in the FIR as a person who was present at the time the incident took place. It is also stated in the FIR that in the said incident PW-1 was injured. We have already noticed that the prosecution has established that this complaint was filed in the Salempur Police Station at 5.30 p.m. If really this witness was not present at the time of incident in question we do not think PW-3 would have included his name without even knowing the whereabouts of this witness on that day and by attributing an imaginary injury to him. In his examination in chief this witness has clearly narrated the incident involving the named accused persons as also the overt acts attributed to them. Of course in the cross examination the defence has brought out that this person is closely connected

with deceased Abid Ali therefore a suggestion was made that he was deposing falsely. This suggestion has been denied by the appellant. In the cross examination defence has brought about certain omissions, contradictions and improvements in the evidence of this witness. These shortcomings in the evidence of this witness will have to be considered in the background of the fact that this witness was subjected to nearly 217 questions over a period of 14 months i.e. his cross examination starting on 14.8.1994 and ending on 28.11.1995. Both the courts below have taken judicial notice of this fact, not only in regard to this witness but in regard to other witnesses also and have come to the concurrent conclusion that when a witness is subjected to such lengthy arduous cross examination over a lengthy period of time there is always a possibility of the witnesses committing mistakes which can be termed as omissions, improvements and contradictions therefore those infirmities will have to be appreciated in the back ground of ground realities which makes the witness confused because of the filibustering tactics of the cross examining Counsel."

42. It is to be noted that evidence of PW- 1 was recorded on 10.01.1995 and his cross-examination was completed on 01.02.1995. Accordingly, witness PW- 2 has been examined on 01.02.1995/02.02.1995 i.e. almost 9 months after the occurrence. Therefore, some contradictions, variations and improvement are not improbable, if they are not tuitored witnesses. Hence, it can be concluded after close scrutiny that the evidence of witnesses PW- 1 and PW- 2 are reliable and trustworthy.

43. It has been contended by learned counsel for appellants that witness Pw- 1 is father of deceased, he is an interested person therefore, the sessions judge has erred to place his reliance on his testimony. Witnesses PW- 1 was eye-witnesses and his evidence regarding commission of offence is supported with medical evidence and other evidences of prosecution. In this regard, it has been held by Hon'ble Apex Court in the case of **Kuria and another Vs. State of Rajasthan (2012) 10 SCC 433**, that:-

"25. The testimony of an eye-witness, if found truthful, cannot be discarded merely because the eye-witness was a relative of the deceased. Where the witness is wholly unreliable, the court may discard the statement of such witness, but where the witness is wholly reliable or neither wholly reliable nor wholly unreliable (if his statement is fully corroborated and supported by other ocular and documentary evidence), the court may base its judgment on the statement of such witness. Of course, in the latter category of witnesses, the court has to be more cautious and see if the statement of the witness is corroborated. Reference in this regard can be made to the case of Sunil Kumar (supra), Brathi alias Sukhdev Singh Vs. State of Punjab [(1991) 1 SCC 519] and Alagupandi @ Alagupandian v. State of Tamil Nadu 2012 (5) SCALE 595]."

44. The co-ordinate Bench of this Court has also held in the case of **Uma Shankar Vs. State of U.P. 2015 (89) ACC 421**, in Para- 47, which is reproduced as under:-

"47. We have also noticed that the Investigating Officer has not sent the said Gupti to the Forensic Laboratory for chemical examination to ascertain that the blood found on the weapon was the same blood of the deceased. Investigating Officer has also not demonstrated the way of arrival of the witnesses at the place of occurrence in the site plan, but only on this point in our opinion the testimony of

the ocular witnesses whose presence on the spot at the time of occurrence is found established, and is supported by medical evidence, cannot be disbelieved until and unless appellant accused is able to establish that due to this fact his right of defence has been prejudiced. The appellant had opportunity to cross examine the witnesses. The said Gupti had been recovered from the possession of the accused on the spot, Doctor has clearly opined that the injury found on the body of the deceased was the result of the blow caused by the said Gupti, no cross examination has been made by the defence on this point, and thus a clerical mistake in the statement of PW-5 S.I. Phool Singh on the part of taking over the investigation on 27.3.1986, which is not materially affecting the prosecution case, we are of the view that no prejudice has been caused to the accused on this score and the prosecution case cannot be doubted."

45. Learned counsel for the appellants further submitted that the motive of offence is not proved, in fact, there was a quarrel in between children in village and due to said enmity accused persons have been named in the case falesly. On the above point, witness PW- 1 has mentioned in his evidence that his son deceased Satish was doing Pairvi of the murder case of Ram Singh in which present accused persons were accused. It has been submitted by learned counsel for the complainant that said Ram Singh was not the resident of same village, whereas deceased was resident of same village and were just neighbour of accused persons that is why they were having the enmity with deceased, particularly for the reason that their co-villager is not supporting them. He further submitted that the accused persons Ram Das, Ram Datt, Avdhesh, Sunil, Kanhai Lal and Nagendra have been convicted in the said case by the court of First Additional Sessions Judge, Aligarh on 14.10.1996 (Sessions Trial No. 859 of 1993), under Sections 147, 148, 302 and 149 I.P.C. Learned counsel for complainant has also pointed that, copy of aforesaid judgement is available on record. The motive suggested by learned counsel for complainant seems probable for committing the offence of murder of Satish. In present case there is direct evidence of eye-witnesses which are found reliable. Hon'ble Apex Court Hon'ble Apex Court has held in the cases of **Gulam Sarbar Vs. State of Bihar (Now Jharkhand) (2014) 3 SCC 401**, of **Rohtash Kumar Vs. State of Haryana**, Criminal Appeal No. 896 of 2011, **Bipin Kumar Mondal Vs. State of West Bengal (2010) 12 SCC 91, Balram Singh Vs. State of Punjab 2003 AIR (SC) 2213** and in **Baboolal Vs. State of U.P. 2001 SCC (Cri) 1484** that where there is direct evidence, prosecution is not needed to prove motive of offence. How the mind of an assailant reacts is not to be fathomed from a detached reflection. Criminal conspiracy, in general, hatched in secrecy, thus direct evidence is difficult to obtain or access.

46. Learned counsel for the appellants further submitted that police has shown false recovery of two weapons (tamanche) of 315 and 12 bore on the pointing out of accused appellants Ballu and Sunil. Police has failed to recover other tamanche as witnesses PW- 1 and PW- 2 have stated in their evidence that all the accused persons were carrying fire-arms in their hand. Investigating officer has failed to send the aforesaid recovered tamanche to F.S.L also. Therefore, the case of prosecution is not reliable. On the

point of above argument it will not be out of context to mention that, if I.O. was failed to recover all the fire arms from all the accused persons prosecution case does not collapse, as it was in the special knowledge of accused persons that where they have kept hidden the used fire arms they have not disclosed. The Hon'ble Apex Court in the case of **State of Punjab Vs. Hakam Singh Appeal (Crl.) No. 130 of 2000** has held that:-

"It was also pointed out by learned counsel for the respondent that no fire arms were recovered and no seizure has been made of empties. It would have been better if this was done and it would have corroborated the prosecution story. Seizure of the fire arms and recovering the empties and sending them for examination by the Ballistic expert would have only corroborated the prosecution case but by not sending them to the Ballistic expert in the present case is not fatal in view of the categorical testimony of PW- 3 about the whole incident."

47. In the case of **Gopal Singh Vs. State of Uttarakhand (2013) 7 SCC 545** it has been held by Hon'ble Supreme Court that:-

"12. In this context, we may refer with profit to the decision in Anwarul Haq v. State of U.P. wherein it was held that solely because the knife that was used in committing the offence had not been recovered during the investigation could not be a factor to disregard the evidence of the prosecution witnesses who had deposed absolutely convincingly about the use of the weapon. That apart, the Court also referred to the evidence of the doctor which mentioned about the use of weapon. It is worth noting that this Court observed that though the doctor's opinion about the weapon was theoretical, yet it cannot be totally wiped out. Regard being had to the aforesaid, this Court maintained the sentence of one year rigorous imprisonment under Section 324 of IPC as imposed by the trial Court and concurred with by the High Court."

48. In the case of **Ram Bali Vs. State of U.P. 2004 (2) JIC 168 (SC)** it has been held by Hon'ble Supreme Court that:-

"12. The investigation was also stated to be defective since the gun was not sent for forensic test. In the case of a defective investigation the Court has to be circumspect in evaluating the evidence. But it would not be right in acquitting an accused person solely on account of the defect; to do so would tantamount to playing into the hands of the investigating officer if the investigation is designedly defective. (See Karnel Singh v. State of M.P. (1995 (5) SCC 518)."

49. On the same point it has been held by Hon'ble Apex Court in the case of **Amar Singh Vs. Balwinder Singh and others (Supra)**, that:-

"14. Coming to the last point regarding certain omissions in the DDR, it has come in evidence that on the basis of the statement of PW4 Amar Singh, which was recorded by PW14 Sardara Singh, S.I. in the hospital a formal FIR was recorded at the Police Station at 9.20 p.m. In accordance with Section 155Cr.P.C. the contents of the FIR were also entered in the DDR, which contained the names of the witnesses, weapons of offence and place of occurrence and it was not very necessary to mention them separately all over again. It is not the case of the defence

that the names of the accused were not mentioned in the DDR. We fail to understand as to how it was necessary for the investigation officer to take in his possession the wire gauze of the window from where A-1 is alleged to have fired. The wire gauze had absolutely no bearing on the prosecution case and the investigating officer was not supposed to cut and take out the same from the window where it was fixed. It would have been certainly better if the investigating agency had sent the fire arms and the empties to the Forensic Science Laboratory for comparison. However, the report of the Ballistic Expert would in any case be in the nature of an expert opinion and the same is not conclusive. The failure of the investigating officer in sending the fire arms and the empties for comparison cannot completely throw out the prosecution case when the same is fully established from the testimony of eye-witnesses whose presence on the spot cannot be doubted as they all received gun shot injuries in the incident. In Karnel Singh v. State of M.P. (1995) 5 SCC 518 it was held that in cases of defective investigation the court has to be circumspect in evaluating the evidence but it would not be right in acquitting an accused person solely on account of the defect and to do so would tantamount to playing into the hands of the investigating officer if the investigation is designedly defective. In Paras Yadav & Ors. v. State of Bihar (1999) 2 SCC 126while commenting upon certain omissions of the investigating agency, it was held that it may be that such lapse is committed designedly or because of negligence and hence the prosecution evidence is required to be examined de hors such omissions to find out whether the said evidence is reliable or not. Similar view was taken in Ram Bihari Yadav v. State of Bihar (1998) 4 SCC 517 when this Court observed that in such cases the story of the prosecution will have to be examined de hors such omissions and contaminated conduct of the officials, otherwise, the mischief which the complainant party and this would obviously shake the confidence of the people not merely in the law enforcing agency but also in the administration of justice. In our opinion the circumstances relied upon by the High Court in holding that the investigation was tainted are not of any substance on which such an inference could be drawn and in a case like the present one where the prosecution case is fully established by the direct testimony of the eye-witnesses, which is corroborated by the medical evidence, any failure or omission of the investigating officer cannot render the prosecution case doubtful or unworthy of belief."

50. The same view has been taken by the Hon'ble Apex Court in the case of **Baleshwar Mandal and another Vs. State of Bihar 1997 JIC 1030 (SC)** in Para- 5, which is reproduced as under:-

"5. Under Section 172 Cr. P.C. read with Rule 164 of Bihar Police Manual dealing with the investigation, an Investigating Officer investigating a crime is under obligation to record all the day to day proceedings and information in his case diary, and also record the time at which the information was received and the place visited by him, besides the preparation of site plan and other documents. The investigating Officer is also required to send blood stained clothes and earth seized from the place of occurrence for chemical examination. Failure on the part of the investigating Officer to comply with the provisions of

Section 172 Cr.P.C. is a serious lapse on his part resulting in diminishing the value and credibility of his investigation. In this case the Investigating Officer neither entered the time of recording of the statements of the witnesses in the Diary nor did he send the blood stained clothes and earth seized from the place of occurrence for examination by a serologist. The High Court also adversely commented upon the lapses on the part of the Investigating Officer in not complying with the provisions of Code of Criminal Procedure. We, therefore, take it that, in fact, there was serious lapse on the part of the Investigation Officer in not observing the mandate of Section 172 Cr.P.C. while investigating the case which has given rise to this appeal. But the question that arises for consideration is, has any prejudice been caused to the accused in the trial by non-observance of rule by the Investigating Officer? The evidence on record before the Sessions Court and the appellate Court does not show that due to the lapses on the part of the Investigating Officer in not sending the blood stained clothes and earth seized from the place of occurrence for chemical examination and further not noting down the time of recording the statement of the witnesses in he Diary has resulted in any prejudice to the defence of the accused. In the present case, the place of occurrence and the identity of the deceased are not disputed. Further, the testimony of the eye witnesses which is consistent and does not suffer from infirmity, was believed by both the courts below. Once the eye witnesses are believed and the courts come to the conclusion that the testimony of the eye witnesses is trustworthy, the lapse on the part of the Investigating Officer in not observing the provisions of Section 172 Cr.P.C. unless some prejudice is shown to have been caused to the accused, will not affect the finding of guilt recorded by the Court. Neither before the High Court nor before this Court, it was pointed out in what manner the accused was prejudiced by non-observance of the provision of Section 172 Cr.P.C. and the rules framed in this regard. We are, therefore, of opinion that judgments of Court below do not suffer on account of omission on the part of Investigating Officer in not sending the earth seized from the place of occurrence for Chemical examination or in not entering the time of recording the statements of witnesses in the Diary."

Therefore, considering the evidence and circumstances of present case, and in the light of above dictums of Hon'ble Apex Court, it can be inferred that, if I.O. has committed some laches during investigation and in collecting evidence against accused appellants, then in that case the evidences of witnesses of prosecution cannot be brushed aside, particularly when their testimonies are reliable and trustworthy.

51. Learned counsel for the appellants further submitted that in spot map, location of accused persons from where they have opened fire on Satish and place of witnesses from where they have seen the occurrence, has not been shown by I.O. On the above point, learned counsel for the complainant has argued that the spot map which has been prepared by I.O., is inadmissible under Section 162 of Cr.P.C. as that map was not prepared by measurement rather witness Pw- 7 (I.O.) had prepared it roughly. Learned cousnel has placed reliance on case of **Tori Singh and another Vs. State of U.P. AIR 1962 Supreme Court 399.**

"7. We are of opinion that neither of these arguments has any force. Let us first take the contention that it was most unlikely that the deceased would be hit on that part of the body where the injury was actually received by him, if he was at the spot marked in Ex. Ka-9. The validity of this argument depends mainly on the spot which has been marked on the sketch-map Ex. Ka-9 as the place where the deceased received his injuries. In the first place, the map itself is not to scale but is merely a rough sketch and therefore one cannot postulate that the spot marked on the map is in exact relation to the platform. In the second place, the mark on the sketch-map was put by the Sub-inspector who was obviously not an eyewitness to the incident. He could only have put it there after taking the statements of the eye witnesses. The marking of the spot on the sketch-map is really bringing on record the conclusion of the Sub-inspector on the basis of the statements made by the witnesses to him. This in our opinion would not be admissible in view of the provisions of s. 162 of the Code of Criminal Procedure, for it is in effect nothing more than the statement of the Sub-inspector that the eye-witnesses told him that the deceased was at such and such place at the time when he was hit. The sketch-map would be admissible so far as it indicates all that the Sub-inspector saw himself at the spot; but any mark put on the sketch map based on the statements made by the witnesses to the Sub-inspector would be inadmissible in view of the clear provisions of s. 162 of the Code of Criminal Procedure as it will be no more than a statement made to the police during investigation. We may in this connection refer to Bhagirathi Chowdhury v. King Emperor,AIR 1926 Cal 550, where it was ob-served that placing of maps before the jury containing statements of witnesses or of information received by the investigating officer preparing the map from other persons was improper, and that the investigating officer who made a map in a criminal case ought not to pat anything more than what he had seen himself. The same view was expressed by the Calcutta High Court again in Ibra A kanda v. Emperor AIR 1944 Cal 339, where if was held that any information derived from witnesses during police investigation, and recorded in the index to a map, must be proved by the witnesses concerned and not by the investigating officer, and that if such information is sought to be proved by the evidence of the investigating officer, it would manifestly offend against s. 162 of the Code of Criminal Procedure."

52. It is to be considered that spot map was prepared by I.O. on the pointing of complainant, as witness Pw- 1 has mentioned in cross examination. This fact has also been mentioned by I.O. in case diary which is available on record (back page of Paper No. 33 Kha/3 dated 12.04.1994) and the witness Pw- 1 has not been cross examined by counsels of accused persons on the above shortcomings of spot map. In the light of above dictum of Hon'ble Apex Court, I.O. cannot be asked about not showing the place of accused persons and eye witnesses.

53. If I.O. has not prepared spot map on scale or there was any fault of investigation in sketching the spot map it can be treated as latches of I.O., which does not affects the case of prosecution adversely, where direct, ocular and reliable evidence is available on record. On the above point Hon'ble Apex Court has held

in the case of **Allarakha K. Mansuri Vs. State of Gujarat 2002 Supreme Court Cases (Cri) 519** that defective investigation by itself cannot be made a ground for acquitting the accused.

It has been held by co-ordinate Bench of this Court in the case of **Ved Ram & Ors. Vs. State of U.P. 2004 (2) JIC 17** that Para- 25.

"25. Another argument of the learned counsel for the appellants is that Bhikam. P.W 2 -- the witness of murder of Raghunath was also an interested witness being Bataidar of Jhamman Lal. In our view, this factum alone does not justify jumping to the conclusion that he deposed falsely in favour of the prosecution. It has to be placed on record that he had no animus with the accused appellants. Yet another submission of the learned counsel for the appellants is that he did not show to the investigating officer the place wherefrom he saw the incident of murderous assault on Raghunath. True, the investigating officer did not show in the site plan the place from where this witness witnessed the incident but because of this lapse or mischief on the part of the investigating officer, his presence there cannot be doubted. His emphatic statement is that at the relevant time he was ploughing the field of Jhamman which he had taken on Batai. It was adjacent to the field which was being dug by Raghunath. Jhamman Lal P.W 1 also spoke about his field being adjacent to that of Raghunath. Existence of the plot of Jhamman Lal adjacent to that of Raghunath was not even challenged either in the cross-examination of Jhamman Lal P.W 1 or Bhikam P.W 2."

54. If eye-witnesses of occurrence are reliable and trustworthy then in that case no corroborative evidence is needed and conviction can be based on the evidence of even sole reliable eye-witness, as it has been held by Hon'ble Apex Court in the case of **Namdeo Vs. State of Maharashtra Criminal Appeal No. 914 of 2006, Seeman Alias Veeranam Vs. State by Inspector of Police 2005 CRI. L. J. 2618, Kuria and another Vs. State of Rajasthan (Supra).**

55. Learned counsel for the appellants further argued that there is no cogent evidence that every appellant was involved in the occurrence. Police has not recovered the number of weapons in proportionate to number of accused persons. On the above point, it reveals from record that witnesses PW- 1 and PW-2 have stated in their evidences that all the accused persons opened fire on Satish by their fire-arms (tamanche) (country-made pistols). Normally, country-made pistol (tamanche) can fire single shot. As according to post-mortem report and evidence of PW-7, deceased sustained 5 injuries of gunshot entry wounds on the different part of his body, which shows the complicity of more than one assailants. There is nothing on record which may bifurcate the role of particular accused person. The number of injuries indicate the common object of assailants Hon'ble Apex Court in the case of **Shivappa and others Vs. State of Karnataka (Supra)** has held in Para- 30, that:-

"30. The submission of Mr. Javali that overt acts have been attributed only to five of the accused and all of them could not have been convicted invoking the provisions of Sections 148 and 149 of the Indian Penal Code may now be considered. The First Information Report, as also the evidences of as many as six eye-witnesses, clearly reveals that all the eleven accused came in a group. All of them were armed with deadly weapons

although actual overt acts had been attributed to Accused No.1, Ningondeppa, Accused No.2, Shivashankar, Accused No.3, Shivappa, Accused No.5, Shekappa and Accused No.11 Malakji only. In their depositions, the prosecution witnesses have categorically stated that all of them took part therein. Even if we do not put entire reliance on the said statements, the very fact that the deceased received as many as 20 injuries is itself sufficient to show that all the accused persons not only came to the place of occurrence upon forming an unlawful assembly but also had the requisite common object to kill the deceased. Formation of common object must be inferred upon taking into consideration the entire situation."

In the case of **Jai Shree Yadav Vs. State of U.P. 2004 SAR (Cri.) 748**, the Hon'ble Apex Court has held that:-

"29. In view of the above principle in law, since the trial court has found these respondent-accused guilty of being members of an unlawful assembly with the common object of causing the murder of the deceased, and the High Court having not differed from the said finding, it erred in acquitting these respondent-accused solely on the ground that there is no evidence to show that they had taken part in the actual assault. In our opinion, assuming that the High Court was correct in coming to the conclusion that these respondent-accused have not taken part in the attack even then they having come together with the other accused armed, and having been members of the unlawful assembly and having shared the common object, they will be guilty of an offence punishable under section 302 read withsection 149 IPC."

In the case of **Krishna Mochi and Others Vs. State of Bihar etc. 2002 (2) J.Cr.C 123**, regarding liability of accused persons in the case of common object Hon'ble Apex Court held that:-

"83. Learned counsel further pointed out that according to the prosecution case and evidence, none of the appellants are alleged to have assaulted either any of the 35 deceased or the injured persons and that from mere presence at the place of occurrence their participation in the crime cannot be inferred inasmuch as they may be even sight seers. In my view, there is absolutely no foundation for the submissions that the accused persons may be sight seers as no suggestion was given to any of the witnesses on this score. According to the prosecution case and the evidence, the accused persons arrived at the village of occurrence, pursuant to a conspiracy hatched up by them, they divided themselves into several groups, different groups went to the houses of different persons in the village, entered the houses by breaking open the door, forcibly took away inmates of the house after tying their hands, taken them first to the temple and thereafter near the canal where their legs were also tied and there some of them were done to death at the point of firearm, but a vast majority of them were massacred by slitting their throats with pasuli. One thing is clear that all these acts were done by the accused persons pursuant to a conspiracy hatched up by them to completely eliminate members of a particular community in the village and to achieve that object, they formed unlawful assembly and different members of that unlawful assembly had played different role. In view of these facts, merely because the appellants are not said to have assaulted either any of the deceased or injured persons, it cannot be inferred that

they had no complicity with the crime, more so according to the evidence they were also armed with deadly weapons, like firearms, bombs, etc., but did not use the same. Reference in this connection may be made to a decision of this Court in the case of Masalti (supra) where it was laid down that where a crowd of assailants, who were members of an unlawful assembly, proceeds to commit the crime in pursuance of the common object of that assembly, it is often not possible for witnesses to describe actual part played by each one of them and a large crowd of persons armed with weapons assaults the intended victims, it may not be necessary that all of them have to take part in the actual assault as in that case several weapons were carried by different members of unlawful assembly and an accused who was member of such an unlawful assembly and was carrying firearm cannot take any advantage from the fact that he did not use the firearms, though other members of the unlawful assembly used their respective arms.

Therefore, only on the ground that I.O. could not recover the fire-arms of each accused persons, case of prosecution does not collapse particularly where the eye-witnesses PW-1 and PW-2 have been found reliable witnesses.

56. Learned counsel for the appellants further argued that it has also been mentioned in F.I.R. that after committing murder of Satish accused persons entered in the house of complainant by pursuing and chasing him, where they robbed the licencee double barrel gun of complainant, cash and jewellery. The occurrence of robbery has not been proved by the evidence available on record. Considering the aforesaid argument, record shows that witness PW-3 who is mother of deceased, was present in her residential home, where it has been alleged that robbery of gun, cash and jewellery took place. Witness PW- 3 has mentioned in her evidence that when her husband was running towards his home with shouting the voice for help, all the accused persons were chasing him with fire-arms, and all the persons entered in her house, they robbed Rs. 1,30,000/-, cash, licencee gun and belt of cartridges, pandel and chain. During the course, Ram Das and Kanhai stood before her and asked her to keep silent. She has further stated in her evidence that cash and jewellery which were kept in open box were robbed. As according to evidence of witness Pw- 1, his servant was also residing with his family members in his house, therefore, it is not probable that the box, wherein case and jewellery were lying would not be in locked condition. Witness PW- 3 has further stated in her evidence that all the articles were robbed from the room of Satish. She has further stated that aforesaid cash amount was consideration money of sale of laha (mustered), but no receipt of sale has been submitted by prosecution. Witness PW- 1 has stated in his evidence that her wife told about the robbed articles. Admittedly the F.I.R. was lodged by complainant after that conversation with his wife but there is no detail of robbed articles in F.I.R. He has also mentioned in his evidence that accused persons had given threat to his wife and servant, on the other hand, witness PW- 3 has stated that accused Kanhai and Ram Das stopped her from shouting the voice for help. She has not taken the name of any servant. Witness PW- 3 further stated that immediately, after robbery, she told her husband about the robbery but witness PW- 1 has stated

in his evidence that he don't know that from where the jewellery was robbed, it is well known to the ladies of home. This statement of Pw- 1, in the light of statement of Pw- 3 is not reliable. Witness PW- 1 has also stated that the licencee gun was in his name and the gun was lying in the room of deceased Satish. Inquest report indicates that, right hand of deceased was already amputated therefore, in such a physical condition it is not possible for Satish to use gun, by a single hand. On the other hand, complainant was a fit person, therefore, the statement of PW- 1 that gun was lying in the room of Satish is not reliable. Normally guns are kept in house, in such a places where it can be used easily in eminent danger conditions. The complainant has not produced his gun's licence also which could prove that he was possessing a gun.

57. It has further argued by learned counsel for appellants that evidence of witness Pw- 2 on the point of robbery is not reliable, as in general, a stranger person who watches the occurrence of violence and running of accused persons with weapons, takes shelter behind some structure as shield, witness PW- 2 and his son Amit at that time would have been in shed of his tractor, therefore, it was not possible for him to recognize the robbed gun of complainant in the hand of Ram Datt witness Pw- 3 has not stated the name of Ram Datt who was well known by her as neighbour. The argument advanced by counsel for appellants at this point seems forceful, and above part of the statement of PW-2 appears as exaggeration, which can be ignored.

58. Considering the evidence on record, surrounding circumstances and keeping in mind that no looted articles were recovered from the pointing out of accused persons or from their residence at the time of proceeding of attachment which took place under the Provisions of Section 83 of Cr.P.C, the occurrence of robbery is not established. Prosecution has failed to prove the occurrence of robbery beyond reasonable doubt against accused persons. Therefore, accused persons are liable to be acquitted from the charge of Section 395 I.P.C.

59. In view of the above facts, circumstances and discussions, we are of the confirmed view that prosecution has proved the charges of Section 302 I.P.C. and 148 I.P.C. beyond reasonable doubt against accused persons. So far as the charges of offence under Section 302/148 I.P.C. is concerned, no error of law as well as in appreciation of fact and evidence is found in impugned judgement. Therefore, conviction and sentence of appellants under Section 302/148 I.P.C. is affirmed. It is further concluded that since the prosecution could not prove the charge of Section 395 I.P.C. against appellants, hence appellants are acquitted from the charge of Section 395 I.P.C.

60. Accordingly, conviction and sentencing order of sessions judge, so far as Section 395 of I.P.C. in concern is set aside. Appeal is allowed partly.

61. Let the copy of this order be sent to court concern for compliance. All the accused persons, namely, Sunil, Ballu, Dhannu, Avadesh and Kanhai are on bail they will surrender immediately before C.J.M. concerned, failing which the C.J.M. concerned shall issue NBW against all the accused appellants. If accused appellants appears or brought before C.J.M. they

shall be sent to jail for execution of their sentences.

(2020)02ILR A651

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 11.02.2020

BEFORE
THE HON'BLE MRS. SUNITA AGARWAL, J.
THE HON'BLE PRADEEP KUMAR SRIVASTAVA, J.

Criminal Appeal No. 125 of 2000

Babadeen ...Appellant (In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Appellant:
Sri V.K. Gupta, Sri K.D. Tewari, Sri Jitendra Singh

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

A. Criminal Law-Indian Penal Code - Section 302- Appeal against conviction.

Law is well settled that even if acquittal is recorded in respect of the co-accused on the ground that there were exaggerations and embellishments yet conviction can be recorded in respect of the other accused if the evidence is found cogent and reliable against him. (Para 28)

If prosecution case is based on direct evidence of eyewitnesses and the law is settled that in such cases presence or absence of motive is not relevant. Motive is not a sine qua non for the commission of a crime. Moreover, it takes a back seat in a case of direct ocular account of the commission of the offence by a particular person. In a case of direct evidence the element of motive does not play such an important role so as to cast any doubt on the credibility of the prosecution witnesses even if there be any doubt raised in this regard. (Para 40)

If the eye-witnesses are trustworthy, the motive attributed for the commission of crime may not be of much relevance. Failure to prove motive or absence of evidence on the point of motive would not be fatal to the prosecution case when the other reliable evidence available on record establishes the guilt of the accused. (Para 42)

FIR has been lodged promptly without any delay. Three eye-witnesses including informant have proved the prosecution case. There is no contradiction, improvement or discrepancy in their statement with regards to time, date, place and manner of commission of offence by accused. The injury report and postmortem report fully corroborate the time, date and manner of incident and it has been found that both died by gunshot injuries. The prosecution has succeeded in proving the charge under Section 302 IPC beyond shadow of any doubt. (Para 46)

Criminal Appeal rejected. (Para 47)

List of cases cited:-

1. Balraje Vs. St. of Maha., 2010 (70) ACC 12 (SC),

2. Kallu Vs. St. of M.P., 2007 (57) ACC 959 (SC),

3. Amzad Ali Vs. St. of Assam, (2003) 6 SCC 270,

4. Om Pal Singh Vs. St. of UP, AIR 2011 SC 1562,

5.Kalika Tewari vs St of Bihar, JT 1997(4) SC 405,

6.Ram Gulam Chowdhary Vs St. of Bihar, 2001(2) JIC 986 (SC),

7. Sheoraj Bapuray Jadhav v St. of Kar., (2003) 6 SCC 392,

8. St. of UP v Sheo Lal, AIR 2009 SC 1912,

9. Durbal v St. of UP, 2011 CrLJ 1106 (SC),

10. Hari Singh v St. of UP, AIR 2011 SC 360,

11. Abu Thakir v State AIR 2010 SC 2119,

12. St. of UP v Nawab Singh AIR 2010 SC 3638,

13. Bipin Kumar Mondal v St. of WB 2005 SCC (Criminal) 33,

14. Shivraj Bapuray Jadhav v St. of Kar. (2003) 6 SCC 392,

15. Thaman Kumar v St. of UT of Chandigarh (2003) 6 SCC 380,

16. St. of HP v Jeet Singh; (1999) 4 SCC 370,

17. Gopi Ram v St. Of UP, 2006 (55) ACC 673 SC,

18. R.R. Reddy v St. of AP, AIR 2006 SC 1656,

19. Sucha Singh v St. of Punjab; AIR 2003 SC 1471,

20. St. of Raj. v Arjun Singh AIR 2011 SC 3380,

21. Varun Chaudhry v St. of Raj. AIR 2011 SC 72,

22. Saddik Vs. St. of Guj., (2016) 10 SCC 663,

23. Awdhesh Kumar v St. of UP, 2019 (4) CRIMES 219 (SC),

24. State of MP v Shivshanker, (2014) 10 SCC 366,

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

1. Heard Sri Jitendra Singh, learned counsel for the appellant, Sri L.D. Rajbhar and Mrs. Alpana Singh, learned A.G.A for the State and perused the record.

2. This criminal appeal has been filed against the judgment and order dated 10.12.1999, passed by the Sessions Judge, Mahoba, in Sessions Trial No. 38 of 1996 (State vs. Baba Deen And others), arising out of Case Crime No. 193 of 1995, under Section 302 IPC, Police Station Shrinagar, District Mahoba, whereby the accused-appellant Baba Deen has been convicted and sentenced for life imprisonment. By the same judgment, two other co-accused persons Chhote Lal and Kali Charan have been acquitted.

3. Brief facts of the case is that the incident took place on 02.12.1995 at about 06:00 PM in the village Pawa, PS Shrinagar, Mahoba. At the time of incident, the informant Prem Narain had gone to the shop of Gaya babu for purchasing *Bidi* and behind him his niece Raj Kumari aged about 13 years and nephew Arjun aged about 12 years had also come to the shop. Accused Baba Deen came from the side of his house along with co-accused Kali Charan and Chhote Lal. Seeing the informant on the shop, Kali Charan and Chhote Lal exhorted Baba Deen, whereupon he fired by his country made gun of 12 bore on the informant, but he escaped. Unfortunately, the pellets of the fire hit his niece and nephew who sustained injuries. After that, all the three accused persons ran away towards their house. The nearby people Lakhan Lal Lodhi and Ashok Kumar Lodhi saw the whole incident. The informant and his family members took the injured persons to the police station by tractor, where he submitted his written report on the basis of which the offence was registered under Section 307 IPC. The informant's niece namely Raj Kumari was dead by the time the doctor examined her, about which the informant also informed to the police. Inquest report of the dead body was prepared along with the relevant papers and the postmortem of Raj Kumari was conducted on 03.12.1995. On the basis thereof, the case was converted into

Section 302 IPC. The injured Arjun was serious and he was referred to the Medical College, Gwaliar, where he was provided treatment and when he was discharged on 14.12.1995 from the hospital and was being brought to the village, at about 05:30 PM, he also died near the railway station and the same was also reported to the police. Inquest report was prepared along with the relevant papers and the postmortem of Arjun was conducted on 15.12.1995.

4. The police investigated into the matter, recorded the statements of the witnesses and prepared the site map. The accused-appellant Baba Deen was taken into custody and on his instance a country made gun of 12 bore was recovered from the hedges of sugarcane field, which the accused Baba Deen gave to the police and stated that by that gun, he fired on Prem Narain and by mistake the fire hit the nephew Arjun and niece Raj Kumari. When asked, he could not show the license. Offence under Section 25 Arms Act was registered against him. The police sent the gun which was recovered from the accused Baba Deen for forensic report and finding sufficient evidence against the accused persons submitted charge sheet for the offence under Section 302 read with Section 34 IPC and under Section 25 Arms Act against the accused Babadeen.

5. The learned trial court framed the charges against accused Baba Deen for the offence under Section 302 IPC and Section 25 Arms Act and against Kali Charan and Chhote Lal for the offence under Section 302/34 IPC.

6. Prosecution examined as many as nine witnesses. PW-1 Prem Narain (informant0 has proved the written report Ext. Ka-1 and the information dated 15.12.1995 regarding the death of Arjun Ext. Ka-2 and has stated about the incident. PW-2 Lakhan Lal and PW-3 Ashok Kumar are the eye witnesses. PW-4 Dr. D. K. Tripathi of District Hospital, Mahoba has proved the postmortem report of Arjun as Ext. Ka-3. PW-5 SI Bhagwant Singh Tomer has proved the GD regarding the death of Raj Kumari as Ext. Ka-4, inquest report as Ext. Ka-5, photo Nash Ext. Ka-6, challan Nash Ext. Ka-7 and letter to CMO Ext. Ka-8. PW-6 Dr. M.S. Rajpoot has proved the injury report of Arjun as Ext. Ka-9 and postmortem report of Raj Kumari as Ext. Ka-10. PW-7 SO R.K. Gautam has proved the chik FIR Ext. Ka-11 and GD report Ext. Ka-12. He has also proved the statement of injured Arjun, recorded in the case diary and filed at the time of giving statement as Ext. Ka-13, site map Ext. Ka-14, Memo of pellets, empty cartridges, blood stained and plain earth Ext. Ka-15, GD report of converting the offence under Section 302 IPC as Ext. Ka-16 and GD report Ext. Ka-17 about the information of death of Arjun, Memo of recovery of gun ext. Ka-18, site map of the place of recovery Ext. Ka-19 and charge sheet Ext. Ka-20. He has also proved the recovered gun as material Ext.-1, empty cartridge as material Ext. 2 and pellets as material Ext. 3. He also proved the sealed blood stained clothes of the deceased which were sent for chemical examination and blood stained and plain earth sealed in a packet. PW-8 SI Nasruddin Siddiqui (IO) has proved the charge sheet as Ext. Ka-20. PW-9 SI Umapati Rai has proved the inquest report as Ext. Ka-21, letter to CMO Ext. Ka-22, photo Nash Ext. Ka-23, challan Nash Ext. Ka-24. He has also proved the gun recovered on the instance of accused Baba Deen as material Ext. 9. FSL report, Agra regarding the gun is Ext. Ka-31.

7. The statements of the accused persons were recorded under Section 313 Cr.P.C. They have put forward the case of

denial and have stated the case and evidence of witnesses to be false and based on enmity. They have not produced any evidence in their defence.

8. On the basis of evidence on record, the learned trial court has convicted the accused-appellant for the offence under Section 302 IPC. He has, however, been acquitted from the offence under Section 25 Arms Act. The co-accused persons Kali Charan and Chhote Lal have been acquitted from the charge under section 302/34 IPC.

9. Feeling aggrieved by the conviction and sentence, the present criminal appeal has been filed contending that the impugned judgment is against the weight of evidence on record and unsustainable in the eyes of law. The sentence awarded is too severe.

10. During the course of argument, learned counsel for the appellant has submitted that the learned trial court has committed error in convicting the accused-appellant as on the basis of same evidence, the co-accused persons have been acquitted. It has further been submitted that the recovered gun which was characterized to be a weapon used in commission of the offence and for which, the accused was tried for the offence under Section 25 Arms Act, he has been acquitted. There are discrepancies and contradictions in the evidence of the fact witnesses. The death of Arjun did not take place instantly as he died while coming back after being discharged from the hospital because of infection.The prosecution has failed to establish the guilt beyond the shadow of doubt and, therefore, the impugned order is liable to be set aside and the accused-appellant is entitled for acquittal.

11. On the contrary, the learned AGA has submitted that the eye witnesses have supported the prosecution version and the case of prosecution was proved by medical and other evidences also. The learned trial court taking into consideration the evidence on record has rightly convicted and sentenced the accused appeallant. Therefore, the appeal is liable to be dismissed.

12. In view of the rival contentions of both the sides, it is necessary to examine and scrutinize the evidence adduced from the side of prosecution to prove the charge.

13. PW-1 Prem Narain is the informant. He has stated that he knows the accused persons. They are the residents of his village. The accused Kali Charan and Chhote Lal are the real brothers and accused Baba Deen is son of Kali Charan. In the village there is a shop of Gaya Babu and from his shop, the house of accused Baba Deen is situated about 30 meters in the north. The incident took place on 02.12.1995 at about 06:00 PM when the informant had gone to purchase *Beedi* from the shop of Gaya Babu along with his nephew Arjun aged about 12 years and niece Raj Kumari aged about 13 years. Accused Baba Deen who was already present there, on the exhortation of other co-accused Kali Charan and Chhote Lal, fired on the informant. Fortunately, he escaped, but the pellets of the fire hit his nephew and niece and they sustained injuries. The witnesses Lakhan Lal and Ashok Kumar saw the whole incident. The accused persons thereafter fled away from the place. Some pellets also hit the wall of the house of Thakur Das. The empty cartridges also fell on the ground. He went to the Police Station Shrinagar along with both the injured children and got the report scribed by Laxman and gave the same to the police station. Both the children were taken to the Hospital at Mahoba where

Rajkumari was declared dead. Arjun was referred to Gwaliar. Arjun died on 14.12.1995 while coming back from there on the railway station after being discharged from the Gwaliar Hospital. The dead body was taken to the Police Station Shrinagar and the written information for the same was given on 15.12.1995. The witness has further stated that two days before the date of incident, the accused Baba Deen had passed in front of his door using abusive language and when he was prevented, the accused threatened him.

14. PW-2 Lakhan Lal is an eye witness. He has stated that he knows all the three accused persons. The accused persons belong to his village. He has stated that about 15 months before at 06:00 PM in the evening, he was taking groundnut from the shop of Gaya Babu. Prem Narain, Arjun and Raj Kumari were also there. The three accused persons came and on the exhortation of Chhote Lal and Kali Charan, accused Baba Deen fired on Prem Narain who escaped but the fire hit Arjun and Raj Kumari. The accused persons ran away from there. The injured children were taken by Prem Narain to Srinagar. Both the children died because of fire arm injuries. The girl died in the police station, whereas, the boy died in Gwaliar.

15. PW-3 eye witness Ashok Kumar has also stated that he knows all the three accused persons. He has stated that about 13 months ago, at about 06:00 PM in the evening, when he had gone to the shop of Gaya Babu for purchasing *Beedi*, Lakhan Lal, Prem Narain, Arjun and Raj Kumari were also present there. The three accused persons came. Accused Baba Deen was having a gun and on the exhortation of the co-accused persons namely Chhote Lal and Kali Charan, the accused Baba Deen fired on Prem Narain who escaped but the pellets of the fire hit Arjun and Raj Kumari who died. Prem Narain took the children to Shrinagar. The accused persons ran away from there. Raj Kumari died in the police station, whereas Arjun died in Gwaliar.

16. PW-4 is Dr. D.K. Tripathi who conducted the postmortem of Arjun on 15.12.1995 at District Hospital, Mahoba on 03:30 PM. The dead body was sent in sealed condition and was brought by Constable Pramod Kumar and Constable Jagdish on Police Station, Shrinagar. The witness has stated that he found the following injuries on the body of the deceased :-

(i) Old healed scar mark, three in number on the left side of the forehead, 0.5 cm. in oval shape. All the three injuries were at the distance of 1 cm. from each other and 1cm. above the upper margin of orbit.

(ii) Old healed scar mark, over vertex, five in number, 0.8 cm. above the root of the nose in size of 0.5 X 0.6 cm. in oval shape and at the distance of 0.3 cm. to 4.5 cm. from each other.

17. In the internal examination, injury was found on the skull and front bone, 0.5 cm. X. 0.5 cm. size oval shape at the distance of 1 cm from each other and in the middle of the orbit. Two oval hole was found present with puss. Two pellets were also found on the left posterior on the 1/3 of the western part and puss was present. The deceased was 12 years old. Rigor mortis was not present in the upper limb and it was only present on the lower part of the foot.

18. The cause of death was injuries caused by fire arm because of invocation and coma. The deceased should have died one day before from the time of postmortem. The doctor has stated that the

deceased must have died on 14.12.1995 at about 05:30 PM.

19. PW-5 SI Bhagwant Singh Tomar has stated that on 02.12.1995, when he was posted in Kotwali as Sub-Inspector, the ward boy Ram Asraey of District Hospital, Mahoba gave a written report about the death of Raj Kumari, which was entered on the same day in the GD Report No. 49 at 10:00 PM. He has also stated that he prepared the inquest report of Raj Kumari and all the necessary papers for postmortem. The dead body was sealed and was sent for postmortem under the custody of Constable Maan singh and Home Guard Mohan Lal.

20. PW-6 Dr. M.S. Rajpoot has stated that on 02.12.1995, he was posted in the District Hospital, Mohaba and the injured Arjun was brought at 08:15 P.M. in the night who was aged about 12 years and he was examined by him. Arjun was brought by Home Guard Jai Prakash and Home Guard Mahendra Kumar of Police Station Shrinagar. In the examination, the following injuries were found on the body of Arjun -

(i) Multiple fire arm injuries, total three in number in the area of 4 cm. X 2 cm. on the left side of the forehead, just above the left eyebrow. The size of injury was 0.5 cm. X 0.5 cm. in oval shape and the margin were internally bend. X-ray was advised.

(ii) Multiple fire arm entry wound, five in number in the area of 10 cm. X 10 cm. on the head, the size of the injury was 0.5 cm. X 0.5 cm., oval shape and the margin were internally bend. X-ray was advised.

21. According to doctor, the injuries were caused by fire arm and it was possible that the injuries must have been caused by gun on the same day at about 06:00 PM.

22. PW-6 has further stated that on 03.12.1995 at about 01:00 PM, he conducted the postmortem of the dead body of Raj Kumari, who was brought by Constable Maan Singh and Home Guard Mohan Lal of Police Station Shrinagar, in sealed condition. On examination, following ante-mortem injuries were found :-

(i) Multiple fire arm injuries in the area of 33 cm x 8 cm on the left hand on the front side in the outer area. The size of injury was 0.5 cm x 0.5 cm, oval shape and the margin were internally bend.

(ii) Multiple fire arm injuries in the area of 45 cm x 16 cm on the left side of chest and on the front abdomen in 0.5 cm x 0.5 cm in size, oval shape and the margin were internally bend.

23. In internal examination, the entry wound was present on the fourth and fifth ribs and on ninth and tenth ribs also. Pellets were recovered. Heart was vacant and black blood was present in the cavity. In the stomach, 250 grams pasty food was present.

24. From the small intestine, one pellet was also found. One pellet was found from membrane and one was recovered from *Tilli* which was torn. The deceased was aged about 13 years and was of average height. The doctor has stated that the cause of death was injuries caused by fire arm and the death must have been caused 3/4 day before on 02.12.1995 and after 08:00 PM in the night. The fire arm injury was possible by gun.

25. PW-7 R.K. Gautam, SO (Investigating Officer) has stated that the injured persons were brought on tractor lying on a cot. The condition of Raj Kumari was very poor and she was not

able to talk. Arjun was conscious and his statement was taken. Next day in the morning, he recorded the statement of Prem Narain and on his identification, site map of the place of occurrence was prepared. Some pellets were found near the wall of the house of Thakur Das which were taken into possession. Empty cartridges, blood stained and plain earth were also taken into possession from there and sealed and memo was prepared. Statements of the witnesses were recorded. The postmortem and the injury report was obtained. The statement of Lakhan Lal and Ashok Kumar was also recorded. The accused Baba Deen surrendered in the court on 09.12.1995 and the other two accused also surrendered in the court. Their statements were recorded. Accused Baba Deen confessed and stated that after firing, he had concealed the gun and he can get the same recovered. On 15.12.1995, the informant Prem Narain gave a written report regarding the death of Arjun. Baba Deen, accused was taken on police remand. He took the police and witnesses voluntarily and got the gun recovered from the garden of Lalu Baba @ Lala Das from the field of sugarcane. The gun was taken into possession and sealed and memo was prepared. The site map of the place of recovery was also prepared. The witness has further stated that on 18.12.1995, he was transferred, whereupon the investigation was undertaken by SO Nasiruddin and after taking the statement about the recovery of gun and the statement of the witnesses of inquest report, the recovered gun and other items were sent for chemical examination at Agra. Thereafter, charge sheet was submitted. This witness has proved the charge sheet as secondary witness and has also proved the gun, empty cartridges, pellets, blood stained clothes of deceased and blood stained and plain earth.

26. PW-8 SI Nasiruddin Siddiqui has also stated that he examined the witnesses of memo of recovery of gun and the witnesses of inquest report and sent for chemical examination the recovered gun and other items to Agra and submitted charge sheet in the case.

27. PW-9 SI Umapati Rai has stated that he prepared inquest report and sealed the dead body of Arjun and prepared relevant letter and papers for the purpose of postmortem and handed over the dead body to Constable Pramod Kumar and Constable Jagdish Prasad. He has also stated that SI R.K. Gautam lodged the first information report against the accused Baba Deen in Crime No. 201 of 1995 under Section 25 Arms Act. He has further stated that he investigated the offence and after taking the statement of the recovery witness and chik writer and preparing the site map of the place of recovery and obtaining the necessary sanction, submitted charge sheet under section 25 of the Arms Act.

28. The first submission of the learned counsel for the accused-appellant is that on the basis of same evidence, the two co-accused persons Kali Charan and Chhotey Lal were acquitted by the learned trial court and as such, the accused appellant was also entitled for acquittal. We are of the firm view that on this ground alone, the accused-appellant is not entitled for acquittal. It has been consistent view of the Supreme Court that where acquittal of co-accused was recorded, the same cannot become a basis for acquittal and the case of individual accused shall be considered on the basis of evidence available on record against him. In **Balraje Vs. State of Maharashtra, 2010 (70) ACC 12 (SC), Kallu Vs. State of M.P., 2007 (57) ACC 959 (SC)** and **Amzad Ali Vs. State of Assam, (2003) 6 SCC 270**, it has been held that where some of the accused persons were acquitted, on the basis of benefit of doubt,

as no positive role or any overt acts was attributed to them, it has been held that same treatment could not have been meted out to all the other accused whose complicity and specific role in the commission of the offence was firmly established by evidence. Law is well settled that even if acquittal is recorded in respect of the co-accused on the ground that there were exaggerations and embellishments yet conviction can be recorded in respect of the other accused if the evidence is found cogent and reliable against him. In the case in hand, the accused appellant has been assigned role of causing firearm injuries resulting in death of two deceased children. The co-accused persons were assigned the role of exhortation only. The learned trial court finding discrepancy in evidence with regards to the involvement of the co-accused persons in the commission of the offence, acquitted them. The learned trial court also found established that the accused-appellant was the main accused who fired and caused death of the two children. In view of the above discussion, we find no force in this argument.

29. The learned trial court has on evidence found that within one and half hours of the incident, FIR has been lodged by giving a written report in the Police Station. The informant went there on a tractor carrying the two injured and the distance was 11 km. PW-1 informant has stated that after the incident he got the report scribed by Laxman in the village itself and gave it to the police after signing the same. Therefore, the FIR was lodged promptly in the facts and circumstances of the case. On this basis, the learned trial court has very rightly concluded that the promptness of FIR rules out any possibility of legal assistance and false implication. The report regarding death of Rajkumari has been also promptly given on the basis of which the offence has been converted into that of section 302 IPC. Thereafter, when Arjun died, it was also reported without any delay. The three fact witnesses examined by prosecution have stated that the incident took place on 6 PM in the evening. PW-1 Premnarain has stated that the incident took place on 2.12.1995 and PW-2 has stated that the incident took place 15 months ago and PW-3 has stated that it took place 13 months ago. They both have been examined 14-15 months ago from the date of incident and as such, the date and time of the commission of offence has been proved. It finds further support from the medical report of Arjun who was examined on the date of incident at 8.15 PM and PW-6 Dr. M. S. Rajpoot has stated that the injury to him should have been caused on same day at 6 PM. Similarly, he conducted postmortem of Rajkumari on 3.12.1995 at 1 PM and she must have died after 8 PM, a day before. Therefore, the time and date of commission of the offence has been proved.

30. So far as place of occurrence is concerned, there is consistency in the version of FIR, site map prepared by the IO and the witnesses examined by the prosecution. Ext. Ka 14 is the site map in which the shop of Gaya Babu has been shown on the corner where one pathway coming from north which connects with the path way from east to west and opposite to it, there is house of Thakur Das. The house of Gaya Babu opens in the west towards the way coming from north and the shop opens towards south on the pathway going towards west from east and in the east after two houses, house of

informant exists, whereas, house of accused Babadeen is situated in the north opening on the path which comes from north to south. This shows that all the concerned including witnesses live in the same vicinity. It has been stated by PW-1 that the house of PW-2 Lakhan Lal is in the east of his house whereas, house of PW-3 Ashok is 20-30 step ahead in the east from his house. Meaning thereby, the houses and shop are situated around and close to the place of occurrence shown by alphabet A which is in front of the shop of Gaya Babu. As such, their presence on and close to shop is natural and the witnesses including informant were there to purchase beedi or some domestic item. All the three witnesses of fact have stated that the offence was committed by accused in front of the shop of Gaya Babu. The IO has stated that he found certain pellets near the wall of the house of Thakur Das. From the place of occurrence, cartridge and blood stained and plain earth were taken in possession and memo was prepared. PW-1 informant has stated that some of the pellets hit the wall of the house of Thakur Das. Therefore, the place of occurrence has been fully established.

31. All the three eyewitnesses have categorically stated that accused Babadeen shot fire on the informant, but he fortunately escaped and the fire hit both the deceased children. Rajkumari died same day by the time she reached hospital. Deceased Arjun died on 14.12.1995 because of firearm injuries. All the three witnesses have been cross-examined by defence, but, there appears to be no contradiction or discrepancy or improvement on any material aspect. They are witnesses of same locality and their presence on spot cannot be doubted as they all had come to the shop for purchasing something. They have stated that that they saw that accused Babadeen shot fire by his gun and the fire struck the two children instead of Prem Narain. This finds further corroboration from the statement of deceased Arjun whose statement was recorded by the IO under section 161 of the Criminal Procedure Code when he was in the hospital and his statement has been proved by PW-7 IO R.K. Goutam as Ext. Ka-13 in which deceased Arjun has stated that accused Babadeen fired and he and his sister Rajkumari sustained injury and fell down. He has also stated that at the time of incident that he and his sister had gone to take biscuit with their uncle. We find that, even though, the statement of the deceased was recorded by the IO, the same has been rightly used by the learned trial court as dying declaration in support of ocular testimonies of the three eye-witnesses.

32. The postmortem report of deceased Rajkumari shows that multiple firearm wounds (34 in number) were found in the area of 33 cm x 8 cm on the left hand and firearm wounds 25 in number in the area of 45 cm x 16 cm on the left side of chest and abdomen. She died due to shock and hemorrhage resulted by ante-mortem firearm injuries. It is pertinent to mention that she died just two hours after the incident and her injuries, particularly injury no 2 is on vital part, with 25 entry wounds of pellets out of which 3 pellets recovered and several internal organs were torn or damaged. In the cross-examination, Dr. Rajpoot has denied the suggestion of the defence that injuries were not caused by firearm.

33. Similarly, the other injured Arjun, though died after 12 days from the date of incident, his condition was very

serious and he was referred to Gwaliar for treatment. Prior to that, he was examined by PW-6 Dr. Rajpoot in the District Hospital, Mahoba and his injuries were on vital part and head in the form of multiple firearm injuries which were eight in numbers. His postmortem report shows that on the middle part of upper orbital margin, two oval hole was found filled with puss and two pellets found in left posterior 1/3 part of parietal cortex and puss present in the frontal part of left cortex. PW-4 has stated that the cause of death was Coma resulted by ante-mortem firearm injuries causing infection in brain. During cross-examination, he has stated that it is not possible to say that, if pellets were removed from brain by operation and proper treatment provided, the deceased could have been saved. He has stated that *the brain does not regenerate* and the injuries were healed from out side but not from inside. It is pertinent to mention that the pellet injuries were on most sensitive part brain and despite treatment it was not cured. It also deserves mention that the deceased was only 12 years in age. As such we do not find any force in the submission of the learned counsel to the appellant that Arjun died because of infection as the infection was also the result of the firearm injuries by which substantial damage was caused to brain. Therefore, we are of the firm opinion that both the deceased persons died because of the firearm injuries caused by the accused which was on the vital and sensitive part of the body and death was the most probable result.

34. It has been further argued that one fire will not result in multiple pellet injuries nor will hit two persons at a time. We, on a thoughtful consideration of this point, are unable to agree with this argument. It all depends upon the nature of gun used in committing the crime. In this case, a country made gun of 12 bore was used by the accused. It has been held in **Om Pal Singh Vs. State of UP, AIR 2011 SC 1562**, that a single shot fired from double barreled gun can cause multiple injuries. A gun the fire of which spreads pellets can always result in multiple injuries and it can hit more than one.

35. It has been submitted by the learned counsel for the appellant that the incident took place at 6 PM and in the month of December it becomes dark and it was not possible to identify the assailant and the accused was falsely implicated. In support of this submission, the statement of PW-2 and PW-3 has been referred who have admitted in their cross-examination that it was sun set when the incident took place. He has also pointed out the discrepancy in the statement of these two witnesses as PW-3 has stated that it was sun set but visibility was there, whereas, PW-2 has stated that he gave statement to IO that it was dark but moonlit night. He has however stated during cross-examination that at the time of fire by accused there was enough visibility, but he is not sure whether it was visibility of day or moonlit.

36. The Supreme Court has clarified the law on this point in various judgments and has laid down that a witness, who is accustomed to live in darkness, poor light or no light, and acquainted with the accused, can identify the accused even in darkness. In **Kalika Tewari v State of Bihar, JT 1997(4) SC 405**, the Supreme Court held,

"The visible capacity of urban people who are acclimatized to fluorescent

light is not the standard to be applied to villagers whose optical potency is attuned to country made lamps. Visibility of villagers is conditioned to such lights and hence it would be quite possible for them to identify men and matters in such lights."

37. In **Ram Gulam Chowdhary v State of Bihar, 2001(2) JIC 986 (SC)**, it was argued that it was not possible for the eye witnesses to have identified the accused persons in poor light of lantern in the night. The Supreme Court rejected the argument and remarked that *"as the incident took place in village and the visibility of villagers are conditioned to such lights and it would be quite possible for the eye witnesses to identify men and matters in such light."*

38. In **Sheoraj Bapuray Jadhav v State of Karnataka, (2003) 6 SCC 392**, in a trial u/s 302/34 IPC, accused persons were known to prosecution witnesses. Occurrence had taken place at about 11.00 PM, two days prior to the new moon day. Parties were used to live in the midst of nature and accustomed to live without light. Further, they were close relatives and living in the neighboring huts. Similarly, in **State of UP v Sheo Lal, AIR 2009 SC 1912** , the murder had taken place at night and the source of light was not indicated in the FIR and the accused and the eye witnesses were closely related. It has been held by the Supreme Court in both the cases that the evidence of eye witnesses cannot be discarded on the basis of non-disclosure of source of light or insufficiency of light as well-acquainted persons can be well identified in darkness. In **Durbal v State of UP, 2011 CrLJ 1106 (SC) and Hari Singh v State of UP, AIR 2011 SC 360**, Where the parties belonged to the same village and were well known to each other, it has been held that merely because torch not taken into possession by the IO would not mean that witnesses were not credible and conviction under Section 302 IPC was held proper.

39. In view of above discussion and also for two reasons, we are not inclined to add any significance to this alleged discrepancy. Firstly, all the three eyewitnesses have clearly stated in their examination-in-chief that they saw accused Babadeen firing by his gun causing injuries to the two children. Secondly, the witnesses lived in same vicinity and accused was well known to them as he resides in the same locality close to their house and close to the shop of Gaya Babu. In such situation, though at 6 PM in December it is not completely dark, but even if it was dark, it was possible for these witnesses to identify the accused as he was well known to them and they lived in village and were in the habit of living in dark or in low light condition. The submission of learned counsel that the prosecution has not alleged the source of light at the time of incident is also of no significance in view of above discussion.

40. It has been further argued by the learned counsel to the appellant that there was no motive with the accused prompting him to cause such offence. In the FIR it has been alleged, and PW-1 has stated during trial that two days before the date of incident, the accused Babadeen passed from his door abusing the informant and on being prevented, he threatened the informant to see him later on. Moreover, the prosecution case is based on direct evidence of eyewitnesses and the law is settled that in such cases presence or absence of motive is not relevant. In a number of decisions, like **Abu Thakir v**

State AIR 2010 SC 2119, State of UP v Nawab Singh AIR 2010 SC 3638, Bipin Kumar Mondal v State of West Bengal 2005 SCC (Criminal) 33, Shivraj Bapuray Jadhav v State of Karnataka (2003) 6 SCC 392, Thaman Kumar v State of Union Territory of Chandigarh (2003) 6 SCC 380, State of HP v Jeet Singh; (1999) 4 SCC 370, it has been repeatedly held by the Supreme Court that motive is not a sine qua non for the commission of a crime. Moreover, it takes a back seat in a case of direct ocular account of the commission of the offence by a particular person. In a case of direct evidence the element of motive does not play such an important role so as to cast any doubt on the credibility of the prosecution witnesses even if there be any doubt raised in this regard. If the eye-witnesses are trustworthy, the motive attributed for the commission of crime may not be of much relevance. Failure to prove motive or absence of evidence on the point of motive would not be fatal to the prosecution case when the other reliable evidence available on record unerringly establishes the guilt of the accused.

41. We find that the Supreme Court has clearly opined in various decisions, such as **Gopi Ram v St. Of UP, 2006 (55) ACC 673 SC, R.R. Reddy v State of AP, AIR 2006 SC 1656, Sucha Singh v State of Punjab; AIR 2003 SC 1471, State of Rajasthan v Arjun Singh AIR 2011 SC 3380, Varun Chaudhry v State of Rajasthan AIR 2011 SC 72** and in the recent judgment of **Saddik Vs. State of Gujarat, (2016) 10 SCC 663**, it has been held that the prosecution case could not be denied on the ground of alleged absence or insufficiency of motive. Motive is insignificant in cases of direct evidence of eyewitnesses. Failure to prove motive or absence of evidence on the point of motive would not be fatal to the prosecution case when the other reliable, truthful and acceptable evidence is available on record sufficient to establish the guilty of accused persons.

42. We are of the view that when there is sufficient direct evidence regarding the commission of offence, the question of motive should go away from the mind of the Court. Motive is a double edged weapon and the key question for consideration in cases based on direct evidence remains whether the prosecution had convincingly and satisfactorily established the guilt of all or any of the accused beyond reasonable doubt by adducing reliable and cogent evidence. As such, the proof of the existence of a motive is not necessary for a conviction for any offence. If the eye-witnesses are trustworthy, the motive attributed for the commission of crime may not be of much relevance. Failure to prove motive or absence of evidence on the point of motive would not be fatal to the prosecution case when the other reliable evidence available on record establishes the guilt of the accused. In the case in hand, evidence shows that motive in terms of threatening two days before has been alleged. As such and in view of the case law discussed above, we find no force in the submission with regards to absence of adequate motive.

43. It has been further submitted by the learned counsel for the appellant that the prosecution failed to connect the allegedly recovered gun at the pointing of the accused with the commission of the offence and the learned trial court acquitted him from the charge under

section 25 of the Arms Act. It appears that the learned trial court has acquitted the accused from the said charge as the public witnesses of recovery were not examined to prove recovery, only IO was examined to prove recovery and by Forensic Report, the said gun was not found to have been used in the commission of offence. It is pertinent to mention that the offence under section 25, Arms Act is a separate offence and is required to be proved in view of the technical requirements necessary for the constitution of offence. His acquittal for the offence under section 25 of the Arms Act will not have effect on the charge under section 302 IPC. Therefore, we are of the view that the acquittal of the accused under section 25 of the Arms Act will not render any advantage to the accused-appellant.

44. The further submission from the side of the appellant is that there was no reason to commit the offence and the accused never intended to cause death of two children. Even, there was no hot talk or quarrel between the accused and informant at the time of incident nor there appears to be any planning. In **Awdhesh Kumar v State of UP, 2019 (4) CRIMES 219 (SC)**, the trial court convicted the appellant for the offence of murder under section 302 IPC as he was attributed the role of causing death by firing. The other co-accused persons were, however, acquitted. The sentence was modified by the High Court to that of an offence under section 304 Part I, IPC holding that it was not a planned crime and there was no prior intention. It took place in the heat of passion on the spur of moment. The incident had taken place when the mother of the informant went to accused side in order to complain about the behaviour of the nephew of the accused on which the accused persons started quarreling and the convicted accused shot fire causing death of the mother. The Supreme Court, referring to an earlier judgment in **State of MP v Shivshanker, (2014) 10 SCC 366**, quashed the judgment of the High Court and maintained the judgment of the trial court. The Court observed:

".... intention is a matter of inference and when death is a result of intentional firing, intention to cause death is patent unless the case falls under any of the exception..... By the accused firing from a close range, the accused was supposed to know that it is so imminently dangerous that it must, in all probability, cause death or such bodily injury as is likely to cause death."

45. In the case in hand also, the accused fired on informant by a SBBL gun of 12 bore and the fire struck the two children and they died because of injury sustained by the fire. No benefit can be given to the accused-appellant of the fact that he never intended to cause death of two children as he fired on informant and accidentally, the children got injured. Accused fired on the informant. His intention to cause death shall be gathered from the act of firing and eventually, if the fire hit children resulting in their death, it will not make any difference and the intention to kill will be attributed to the accused. Moreover, he fired in front of a shop where other persons including deceased children were present. Therefore, the accused-appellant will be supposed to have knowledge that his act of firing shall result in the death of anybody including deceased children, if it did not hit the informant.

46. In view of above discussion, we find that in this case, FIR has been lodged promptly without any delay. Three eye-witnesses including informant have proved the prosecution case who are of the same

locality where the accused lives and where the place of the commission of offence is situated. PW-1 is informant with whom the deceased children were present on the shop. PW-2 and PW-3 are independent witnesses of same locality and the presence of all the three fact witness is quite natural at the time and place of occurrence. There is no contradiction, improvement or discrepancy in their statement with regards to time, date, place and manner of commission of offence by accused. All the three witnesses have stated that in their presence, accused Babadeen fired on informant which hit the deceased children and Rajkumari died instantly within 2 hours by the time she was taken to hospital, whereas, Arjun died after 12 days on the railway station while coming from Gwaliar. The ocular version further finds corroboration from the dying declaration of deceased Arjun. The injury report and postmortem report fully corroborate the time, date and manner of incident and it has been found that both died by gunshot injuries. Motive, alleged has been also proved and absence or inadequacy of motive is of no avail as the prosecution case is based on direct evidence. Thus, the prosecution has succeeded in proving the charge under Section 302 IPC beyond shadow of any doubt. There is no perversity or illegality in the impugned judgment and the sentence awarded is the minimum prescribed under law for the offence of murder. Therefore, this criminal appeal has got no force and is liable to be dismissed.

47. The Criminal Appeal is **dismissed.**

48. Accused-appellant Babadeen is on bail during appeal, his bail bonds are canceled and sureties are discharged. The accused **Babadeen** is directed to surrender before the court concerned **forthwith** from where he shall be sent to jail to undergo the sentence.

49. The office is directed to transmit back the lower court record along with a certified copy of this judgment for information and necessary compliance.

(2020)02ILR A664

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 22.01.2020

BEFORE
THE HON'BLE ARVIND KUMAR MISHRA-I, J.
THE HON'BLE GAUTAM CHOWDHARY, J.

Criminal Appeal No. 236 of 1992

Sri Anant Singh @ Pappu ...Appellant (In Jail)
Versus
State of U.P. ...Respondent

Counsel for the Appellant:
Sri Prabhat Agrawal, Sri H.C. Tiwari (A.C.)

Counsel for the Respondent:
A.G.A.

A. Criminal Law-Indian Penal Code-Section 307 - Appeal against conviction.

The testimony of doctor PW-4 becomes relevant. He has testified in his testimony that he medically examined the injured and found signs of injury. There was no blackening, tattooing or scorching present. It means that the weapon of assault was used at some distance from the injured. (Para 21)

As per his testimony, the incident took place, all of a sudden, on account of hot conversation between both the sides, therefore, it cannot be branded to be a well

designed crime committed by the accused-appellant. (Para 23)

Nature of injury caused cannot be properly adjudged to the magnitude to cause death nor any suggestion has been made by the doctor witness that injury caused to the injured / informant would, in normal parlance, might have caused death. (Para 24)

Considering the nature of the offence committed and proved, hereby direct that the appellant be sentenced to three years rigorous imprisonment under Section 324 I.P.C. Accordingly, sentence awarded by the trial court is modified to that extent as aforesaid. (Para 28)

Criminal Appeal partly allowed. (E-2)

List of cases cited:-

1.Ved Prakash Vs. St. of Hary. 1996 SCC (Crl.) 1182

(Delivered by Hon'ble Arvind Kumar Mishra-I, J. & Hon'ble Gautam Chowdhary, J.)

1. By way of the instant criminal appeal, challenge has been made to the validity and sustainability of the judgment and order of conviction dated 28.01.1992 passed by the VI-Additional Sessions Judge, Fatehpur, in Sessions Trial No.278 of 1990 State of U.P. Vs. Kalika Singh and another, arising out of Case Crime No.153 of 1989, under Section 307 I.P.C., Police Station-Husainganj, District- Fatehpur whereby the appellant has been sentenced to undergo life imprisonment.

2. Heard Sri Harish Chand Tiwari, learned amicus curiae for the the appellant, Shri Krishna Pahal, learned Additional Advocate General assisted by Sri Bhanu Pratap Singh, Sri Ajay Kumar Singh, Sri Jitendra Kumar and Sri Nafis Ahmed, learned brief holders for the State and perused the record of this appeal.

3. Facts germane as reflected from perusal of the record and particularly from the first information report reveal that the informant Ramanuj son of Ram Singh, resident of village Jamrawan, Police Station Husainganj, District Fatehpur, lodged the written report at Police Station Husainganj, on 16.09.1989 at 9:35 pm to the effect that the informant was sitting at his doors when his grand-father Kalika and his son Anant Maan Singh @ Pappu arrived on the spot and asked him whether he went on the roof whereupon the informant said that he never went on the roof. At this, the assailants were agitated and at the exhortation of Kalika, Pappu opened fire on the informant with intent to kill him which hit him on his skull, thus causing injury. The incident was witnessed by Rajkali, sister-in-law of the the informant, Gomti Devi wife of Ram Singh, mother of the informant and other villagers. The time of the incident was described as 8:00 pm. It was requested that report be lodged and appropriate action be taken. This written report was scribed by Hardev Singh and the same is Ext. Ka-1.

4. Contents of the aforesaid information were taken down in the concerned Check FIR at Case Crime No.153 of 1989 under Section 307 I.P.C., at Police Station Husainpur, District Fatehpur, on 16.09.1989 at 9:35 pm. Check FIR is Ext. Ka-4. On the basis of entries so made in the check F.I.R., a case was registered against the accused-appellant in the relevant G.D. at aforesaid case crime number at Police Station Husainganj under aforesaid section of I.P.C. against accused-appellant.

5. Record reflects that the informant / injured Ramanuj was medically examined at District Hospital Fatehpur by Dr. Harish

Chandra Sachan, PW-4 on 16.09.1989 at 11:20 pm who found the following injury:-

"Multiple lacerated wound with abraded collar size variable from 0.2 to 0.4 cm x 0.2 to 0.3 cm, margins inverted. Blood oozing present on right side of head, neck front of right side of shoulder and right side of upper part of chest in an area of 30 cm x 18 cm. No blackening, tattooing or scorching was present. X-ray was advised.

6. In the opinion of the doctor, injury might have been caused by some firearm. Injury report is Ext. Ka-6.

7. The investigation ensued and the same was entrusted to Israr Ahmad Khan, Investigating Officer PW-3 who after lodging of the first information report took note of the contents of the first information report and the relevant general diary entry and proceeded to the spot and prepared site plan and after recording statement of the witnesses filed charge sheet against the accused-appellant under Section 307 I.P.C. which is Ext. Ka-3.

8. Pursuant thereto, proceedings were committed to the court of Sessions from where it was transferred for conduction of trial and disposal of the case to the aforesaid trial court of VII-Additional Sessions Judge, Fatehpur who in turn heard both the sides on point of charge and was prima-facie satisfied with case against the accused-appellant, accordingly, framed charge under Section 307/34 I.P.C. Charge was read over and explained to the accused-appellant who abjured charge and opted for trial.

9. In furtherance of the proceedings the prosecution produced in all 4 witnesses. A brief sketch of witnesses is *ut-infra:-*

10. Ramanuj PW-1 is the injured / informant who lodged the first information report. Gomti Devi PW-2 is eyewitness of the occurrence. Israr Ahmad Khan PW-3, the Investigating Officer, has detailed the various steps, he took in completing the investigation and has stated to have submitted charge sheet against the accused-appellant. Dr. Harish Chandra Sachan PW-4 has examined the injured informant. Except as above, no other evidence was adduced by the prosecution.

11. Therefore, evidence for the prosecution was closed. The statement of the accused-appellant was recorded under Section 313 Cr.P.C. wherein he has claimed his innocence and stated that he has been falsely implicated in this case on account of enmity and the fact that two years prior to the incident, there was no interaction between the informant side and the accused appellant, therefore, false case has been thrusted upon the accused-appellant.

12. No evidence, whatsoever, was adduced by the defence.

13. The case was heard on merit by the learned trial Judge who after appraisal of facts and evaluation of the evidence and circumstances of the case, returned finding of conviction against appellant under Section 307 I.P.C. and sentenced the accused-appellant to undergo life imprisonment vide judgment impugned in the instant appeal.

14. Consequently, this appeal.

15. Learned amicus curiae for the appellant has succinctly submitted that in this case, the very allegations levelled

against the accused-appellant are vague and on account of enmity, false case has been cooked up against him. Assuming it to be that any such incident took place even then origin of the incident has been concealed by the informant himself. It so happened that the informant himself was preparing some gun powder which in process got exploded, thus causing injury to him. The cause shown for firing is not sufficient and it is trivial and petty one.

16. It has been further contended that admittedly, there was no prior motive for committing the offence. If any incident like the present one suggested by the informant took place, if assumed to be correct even then the case does not fall within periphery of Section 307 I.P.C., for the reason that 'intent to kill' was missing. In case intent to kill is missing then it being a vital ingredient of Section 307 I.P.C., no conviction can be recorded under Section 307 I.P.C., may be that considering the nature of injury caused to the injured, that too is dubious whether it was caused by use of any gun, pistol etc. or any other means then simplicitor, it is a case of voluntary causing hurt by some weapon. That way, the case of the accused-appellant shall be covered under Section 324 I.P.C. instead of Section 307 I.P.C. The trial court wrongly recorded finding of conviction under Section 307 I.P.C. and imposed harsh punishment on the accused-appellant which is not justified under facts and circumstances of the case.

17. It has been lastly added that the accused-appellant does not bear any criminal antecedent and he promises that he will not repeat the same offence in future. Therefore, his case may be considered leniently.

18. While retorting to the aforesaid submissions, learned A.A.G. has contended that testimony of the injured / informant Ramajun PW-1 is flawless on the point of causing injury on the vital part of his body namely skull, head and chest etc. and injury was found to be scattered in an area of 30 cm x 18 cm. which very much reflects intent to cause injury to the injured, may be weapon and pellets faulted because of its own demerit but intent cannot be minimized as it was one to cause death. Had the pellets not faulted and not scattered, it would have aimed perfectly with precise execution, the result is obvious death. Merely because injury caused to the injured was not found to be grave putting the injured in minimum dangerous position but that alone would not minimize by any stretch of imagination the degree of intent which is as obvious as to cause death. The trial Judge not only took note of testimony of the injured / informant PW-1 but also took note of surrounding facts and prevailing circumstances of the case and rightly convicted the accused-appellant under Section 307 I.P.C. and imposed just sentence upon him.

19. We have also considered the above rival submissions and taken into consideration rival claims. In view of above, the point for determination of this appeal specifically relates to fact whether the prosecution has been able to prove charge under Section 307 I.P.C. beyond reasonable doubt and has sentenced condignly?

20. In this case, as per description contained in the first information report, the incident was allegedly caused around 8:00 pm when the injured / informant was sitting in front of his doors. It was stated

that two accused arrived on the spot and started conversation on the spot. It so happened that the accused-appellant opened fire upon the injured / informant which as per injury report Ext. Ka-6 was in the shape of abraded collar size variable from 0.2 to 0.4 cm x 0.2 to 0.3 cm, margins inverted. Blood oozing present on right side of head, neck front of right side of shoulder and right side of upper part of chest in an area of 30 cm x 18 cm. No blackening, tattooing or scorching was seen.

21. In view of the aforesaid injury, testimony of Dr. Harish Chandra Sachan PW-4 becomes relevant. He has testified in his testimony that he medically examined the injured / informant Ramanuj on 16.09.1989 at 11:20 pm and found aforesaid signs of injury. There was no blackening, tattooing or scorching present. It means that the weapon of assault was used at some distance from the injured / informant. However, the doctor has opined that injury might have been caused by use of firearm. He has proved injury report Ext. Ka-6. He was cross-examined wherein he has confirmed to fact that firearm was used from 5-6 paces away from the injured / informant. A suggestion was made that injury might have been caused by fall, however, that was refused by the doctor.

22. In this view of the matter, obviously injury caused to the injured / informant by use of firearm cannot be doubted at this juncture. Now, point relevant for consideration is what was the intent to commit crime in question whether to cause death or not to cause death.

23. We have perused testimony of the injured / informant PW-1 who has categorically stated that there was no previous enmity and no interaction between both the sides. As per his testimony, the incident took place, all of a sudden, on account of hot conversation between both the sides, therefore, it cannot be branded to be a well designed crime committed by the accused-appellant. Consequently, very much possibility to cause injury to the injured-informant by the accused-appellant with intention to commit murder stands ruled out under prevailing facts and circumstances of the case.

24. We have no hesitation in observing that though Dr. Harish Chandra Sachan PW-4 had advised x-ray examination of the injury sustained by the injured / informant, however, no supplementary report in the shape of any x-ray examination has been brought before us. It appears that the same was not produced before the trial court as well. Therefore, nature of injury caused cannot be properly adjudged to the magnitude to cause death nor any suggestion has been made by the doctor witness that injury caused to the injured / informant would, in normal parlance, might have caused death.

25. That way, intention to commit murder is found to be missing which finding recorded by the trial court is on its face not based on any material on record. That way, we after careful consideration of the entirety of the case and primarily considering the nature of the injury caused and the statement of the injured / informant Ramanuj PW-1 and the attendant facts and circumstances of the case, are of the considered opinion that the conviction recorded by the trial Court under Section 307 I.P.C. is not justified and cannot be sustained as such. However,

the factum of injury being caused by use of firearm and the nature of injury as described in the medical examination report of the injured / informant, Ext. Ka-6, indicates that the case squarely falls within ambit of Section 324 I.P.C. instead of under Section 307 I.P.C. Consequently, the conviction recorded by the trial court under Section 307 I.P.C. is liable to be altered under Section 324 I.P.C. Accordingly, the conviction recorded under Section 307 I.P.C. is altered and modified to one under Section 324 I.P.C.

26. Insofar as the point of sentencing the accused-appellant under Section 324 I.P.C. is concerned, learned amicus curiae for the appellant has urged that the accused-appellant being a young man and he does not bear criminal history, therefore, his case may be considered leniently and he should be punished with the minimum sentence prescribed under Section 324 I.P.C. and fine alone may be imposed as sentence as that would better serve the ends of justice under facts and circumstances of the case.

27. While opposing the aforesaid plea of leniency on sentencing the accused-appellant, learned A.A.G. has brought to the notice of the Court a decision of Hon'ble Apex Court in the case of ***Ved Prakash Vs. State of Haryana 1996 Supreme Court Cases (Crl.) 1182*** whereby he has claimed that on the point of sentencing under similar circumstances when the case was found to have been proved under Section 324 I.P.C., Hon'ble Apex Court was of the view that sentence of three years would serve the ends of justice.

28. We upon careful consideration of the entirety of the case and considering the nature of the offence committed and proved, hereby direct that the accused-appellant be sentenced to three years rigorous imprisonment under Section 324 I.P.C. Accordingly, sentence awarded by the trial court is modified to that extent as aforesaid.

29. Consequently, the instant appeal succeeds, partly in aforesaid terms and we order accordingly.

30. In this case, appellant Anant Singh @ Pappu is on bail. His bail bonds and sureties are cancelled. He shall be taken into custody forthwith for serving out his remaining sentence imposed upon him.

31. Let a copy of this order/judgment be certified to the court below for necessary information and follow up action.

(2020)02ILR A669

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 29.01.2020

BEFORE
THE HON'BLE ARVIND KUMAR MISHRA-I, J.
THE HON'BLE GAUTAM CHOWDHARY, J.

Criminal Appeal No. 243 of 1993

Ram Lakhan @ Kalloo
...Appellant (In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Appellant:
Sri H.N. Singh, Sri Sukhvir Singh A/C, Sri Rishabh Srivastava

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

A. Criminal Law-Indian Penal Code-Section 302 .— Appeal against conviction.

The prosecution witnesses have very much proved the factum of incident and all the relevant aspects and circumstances have been consistently established within the four corners of the provisions of Section – 300 I.P.C. thus proving the charge for punishment under Section - 302 I.P.C. In the postmortem examination report, two injuries have been found on the skull and combined effect of both these injuries along with others proved fatal to the deceased. (Para 13)

It is specific that these injuries on the body of the deceased have not been challenged specifically by the defense to the ambit and magnitude that the same have not been caused in any such incident as the present one. (Para 14)

The testimony on the point of occurrence of both the aforesaid eye-witnesses P.W.1 and P.W.2 is consistent, truthful and unambiguous. In view of the evidence on record to claim that no one saw the occurrence, is an absolutely misconceived claim and it cannot be sustained on its face. The trial Judge while considering the case on its merit, has recorded just and consistent finding. The same is based on material on record. (Para 15)

Criminal Appeal rejected. (E-2)

(Delivered by Hon'ble Arvind Kumar Mishra-I, J.)

1. Heard Sri Sukhvir Singh, learned *Amicus Curiae* on behalf of the appellant, Sri Krishna Pahal, learned A.A.G. assisted by Sri Bhanu Prakash Singh, learned Brief Holder for the State.

2. By way of instant criminal appeal, challenge has been made to the authenticity, veracity and sustainability of the judgment and order of conviction dated 30.01.1993 passed by the Sessions Judge, Sonbhadra in Sessions Trial No. 84 of 1990 (State vs. Ram Lakhan alias Kallu Pal) s/o Khedu, r/o Bakahi, Police Station - Robertsganj, District - Sonbhadra, whereby the accused-appellant has been convicted under Section - 302 I.P.C. and sentenced to imprisonment for life.

3. Factual chronology of this case, culminating into lodging of the First Information Report, as discernible from perusal of record, is that a written report (Ex.Ka.1) was lodged at Police Station - Robertsganj on 02.10.1988, at 11.30 a.m. by the informant (P.W.1) Rameshwar Nath Dubey s/o Akshaywar Ram Dubey, r/o Village - Bakahi, Police Station - Roberstsganj, Mirzapur, to the effect that the accused - Ram Lakhan alias Kallu Pal was abusing his (informant's) nephew, Shobhnath alias Nageshmani s/o Satya Narayan at 05.30 a.m. in the morning. The nephew of the informant (Shobhnath) asked him not to hurl abuses. An altercation took place on the spot. It has been described in the F.I.R. that Ram Lakhan alias Kallu Pal was watering his field through pumping set in the night and someone manipulated the flow of water and mis-directed it towards some ditch. Ram Lakhan alias Kallu Pal, the accused, was apprehensive that this mischief has been done by Shobhnath (the deceased). Therefore, on account of aforesaid altercation, the dispute increased to some extent, whereupon accused Ram Lakhan alias Kallu Pal took *'khanti'* (a tool for digging mud) from his house and tried to assault Shobhnath (deceased), whereupon co-villagers Babu Lal, Banshdhari, Hari Nath, Yadunath, Badrinath and the informant arrived on the spot. They snatched away the *'khanti'* from the hand of the accused and the matter was patched up for the time being. After some time, when Shobhnath alias Nageshmani was

going to the field for grazing his buffaloes, at around 6.15 a.m. in the morning, the accused - Ram Lakhan alias Kallu Pal possessing *'lathi'* (wooden stick) in his hand, appeared outside the village all of a sudden and caused *'lathi'* blows on him, thus causing grievous injuries. The aforesaid persons rushed to his rescue, but by that time, the accused had made his escape good. The saviours tried to apprehend the accused, but they did not succeed. It has been further described that the incident was witnessed by a number of villagers. The injured was taken to the District Hospital, Kakrahi, where the doctor, after giving first aid treatment and considering the condition of the injured Shobhnath serious, referred the matter to B.H.U., Varanasi. The injured was taken to the Government Hospital, Robertsganj, where Shobhnath alias Nageshmani succumbed to his injuries. The dead body of Shobhnath alias Nageshmani was lying in the hospital when the informant Rameshwar Nath Dubey went to lodge the report at the police station. This report was taken down in the Check F.I.R. concerned (Ex.Ka.4) and relevant entries were made in the relevant G.D. of the aforesaid date and time on 02.10.1988 at 11.30 a.m. at Police Station - Robertsganj and a case was registered against the accused at Case Crime No. 537 of 1988, under Section - 304 I.P.C. The investigation of the case ensued and it was entrusted to Hridayanand Mishra (P.W.5), who proceeded to the spot after noting the contents of the F.I.R. and the relevant G.D.; recorded statement of various persons and prepared Inquest Report *(panchayatnama)* at Government Hospital, Robertsganj and which is marked as Ex.Ka.2. He also prepared relevant documents, while preparing the inquest report and has proved the same as Ex.Ka.6, Ex.Ka.7, Ex.Ka.8, Ex.Ka.9, Ex.Ka.10 and Ex.Ka.11. Besides, he also recorded statement of informant - Rameshwar Nath Dubey at the hospital itself and the statement of the inquest witnesses. Thereafter, he arrived on the spot and prepared the site-plan of the occurrence (Ex.Ka.12). He also collected simple earth and blood stained earth from the spot and kept it in two separate containers and prepared a memo of the same (Ex.Ka-13). Subsequently, the weapon of assault *'lathi'* was also recovered at the pointing out of the accused Ram Lakhan alias Kallu Pal. A recovery memo (Ex.Ka.14) was also prepared.

4. After completing the investigation, charge-sheet (Ex.Ka.15) was filed under Section 304 of I.P.C.

5. Pursuant thereto, the committal proceeding took place and the case was committed to the Court of Sessions, where it was registered as Sessions Trial No. 84 of 1990 (State vs. Ram Lakhan alias Kallu Pal). From there, it was made over for trial and disposal to the court of Sessions Judge, Sonbhadra. Accused was heard on point of charge and the trial court was *prima facie* satisfied with the case against the accused, therefore, it framed charge against the accused - Ram Lakhan *alias* Kallu Pal, under Section 302 of IPC. Charge was read over and explained to the accused in hindi, who pleaded not guilty and claimed to be tried.

6. The prosecution, in order to prove guilt of the accused and substantiate charge against him, produced in all seven witnesses, brief sketch of the same is *ut infra* :-

Rameshwar Nath Dubey (P.W.1), the informant and Hari Nath Dubey (P.W.2) both claim themselves to be the eye-witnesses of the fact of occurrence. Dr. J.S. Gogia (P.W.3) has conducted postmortem examination on the dead body of the deceased on 2.10.1988 at 4.30 p.m. and he has noted seven ante-mortem injuries at the time of the postmortem examination, which injuries are detailed as herein below :-

(1) Lacerated wound 5 cm x 1 cm x bone deep on right side of scalp 10 cm from right ear.

(2) Contusion 5 cm x 3 cm on the left side of scalp 8 cm from left ear.

(3) Contusion 9 cm x 1½ cm on left thigh 10 cm below hip joint.

(4) Contusion 8 cm x 1 cm on left thigh 2 cm below injury no.3.

(5) Contusion 6 cm x 1½ cm on left thigh 1 cm below injury no.4.

(6) Contusion 10 cm x 2 cm on left thigh 2 cm below injury no.5.

(7) Contusion 7 cm x 1 cm on left thigh 1 cm below injury no.6.

Opinion :- In the opinion of the doctor, the cause of death was due to shock and haemorrhage as a result of the ante mortem injuries.

7. Head Moharrir - Shitla Prasad (P.W.4) has proved entry being made in the Check F.I.R. concerned (Ex. Ka-4) on the basis of the written report (Ex.Ka.1) and relevant G.D. entry (Ex.Ka.5), whereby the case was registered against the accused at Case Crime No. 537 of 1988, under Section - 304 I.P.C. Hridaya Nand Mishra (P.W.5) is the Investigating Officer. He conducted investigation and filed the charge-sheet (Ex.Ka.15). Dr. S.C. Rai (P.W.6) is the person before whom the deceased was brought in injured position, while he was alive and he has proved fact that considering the condition of the injured to be serious, he referred him immediately to the District Hospital or B.H.U. for treatment. He also proved fact that he informed the S.H.O. concerned in writing regarding the condition of the injured, which fact has been proved as Ex.Ka.17. Constable 228 Shiv Nath Yadav is P.W.7.

8. Except as above, no other testimony was adduced, therefore, evidence for the prosecution was closed and statement of the accused was recorded under Section - 313 Cr.P.C., wherein the charge was denied and it was claimed that the informant has acted in collusion with the Investigating Officer and the case has been registered on account of enmity.

9. The defence did not lead any evidence, whatsoever.

10. The learned trial judge after hearing both the sides and considering the evidence on record found the charge proved, thus convicting the accused-appellant under Section - 302 I.P.C. and sentenced him to imprisonment for life.

11. Resultantly, this appeal.

12. It has been vigorously claimed by Sri Sukhvir Singh, learned *Amicus Curiae* on behalf of accused-appellant that the incident in question cannot be said to have been the outcome of any pre-meditation. The fact is that the first information report is ante-timed. In fact, no one saw the occurrence. As per testimony, the prosecution witnesses arrived on the spot only after hearing the noise. That very much shows and establishes fact that they did not witness the occurrence.

13. Sri Krishna Pahal, learned A.A.G. assisted by Sri Bhanu Prakash Singh, learned Brief Holder for the State, have retorted to the aforesaid argument and have submitted that the prosecution witnesses have very much proved the factum of incident and all the relevant aspects and circumstances have been consistently established within the four corners of the provisions of Section - 300 I.P.C. thus proving the charge for punishment under Section - 302 I.P.C. In the postmortem examination report, two injuries have been found on the skull and combined effect of both these injuries along with others proved fatal to the deceased.

14. We have considered the rival submissions and also considered the facts and evidence on record. Obviously, as per the first information report, the incident took place around 06.15 a.m. on 02.10.1988 and prior to this, some altercation/dispute had occurred at 05.30 a.m., the same morning, when the dispute was initially reconciled by the interference of the informant and co-villagers, but the crime was committed by the accused after that at a time when the matter was pacified and the deceased Shobhnath alias Nageshmani was proceeding along with his buffaloes for grazing them on the field, when the accused possessing *'lathi'* suddenly appeared on the scene and dealt several *'lathi'* blows on him, which blows resulted in seven injuries being caused to him (the deceased). It is specific that these injuries on the body of the deceased have not been challenged specifically by the defense to the ambit and magnitude that the same have not been caused in any such incident as the present one. Obviously, the incident took place around 6.15 a.m. and the injured was taken to the hospital, where he was examined by Dr. S.C. Rai (P.W.6), who without making a note of the injuries and considering the condition of the victim to be serious, immediately referred the injured to District Hospital or the B.H.U. for treatment. Besides, he also informed the S.H.O. concerned about the condition of the victim. It so happened that the victim, while being taken to the hospital, succumbed to his injuries, whereupon a report was written and lodged at the Police Station – Robertsganj.

15. Contention is that the incident was result of provocation on the spot, but nothing of the sort finds the support from the prevailing facts and circumstances of the case, in the light of the development of the incident which took place at 5.30 a.m. and subsequently, at 6.15 a.m. on 02.10.1988. The testimony of the informant regarding the occurrence is straight and unambiguous. Rameshwar Nath Dubey (P.W.1) has been examined as an eye-witness. He has detailed the various aspects of entire incident that took place on 02.10.1988. He has specifically stated that some altercation took place with the deceased and the accused, prior to the incident (at 5.30 a.m.) and the matter was pacified by the interference of others and himself and the accused left the scene. But the incident occurred at a time when the nephew of the informant - the victim- proceeded with his buffaloes for grazing them on the field, when on way the accused appeared on the scene all of a sudden possessing *'lathi'* in his hand and dealt a number of *lathi* blows on the victim, due to which, he fell down. The incident was witnessed, apart from P.W.1, by others including the another eye-witness - Harinath Dubey (P.W.2). They retrieved the situation and took the victim to the hospital before the doctor (P.W.6),

who referred the matter for further treatment to District Hospital/B.H.U. The testimony on the point of occurrence of both the aforesaid eye-witnesses P.W.1 and P.W.2 is consistent, truthful and unambiguous. No suggestion, whatsoever, has come forth, which may cast any shadow of doubt on the veracity of these two eye-witnesses. These two eye-witnesses have given a detailed account of the occurrence and they are worthy of credit. Their position on the spot is found to be natural. The postmortem examination report also tallies with the ocular version that several *'lathi'* blows were given by the accused to the victim. Upon careful perusal, we found seven ante-mortem injuries to have been noted by Dr. J.S. Gogia (P.W.3) in the postmortem examination and has proved these ante-mortem injuries, due to which the accused died on account of shock and haemorrhage. In view of the evidence on record to claim that no one saw the occurrence, is an absolutely misconceived claim and it cannot be sustained on its face. The trial Judge while considering the case on its merit, has recorded just and consistent finding. The same is based on material on record.

16. Consequently, the conviction recorded under Section - 302 I.P.C. and the sentence imposed on the accused is justified. We hereby affirm the conviction and sentence imposed upon the accused as no good ground is made out for interference.

17. Consequently, this appeal sans merit and the same is hereby **dismissed**.

18. The appellant is on bail. He be taken into custody forthwith to serve out the remaining part of the sentence imposed on him by the trial court. His personal bonds and bail bonds are cancelled and sureties stand discharged.

19. Let a copy of this judgment/order be certified to the court concerned for necessary information and follow up action. The lower court record be remitted to the lower court concerned.

(2020)02ILR A674

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 13.02.2020

BEFORE
THE HON'BLE B. AMIT STHALEKAR, J.
THE HON'BLE ALI ZAMIN, J.

Criminal Appeal No. 442 of 2001

Jagannath & Ors. ...Appellants (In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Appellants:
Sri Kamal Krishna, Sri R.K. Tiwari, Sri Anshul Tiwari, Sri Ghan Shyam Das, Sri Sanjeev Yadav

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

A. Criminal Law-Indian Penal Code-Section 302 I.P.C. read with Section 34 - Appeal against conviction.

In cross-examination nothing has been extracted by the defence from this witness also so that his testimony can be doubted regarding firing of shots by accused persons at the deceased. In view of the above discussion, contention of the appellant has no force that presence of P.W.1 and P.W.2 is doubtful. (Para 34)

Informant has specifically stated that a day before the incident in the evening the accused persons had dismantled his medh regarding

which an altercation took place with his son. No question regarding dismantling of informant's medh by accused persons has been put by defence as such the statement of P.W.1 is uncontroverted, therefore we have no reason to disbelieve his testimony regarding dismantling of his medh. (Para 48)

If the Investigating Officer did not inspect the dismantled medh it is a fault on the part of the Investigating Officer which is trivial in nature which will not affect the prosecution case. (Para 48)

Therefore, on a conspectus of the facts and circumstances of the case and close scrutiny of evidences available on record as discussed above we find that prompt FIR naming the appellants has been lodged, informant are witnesses of the incident and their testimony is trustworthy and reliable. Ocular version is supported by medical evidence. (Para 51)

Criminal Appeal rejected. (E-2)

List of cases cited:-

1. Arumugam Solathirayar vs. Ponnalagu Pandarar and others, 1957 SCC online Madras 172,

2. Ramji Singh and others vs. St. of U.P. 2019 SCC online SC Hon'ble Supreme Court 1597,

3. Syed Ibrahim vs. St. of A.P., (2006) 10 SCC 601.

4. Gautam Chaturvedi vs. St. of U.P., 2019 SCC Online All 4307,

5. St. of Kar. v. Suvarnamma and another, (2015) 1 SCC 323,

6. St. of UP vs. M.K. Anthony (1985) 1 SCC 505,

7. Ramji Singh and others vs. St. of U.P. 2019 SCC Online SC 1597,

8. Rajesh Govind Jagesha vs. St. of Maha., (1999) 8 SCC 428

(Delivered by Hon'ble Ali Zamin, J.)

1. Heard Sri Kamal Krishna, learned Senior Counsel assisted by Sri Ghan Shyam Das and Sri Sanjeev Kumar Yadav, learned counsel for the appellants and Sri Ajeet Ray, learned A.G.A. for the State.

2. This appeal has been preferred against the judgement and order dated 31.01.2001 passed in Session Trial No.481/90, arising out of Case Crime No.242 of 1990 by which learned Additional Sessions Judge, IVth (Room No.4), Allahabad, convicting the appellants, under Section 302 I.P.C. read with Section 34 I.P.C. has sentenced them to life imprisonment.

3. According to prosecution version Ram Harsh had dismantled the Medh of the informant Jagannath in the evening a day before the incident on 08.10.1990 and his son Santosh Kumar had stayed on the filed to mend the Medh when Ram Harsh his son Jagannath and Nanka @ Ram Swaroop had an altercation with his son. On that day his son came to his house and on 08.10.1990 at 6:00 a.m. in the morning when his son Santosh Kumar had gone towards west side of the village to respond the call of nature, Jagannath having licensee gun of his father, Nanka @ Ram Swaroop and Jagatpal son of Ram Padarath Patel having country-made pistol of 315 bore went to his son and surrounding him, fired shot at him due to the incident of the previous day on account of which he died on the spot. The incident has been witnessed by Babu Lal son of Ram Bharosh Patel, Ram Jatan son of Ram Garib Patel, Ram Newaj son of Mahajan Patel, resident of Kashimpur Juda @ Moosepur, Police Station Nawabganj, District Allahabad.

4. Informant Jagannath got scribed the report (Ext.Ka-1) of the incident from Durga Prasad and lodged report to the police station Nawabganj. On the basis of written report Ext.Ka-1. Chik F.I.R. Ext.Ka-12 under Section 302 I.P.C. was registered on 08.10.1990 at 7:45 and investigation of the case was entrusted to S.H.O., A.S. Yadav, who reached the spot and prepared inquest memo (Ext.Ka-2) as well as challan lash (Ext.Ka-3), letter to R.I. (Ext.Ka-4), letter to C.M.O. (Ext.Ka-5), specimen seal (Ext.Ka-6), photo lash (Ext.Ka-7) and dispatched the dead body for post-mortem.

5. Dr. N.P. Singh (P.W.4) conducted autopsy on the dead body and prepared report (Ext.Ka-11). According to the post-mortem following injuries were found on the dead body :-

1. Fire arm wound of entry middle of the nose 1 x 1 c.m.

2. Fire arm wound of entry left side of neck 1 x 1 c.m., 2 c.m. below the middle of mandible.

3. Fire arm wound of entry 1 x 1 c.m. left side of scapula clavicle.

4. Fire arm wound of entry 1 x 1 c.m. left arm 2 c.m. below the left acromion process size 1 c.m. x 1 c.m.

5. Fire arm wound of entry 1 x 1 c.m. on left side chest wall, 2 c.m. medial to the left nipple blackening present.

6. Fire arm injury 1 x 1 c.m. on the right side chest wall, 5 c.m. below right nipple 1 x 1 c.m.

7. Fire arm wound of exit 2 c.m. x 2 c.m. over left scapular region 1 c.m. medial to the medial both of scapula.

8. Fire arm wound of exit 2 c.m. x 2 c.m. in middle of biter scapular region of the upper part.

Four medium size pellets recovered from thoracic cavity.

Cause of death was found shock due to excess bleeding and death occurred 12 hours earlier due to the ante-mortem injuries caused.

6. Investigating Officer also prepared spot map Ext.Ka-9, taking into possession two empty cartridges 12 bore from the spot, plain earth as well as blood stained earth from the field of Pandit Budh Narayan prepared recovery memo Ext.Ka-8. After completing the investigation, he submitted charge sheet (Ext.Ka-10), under Sections 302 I.P.C. against the accused-appellants before the court of C.J.M.

7. Learned C.J.M., Allahabad committed accused to the court of session for trial where Case Crime No.342 of 1990, under Section 302 I.P.C. was registered as Session Trial No.481 of 1990, wherefrom the case was transferred to the court of Second Additional Session Judge, Allahabad, who framed charge under Section 302 I.P.C. read with Section 34 I.P.C. against the accused persons, who denied the charge and claimed trial.

8. Prosecution to prove charge against the accused persons produced five witnesses. P.W.1 Jagannath is informant, P.W.2 Babu Lal is a witness of fact, P.W.3 Anwar Singh Yadav Investigating Officer of the case, P.W.4 Dr. N.P. Singh conducted post-mortem and P.W.5 Indra Bahadur Singh scribed the F.I.R. (Ext.Ka-13) and G.D. (Ext.Ka14), are the formal witnesses. After examination of prosecution witnesses, statement of the accused persons were recorded under Section 313 Cr.P.C. in which accused Jagdish Pal has stated that due to enmity the case proceeded against him and accused Jagannath and Nanka have stated that the family of the informant had

forcefully taken possession of Gram Sabha land; their father Ram Harsh was pradhan, who had filed case against him. The deceased was a man of criminal antecedent. The incident occurred at another place and they have been falsely implicated in the present case. The accused persons led no evidence in their defence.

9. After hearing the parties and perusal of the record, learned Additional Sessions Judge, IVth (Room No.4), Allahabad passed the impugned judgement and order, hence this appeal.

10. Learned counsel for the appellants submits that salient features; like, informant Jagannath has seen the incident, deceased he had gone to answer call of nature; the incident took place in the field of Budh Narayan; 5-6 shots were fired upon the deceased, who told him about the incident, are absent. Per contra learned AGA submits that FIR is not an encyclopaedia and every detail is not necessary to be mentioned in the FIR.

11. In ***Arumugam Solathirayar vs. Ponnalagu Pandarar and others, 1957 SCC online Madras 172***, Hon'ble High Court has held that the fact that in the F.I.R, the name of one accused is not mentioned or the names of some witnesses are not mentioned is no ground for disbelieving the prosecution story and acquitting the accused whose names are mentioned in the F.I.R. and disbelieving the witnesses whose names are mentioned in the F.I.R. The F.I.R is not an encyclopedia. It is not the beginning and end of every case, it is only a complaint to set the law into motion. It is only at the investigation stage that all the details can be gathered and filled up.

12. In ***Ramji Singh and others vs. State of U.P. 2019 SCC online SC Hon'ble Supreme Court 1597***, Hon'ble Supreme Court has held that an F.I.R is not supposed to be an encyclopedia detailing all facts in extenso.

13. On consideration of the law laid down by the Madras High Court and Hon'ble Supreme Court, we are of the view that the contention of the learned counsel for the appellants that salient features like, informant Jagannath has seen the incident, deceased had gone to answer call of nature, incident took place in the field of Budh Narayan, 5-6 shots were fired upon the deceased and the question as to who told him about the incident are absent in the F.I.R. is without force.

14. Learned counsel further submits that there is sharp contradiction in the statement of P.W.1 Jagannath informant and P.W.2 Babu Lal. P.W.1 Jagannath states that the incident has taken place in the field of Budh Narayan whereas Babu Lal states that the incident has taken place in the field of Radhey Shyam. It is not the case of prosecution that the deceased Santosh after receiving injuries in the field of Budh Narayan ran towards the field of Radhey Shyam. Evidence of P.W.1, on page 22 in the third paragraph of paper-book is that after receiving the injuries he fell down in the field of Budh Narayan. He also submits that in order to establish the place of occurrence bloodstained and plain earth is always taken into possession by the Investigating Officer and are then sent to the serologist but in the present case the Investigating Officer PW-3 Anwar Singh Yadav admitted on page 32 of the paper-book that he has not sent the bloodstained and plain earth to the serologist. A perusal of the site plan would show that it does not

contain recital to the effect that any blood was found at the place of occurrence and on this ground, he submits that the place of occurrence is not proved. In support of his contention he has relied on the judgements of ***Syed Ibrahim vs. State of A.P., (2006) 10 SCC 601*** and ***Gautam Chaturvedi vs. State of U.P., 2019 SCC Online All 4307.***

15. Per contra learned AGA submits that from the prosecution evidence it is proved that the place of incident is the field of Budh Narayan. Investigating Officer took bloodstained and plain earth from the field of Budh Narayan which is established from its recovery memo Ext.Ka-8 proved by him. Although Investigating Officer has committed a lapse in not sending the bloodstained and plain earth to the serologist and he also did not mention in the site plan wherefrom the bloodstained and plain earth were taken but on the basis of these lapses on the part of Investigating Officer the prosecution case cannot be thrown out as held by Hob'ble Supreme Court in ***State of Karnatka v. Suvarnamma and another, (2015) 1 SCC 323.***

16. P.W.1 Jagannath has stated that his son was going to answer the call of nature and when he reached the field of Budh Narayan, the accused Jagannath having licensee gun of his father, Jagatpal and Nanka @ Ram Swaroop having country-made pistol came and surrounding his son killed by firing 5-6 shots at him. From his cross-examination by defence nothing has been extracted, so that, any adverse inference may be drawn that the incident did not occur in the field of Budh Narayan. P.W.2 Babu Lal has also stated that Santosh Kumar son of Jagannath was murdered on 08.10.1990. It was 6:00 a.m. of the morning, he was returning after answering the call of nature, when he saw that the accused persons killed Santosh Kumar in the field of Budh Narayan. In the hand of Jagannath there was a gun and in the hand of Nanka and Jagannath country-made pistol and all the three accused fired shots from their arms. At page 28 of the paper book, in cross-examination this witness has stated that towards south west is that field of Radhey Shyam where murder took place. On the basis of this very statement learned counsel for the appellants has emphasized that the statements of P.W.1 Jagannath and P.W.2 Babu Lal are contradictory to each other but in our opinion the above statement of P.W.2 Babu Lal does not connote that the incident took place in the field of Radhey Shyam. It appears that the question was tactfully put to the witness in such a manner, so that, such inference can be drawn from the reply of the witness. The question might have been put to the witness whether there is field of Radhey Shyam in the south west of the village where murder took place and witness then replied as mentioned above. P.W.1 Anwar Singh Yadav, Investigating Officer has proved the spot map as Ext.Ka-9 in which it is mentioned that "A' is the place where murder took place and this is shown as field of Budh Narayan. In cross-examination the Investigating Officer has firmly stated that the murder took place in the field of Budh Narayan and this field will be towards west of the village. Thus we find that there is consistency in the prosecution evidence of P.W.1 Jagnnath, P.W.2 Babu Lal and Investigating Officer P.W.3 Anwar Singh Yadav regarding the place of incident to be field of Budh Narayan.

17. It is true that in spot map Ext.Ka-9, the Investigating Officer has not

mentioned the place from where he took bloodstained and plain earth but in view of the consistent prosecution evidence as discussed above regarding place of incident to be field of Budh Narayan and recovery memo Ext.Ka-2 of bloodstained and plain earth as well as two empty cartridges proved by him, in which it is clearly mentioned that the bloodstained and plain earth were taken into possession from the place of incident (field of Pandit Budh Narayan).

18. In ***State of Karnataka vs. Suvarnamma and another supra*** referred by learned AGA, Hon'ble Supreme Court has considered its own opinion in para 12.5 of the judgement held in ***State of UP vs. M.K. Anthony (1985) 1 SCC 505*** that minor discrepancies on trivial matters not touching the core of the case, hyper technical approach by taking sentences torn out of context here or there from the evidence, attaching importance to some technical error committed by the Investigating Officer not going to the root of matter would not ordinarily permit rejection of the evidence.

19. The Investigating Officer has admitted in cross examination that he did not send bloodstained and plain earth to the expert. He also did not mention in the site plan the place from where he took the bloodstained and plain earth which are lapses on the part of the Investigating Officer. However, since in aforesaid discussion we have found that regarding place of incident (field of Budh Narayan) prosecution evidence is consistent, therefore the above lapses committed by the Investigating Officer are in the category of minor discrepancies, which do not go to the root of the matter. In view of consistency in prosecution evidence in the instant case and keeping in mind the opinion of Hon'ble Supreme Court in ***State of UP vs. M.K. Anthony*** considered in ***State of Karnataka vs. Suvarnamma and another supra***, the above lapses committed by investigating officer will not affect the prosecution case.

20. In the case of ***Syed Ibrahim vs. State of A.P. (supra)***, referred by learned counsel for the appellants, P.W.1 had indicated four different places to be the place of occurrence. The Hon'ble Supreme Court held that when the place of occurrence itself has not been established, it would not be proper to accept the prosecution version.

21. In ***Gautam Chaturvedi vs. State of U.P. (supra)***, as per F.I.R. the incident occurred when P.W.1, his nephew P.W.4 Amit Gupta and the deceased were talking amongst themselves standing in the lane outside their house, and the deceased parted company to leave for some place where he had to go. He had reached a point in front of the house of Rajendra, bearing premises no.2/32, where the appellant arrived in an inebriated condition and after a sharp exchange of words between appellant and the deceased, the appellant stabbed him in the witnesses' presence but in his dock evidence, he stated that the appellant arrived at the entrance to the deceased's home, premises no.2/123, where after some exchange of words, the appellant stabbed the deceased. Therefore, it was held that prosecution has not been able to formally establish the place of occurrence.

22. In the instant case, prosecution evidence is consistent with regard to place of incident, the field of Budh Narayan, while in the referred cases, place of

incident was not consistent. Therefore, on the basis of the referred cases, no benefit can be given to the appellants.

23. In view of the above discussion, from the evidences on record as discussed above place of incident is proved to be the field of Budh Narayan, accordingly, there is no substance in the contention of the learned counsel for the appellants that statement of P.W.1 Jagannath and P.W.2 Babu Lal are contradictory to each other that there is no mention of taking bloodstained and plain earth in the site plan and that Investigating Officer did not send the bloodstained and plain earth to serologist, therefore place of incident is not proved.

24. As per P.W.4 Dr. N.P. Singh and post-mortem report Ext.Ka-11 proved by him blackening in injury nos.1, 2 and 5 have been found and according to P.W.3 Anwar Singh Yadav as well as spot map Ext.ka-9 proved by him the deceased had received injuries on point A and the accused had fired from point B. Distance between A and B is 10 feet therefore learned counsel for the appellants submits that if the injuries were caused from a distance of 10 feet then blackening in the injuries would not occur.

25. In ***Ramji Singh and others vs. State of U.P. 2019 SCC Online SC 1597***, Hon'ble Supreme Court has held in para 17 of the judgment that a site plan only gives a general idea and is not a true scale map. In para 17 of the judgment it has been also held that it would not be possible for any witness to exactly state who was at which place.

26. In the instant case the witnesses have not stated from which place the accused persons fired shots upon the deceased. In view of the statement of witnesses in the instant case that all the accused persons fired upon the deceased by their fire arms, as well as opinion of Hon'ble Supreme Court held in ***Ramji Singh and others vs. State of U.P. (supra)*** on the basis of distance mentioned of the deceased and accused in the site plan and blackening found in the injuries no. 1, 2 and 5 to the deceased the prosecution case cannot be doubted. Accordingly we find no substance in the contention of the learned counsel of appellants.

27. Learned counsel for the appellants also submits that according to post mortem report injuries of same dimension 1 cm x 1 cm have been found, therefore, it cannot be conceived that all the three assailants had a weapon of the same bore. Per contra learned AGA submits that according to prosecution a gun and two countrymade pistols were used in the incident and as per recovery memo Ext.Ka-8 two empty cartridges of 12 bore were taken into possession and cartridge of 12 bore can be used in country made pistol as well as gun both.

28. According to the written report Ext.Ka-1 Jagnnath having licensee gun of his father, Nanka alias Ramswaroop and Jagatpal other accused having country made pistol of 315 bore went to the deceased and shot him. P.W.1 Jagnnath as well as P.W.2 Babu Lal has stated that Jagnnath had a gun, Nanka and Jagat Pal had Tammancha in their hand and they fired bullets from their arm. In cross-examination no question has been put by defence on this point, therefore, statement of both witnesses in this regard is uncontroverted, hence we have no reason to disbelieve the prosecution version

regarding use of aforesaid arms in the incident by the accused persons. As per recovery memo Ext.Ka-8 two empty cartridges of 12 bores were recovered from the place of incident. As per 24th Edition Reprint 2012 page 535 of Modi Medical Jurisprudence and Toxicology improvised or country made firearms made out of steel tubes are crude, mostly smooth, 12 bored unlicensed weapons which are often made by criminals in India. In guns as well as country made pistols, 12 bore cartridges are used. Although in the written report it has been mentioned that Jagatpal had country made pistol of 315 bore which may be a wrong identikit on the basis of assumption only which cannot affect the prosecution case, since it is the consistent prosecution case that a gun and two countrymade pistols were used in the incident, 12 bore empty cartridges were also recovered from the spot and 12 bore cartridges can be used by countrymade pistol and gun both, therefore, injury of same dimension is possible. In view of the above, contention of the learned counsel for the appellant is misconceived that injuries of same dimensions have been found therefore it cannot be conceived that all the assailants had a weapon of same bore.

29. Next submission of learned counsel for the appellants is that as per evidence adduced during trial the deceased was surrounded by assailants and shots were fired upon him. Post-mortem report shows that most of the injuries are on the left of the deceased which are not possible if the incident was caused surrounding the deceased, therefore presence of P.W.1 Jagnnath and P.W.2 Babu Lal at the place of occurrence is doubtful. Per contra learned AGA submits that surrounding doesn't mean that deceased was encircled and shots were fired from all sides.

30. In Ext.Ka-1 it is mentioned that accused persons shot the deceased surrounded the deceased and shot him. P.W.1 Jagnnath has also deposed that the accused had surrounded the deceased and shot him. As per post mortem report Ext.Ka-11 on the person of the deceased eight injuries in total were found among which injury no. 7 and 8 are exit injuries. Injury no. 1 is on the middle of nose; injuries no. 2, 3, 4, 5 are towards left side of neck, scapula, acromion process and chest wall respectively. It appears that injury no. 7 is the corresponding injury of injury no. 5 as injury no. 5 is on the left side chest wall 2 cm medial to left nipple which have been caused from the front side that is why injury no. 7 is the exit wound over left scapular region. In the spot map Ext.Ka-9 the location of accused persons at the time of incident has not been disclosed. In cross-examination also in this regard no question has been put to P.W.1 Jagnnath and P.W.2 Babu Lal by the defence. As per prosecution version the incident was caused at the time of the deceased going to answer the call of nature. In such a situation it is possible that while the deceased was going, the accused persons coming in front of the deceased fired upon him. In the circumstance and evidence available on record it cannot be gathered that the incident was caused by the accused persons encircling the deceased. In view of the above, in the present case surrounding does not connote that incident was caused by the accused persons encircling the deceased and thereafter fired shots upon him. Accordingly we find no force in the contention of the learned counsel of the appellant that presence of P.W.1 Jagnnath

and P.W.2 Babu Lal at the place of occurrence is doubtful.

31. Learned counsel for the appellant on the basis of statement of P.W.1 Jagnnath at page 18 of the paper book that he is not able to remember whether the police personnel prepared the inquest memo at the mortuary or not and obtained signature of panches or not, submits that presence of the witness at the time of occurrence is doubtful. Per contra learned AGA submits that the contention of the learned counsel for the appellant is based on picking sentences made by the witness in his favour. Subsequent to the statement he has firmly stated that inquest was conducted where incident took place, therefore, presence of the witness at the time of occurrence is established.

32. P.W.1 Jagnnath at page 18 of the paper book has stated that he is not able to remember whether police personnel prepared the inquest memo at the mortuary or not, but in his further cross examination, he has stated firmly on the same page that the inquest memo was prepared at 11:00 AM on the spot by the Daroga. He has also stated that he had reached the Police Station at quarter to 8:00 AM. The Daroga arrived at 10:00 AM on the spot. He saw the dead body, took into possession the empty cartridges found on the spot. He also took blood stained shirt in his possession, thereafter prepared inquest memo and directed the police for taking the dead body to the medical college, thereafter the Investigating Officer went away. In view of aforesaid vivid statement of witness Jagnnath on the basis of his statement that he is not remembering whether police personnel prepared inquest at mostuary or not and obtained signature of panches or not which too has been recorded after a lapse of near about eight years from the date of incident, presence of witness cannot be doubled. Accordingly, we find no substance in the contentions of learned counsel for the appellant, that P.W.1 Jagnnath is unable to tell as to where the Panchayatnama of the deceased was conducted, therefore presence of the witness at the time of occurrence is doubtful.

33. P.W.1 Jagnnath has stated that 5-6 shots were fired and as per recovery memo Ext.Ka-8 two empty cartridges were taken into possession by the police, therefore submission of learned counsel for the appellants is that the presence of P.W.1 Jagnnath and P.W.2 Babulal is doubtful. Per contra learned AGA submits that P.W.1 Jagnnath and P.W.2 Babu Lal are the eye-witnesses of the incident and their credibility is could not be shaken from the cross-examination, therefore, on the basis of recovery of two empty cartridges their presence cannot be doubted.

34. In the written report Ext.Ka-1 it is not mentioned as to how many shots were fired but as discussed above FIR is not an encyclopaedia, therefore, not mentioning fire shots in the written report will not affect the prosecution case. P.W.1 Jagannath has stated that accused persons killed his son by firing 5-6 shots and defence has not put any question to his witness regarding firing of shots as such the evidence of P.W.1 Jagnnath is uncontroverted, therefore, we have no reason to disbelieve the witness. As such the presence of witness Jagnnath on the basis of his statement that 5-6 shots were fired and only two cartridges were recovered from the spot cannot be

doubted, particularly when according to post-mortem report Ext.Ka-11 proved by Dr. N.P. Singh injuries were found to be caused by firearm and cause of death was found shock due to excessive bleeding on account of ante-mortem injuries. P.W.2 Babulal has also stated that while returning agter answering the call of nature he saw in the field of Budh Narayan accused Jagnnath having gun in his hand, Nanka and Jagatpal country-made pistol in their hand. All the accused persons fired from their arms. In cross-examination nothing has been extracted by the defence from this witness also so that his testimony can be doubted regarding firing of shots by accused persons at the deceased. In view of the above discussion, contention of the appellant has no force that presence of P.W.1 Jagnnath and P.W.2 Babu Lal is doubtful.

35. Learned counsel for the appellant further submits that P.W.2 Babu Lal has stated on page 26 in his deposition that P.W.1 Jagnnath was working in the city of Allahabad as a gardener and the P.W.1 Jagnnath used to leave the village at about 6:00 AM and reach Allahabad at about 8:00 AM, distance between the city of Allahabad and village of the P.W.1 Jagnnath is about 12 miles. P.W.1 Jagnnath has stated on page 18 in his deposition that he saw the body of the deceased on 08.10.1990 at about 1:00 PM in the Medical College, Allahabad. In the backdrop of evidence of P.W.2 Babu Lal, the evidence of P.W.1 Jagnnath assume simportance and makes the presence of P.W.1 Jagnnath doubtful at the time of occurrence. Per contra learned AGA submits that prompt FIR had been lodged. He has supported the prosecution case and from cross-examination his presence is not impeached.

36. P.W.2 Babu Lal at page 26 of the paper-book has stated that at the time of incident his brother Jagannath was working in Allahabad as a gardener. He used to go and come by cycle from his village. He used to go at about 6:00 a.m. from the house and reach Allahabad at about 8:00 a.m. Distance of Allahabad from his village is 12 miles. P.W.1 Jagnnath on page 18 of the paper-book has stated that he saw the dead body of Santosh in the medical college on the day of murder i.e. on 08.10.1990 at 1.00 PM in the day. He has also stated that apart from him, the incident was witnessed by Babulal, Ram Jatan and others. He has stated that scribing the report from Durga Prasad he gave it at the police station which has been proved by him as Ext.Ka-1. In cross-examination he has also stated that he reached the police station at quarter to 8 a.m. and the Daroga reached the place of incident at 10:00 a.m. and at page 20 in cross-examination he has stated that near about after two hours of the murder he reached the police station. From a lengthy cross-examination nothing has been extracted by the defence so that an adverse inference can be drawn that P.W.1 Jagannath did not get scribe the report Ext.Ka-1 from Durga Prasad and did not go to police station on 08.10.1990 along with written report at 7:45 a.m. P.W.5 Indra Bahadur Singh scribe of the F.I.R and G.D. has also stated that on 08.10.1990 he was posted as Moharrir at police station Nawabganj and on the basis of Ext.Ka-1, he had prepared chick F.I.R of Crime No.342 of 1990 in his writing and signature which has been proved by him as Ext.Ka-12 and its reference was made in the G.D. No.9 dated 08.10.1990 at about 07:45 a.m. in his writing and signature, which has been proved by him as Ext.Ka-13. In cross-examination he has

also stated that by giving copy of the chick F.I.R informant was sent back, entry of which is made in the G.D.

37. In Ext.Ka-12 chick F.I.R the date and time of the report has been mentioned as 08.10.1990 at 07:45 a.m. P.W.3 Investigating Officer Anwar Singh Yadav also has stated that the case crime no.342 of 1990 under Section 302 IPC was registered in his presence and in cross-examination he has stated that he moved from the police station for the spot at 07:45 a.m.

38. Thus, evidence of P.W.1 Jagannath, P.W.5 Indra Bahadur Singh and P.W.3 Investigating Officer Anwar Singh Yadav is consistent with regard to lodging the report by informant P.W.1 Jagannath at 07:45 a.m. on 08.10.1990. If informant P.W.1 Jagannath was not present at the time of incident then prompt FIR could not have been lodged which otherwise also supports the presence of the informant Jagnnath at the time of occurrence.

39. It appears that the learned counsel for the appellant taking torn out sentences out of context has advanced the submission which has no force, as held by Hon'ble Supreme Court in ***State of MP vs. M.K. Anthony 1985 SCC (CRI 105), (Supra),*** and observed in para 18 of the judgement.

40. In view of the above discussion, on the basis of statement of P.W.2 Babu Lal that at the time of incident Jagnnath was working in Allahabad as a gardener, he used to go at about 6:00 AM and reach Allahabad at 8:00 AM, distance of Allahabad from his village is 12 miles and statement of P.W.1 Jagnnath in cross-examination that he saw the dead body of his son Santosh in the hospital of medical college at 1:00 a.m., it cannot be held that presence of P.W.1 Jagnnath at the time of occurrence is doubtful. Accordingly we find no substance in this contention also.

41. Learned Counsel for the appellants also submits that P.W.2 Babu Lal has admitted that he had filed a complaint case against Ram Harsh father of appellant no.1 Jagnnath and appellant no.2 Nanka which shows that P.W.2 Babulal is inimical towards the accused. Per contra learned AGA submits that a day before the incident the medh was dismantled and an altercation had taken place with the deceased and Ram Harsh also but Ram Harsh has not been named in the FIR which shows that only those who caused the incident have been named in the FIR and there is no false implication.

42. P.W.2 Babulal on page 26 of the paper-book has stated that the Pradhan of his village was Ram Harsh. He is village-head since last 30 years. The lekhpal had instituted 11 cases against him on behalf of the Gaon-sabha. He has further stated that village pradhan or vice-pradhan of the village never came for prosecuting the case and he had filed a complaint case against Ram Harsh. He has denied that the case was proceeding at the behest of Ram Harsh. Since Babu Lal had filed a complaint case against Ram Harsh, therefore, it may be inferred that the witness Babu Lal and Ram Harsh had inimical terms. Inimical terms is a double edge weapon which cuts both ways. On the basis of inimical terms one can be falsely implicated as well as one can author the incident, therefore, on the sole ground of inimical terms no conclusive

inference can be drawn and the whole evidence is to be evaluated for the purpose.

43. P.W.1 Jagnnath on page 22 of the paper-book has stated that he was going towards south from the road west side of the village and his son was going towards north side, therefore learned counsel for appellants submits that Jagannath was not in a position to see the incident. Per contra learned AGA submits that the incident has taken place in the fields outside the village where even on going in opposite directions incident can easily be seen. Jagnnath has promptly lodged the FIR and if he was not present at the time of occurrence then prompt FIR could not have been lodged.

44. In spot map Ext.Ka-9 the location of Jagnnath has not been mentioned from where he saw the incident but from the spot-map it is clear that the incident has occurred in the vacant field of Budh Narayan. The witness on the same page has stated that when first time he heard the sound of fire his son was going taking a Lota. Since the place of incident is visible from the road on either side, i.e. North and South, in such a situation on hearing the sound of fire the deceased and accused persons can be seen easily. In view of the above we also find no substance in the contention of the learned counsel for the appellant that the deceased was going towards north side and the witness Jagnnath was going towards south side on the road west side of the village in such circumstance he was not in position to see the incident.

45. Learned counsel for the appellant also submits that it was the duty of the trial judge to bring the evidence of the witnesses in the notice of the accused persons by putting a clear question but he has not put the evidence in clear manner in these circumstances the evidence of the witnesses stand vitiated. Per contra learned AGA submits that the learned counsel of the appellant has not specifically attracted attention towards the evidence which were not put to the accused persons in clear manner.

46. On going through the statement under section 313 Cr.P.C. it appears that question number third has been put regarding inquest memo and spot map in which exhibit number of inquest memo is missing in the question and exhibit number of spot map has been disclosed as Ext.Ka-9. Since in the question the inquest memo has been mentioned clearly, therefore, mere non on the basis of mentioning exhibit number of inquest memo, no prejudice will be caused, accordingly, this contention of the learned counsel for the appellants is without substance.

47. Learned counsel for the appellant further submits that the Investigating Officer has not stated in his deposition that he inspected the field where the medh was broken, therefore motive of the incident is not established. Per contra learned AGA submits that the incident has occurred at 6:00 AM and there are witnesses of the incident. If the dismantled medh was not inspected by the Investigating Officer, it is a trivial fault on the part of the Investigating Officer which will not affect the prosecution case.

48. As per written report Ext.Ka-1 a day before the incident Ram Harsh had dismantled the medh of the informant. The deceased had asked to mend the medh then an altercation took place between deceased, Ram Harsh and his son Jagnnath

and Nanka alias Ram Swaroop. This fact has been supported by P.W.1 Jagnnath. P.W.3 Anwar Singh Yadav Investigating Officer in his deposition has not stated that he had inspected the dismantled medh of the informant. The incident took place at 6:00 AM. In written report Ext.Ka-1, it is mentioned that the incident was witnessed by Babu Lal, Ram Niwas and Ramjatan. Informant Jagnnath and named witness in FIR, P.W.2 Babu Lal have supported the prosecution version. Informant Jagnnath has specifically stated that a day before the incident in the evening the accused persons had dismantled his medh regarding which an altercation took place with his son. No question regarding dismantling of informant's medh by accused persons has been put by defence as such the statement of P.W.1 Jagnnath is uncontroverted, therefore we have no reason to disbelieve his testimony regarding dismantling of his medh. If the Investigating Officer did not inspect the dismantled medh it is a fault on the part of the Investigating Officer which is trivial in nature which will not affect the prosecution case. Apart from it in a case of direct evidence motive is not at all relevant as held by Hon'ble Supreme Court in ***Rajesh Govind Jagesha vs. State of Maharashtra, (1999) 8 SCC 428***, that "motive" in a criminal case based on ocular testimony of witnesses is not at all relevant.

In view of the above discussion we also find no substance in the contention advanced by learned counsel for the appellant.

49. Lastly learned counsel for the appellant submits that P.W.2 Babu Lal has admitted on page 26 of the paper book that Ram Harsh father of the appellant 1 and 2 was village pradhan for last 30 years and lekhpal of the village had instituated as many as 11 cases against him. The accused persons have clearly stated in their statement under section 313 Cr.P.C. that Ram Harsh had filed cases against P.W.2 Babu Lal and for this reason they have been falsely implicated. Per contra learned AGA submits that medh was dismantled by Ram Harsh and an altercation also took place between deceased and Ram Harsh and his sons but Ram Harsh has not been implicated in the case which shows that there is no false implication in the case.

50. P.W.2 Babu Lal has stated that lekhpal had filed 11 cases against him on behalf of gaon-sabha but he has further stated that Gram Pradhan or Up-Pradhan never came for prosecuting the cases. He has also stated that he had filed a complaint case against Ram Harsh. If Babu Lal had filed complaint case against Ram Harsh and on behalf of the Gram-Sabha 11 cases against P.W.2 Babu Lal were filed, in such condition if any enmity accrues, it will be against Pradhan Ram Harsh and lekhpal but even after altercation of the deceased with Ram Harsh Pradhan took place one day before the incident, Ram Harsh has not been implicated in the case which indicates that there is no false implication in the case. We therefore, find no substance in the contention of the learned counsel for the appellants that the appellants have been falsely implicated in the present case.

51. Therefore, on a conspectus of the facts and circumstances of the case and close scrutiny of evidences available on record as discussed above we find that prompt FIR naming the appellants has been lodged, informant Jagnnath and Babu Lal are witnesses of the incident and their testimony is trustworthy and reliable.

Ocular version is supported by medical evidence. Learned Additional Session Judge 4th Allahabad has rightly convicted and sentenced the appellants. There is no merit in the appeal, hence appeal fails and is liable to be rejected. Accordingly appeal is rejected.

52. The appellants Jagannath, Nanka @ Ram Swarup and Jagatpal respectively are on bail. The C.J.M., Allahabad is directed to take the appellants in the above case into custody forthwith and send them to jail to serve out the sentence, as awarded by the trial court and affirmed by us.

Office is directed to send a copy of this order to the court concerned within a week for compliance.

(2020)02ILR A687

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 12.02.2020

BEFORE
THE HON'BLE SURESH KUMAR GUPTA, J.

Criminal Appeal No. 456 of 2017

Ajay Kumar ...Appellant (In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Appellant:
Sri Tripurari Pal, Sri Noor Mohammad, Sri Ronak Chaturvedi

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

A. Criminal Law-Indian Penal Code - Section 304-B & 4 of D.P. Act,— Appeal against conviction.

Larynx and trachea are congested. Lungs are also congested. Clotted blood was present in the mouth and nose tray. These are the signs which is clearly shows that in the present case, death of the deceased was homicidal. (Para 34)

In the present case, at the time of incident when the parent and relative were arrived at the matrimonial house of the deceased then they saw that all of the family members of in-law had run away from the scene of occurrence. Neither of any family member was present at the time of preparation of the inquest report. These are the circumstances are clearly shows the indulgence of the appellant. (Para 38)

The deceased was beaten just before her death, she was strangulated. This fact is admitted that the deceased is died inside the house and in place of occurrence broken bangles, rings, ear rings, hair clips, plastic rope (fastened with wood) were recovered at the place of occurrence which shows that the deceased was murdered by committing strangulation and by pressing neck of the deceased. (Para 39)

Autopsy of dead body was conducted by PW-5 Dr. S.K. Varshney noted several ante mortem injuries besides ligature mark measuring 28 cm X 2 cm around the neck and bones underneath were found fractured cause of death was strangulation. (Para 42)

In these circumstances, this Court is not inclined to interfere the judgement and order of the trial court. (Para 43)

It is not a case of suicidal death but a case of homicidal death. There is no mitigating circumstance against the applicant. It shall not be justified to interfere or reduce the sentence awarded to appellant. Accordingly, the appeal is liable to be dismissed. (Para 44)

Criminal Appeal rejected. (E-2)

List of cases cited:-

1. Gajanan Dashrath Kharate v. St. of Maha., [2016 (4) SCC Page 604],

2. Sher Singh @ Pratapa v. St. of Har. 2015 (89) ACC 288 (SC).

(Delivered by Hon'ble Suresh Kumar Gupta, J).)

1. This appeal has been preferred against the judgement and order dated 13.1.2017 passed by Additional Sessions Judge, Fast Track Court No. 1 Aligarh in S.T. No. 529 of 2013 (State Vs. Ajay Kumar and others) arising out of case crime No. 120 of 2013, under Sections 304-B IPC & 4 of D.P. Act, Police Station-Jawan, District Aligarh and convicted and sentencing the appellant u/s 304-B IPC 10 years rigorous imprisonment and fine of Rs. 5,000/- in default of payment of fine three months further imprisonment and sentencing the appellant u/s 4 D.P. Act and two years simple imprisonment and fine of Rs. 5,000/- in default of payment of fine two months further imprisonment.

2. Brief facts of the case are that the FIR Exhibit Ka-6 lodged by PW 1 on the basis of written report Exh Ka-1 on 11.4.2013 with allegation that the marriage of daughter of PW 1, namely, Maya Devi was solemnized with appellant on 17.5.2011 with Hindu Reties and Customs, in this marriage informant given sufficient dowry according to his status and spent about 3-4 lacs Rupees, but the appellant and his family members were not happy and they started harassment to his daughter about further demand of dowry as Rs. One Lakh cash and they committed murder to his daughter. It is further alleged that on 9.4.2013 i.e. before two days of unfortunate death of the deceased the appellant had brought the deceased at her matrimonial home on that fateful day i.e. 11.4.013. The first informant had received a telephonic information that his daughter has been done to death, on this information, the informant as well as his family members reached to the matrimonial house of deceased, they saw that the dead body was lying at her matrimonial house inside the floor of room with wounds and contusions on her body. This incident had happened about 8:00 o'clock in the morning and on the basis of above allegations, FIR lodged by PW-1 in P.S., Java, District Aligarh on 11.4.2013 at about 15:40 pm. against the appellant/accused Ajay Kumar (husband of the deceased) and also against Bhagwan Singh (Father in law), Meena Devi (Mother in law), Nirmala Devi (Jethani), Km. Neetu (Nanad).

3. Investigation of this case handed over to the C.O. Sansar Singh Investigating Officer, recorded the statement of informant and other witnesses and also prepared the site plan Exhibit Ka-3 and he also collected the post mortem report and inquest report after conducting the formality of investigation. Investigating Officer submitted the charge sheet (Exhibit-Ka-4) against the appellant Ajay Kumar as well as Bhagwan Singh and Meena Devi under Sections 498A / 304B IPC and section 3/4 D.P. Act exonerated other named accused, namely, Smt. Nirmala Devi and Km. Neetu.

4. Charge sheet submitted before the CJM concerned on 25.6.2013 and trial committed before the court of sessions Judge where it is registered as sessions trial No. 529 of 2013 from where this case was transferred for trial to the Additional Distirct Judge, Fast Track Court-1, Aligarh.

5. On 6.9.2013 appellant as well as other accused charged under Sections 498A/149, 304/149 and under section 4 of the D.P. Act in alternative the appellant

was charged under Sections 302/149 IPC. After framing of the charges, they denied all the charges against them and claimed trial.

6. To bring home to the accused prosecution has examined 7 witnesses PW-1 Ramakishan, (complainant) father of the deceased; PW-2 Lokman, uncle of the deceased; PW-3 Saroj, Baua of the deceased; PW-4 Sansar Singh, Circle Officer, Aligarh; PW-5 Dr. S.K. Varshney, C.M.O. Mahoba; PW-6 Rajbahadur Singh, Constable and PW-7 O.P. Rana, Investigating Officer.

7. After conclusion of the evidence of prosecution, statement of the accused recorded under Section 313 Cr.P.C. in which all the accused stated that at the time of incident they were not present on spot and they are falsely implicated in this case.

8. In defence, DW 1 Rajpal Singh examined, he deposed that at the time of incident all the accused were present in their field and busy in doing agricultural work in their field. Nobody was present inside the house at the time of alleged incident.

9. After conclusion of the trial, learned trial court exonerated the co-accused Bhagwan Singh and Smt. Meera Devi against charge levelled upon them and after appreciating the evidence on record the prosecution has been able to prove his case against the appellant beyond reasonable doubt and, therefore, the appellant convicted under Sections 304-B IPC and 4 D.P. Act.

10. Being aggrieved by the judgement and order of conviction dated 13.1.2017, this appeal has been filed by the appellant.

11. I have heard learned counsel for the appellant-Sri Noor Mohammad, learned AGA and perused the material available on record.

12. The Exhibit Ka-2-inquest report of the dead body of the deceased-Smt. Maya Devi was done by Virendra Singh, Tehsildar, Tehsil-Kol, District Aligarh in the presence of Sub Inspector-O.P. Rana and police papers were also prepared by Sub Inspector-O.P. Rana. Recovery memo of broken bengles, rings, ear rings, hair clips, khadia, plastic rope was prepared which is Exhibit Ka-8 and a recovery memo of plain soil & vomit mixed soil was also prepared which is Exhibit Ka-9.

13. The post mortem of the death body of Smt. Maya Devi was performed by Dr. S.K. Varshney (P.W. 5) on 12th April, 2013 at about 1:00 pm at District Hospital, Aligarh which is Exhibit Ka-5, in which, doctor found the age of the deceased as about 20 years and the deceased was found to be of average built. Her eyes and bones were protruded. Rigormorties was passed over from the upper part of the body which was present in the lower part of the body. Face and eyes were congested. Clotted blood was present in the left ear and nose.

14. Following ante mortem injuries were found on the body of the deceased:-

1. Contusion at left upper eye lid, measuring 2 cm X 1 cm.

2. Abrasion at left ankle lateral side measuring 1 cm X 1 cm.

3. Abrasion/contusion right side of forehead 2 cm above right eyebrow measuring 1.5 cm X 1 cm.

4. Ligature Marks of 28 cm X 2 cm of around neck upper part present.

5. The mark was hard groomed, leathery on dissection subcutaneous

membrane tissue found congested and hemorrhage present.

6. Hyoid bone found fractured.

7. On internal examination, membrane of brain larynx hard; lever, pancreas spleen and other parts of the body were congested.

15. This post mortem report Exhibit Ka-5 was done on the concurrence of Dr. S.K. Verma who has also put his signature on the post mortem report.

16. Dr. S.K. Varshney (PW-5) opined that the cause of death is strangulation asphyxia due to strangulation and death was done one day before.

17. According to Modi's Medical Jurisprudence and Toxicology, 23rd Edition, followings are the symptoms of death caused of strangulation:-

"If the windpipe is compressed so suddenly as to occlude the passage of air altogether, the individual is rendered powerless to call for assistance, becomes insensible, and may die instantly. If the windpipe is not completely closed, the face becomes cyanosed, bleeding occurs from the mouth, nostrils and ears, the hands are clenched and convulsions precede delayed death. As in hanging, insensibility is very rapid, and death is quite painless."

a. The death is usually due to asphyxia, but it may be due to other causes, namely, cerebral ischemia or venous congestion, asphyxia and venous congestion combined, or shock due to reflex cardiac arrest.

b. In the case, where the death is caused due to asphyxia, eyes are prominent and open. The pupils are dilated. The tongue is often swollen, bruised, protruding and dark in colour.

c. According to postmortem report, the membranes were congested, brain was congested, spinal cord was congested, larynx and trachea were crushed. Both the lungs were congested, pericardium was congested.

d. According to Modi's Medical Jurisprudence and Toxicology, 23rd Edition, the larynx and trachea are congested in the case of strangulation. The lungs are usually markedly congested, showing haemorrhagic patches and petechiae and exuding dark fluid blood on section. Brain is also congested and abdominal organs are darkly congested.

18. Prosecution, in order to prove its case before the trial court, has produced seven witnesses complainant **PW-1** (father of the deceased-Maya Devi) Ram Kishan has stated that her daughter was married to the appellant-Ajay Kumar and during marriage he spent about Rs. Three-Four Lakhs but the family members of in-laws were not happy and started demanding Rs. One Lakh in cash as additional dowry but he could not fulfill the demand of the appellant and his family members. They started treating her with physical cruelty. He console her daughter that by passage of time everything shall be sort out. On 9.4.2013 all the members of in-laws family came to his house for the purpose of *'vidai'* and assured that in future they will not harass his daughter. On that fateful day, he received telephonic call from the police then he alongwith his wife, brother-Lokman and Ram Kishore rushed to the village-Pala, Aligarh when they reached there, all the family members of in-law's had run away from the place of occurrence and dead body was lying inside the room near the bed, he lodged the first

information report, Exhibit Ka 1 at P.S. Java, Aligarh.

19. PW-2 Lokman is the witness who is the brother of the PW-1, he also supported the evidence of PW-1 Ram Kishan.

20. PW-3 Saroj who is the wife of PW-2 (Real Aunty of the deceased) also deposed that the appellant as well as in law of the victim were harassed and victimized the deceased on demand of additional dowry of Rs. One Lakh. This fact came into light when Maya Devi came in her maternal home then she told her mother that her inlaws are harassing her on demand of dowry. PW-3 Saroj clearly stated in her statement that all the family members of inlaws committed murder of Maya Devi.

21. PW-4 Sansar Singh who was Circle Officer-III, Aligarh on 11.4.2013 and investigated the case, in that capacity, he collected the copy of application, Chik FIR, general case diary and recorded the statement of FIR Writer Rajbahadur Singh, statement of informant Ram Krishan and prepared the site plan in his handwriting and signature and proved the same as Exhibit Ka-3 and after recording the evidence of witness under Section 161 Cr.P.C. submitted the chargesheet-Exhibit Ka-4 against the accused persons under his signature and in his handwriting.

22. PW-5 is Dr. S.K. Varshney whose statement has already discussed in aforesaid paragraph.

23. PW-6 is constable-clerk Rajbahadur Singh of police station, Java, Aligarh who registered the FIR and prepared the Chik FIR on the basis of the Tehriri-Exhibit Ka-1 and proved the same as Exhibit Ka-6 and he also prepared the G.D. Srl. No. 35, 1540 dated 11.4.2013 in his handwriting and proved as Exhibit Ka-7.

24. PW-7 Inspector O.P. Rana who assisted the Investigating Officer PW-4 Sansar Singh and on the instruction of PW-4 Sansar Singh he prepared the recovery memo of Bangles, Hairclips, ear rings and plastic rope measuring about three hands in which wood is tied in both ends, which are proved as Exhibit Ka-8 and a recovery memo of plain soil as well as vomiting mixed soil Exhibit Ka-9.

25. The appellant also produced one defence witness DW-1-Rajpal Singh who deposed his statement that he know the appellant and he resided in the same village and the appellant's house is too close to this house. At the time of incident, crop was cutting and appellant as well as other family members were present in wheat field. Information of the death of Maya Devi was given by the children of the village then the appellant as well as he was rushed to the house of the appellant at that time except deceased nobody was present there.

26. Learned counsel for the appellant submitted that the trial court has convicted the appellant purely on the basis of surmises and conjectures and has failed to appreciate the evidence available on record. He further submitted that the trial court has ignored the major contradictions present in the testimony of the prosecution witnesses and it is next submitted that informant has failed to produce any independent witness either of the village of the appellant or village of informant to support the prosecution case.

27. Learned counsel for the appellant contended that the death of the deceased-Maya Devi was suicidal and is not homicidal and it is further argued that the appellant in his statement recorded under Section 313 Cr.P.C. has stated that due to his disability his wife herself committed suicide due to stress and has also submitted that at the time of incident, he was not present in his house but he was present in the field with all the family members. It is also submitted that no grievous injury is seen in the inquest report and also submitted that from the prosecution evidence, demand of dowry is not made. The prosecution has utterly failed to prove that just before her death deceased-Maya Devi was subjected to cruelty and harassment by her husband or any relative of the husband, in connection with, demand of dowry. Learned trial court has passed the impugned order without properly appreciating the evidence. The prosecution has failed to prove guilty of the appellant beyond reasonable doubt. Lastly, learned counsel for the appellant has mainly argued to consider the appeal on the quantum of sentence. He submits that the appellant is languishing in jail since 17.4.2013 which is near about 7 years. The appellant who is a very poor person, is a daily wage worker and disabled person. He has to face a lot of difficulty to do the daily tasks of the life. The period of 10 years imprisonment is too excessive, hence, he prays for leniency and submitted that since the appellant's sentence prescribed under Section 304 B IPC that is to say 7 years, should be reduced.

28. Per contra, learned AGA contended that victim was died inside the house in her matrimonial home by means of strangulation. PW-5 Dr. Varsaney opined that the cause of death is asphyxia as a result of ante mortem strangulation and further submitted that this is the clear cut case of murder and also submitted that there is no any document submitted by the appellant with regard to his physical disability. It is proved by clinching evidence that deceased died within seven years of marriage due to physical and mental torture and is also proved that soon before her death the victim was harassed and tortured by making demand of additional dowry. Hence, learned AGA lastly contended that there is no infirmity or illegality in the impugned order passed by the trial court and as such the appeals are liable to be dismissed.

29. To appreciate the arguments of the parties and also the evidence, it is necessary to look into the statutory provisions of Section 304 B IPC and Section 113 B of the Evidence Act (hereinafter referred to as 'the Act'). Provisions of Section 304 B IPC reads as follows:

[304B. Dowry death.--(1) Where the death of a woman is caused by any burns or bodily injury or occurs otherwise than under normal circumstances within seven years of her marriage and it is shown that soon before her death she was subjected to cruelty or harassment by her husband or any relative of her husband for, or in connection with, any demand for dowry, such death shall be called "dowry death", and such husband or relative shall be deemed to have caused her death.

Explanation.--For the purpose of this sub-section, "dowry" shall have the same meaning as in section 2 of the Dowry Prohibition Act, 1961 (28 of 1961).

(2) Whoever commits dowry death shall be punished with imprisonment

for a term which shall not be less than seven years but which may extend to imprisonment for life.]

30. Section 113 B of the Act reads as follows:

[113B. Presumption as to dowry death.--When the question is whether a person has committed the dowry death of a woman and it is shown that soon before her death such woman has been subjected by such person to cruelty or harassment for, or in connection with, any demand for dowry, the Court shall presume that such person had caused the dowry death. Explanation.--For the purposes of this section, "dowry death" shall have the same meaning as in 304 B of the Indian Penal Code, (45 of 1860).]

31. As per definition of dowry death under Section 304 B IPC and the wording in the presumptive Section 113 B of the Act, if it is proved that death of woman is caused by any burn or bodily injury or occurs otherwise than under normal circumstances within seven years of her marriage and it is shown that soon before her death (i) She was subjected to cruelty or harassment by her husband or his relatives, or (ii) Such cruelty or harassment was for, or in connection with, demand of dowry, or (iii) Such cruelty or harassment was soon before her death; then it becomes obligatory on the court to raise a presumption that accused caused dowry death.

32. As per post mortem report Exhibit Ka-9 and statement of Dr. Varsaney PW-5 is that cause of death of deceased-Maya Devi asphyxia as result of strangulation, this shows that the death of the deceased was homicidal and not suicidal. The contention of the learned counsel for the appellant that the deceased committed suicide by hanging herself is not acceptable. PW-5 Dr. S.K. Varsaney in his statement clearly stated that the death of the deceased was caused by strangulation. In the present case, dead body of the deceased was lying on bed, inside, bedroom of appellant. It was for him to explain under Section 106 of Evidence Act that under what circumstances his wife died.

33. In ***[2016 (4) SCC Page 604]***, in the case of ***Gajanan Dashrath Kharate v. State of Maharashtra***, their Lordships of Hon. Supreme Court have held that the initial burden to establish the case would undoubtedly be upon the prosecution. In view of Section 106 of the Evidence Act, there will be a corresponding burden on the inmates of the house to give cogent explanation as to how the crime was committed. The inmates of the house cannot get away by simply keeping quiet and offering no explanation on the supposed premise that the burden to establish its case lies entirely upon the prosecution and there is no duty at all on the accused to offer explanation. In paragraph no.13, their Lordships have held as under: -

"13. As seen from the evidence, appellant Gajanan and his father Dashrath and mother Mankarnabai were living together. On 7-4-2002, mother of the appellant-accused had gone to another Village Dahigaon. The prosecution has proved presence of the appellant at his home on the night of 7-4- 2002. Therefore, the appellant is duty-bound to explain as to how the death of his father was caused. When an offence like murder is committed in secrecy inside a house, the initial burden

to establish the case would undoubtedly be upon the prosecution. In view of Section 106 of the Evidence Act, there will be a corresponding burden on the inmates of the house to give cogent explanation as to how the crime was committed. The inmates of the house cannot get away by simply keeping quiet and offering no explanation on the supposed premise that the burden to establish its case lies entirely upon the prosecution and there is no duty at all on the accused to offer. On the date of the occurrence, when the accused and his father Dashrath were in the house and when the father of the accused was found dead, it was for the accused to offer an explanation as to how his father sustained injuries. When the accused could not offer any explanation as to the homicidal death of his father, it is a strong circumstance against the accused that he is responsible for the commission of the crime."

34. As per post mortem report, Exhibit ka-5, 8 injuries was found on the person of the deceased were contusions and contused swelling. In this case, larynx and trachea are congested. Lungs are also congested. Clotted blood was present in the mouth and nose tray. These are the signs which is clearly shows that in the present case, death of the deceased was homicidal.

35. Prosecution witness PW-1 Ramkishan, PW-2 Lokman, PW-3 Saroj proved this fact that the marriage of Smt. Maya Devi was solemnized with the accused-appellant on 17.5.2011. This fact was also been admitted by accused in their statement under Section 313 Cr.P.C. The deceased died on 11.4.2013 about 8:00 hours in the morning, therefore, it is proved beyond doubt that the death of deceased-Maya Devi was done within 7 years of her marriage and her death was caused otherwise than in normal circumstances.

36. Now, it has to be seen that just before her death, deceased Smt. Maya Devi was subjected to cruelty or harassment by her husband and any relative of husband in connection with demand of dowry. This element and burden of prove in case of dowry deaths have been dealt with in detail by ***Hon'ble The Apex Court in Sher Singh @ Pratapa v. State of Haryana 2015 (89) ACC 288 (SC). The Apex Court*** held as under:

12. In our opinion, it is beyond cavil that where the same word is used in a section and/or in sundry segments of a statute, it should be attributed the same meaning, unless there are compelling reasons to do otherwise. The obverse is where different words are employed in close proximity, or in the same section, or in the same enactment, the assumption must be that the legislature intended them to depict disparate situations, and delineate dissimilar and diverse ramifications. Ergo, ordinarily Parliament could not have proposed to ordain that the prosecution should "prove" the existence of a vital sequence of facts, despite having employed the word "shown" in Section 304 B. The question is whether these two words can be construed as synonymous. It seems to us that if the prosecution is required to prove, which always means beyond reasonable doubt, that a dowry death has been committed, there is a risk that the purpose postulated in the provision may be reduced to a cipher. This method of statutory interpretation has consistently been disapproved and deprecated except in exceptional instances where the

syntax permits reading down or reading up of some words of the subject provisions.

13. In Section 113A of the Evidence Act Parliament has, in the case of a wife's suicide, "presumed" the guilt of the husband and the members of his family. Significantly, in section 113 B which pointedly refers to dowry deaths, Parliament has again employed the word "presume". However, in substantially similar circumstances, in the event of a wife's unnatural death, Parliament has in Section 304 B "deemed" the guilt of the husband and the members of his family. The Concise Oxford Dictionary defines the word "presume" as: supposed to be true, take for granted; whereas "deem" as: regard, consider; and whereas "show" as: point out and prove. The Black's Law Dictionary (5th Edition) defines the word "show" as- to make apparent or clear by the evidence, to prove; "deemed" as- to hold, consider, adjudge, believe, condemn, determine, construed as if true; "presume" as- to believe or accept on probable evidence; and "Presumption", in Black's, "is a rule of law, statutory or judicial, by which finding of a basic fact gives rise to existence of presumed fact, until presumption is rebutted." The Concise Dictionary of Law, Oxford Paperbacks has this comprehensive yet succinct definition of burden of proof which is worthy of reproduction:

"Burden of Proof: The duty of a party to litigation to prove a fact or facts in issue. Generally the burden of proof falls upon the party who substantially asserts the truth of a particular fact (the prosecution or the plaintiff). A distinction is drawn between the persuasive (or legal) burden, which is carried by the party who as a matter of law will lose the case if he fails to prove the fact in issue; and the evidential burden (burden of adducing evidence or burden of going forward), which is the duty of showing that there is sufficient evidence to raise an issue fit for the consideration of the trier of fact as to the existence or non-existence of a fact in issue.

The normal rule is that a defendant is presumed to be innocent until he is proved guilty; it is therefore the duty of the prosecution to prove its case by establishing both the actus reus of the crime and the mens rea. It must first satisfy the evidential burden to show that its allegations have something to support them. If it cannot satisfy this burden, the defence may submit or the judge may direct that there is no case to answer, and the judge must direct the jury to acquit. The prosecution may sometimes rely on presumptions of fact to satisfy the evidential burden of proof (e.g. the fact that a woman was subjected to violence during sexual intercourse will normally raise a presumption to support a charge of rape and prove that she did not consent). If, however, the prosecution has established a basis for its case, it must then continue to satisfy the persuasive burden by proving its case beyond reasonable doubt (see proof beyond reasonable doubt). It is the duty of the judge to tell the jury clearly that the prosecution must prove its case and that it must prove it beyond reasonable doubt; if he does not give this clear direction, the defendant is entitled to be acquitted.

There are some exceptions to the normal rule that the burden of proof is upon the prosecution. The main exceptions are as follows. (1) When the defendant admits the elements of the crime (the actus reus and mens rea) but pleads a special defence, the evidential burden is upon him to prove his defence. This may occur, the example, in a prosecution for murder in

which the defendant raises a defence of self-defence. (2) When the defendant pleads automatism, the evidential burden is upon him. (3) When the defendant pleads insanity, both the evidential and persuasive burden rest upon him. In this case, however, it is sufficient if he proves his case on a balance of probabilities (i.e. he must persuade the jury that it is more likely that he is telling the truth than not). (4) In some cases statute expressly places a persuasive burden on the defendant; for example, a person who carries an offensive weapon in public is guilty of an offence unless he proves that he had lawful authority or a reasonable excuse for carrying it".

14. As is already noted above, Section 113 B of the Evidence Act and Section 304B of the IPC were introduced into their respective statutes simultaneously and, therefore, it must ordinarily be assumed that Parliament intentionally used the word 'deemed' in Section 304B to distinguish this provision from the others. In actuality, however, it is well nigh impossible to give a sensible and legally acceptable meaning to these provisions, unless the word 'shown' is used as synonymous to 'prove' and the word 'presume' as freely interchangeable with the word 'deemed'. In the realm of civil and fiscal law, it is not difficult to import the ordinary meaning of the word 'deem' to denote a set of circumstances which call to be construed contrary to what they actually are. In criminal legislation, however, it is unpalatable to adopt this approach by rote. We have the high authority of the Constitution Bench of this Court both in State of Travancore-Cochin v. Shanmugha Vilas Cashewnut Factory, AIR 1953 SC 333 and State of Tamil Nadu v. Arooran Sugars Limited (1997) 1 SCC 326, requiring the Court to ascertain the purpose behind the statutory fiction brought about by the use of the word 'deemed' so as to give full effect to the legislation and carry it to its logical conclusion. We may add that it is generally posited that there are rebuttable as well as irrebuttable presumptions, the latter oftentimes assuming an artificiality as actuality by means of a deeming provision. It is abhorrent to criminal jurisprudence to adjudicate a person guilty of an offence even though he had neither intention to commit it nor active participation in its commission. It is after deep cogitation that we consider it imperative to construe the word 'shown' in Section 304B of the IPC as to, in fact, connote 'prove'. In other words, it is for the prosecution to prove that a 'dowry death' has occurred, namely, (i) that the death of a woman has been caused in abnormal circumstances by her having been burned or having been bodily injured, (ii) within seven years of a marriage, (iii) and that she was subjected to cruelty or harassment by her husband or any relative of her husband, (iv) in connection with any demand for dowry and (v) that the cruelty or harassment meted out to her continued to have a causal connection or a live link with the demand of dowry. We are aware that the word 'soon' finds place in Section 304B; but we would prefer to interpret its use not in terms of days or months or years, but as necessarily indicating that the demand for dowry should not be stale or an aberration of the past, but should be the continuing cause for the death under Section 304B or the suicide under Section 304B of the IPC. Once the presence of these concomitants are established or shown or proved by the prosecution, even by preponderance of possibility, the initial presumption of innocence is replaced by an assumption of guilt of the accused,

thereupon transferring the heavy burden of proof upon him and requiring him to produce evidence dislodging his guilt, beyond reasonable doubt. It seems to us that what Parliament intended by using the word 'deemed' was that only preponderance of evidence would be insufficient to discharge the husband or his family members of their guilt. This interpretation provides the accused a chance of proving their innocence. This is also the postulation of Section 101 of the Evidence Act. The purpose of Section 113B of the Evidence Act and Section 304B of the IPC, in our opinion, is to counter what is commonly encountered - the lack or the absence of evidence in the case of suicide or death of a woman within seven years of marriage. If the word "shown" has to be given its ordinary meaning then it would only require the prosecution to merely present its evidence in Court, not necessarily through oral deposition, and thereupon make the accused lead detailed evidence to be followed by that of the prosecution. This procedure is unknown to Common Law systems, and beyond the contemplation of the Cr.P.C.

37. It is well settled principle of law that once prosecution proved that where the death of the woman which was occurred otherwise under normal circumstances within 7 years of her marriage and she was subjected to cruelty and harassment by her husband and relatives of her husband soon before her death in connection with the demand of dowry, then heavy burden of proof lies upon accused to adduce evidence dislodging his guilt, beyond reasonable doubt. In the present case accused appellant-Ajay Kumar had failed to prove reason of doubt that his wife Smt. Maya Devi committed suicide due to depression.

38. In the present case, at the time of incident when the parent and relative were arrived at the matrimonial house of the deceased then they saw that all of the family members of in-law had run away from the scene of occurrence. Neither of any family member was present at the time of preparation of the inquest report. These are the circumstances are clearly shows the indulgence of the appellant.

39. From the post mortem report and statement of the doctor, it is evident that the deceased was beaten just before her death, she was strangulated. This fact is admitted that the deceased is died inside the house and in place of occurrence broken bangles, rings, ear rings, hair clips, plastic rope (fastened with wood) were recovered at the place of occurrence which shows that the deceased was murdered by committing strangulation and by pressing neck of the deceased.

40. Contention of the learned counsel for the appellant is that the prosecution has failed to prove that soon before death of deceased-Maya Devi there was demand of dowry by the accused. To convict the accused under Section 304 B IPC, it is not necessary for prosecution to prove that soon before her death there was no demand of dowry. It will be sufficient for prosecution to prove that soon before the death of the deceased, she was subjected to cruelty or harassment for any demand of dowry or in connection with any demand of dowry.

41. Last argument of learned counsel for the appellant is that the appellant is languishing jail since 17.4.2013 about 7 years. Appellant is disable and very poor person and daily wager so considering the peculiar facts and circumstances, prayer

for reduction of sentence from 10 years to 7 years.

42. In this particular case, deceased was beaten and she resisted before her death. On place of occurrence, broken bangles, one plastic rope tied with both ends with wood measuring three hands and autopsy of dead body was conducted by PW-5 Dr. S.K. Varshney noted several ante mortem injuries besides ligature mark measuring 28 cm X 2 cm around the neck and bones underneath were found fractured cause of death was strangulation.

43. The appellant was charged for offence under Section 498A, 304 B and Section ¾ D.P. Act with alternative charge of under section 302 IPC although learned sessions court after appreciating the evidence arrived at a finding that the deceased died about two years of her marriage and held that offence under Section 304 B and Section 4 D.P. Act is proved beyond shadow of doubt but learned trial court acquitted the appellant on alternative charge under Section 302 IPC while holding that since the offence under section 304 B had been fully established by prosecution therefore, the appellant could not be convicted under Section 302 IPC. Thus, finding of the court below is totally whimsical and against the evidence on record acquittal of the appellant under Section 302 IPC is against the evidence on record but as no appeal on behalf of the State for enhancement of sentence. In these circumstances, this Court is not inclined to interfere the judgement and order of the trial court.

44. So far as contention of learned counsel for leniency and reduction of sentence of accused-appellant-Ajay Kumar is concerned, it is not a case of suicidal death but a case of homicidal death. There is no mitigating circumstance against the applicant. It shall not be justified to interfere or reduce the sentence awarded to appellant. Accordingly, the appeal is liable to be dismissed.

45. The conviction and sentence of appellant-Ajay Kumar passed by Additional Sessions Judge, Fast Track Court No. 1 Aligarh, under Sections 304B and 4 D.P. Act are hereby **upheld**. The appellant-Ajay Kumar is in jail and he shall serve out the sentence awarded to him.

46. In view of the above, the appeal is **dismissed**.

47. Office is directed to transmit the certified copy of this order to the court below alongwith the lower court record, for necessary compliance.

(2020)02ILR A698

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 29.01.2020

BEFORE
THE HON'BLE ARVIND KUMAR MISHRA-I, J.
THE HON'BLE GAUTAM CHOWDHARY, J.

Criminal Appeal No. 589 of 1986

Girraj Singh & Ors. ...Appellants (In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Appellants:
Sri G.C. Saxena, Sri S.P. Giri

Counsel for the Opposite Party:
D.G.A.

A. Criminal Law-Indian Penal Code-Sections 302/34 - Appeal against conviction.

So far as the applicability of ingredients of Section 34 I.P.C. is concerned, the totality of the circumstances when taken as a whole establishes the prevalence of common intention amongst all the three accused, who con-jointly committed the offence.

No doubt, one caused the firearm injury and the other two assailants, who were empty handed, were present on the spot, but they shared the common intention and had only one motive to kill the deceased. (Para 29)

The Investigating Officer committed minor lapses at the time of the investigation, but these lapses on the part of the Investigating Officer cannot be considered to be material one carrying weight to throw the entire prosecution version. Once the incident stands proved, participation of the accused in the incident is cogently proved by the evidence of the prosecution witnesses at the time and place of occurrence and nothing adverse emerges in the cross examination of the eye witnesses, then only conclusion drawn from the evidence, facts and circumstances of the case is the guilt of the accused. (Para 27)

In view of above discussion, the prosecution has been able to establish reasonably guilt of the accused under charges brought against him and the prosecution has proved its case beyond reasonable doubt. (Para 28)

Criminal Appeal rejected. (E-2)

(Delivered by Hon'ble Arvind Kumar Mishra-I, J. & Hon'ble Gautam Chowdhary, J.)

1. Heard Sri S.P. Giri, learned counsel for the appellant no.1 Giriraj Singh, learned A.G.A. for the State and perused the material brought on record.

2. In this case that appellant nos. 2 and 3 namely Jalim Singh and Fatte Singh have since expired during pendency of this appeal, therefore, the instant appeal against them stood abated on 20.08.2018. The instant appeal pertains to the surviving appellant no.1 Girraj Singh.

3. By way of instant appeal, challenge has been made to the authenticity and veracity of the judgment and order of conviction dated 15.2.1986 passed by the IInd Additional Sessions Judge, Mathura in Session Trial No. 174 of 1985 State Versus Giriraj Singh and others, arising out of Case Crime No. 113 of 1984 under section 302 I.P.C., P.S. Baldev, District Mathura whereby the trial judge has recorded judgment of conviction against the surviving appellant Girraj Singh and sentenced him under sections 302/34 I.P.C. to imprisonment for life.

4. Brief facts of the case as discernible/relevant for the adjudication of this appeal appear to be that a written report was lodged by the informant, P.W. 4 Basant Kumar, at Police Station Baldev District Mathura on 25.6.1984 at 7.10 a.m. with the allegations that Munga Ram, his maternal grand father had been owning 25 bighas of land, which was given to the informant's mother by executing a will two years ago. Jalim Singh and Girraj Singh sons of Dani Ram are the nephews of Munga Ram, they prepared a fake agreement to sell dated 28th March, 1984, for 25 bighas of land regarding which a suit was instituted by the maternal grand father of the informant, due to which there was enmity between them. On account of that enmity, it so happened that the informant was sleeping on the cot with his maternal grand father on 24.6.1984 and at the same time Hoti Lal and two other persons were also sleeping on their respective cots at short distance. It was

around 10.00 p.m. when Girraj Singh, Jalim Singh and Fatte Singh appeared on the spot and asked that since the land was not given to them, therefore, he (the informant's maternal grand father) will not be spared. After saying so, Jalim Singh opened fire on the deceased Munga Ram, due to which he died on the spot. The incident was also witnessed by Hoti Lal and Lakhan Singh. It was stated that the dead body was lying in the village. Report be lodged and action be taken. This written report is Exhibit- Ka- 4.

5. On the basis of the check F.I.R. (Ext. Ka-5), its corresponding G.D. entry was prepared, which is Ext. Ka.-6, and the case was registered under section 302 I.P.C. and the investigation ensued and it was entrusted to Ajay Kumar Yadav PW-5, who pursuant to the lodging of the FIR, took note of the relevant contents of the FIR, made entry in the G.D. and proceeded to the spot around 9.00 a.m. for preparing inquest report.

6. A perusal of the record reflects that after the report was lodged by the informant, the inquest was prepared, which commenced at 9.00 a.m. and completed at 10.15 a.m. on 25.6.1984. Thereafter, on the basis of the relevant papers and the statement of the inquest witnesses, it was thought proper for sending the dead body for post mortem examination in order to ascertain cause of death. In the process, certain papers were prepared by the Investigation Officer for sending the dead body for conduction of post mortem examination to the mortuary. These papers have been proved as Ext. Ka-7, Ext. Ka-8, Ext. Ka-9, Ext. Ka-10 and Ext. Ka-11. Consequently, the post mortem examination was conducted by Dr. R.C. Chauhan P.W. 3, at 3.00 p.m. on 26.6.1984 who noted the following ante morterm injuries:-

1. Firearm wound of entry 1.5 cm x 1.5 cm x cavity deep on front of right chest, 5 superior and medial to right nipple. Lung is protruded out. Margin lacerated and inverted. Blackening present around the wound.

2. Firearm wound of exit 3 cm x 3 cm x cavity deep on back of the left side abdomen in middle part,6 cm superior and medial to left posterior iliac crest, Margin everted. Loops of intestine coming out, communicated to injury no. 1.

7. In the opinion of the doctor, the cause of death was shock and haemorrhage due to ante mortem injuries. The testimony of the doctor PW-3 shows that death might have occurred in the intervening night of 24/25.6.1984 at 10:00 p.m. He has proved the post mortem examination report which is Exhibit Ka-1.

8. Record further reflects that the Investigating Officer PW-3, also prepared the site plan Exhibit Ka-12 and also collected head/cap of the cartridge (Tikli) and prepared the memo of the same which is Exhibit Ka-13. Besides, he prepared memo of the simple and blood stained clay which is Ext. Ka-14. He also prepared memo of the lantern Exhibit Ka-15 and recorded the statement of Hoti Lal, Lakhan Singh and the informant's mother. He has proved the memo of vest Ext.- Ka 16 prepared by Head Constable Shri Kishan. After completing the investigation, he filed the charge sheet Ext. Ka-17 against the accused.

9. As a sequel to that, the case was committed to the court of Sessions from where it was transferred for conduction

and disposal of trial to the aforesaid trial court ? i.e. - II-Additional Sessions Judge, Mathura who after hearing the accused-appellant and the prosecution on point of charge and perusing the record was satisfied with prima facie case against the accused-appellant and, accordingly, framed charge under Section 302/34 IPC. Charge was read over and explained to the accused-appellant who abjured the charge and opted for trial.

10. Thereafter, the prosecution was required to adduce its testimony in support of the charge in order to establish guilt of the accused-appellant beyond reasonable doubt. In turn, the prosecution produced in all seven witnesses, reference of whom is given here in below:

11. Hoti Lal PW-1 and Lakhan Singh P.W. 2. are eyewitnesses and they have admitted the occurrence but have turned hostile on the point of identification of the culprits/assailants as to who caused the incident, they have been declared hostile and cross examined by the prosecution as well. Dr. R.C. Chauhan P.W. 3 who conducted the post mortem examination has proved the same. Basant Kumar PW-4, the informant is also the eye witness of the occurrence. He has supported the prosecution version and has proved the written report Exhibit- Ka-4. S.I. Ajay Kumar Yadav P.W. 5 is the Investigating Officer. He has detailed various steps taken in completing the investigation and has filed charge sheet Ext. Ka-1. However, he also proved the entry made in the check FIR and the relevant entries made in the concerned G.D. whereby the case was registered against the accused. Shiv Lal PW-6 is the Constable who took the dead body of Munga Ram to the mortuary and has proved the fact before the trial court. Virpal Singh P.W. 7 is the constable, he brought the chemical report and various material from the laboratory at Agra.

12. Except as above, no other testimony was adduced by the prosecution. Consequently, evidence for the prosecution was closed and statement of the accused-appellant was recorded under Section 313 Cr.P.C. wherein the incident has been specifically denied by the accused-appellant and it has been claimed that he has been falsely implicated in the present case on account of enmity. He has further submitted that some miscreants had committed the incident and Basant Kumar has wrongly and falsely roped in him in this case.

13. The defence got examined Man Singh D.W. 1 who scribed the written report and has tried to persuade the court that he, in fact, was called around 8.00 to 9.00 p.m. the next day after the occurrence took place and then the written report was scribed by him. No other evidence was adduced. Thereafter, evidence for the defence was closed and the case was posted for arguments.

14. Learned trial Judge after hearing the parties on merit recorded aforesaid finding of conviction against the accused-appellant and sentenced him to imprisonment for life under Section 302/34 IPC vide impugned judgment and order dated 15.02.1986.

15. Consequently, this appeal.

16. It has been vehemently contended on behalf of the accused-appellant that there is no specific motive for the accused- appellant to indulge in any such act as alleged against him. More

so, had he participated in the incident at the time and on the date of the occurrence then he must not have appeared on the scene empty handed without any weapon. At the most, the case is made out against the co-accused Jalim Singh who is stated to have opened fire on the deceased Munga Ram. There is only one firearm wound in the shape of entry wound as well as exit wound. Peculiarity of this case is that there are witnesses who are said to have witnessed the incident. However, two of the eye witnesses namely PW-1 and PW-2 have not supported the case of the prosecution. The case does not attract the provisions of Section 34 I.P.C. and no culpability can be fastened upon the accused-appellant on the ground of applicability of common intention.

17. It has been further contended that apart from various other aspects of the case, FIR is ante timed and was not lodged at the time when it is stated to have been lodged at 7.00 a.m. on 25.6.1984. The testimony of Maan Singh D.W. 1 in that regard cannot be overlooked that gives credence to the case of the accused-appellant that his involvement is afterthought and it is due to deliberation between the police and the informant.

18. While replying to the aforesaid argument, learned A.A.G. assisted by the learned A.G.As. has claimed that in this case, the quality of the evidence regarding the occurrence alleged to have been caused at 10.00 p.m. on 24.6.1984 in the intervening night of 24/25.6.1984 cannot be denied in view of the innocuous testimony of the eye witness Basant Kumar P.W. 4, No doubt, the other two independent witnesses were also present and their names have been mentioned in the FIR, but they have been wonover by the defence as they resiled from their statement recorded earlier under section 161 Cr.P.C. and are not stating the correct fact. However, their testimony after all confirms and establishes the time of the occurrence as 10.00 p.m. To say, that the unknown assailants committed the incident is nothing but an argument without any basis not supported by the attendant circumstances of the case and not a single suggestion has been made to Basant Kumar P.W. 4, eye witness in regard to the commission of the offence by any other person. That being the case, the incident stands proved beyond all reasonable doubt against the appellant.

19. So far as the applicability of ingredients of Section 34 I.P.C. is concerned, the totality of the circumstances when taken as a whole establishes the prevalence of common intention amongst all the three accused, who con-jointly committed the offence. No doubt, Jalim Singh caused the firearm injury and the other two assailants, who were empty handed, were present on the spot, but they shared the common intention and had only one motive to kill the deceased Munga Ram. That way, the case of the prosecution under sections 302/34 I.P.C. stands proved against the appellant beyond reasonable doubt. Evidence on record profusely indicates involvement of the accused-appellant in the occurrence. The trial court has taken correct view of law and facts and has justifiably recorded conviction against the accused-appellant.

20. We have considered the respective submissions and also perused the entire record.

21. As far as the incident is concerned, a bare perusal of the first information report is indicative of the that the incident occurred at 10.00 p.m. in the intervening night of 24/25.6.1984 regarding which description has come

forth that it was around 10.00 p.m. Giriraj Singh, Jalim Singh and Fatte Singh arrived on the spot and asked the deceased that they will not spare him because he has not given his land to them. Upon saying so, Jalim Singh opened fire on the deceased Munga Ram by a single shot which caused his death. In that regard, ocular testimony of the prosecution witnesses of fact becomes relevant for its evaluation and appreciation.

22. The testimony of the two eye witnesses say - Hoti Lal P.W.1 and Lakhan Singh P.W. 2 on the point of the occurrence is indicative of fact that some incident occurred at 10.00 p.m. in the intervening night of 24/25.6.1984. However, these two witnesses could not identify the assailants as to who committed the crime. At this stage, these two prosecution witnesses were confronted with cross examination recorded by the Investigating Officer in which they had clearly indicated/stated that they saw Jalim Singh, Giriraj Singh and Fatte Singh committing the offence in the illuminated light of the lantern. These two witnesses have been challenged specifically that they have been wonover by the defence due to which they are not siding with the prosecution. These suggestions have been denied by these two witnesses.

23. Now, the story does not complete here and proceeds on to the appreciation and analogy of the testimony of Basant Kumar P.W. 4, the informant who is also an eyewitness. He has detailed the entire incident and has proved the version recorded in the first information report. He has stated that it was 10.00 p.m. in the intervening night of 24/25.06.1984 when the incident occurred and the incident was witnessed in the light of the lantern, which was illuminating light over there at five to six paces. Jalim Singh was possessing the gun in his hand and two other accused present were empty handed, they asked the maternal grand father of the informant PW-4 that since he did not give them the land, therefore, they are firing on him and after firing, they secured their escape. The incident was witnessed by him, blood oozed out from the deceased and it clotted his waist. The deceased died on the spot.

24. The point is that insofar as the time and place of the occurrence is concerned, it is virtually proved by testimony of all the three witnesses but insofar as identifiabilty and the involvement of the accused in the commission of the offence is concerned, testimony of Basant Kumar PW-4, on its face, is innocuous, consistent to the point and nothing concrete or adverse has emerged even in the strenuous cross examination which may create any doubt about the involvement of the accused in the offence that the incident was not committed by the present accused but by some unknown or unidentified person. That way, testimony of P.W. 2 and P.W. 4 when taken in wholesome then a cumulative study and reading would indicate fact of participation with same intent stands proved against the present accused along with others in the incident.

25. Now, insofar as the point of prevalence of common intention on the spot against the accused is concerned, the same is found to be based on the analogy of the facts and circumstances of the case and scrutiny of the evidence on record, while insofar as the occurrence is concerned, it is stated that three persons including the appellant-accused arrived on the spot and asked the deceased for a while

thereafter one single shot was fired by Jalim Singh, the another co-accused and thereafter all the three co-accused secured their escape then natural and reasonable analogy would be that all the three have one motive and the same mens rea to commit the offence because as per section 34 I.P.C. a criminal act when committed by several persons in furtherance of common intention of all each one of such person shall be responsible for the act of another, as if, it was done by him alone. That way, the liability is imputed on the appellant that he had the same intention as was there for the other co-accused say - Jalim Singh and another present on the spot, their presence on the spot has not been challenged by the defence.

26. We also take note of testimony of doctor witness Dr. R.C. Chauhan, PW- 3 who noted two ante mortem injuries in the shape of entry wound and exit wound and has proved the post mortem examination report Exhibit Ka-1, even not a single suggestion has been made to the doctor that the incident did not occur at 10.00 p.m. in the intervening night of 24/25.06.1984.

27. May be that the Investigating Officer committed minor lapses at the time of the investigation, but these lapses on the part of the Investigating Officer cannot be considered to be material one carrying weight to throw the entire prosecution version. Once the incident stands proved, participation of the accused in the incident is cogently proved by the evidence of the prosecution witnesses at the time and place of occurrence and nothing adverse emerges in the cross examination of the eye witnesses Basant Kumar P.W. 4, then only conclusion drawn from the evidence, facts and circumstances of the case is the guilt of the accused.

28. In view of above discussion, the prosecution has been able to establish reasonably guilt of the accused under charges brought against him and the prosecution has proved its case beyond reasonable doubt.

29. Learned trial court while appraising the evidence on record and marshaling facts considered every aspect of the case and has recorded just finding of conviction against the appellant and has imposed proper sentence under section 302/34 against him which warrants no interference by us in instant appeal. We uphold the judgment and order of conviction dated 15.2.1986 passed by the IInd Additional Sessions Judge, Mathura in Session Trial No. 174 of 1985 State Versus Giriraj Singh and others, arising out of Case Crime No. 113 of 1984 under section 302 I.P.C., P.S. Baldev, District Mathura.

30. In the result, the instant appeal being devoid of merit is dismissed. In this case, appellant Girraj Singh is on bail. His bail bonds are cancelled and sureties are discharged. He shall be taken into custody forthwith for serving out his remaining sentence imposed upon him by the trial court.

31. Let a copy of this judgment/order be certified to the court concerned for necessary information and follow up action.

(2020)02ILR A704

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 20.05.2019

BEFORE
THE HON'BLE AJIT SINGH, J.

Criminal Appeal No. 623 of 1989

Sundu & Ors. ...Appellants
Versus
State of U.P. ...Opposite Party

Counsel for the Appellants:
Sri Hemendra Kumar, Sri Anupama Tripathi, Sri Rakesh Kumar Tripathi

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

A. Criminal Law-Indian Penal Code-Section 452, 323/34 - Appeal against conviction.

Considering the facts and circumstance of the case, the alleged incident which took place in the year 1987 about 32 years ago and now appellants are more than 60 years of age and considering that the accused/appellants had suffered the agony of conviction for more than 32 years and no criminal antecedents have been shown to their credit after passing of so much long period out of jail, at this stage it does not appear appropriate to send the accused-appellant to jail. (Para 17)

The accused-appellants are sentenced to the period already undergone by them in jail during trial. (Para 19)

Criminal Appeal partly allowed. (E-2)

List of cases cited:-

1. Bankat and another Vs. St. of Mah., (2005) 1 SCC, 343,

2. Sattan Sahani Vs. St. of Bihar and others, (2002) 7 SCC, 604,

3. Uthem Rqajanna Vs. St. of A.P., 2005 (11) SCC, 531,

4. Neelam Bahal and another Vs. St. of Uttarakhand, (2010) 2 SCC, 229;

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

1. Heard learned Counsel for the appellants and learned AGA for the State.

2. This criminal appeal has been filed against the judgment and order dated 27.02.1989 passed by IVth Additional Sessions Judge, Bijnor passed in Session Trial No.311 of 1987, by which the appellants have been convicted to undergo one year R.I. under Section 452 I.P.C. And Rs.1,000/- fine each under Section 323/34 I.P.C. and in default of payment of fine shall undergo R.I. for six months and it was further ordered to pay this amount of fine to complainant as compensation.

3. The present appeal, as per report of Chief Judicial Magistrate, Bijnor the appellant no.3, namely, Lokendra has expired. The present appeal with regard to appellant no.3, Lokendra is concerned was abated vide order dated 19.11.2018 passed by coordinate Bench of this Court. The present appeal is confined to appellant nos.1 Sundu and appellant no.2 Jagga only. The appellant no.2, Jagga is presently lodged in jail. Since the non-bailable warrants were also issued against the appellant no.1 but it could not be served upon the appellant no.1 so the appellant no.1 was not arrested but now the learned counsel for the appellants is arguing the appeal on behalf of the appellant nos.1 and 2.

4. Brief facts of the case are that on 22.07.1987 at about 4.00 p.m. the

appellant no.3, Lokendra, appellant no.2 Jagga and appellant no.1 Sundu armed with dandas and the other accused armed with stones entered into the house of the complainant. The husband of the complainant was lying down inside the house and beaten the husband of the complainant by dandas and stones. The husband of the complainant raised alarm, which attracted the attention of the witnesses Jasrath and Pappu, who saved the husband of the complainant from the accused persons. The husband of the complainant received injuries and he was medically examined on the same day at about 8.45 p.m. by Dr. S.K.Rastogi, Medical Office Incharge, Meerut. It was further mentioned in the complaint that the first information report could not be lodged at the police station because the police has not noted down the report of the complainant. The husband of the complainant sent a telegram to the Superintendent of Police, Bijnor and copy of the same has been exhibited as Ka-1 was filed by the prosecution. The house of the complainant later-on succumbed to the injuries in Delhi where an inquest was prepared and post mortem was conducted by Dr. D.N.Bhardwaj on 14.03.1986. After the death of her husband, the complainant moved an application to Superintendent of Police, Bijnor alleging the entire incident and on the basis of that application, a case was ordered to be registered and investigated.

5. The first information report Ext. Ka-3 and G.D.Report Ext.Ka-4 were prepared on the basis of the application of the complainant to Superintendent of Police, Bijnor Ext.Ka-2. The first information report and the G.D. Report were duly proved by the PW-2, Investigating Officer of the case.

6. PW-5, Dr.S.K. Rastogi, who has medically examined the injured, Gyun Singh at about 8.45 p.m. has found seven injures, contusion, two abraded contusion, Linear abrasion, contusion and complaint of pain on back of lower part of neck and back of chest on both sides.

7. PW-6, Dr. D.N.Bhardwaj, Medical Officer, Lady Harding Medical College, Delhi, who conducted the post-mortem was also examined, who proved the post-mortem report Ext.Ka-9.

8. The prosecution in order to prove its case has examined PW-1, Smt. Kishan Dai, wife of the deceased, eye-witnesses of the case, PW-2, Pappu and PW-3, Jasrath, PW-4, K.M.Mishra, the Investigating Officer of the case, PW-5, Dr.S.K.Rastogi, Medical Officer, District Hospital, Bijnor, PW-6, Dr.D.N.Bhardwaj, Medical Officer, Lady Harding Medical College, Delhi. The accused persons did not produce any witness in their defence.

9. PW-2 Pappu and PW-3 Jasrath are the eye witnesses of the occurrence. They narrated the entire prosecution version in their statements on oath. Thus, the statement of the complainant is fully corroborated by the evidence of PW-2 and PW-3. PW-2, is the real brother of the deceased as per his own admission in the cross-examination but the PW-3 is an independent eye witness of the incident. Both the witnesses are residing in the same locality as is clear by their unrebutted statement on this point and, therefore, they are natural witnesses. No enmity of any kind of the accused with theses witnesses is established or proved by any evidence on record.

10. After taking the prosecution evidence, the statement of the accused under Section 313 Cr.P.C. was recorded and the accused had not led any evidence in their defence. The accused in their statements recorded under Section 313 Cr.P.C. alleged that they have been falsely implicated in the present case due to village partybandi.

11. Learned counsel for the appellant submitted that the appellant no.2 was earlier in jail got for some time and now the appellant no.2 is in jail for the last about eight months and the appellant no.1 has was also in jail for some time. He next submitted that it was the first offence of the accused/apellants and after conviction the accused had not indulged in any other criminal activity. He further submitted that on the question of legality of sentence he is not pressing this appeal and only pressing on the quantum of sentence and he has prayed for taking lenient view considering the age of the accused and their age related ailments.

12. Learned A.G.A. on the other hand has opposed the argument of learned counsel for the appellant and has submitted that the conviction of the appellant nos.1 and 2 are fully justified and no interference is required in their conviction, hence the appeal against the appellant nos.1 and 2 be dismissed and accused be directed to suffer the sentence.

13. In the case of ***Bankat and another Vs. State of Maharashtra, reported in (2005) 1 SCC, 343***; accused were convicted under Section 326 I.p.C. and sentenced for one year imprisonment with fine. Hon'ble Apex Court reduced the sentence to the period already undergone on the ground that the parties have settled the dispute outside the Court and 10 years have elapsed from the date of incident.

14. In the case of ***Sattan Sahani Vs. State of Bihar and others, reported in (2002) 7 SCC, 604***; accused were sentenced to three years' rigorous imprisonment under Section 326 I.P.C. In appeal, Hon'ble Supreme Court reduced the sentence to the period already undergone on the ground that the incident took place two decades back and parties have also compromised.

15. In the case of ***Uthem Rqajanna Vs. State of A.P., reported in 2005 (11) SCC, 531***, accused was convicted and sentenced for six months under Section 304-A I.P.C. along with fine and for three months under Section 338 I.P.C. In appeal Hon'ble Supreme Court has reduced the sentence to the period already undergone.

16. In the case of ***Neelam Bahal and another Vs. State of Uttarakhand, reported in (2010) 2 SCC, 229***; accused was convicted under Section 307 I.P.C. and was sentenced to undergo seven years' rigorous imprisonment. Hon'ble Supreme Court has convicted accused under Section 326 I.P.C. and reduced the sentence to period already undergone, i.e. almost one year, on the ground that the incident happened in the year 1987 when the accused was of young age of 25 years.

17. After considering the rival submissions made by learned counsel for the appellant, considering the facts and circumstance of the case, considering that the alleged incident which took place in the year 1987 about 32 years ago and now appellant nos.1 and 2 are more than 60 years of age and considering that the accused/appellant nos.1 and 2 had suffered

the agony of conviction for more than 32 years and no criminal antecedents have been shown to their credit after passing of so much long period out of jail, at this stage it does not appear appropriate to send the accused-appellant to jail. It has been pointed out by learned counsel for the accused-appellant that the accused-appellant had remained in jail for sometime during trial.

18. Considering all these facts, it would be appropriate and proper that the accused be sentenced with the period already undergone and the amount of fine be enhanced.

19. Considering all the facts and circumstances of the case, the accused-appellant nos.1 and 2 are sentenced to the period already undergone by them in jail during trial and an amount of fine of Rs.5,000/- be imposed instead of sending them to jail.

20. Accused-appellant nos.1 Sundu and appellant no.2, Jagga are both being directed to deposit the fine of Rs. 5,000/- before learned lower court within two month from the date of issuance of certified copy of this order, out of which Rs.2,500/- shall be paid to the complainant, if she is alive and in case she is dead then it would be paid to her legal heirs and in default of payment of fine as directed above, accused shall undergo simple imprisonment for a period of fifteen days. If the said amount is deposited by the appellant no.2, Jagga he shall be released forthwith, if not wanted in any other case and the appellant no.1, Sundu who was not arrested in compliance of the order of this Court need not to surrender. The appellant no.1, Sundu will also deposit the fine of Rs.5,000/- within two months from the date of issue of certified copy of this order.

21. Appeal is partly allowed against the appellant nos. Sundu and appellant no.2, Jagga in the above terms.

22. Copy of this order be transmitted to the concerned lower court forthwith for compliance.

(2020)02ILR A708

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 13.01.2020

BEFORE
THE HON'BLE BACHCHOO LAL, J.
THE HON'BLE NARENDRA KUMAR JOHARI, J.

Criminal Appeal No. 860 of 1998
connected with
Criminal Appeal No. 1123 of 1998

Munna ...Appellant (In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Appellant:
Sri S.C. Dwivedi, Sri I.K. Chaturvedi

Counsel for the Opposite Party:
A.G.A., Sri P.B. Umrao, Sri Rajeev Trivedi, Mrs. Swati Agrawal, Sri Amit Mishra, Sri Viresh Mishra

A. Criminal Law-Indian Penal Code-Sections 302, 323, 324 & 307 - Appeal against conviction.

The statement of witness regarding injuries of deceased and injuries on injured persons are corroborated by medical evidence. The presence of injured eye-witness is not doubtful, therefore, their statement are liable to be believed.(Para 18)

Identification of accused in court is a substantial piece of evidence in present case. Accused/appellants failed to mention any motive for causing voluntarily delay in test identification parade. There is consistency in evidence on the point of occurrence and on the point of roll played by each accused/appellants in evidence of witnesses Pw- 1 to Pw- 3, which is also corroborated by medical evidence. The injuries which have been found on the body of deceased and on the body of eye-witnesses indicates that weapons, as has been mentioned in F.I.R. and in evidence of witnesses. (Para 32)

It has to be kept in mind that counsel for defence neither asked any explanation nor confronted on above point as according to provisions to Section 145 of Evidence Act in cross-examination of Pw- 7 (investigating officer), therefore appellants cannot raise such defence as grounds for their acquittal at appellate stage. (Para 34)

In view of the facts, circumstances and evidence as discussed above, we are of the confirmed view that prosecution has succeed to prove the charges and no illegality or infirmity is found in the judgement and conviction order of sessions court. (Para 37)

Criminal Appeal rejected. (E-2)

List of cases cited:-

1. Surjit Singh @ Gurnit Singh Vs. St. of Punj. 1993 SCC (Cri) 161,

2. Gulam Sarbar Vs. St. of Bihar (Now Jharkhand) (2014) 3 SCC 401,

3. Bipin Kumar Mondal Vs. St. of W.B. (2010) 12 SCC 91,

4. Balram Singh Vs. St. of Punj. 2003 AIR (SC) 2213,

5. Baboolal Vs. St. of U.P. 2001 SCC (Cri) 1484,

6. Rizan and Another Vs. St. of Chattis. 2003 CRI. L.J. 1226 SC,

7. Dharampal and others Vs. St. of U.P. 2008 Cr.L.J. 1016,

8. St. of U.P. Vs. Shane Haidar and others 2015 (1) J.Cr.C 775 I,

9. Tufail Ansari vs. St. of U.P. 2015 (2) J.Cr.C 1086,

10. Leela Ram vs. St. of Har. and Others, 2000 SCC (Cri) 222,

11. Shivappa and Others vs. St. of Kar., 2008 CrLJ 2992,

12. Satrughana Alias Satrughana Parida and others Vs. St. of Orissa 1995 Supp (4) SCC 448,

13. Pramod Mandal Vs. St. of Bihar (2004) 13 SCC 150,

14. Sheo Shankar Singh Vs. St. of Jharkhand and another (2011) 3 SCC 654,

15. Sukhchain Singh Vs. St. of Har. & Ors 2002 SCC (Cri.) 961,

16. Allarakha K. Mansuri Vs. St. of Guj. 2002 SCC (Cri.) 519,

17. Kashi Nath Mandal vs The St. of W.B. & Ors 2013 (1) SCC 364 (SC),

18. State Of Kar. vs K. Yarappa Reddy AIR 2000 SC 185,

19 Umashankar Tivari vs St. Of U.P. And Another 2015 (89) SCC 421,

20. Ram Bali Vs. State of U.P. 2004 (2) JIC 168 (SC),

21. St. Of Punj. vs Hakam Singh Appeal (Cri.) 130 of 2000,

22. Krishna Mochi And Others vs St. Of Bihar 2002 (2) J.Cr.C 123,

23. Gajoo vs State Of Uttarakhand 2012 (9) SCC 532,

24. Virendra Singh @ Virendra Pratap Singh Vs. St. of U.P. 2015 (2) ACR 1461

(Delivered by Hon'ble Narendra Kumar Johari, J.)

1. The instant appeals have been preferred against the judgement and conviction order dated 27.04.1998 passed by Sessions Judge, Hamirpur in Sessions Trial No. 34 of 1989 (State Vs. Bal Kishan), and Sessions Trial No. 103 of 1989 (State Vs. Munna) under Sections 302, 323, 324 & 307 I.P.C., P.S.- Rath, District- Hamirpur.

2. Both the Sessions Trial have been decided by the common judgement as both the accused persons were involved in same occurrence and Crime No. 443 of 1988. Hence, both the appeals are being decided by the common judgement.

3. By order dated 27.04.1998 learned sessions judge has convicted appellants Bal Kishan and Munna with life imprisonment under Sections 302/34, four years rigorous imprisonment under Section 307/34, one year rigorous imprisonment under Section 324 I.P.C. and imprisonment for six months under Section 323 of I.P.C. concurrently.

4. The facts of the case in brief are that complainant Indra Bahadur Misra moved a *Tahrir* in Police Station- Rath, District- Hamirpur that Suresh Mishra @ Lalla, Chaini and his son Sarman Chamar all the resident of his village had gone to Shaktideen Lodhi at village- Badanpura for some of their work. Shaktideen was not available at his residence, therefore, all the three persons were returning back. The complainant and Ram Kumar Lodhi a resident of his village were going towards Rath from his Village, as they reached near culvert *(puliya)* of Badanpura, Bal Kishan @ Ballu Gaderiya carrying country-made pistol in his hand, Lakshmi Prashad Gaderiya carrying axe in his hand and one unknown person who was carrying *Ballam*, came out of the bushes Renaujha; Lakshmi Prashad exhorted to kill them. On his exhortation, one unknown person pushed *Ballam* in the wheel of cycle of Suresh, resultantly Suresh fell down and all the three miscreants started beating Suresh; Lakshmi attacked on the head of Suresh by his axe, Bal Kishan fired on Suresh by country-made pistol on the temple *(kanpati)* of Suresh, resultantly he fell down on the spot and died. When other persons tried to rescue Suresh, one of the miscreants attacked on the thigh of Chaini by his *Ballam*, resultantly he also fell down. Bal Kishan fired on Sarman by his country-made pistol but the fire was missed then the miscreant who was carrying *Ballam* in his hand beaten Sarman by his *Ballam* using as lathi Sarman ran away by shouting voice. The complainant and Ram Kumar exhorted and ran towards spot then that miscreant who was carrying *Ballam* in his hand and Lakshmi both started beating Ram Kumar Lodhi, resultantly all the persons ran away from the spot and started shouting. The miscreants ran away towards north side. The occurrence was seen by so many peoples including above persons. Informant has further stated that at the time of game of Diwali, a fighting and quarrel took place among deceased, Bal Kishan and Lakshmi Prashad. The villagers extricated the quarrel. He has further stated that the miscreant who was carrying *Ballam*, was a young person, if he will come again before him he will recognize him.

5. On the basis of above application *(tahrir)* the F.I.R. of occurrence was

registered at Crime No. 443 of 1988, under Section 302 and 307 at Police Station- Rath, District- Hamirpur. The time of occurrence was shown on 11.11.1988 at 12.00 noon and the F.I.R. was lodged on the same day at 3.00 p.m. Inquiry officer Deena Nath Dubey (Pw- 7) reached on spot and prepared inquest report of deceased and sent the dead body for post mortem in sealed condition through constable Chote Lal and Hargobind. I.O. also prepared letter for medical inspections of injured persons. He prepared the recovery memo of blood-stained and plain soil from the spot. He recovered one cycle near the dead body of Suresh Chandra Misra and a wrist watch and prepared its memo. He sketched spot map also. The post-mortem of Suresh Chandra was conducted by Doctor N.K. Joshi (Pw- 6) on 12.11.1988 and injured persons Sarman, Chaini and Ram Kumar was medically examined in hospital on 12.11.1988. After completion of investigation, I.O. submitted charge-sheet against accused persons Bal Kishan, Munna and Lakshmi.

6. The charges of Section 302/34, 307, 324 and 323 were framed against accused persons namely, Bal Kishan, Lakshmi Prashad and Munna who denied the charges and chosen to be tried.

7. As documentary evidence, prosecution filed following papers which were proved by respective witnesses:-

Tahrir F.I.R. as (Ex. Ka- 1), identification memo as (Ex. Ka- 2), charge-sheet against Bal Kishan and Lakshmi Prashad as (Ex. Ka- 3), charge-sheet against Munna as (Ex. Ka- 4), injury report of Chaini as (Ex. Ka- 5), injury report of Sarman as (Ex. Ka- 6), injury report of Ram Kumar as (Ex. Ka- 7), the post-mortem report of Suresh Chandra as (Ex. Ka- 8), Chick F.I.R. (Ex. Ka- 9), inquest report as (Ex. Ka- 10), police paper form no. 13 as (Ex. Ka- 11), photo nash (Ex. Ka- 12), letter for P.M.R. (Ex. Ka- 13), spot map (Ex. Ka- 14), letter for medical examination of Chaini (Ex. Ka- 15), letter for medical examination of Sarman as (Ex. Ka- 16), letter for medical examination of Ram Kumar as (Ex. Ka- 17), recovery memo of blood-stained and plain soil (Ex. Ka- 18), recovery memo of cycle and wrist watch as (Ex. Ka- 19), attachment memo (Ex. Ka- 20), carbon copy of G.D. entry (Ex. Ka- 21).

8. As oral evidence prosecution produced Indra Bahadur as Pw- 1, Chaini Pw- 2, Ram Kumar as Pw- 3, M.P. Awasthi Pw- 4 and Ram Swaroop Singh as Pw- 5, Doctor N.K. Joshi as Pw- 6, Deena Nath Dubey as Pw- 7.

9. The statement of witness Pw- 1 Indra Bahadur was recorded on 31.08.1992 who in his examination in chief has repeated the same prosecution version regarding the occurrence as mentioned in F.I.R. The cross-examination was concluded on 03.11.1992. The statement of witness Pw- 2 was recorded on 03.11.1992 who corroborated the statement of Pw- 1 on the point of occurrence his cross-examination was concluded on 03.11.1992. Witness Pw- 3 Ram Kumar deposed on 27.11.1992 who also stated the same story as Pw- 1 and Pw- 2 in his cross-examination, was concluded on same day. Witness Pw- 4 M.P. Awasthi- the Identification Magistrate, Hamirpur has deposed that in his presence the identification pared took place. Witness Pw- 6 Doctor N.K. Joshi has proved the injury reports of Chaini,

Sarman and Ram Kumar. He also proved the post-mortem of deceased Suresh Chandra Mishra. Witness Deena Nath Dubey- Pw- 7 the I.O. has proved the proceedings of investigation.

10. Regarding the facts, evidence and incriminating circumstances, questions were asked by accused appellants Bal Kishan and Munna under Section 313 of Cr.P.C. in which both the accused persons shown their ignorance in reply of the questions. The reason for prosecution they have replied "due to enmity." In reply of the questions of identification in jail, accused appellant Munna has stated that witnesses were acquainted with him prior to occurrence as he is brother-in-law of Chatrapal who is younger brother of Bal Kishan. During trial accused Lakshmi Prashad had died and the trial was abated against him on 08.08.1990. Before recording his statement under Section 313 of Cr.P.C. On behalf of the accused appellants, Jai Kunwar has been examined as Dw.- 1.

11. We have heard learned counsel for the appellants, learned counsel for the complainant as well as learned A.G.A. for the State and perused the record.

12. Learned counsel for the appellants has submitted that the appellants have falsely been implicated in the case. The place of occurrence has not shown in F.I.R. The presence of witnesses as Pw- 1, Pw- 2 and Pw- 3 are doubtful. No recovery of weapons or cartridges has been made. Witnesses are interested. Identification of appellant- Munna is doubtful. Motive of offence has not been proved. The appellants have falsely been implicated only due to enmity. Prosecution has failed to prove his case against appellants. Appellants liable to be acquitted, accordingly appeals be allowed.

13. Learned A.G.A. as well as counsel for complainant submitted that F.I.R. of occurrence is prompt. There is no discrepancy in evidence regarding place of occurrence. Injured witnesses have deposed and proved the case successfully. There is no discrepancy on the factum of occurrence. Appellant Munna has been identified in jail as well as in court by the witnesses. Motive of occurrence has been proved, which is supported by ocular evidence and by the evidence of injured witnesses who had received injuries in same occurrence. The aforesaid evidence is corroborated by medical evidence. Prosecution has succeeded to prove his case against appellants beyond reasonable doubt. They have rightly been convicted by the Sessions Judge. Appeals are liable to be rejected.

14. In F.I.R. the date and time of occurrence has been shown on 11.11.1988 at 12.00 noon. The F.I.R. has been lodged on the same date at 3.00 pm whereas the distance of police station has been shown as 14 k.m. The fact regarding lodging of F.I.R. has been supported by G.D. entry (Ex. Ka- 21). In first information report and in statement of witnesses Pw- 1 to Pw- 3 it has been shown that witness Pw- 1 Indra Bahadur Mishra was eye-witness of the occurrence and after committing the occurrence when the accused persons fled away from the spot, the informant rushed to Police Station- Rath, District- Hamirpur by keeping the dead body of deceased Suresh Chandra in supervision of injured witnesses- Chaini, Sarman and Ram Kumar. Witness Pw- 1 Indra Bahadur has stated in his evidence that he had reached at Dharamsala in approximately 01.15

hours where he wrote the application *(tahrir)* for F.I.R. The distance of police station is approximately 15 to 20 steps away from the said Dharamsala. In cross-examination he has denied that the application *(tahrir)* was written by him on the dictation of *Daroga Ji.* The witness has been cross-examined by defence side at length but nothing could be brought on record which could indicate the fact that the F.I.R. of the occurrence was lodged by complainant with any prior consultation or with any inordinate delay. Keeping in mind, the distance of place of occurrence from police station and in abscene of any contrary evidence, it appears that the F.I.R. of occurrence has been lodged by complainant promptly and without any inordinate delay.

15. Witness Pw- 1 has deposed in his evidence that on 11.11.1988 at about 12.00 noon Suresh Chandra Mishra and Chaini Chamar and his son Sarman who were resident of the same village, they had gone Badanpura to the house of Shaktideen Lodhi for some of his work. They went there by cycles. Suresh Chandra was riding alone at his cycle and Chaini and his son Sarman were on another cycle. Chaini was sitting at the cycle as pillion rider. As Shaktideen Lodhi was not available at his residence of Badanpura therefore, all those persons coming back from Badanpura to their village. At that time witness Pw- 1 Indra Bahadur along with Ram Kumar a resident of his village were going to Rath from their village, as they reached near the culvert *(puliya)* of Badanpura, they saw that all of sudden Bal Kishan Gaderia, Lakshmi Prashad and one unknown person came out from the bushes of *Reunjha*. Bal Kishan was carrying tamancha, Lakshmi Prashad was carrying axe and unknown person was carrying *Ballam* in their hands. On the exhortation of Lakshmi Prashad to kill Suresh Chandra, all the three persons ran towards him. The unknown person who was carrying *Ballam* in his hand pushed the *Ballam* in the wheel of cycle of Suresh Chandra, resultantly, Suresh Chandra fell down. At once all the three persons started beating Suresh Chandra. Lakshmi attacked with his axe on his head, Bal Kishan fired by his country-made pistol *(tamancha)* on his temple *(kanpati)*. Suresh Chandra fell down and died on spot. At that time, as the Chaini and Sarman tried to save him, the person who was carrying ballam pushed his ballam in thigh of Chaini resultantly Chaini fell down due to its injury. Bal Kishan fired on Sarman which fortunately got missed. Simultaneously, the person who was carrying *Ballam* ran towards Sarman and beaten him by lathi part of his *Ballam*. Consequently, Sarman shouted and ran away. Seeing the occurrence the complainant as well as Ram Kumar also ran towards the place of occurrence to save them. Complainant was behind Ram Kumar. When Ram Kumar tried to save, Lakshmi and the unknown persons who was carrying *Ballam*, beaten him. Seeing the occurrence all the persons shouted loudly for help resultantly the assailants ran towards northern side. The occurrence was seen by the aforesaid persons as well as other persons who were present in their fields. The witness PW-1 has further stated in his evidence that just after the occurrence the fact was told him by Chaini that the deceased Suresh and the witnesses Chaini and Sarman had gone to Badanpura for some of their work.

16. So far as the role of accused persons are concerned, witness Pw- 1 has stated in his evidence, that as the deceased Suresh Chandra fell down from his cycle,

all the three assailants started beating him. Lakshmi Prasad attacked on deceased by his axe thereafter Bal Kishan fired on Suresh by his country-made pistol. He has further stated that at the time of firing he along with Ram Kumar was 25 to 30 steps away from deceased. He has also stated that the deceased has received only one injury of fire arm. The country-made pistol *(tamancha)* was single barrel. Witness Pw-1 has also said that Chaini had fell down by the injury of *Ballam* just 8 to 10 steps away from deceased towards East. At that time Chaini was wearing *Kurta* and *Dhoti*, with knot like *langot*. Ram Kumar had received the injury of axe at his palm. He further stated that the unknown assailant was attacking on Sarman from the wooden side (lathi part) of his *Ballam*.

17. Witness Pw- 2 Chaini has narrated and reiterated the happening of occurrence same as it has been stated by witness Pw- 1 so far as the injury on his body as well as on the body of his son Sarman, he has stated in his evidence that they have gone to Badanpura to hire tractor of Sattidin for ploughing the field. He was not available at his residence, therefore they were coming back. He has further submitted that he had received the injury of *Ballam*. He has also stated that Bal Kishan has fired on his son Sarman which was missed. On firing upon him, his son Sarman turned back, at that time the unknown persons beaten him by lathi part of his *Ballam* then after that Sarman ran towards village, when Ram Kumar moved to save Suresh Chandra, Lakshmi attacked by his axe and unknown persons attacked on him also by lathi part of his *Ballam*. He has further stated that he (witness Pw- 2), Sarman, Ram Kumar and Indra Bahadur had gone to police station and thereafter they have gone for medical examination, where he, Sarman and Ram Kumar was examined by Doctor. He has further stated that he had gone to village- Badanpura for hire tractor to plough his field which he had taken on *Balkat*. The deceased also went to hire the tractor of Sattidin to plough his own field. He has also stated that today I have dressed kurta and dhoti which is lying upto his knee. Learned counsel for the appellant has submitted that witness Pw- 2 wear dhoti upto knee long, hence his statement that at the time of occurrence he was wearing his dhoti knot like *langot* is false, as normally one can wear the dhoti as *langot*. Since no pierced and blood-stained dhoti has been recovered by I.O., therefore, the presence of Chaini on spot is highly doubtful. In reply counsel for complainant has submitted that at the time of occurrence witness Pw- 2 Chaini was sitting at the carrier of cycle as pillion rider. In such a situation it is probable that he may knot his dhoti as *langot* type just to prevent sticking of his dhoti in the back wheel of cycle. If the I.O. has not recovered any such dhoti of witness Pw- 2 then in that case it may be the fault of I.O. Learned counsel for the appellants has also submitted that the witness Pw- 1 has mentioned that when Chaini tried to save Suresh, the unknown assistant stabbed his *Ballam* in the thigh of Chaini (Pw- 2) whereas the medical report of his injury indicates that there was a incised wound with clean cut. He has further stated that if a sharped weapons like *Ballam* will be stabbed on the body, the edges of wound will be with everted margin, which is not found in this case. Learned counsel for the complainant has replied that witness Pw- 2 has not stated that the assailants had stabbed *Ballam* in his thigh rather he has mentioned that the assailants attacked him by his *Ballam*. The word stab was used by

the eye-witnesses Pw- 1 and Pw- 3 who have seen the occurrence from some distance. The attack was so quick that it is highly probable that the witnesses would not have been able to see the occurrence attack like slow motion. At that time the attention of witnesses was also diverted towards the attack on Suresh Chandra. Witness Pw- 6 Dr. N.K. Joshi has openid that the injury of Chaini is probable by the *Ballam*, therefore, the presence of witness Pw- 2 cannot be doubted on place of occurrence.

18. Witness Pw- 3 Ram Kumar has also described the manner of occurrence of attack on deceased in his evidence as it has been stated by witnesses Pw- 1 and Pw- 2 in their evidence. Witness Pw-3 has further stated that when the assailants attacked on Suresh Chandra he along with Indra Bahadur moved forward to save him. At that time Indra Bahadur was behind him. As witness Pw- 3 Ram Kumar moved forward, Lakshmi Prashad attacked on him by his axe, his aim was head of Ram Kumar but he has pushed his hand just to prevent and save the attack on his vital part resultantly he received the injury of axe at his palm. The unknown persons who was carrying *Ballam* also attacked on him from the lathi sides of *Ballam*. As they shouted voice for help assailants ran towards north. Witness Pw- 3 on the part of his evidence regarding mode of occurrence as well as role of assailants has been cross-examined thoroughly by the defence side but no contradiction comes out. Witnesses Pw- 1 and Pw- 3 has narrated the F.I.R. version properly. No otherwise fact could come on record which may indicate any fact otherwise. The injury of injured persons is supported by their medical examination reports as Ex. Ka-5, 6 & 7. The injury sustained by deceased has also been mentioned in F.I.R. which has been proved by his post-mortem report as well as by evidence of witness Pw- 6 Dr. N.K. Joshi. Injury nos. 1, 2, 9 and 10 shows the injury of sharp, edged weapon like axe. Injury nos. 3, 4, 8, 12 and 13 can be caused by lathi. Eye-witnesses Pw- 1, Pw- 2 and Pw- 3 have stated that the unknown assailant has used his *Ballam* like lathi also. Therefore, the aforesaid injuries are probable when the *Ballam* has been used like lathi. Injury nos. 14 and 15 can be caused by the sharp pointed weapon like *Ballam* and injury nos. 3 and 5 can be caused by fire-arm as has been narrated by witnesses that the appellant Bal Kishan fired on deceased by *tamancha*. It has not been disputed that a close range fire which has been caused almost in contact with the surface of body may cause through and through injury over the surface and in that case entry wound may be larger in size than exit wound, which is possible due to movement of projectile of fire-arm. It has also been found that blackening was present at the edges of wound of enjury no. 5 which was entry wound. The mode of fire-arm injury has been corroborated by the statement of Pw- 1 where he has stated Bal Kishan has fired on temple *((kanpati))* of deceased in close range. Keeping the *tamancha* in contact with temple *(kanpati)* region of deceased. The statement of witness regarding injuries of deceased and injuries on injured persons Sarman, Chaini and Ram Kumar are corroborated by medical evidence. The presence of injured eye-witness is not doubtful, therefore, their statement are liable to be believed. If there is no contradiction in the statement of witness and with medical evidence it has been held by Hon'ble Apex Court in the case

Surjit Singh @ Gurnit Singh Vs. State of Punjab 1993 SCC (Cri) 161, that:-

"9. To be fair to the learned counsel for the appellant, we may mention that he ventured to argue that the evidence regarding the matching of the crime bullet shells with the pistol recovered was not convincing, more so when the .303 pistol, the alleged crime weapon, was recovered from Gurmit Singh, co-accused. It is noteworthy that Gurmit Singh, co-accused, stands convicted under the Arms Act for being in possession of that pistol. This aspect of the case cannot be a substitute to the eye-witness account or the plea taken by the appellant. Had the presence of the two witnesses, that is, Jaswinder kaur PW-5 and Taljit Singh PW-2 at the scene of the occurrence been doubted, the recovery of the weapon of offence and its connection with the empty shells recovered at the spot would have assumed some significance. When the two eye-witness are natural witnesses of the crime, one being the young wife who would normally be in the company of the husband at 10.30 p.m. on a summer night and the other the nephew of the deceased who had suffered grevious injuries in the occurrence and was thus a stamped witness, not much importance is to be attached to this aspect of the case. The venture is futile."

The evidence of injured witnesses Pw- 2 and Pw- 3 are reliable and trustworthy.

19. Learned counsel for the appellants further argued that as according to prosecution case if the assailants were having deadly weapons in their hands and they were able to give fatal injuries to witness and were able to eliminate the evidence against them why they have not caused grievous/fatal injuries to Chaini, Sarman, Ram Kumar and Indra Bahadur, on the other hand the said injuries of Chaini, Sarman and Ram Kumar is simple in nature, therefore, the evidence of aforesaid persons are not liable to be believed. Considering the facts and evidence on record it reveals that there was enmity of deceased with appellants namely, Bal Kishan and Lakshmi Prashad. It has been shown in F.I.R. as well as in evidence of witness Pw- 1 that prior to incident, during the game of Diwali, a quarrel and fighting took place in between appellants Bal Kishan, Lakshmi Prashad with deceased Suresh, which was extricated and settled by interference of village persons. In his cross-examination witness Pw- 1 has stated that he himself was witness of that altercation, both the parties were abusing each other. He was also one of the mediator. Reason of murder of deceased Suresh has been shown aforesaid quarrel and due to the enmity, the appellants and Lakshmi Prashad attacked on deceased- Suresh Chandra Mishra. They were not having any enmity with complainant or other eye-witness and just to provide scare and horrify them as well as manage to escape they have given the simple injuries to eye-witnesses. Therefore, accused persons have not caused any fatal injuries to witnesses rather they attacked only on deceased Suresh Chandra, hence it cannot be said that presence of eye-witnesses of the place of occurrence was not probable.

20. Learned counsel for the appellants has further argued that the motive as shown in F.I.R. is rather weak in nature and upon simple quarrel in village it was not probable to cause death of deceased Suresh Chandra. The argument advanced by learned counsel for the

appellants is not forceful as what was the situation at the time of quarrel and fighting one day prior to occurrence, it has not been described. The enmity of trifle matter may grow up. It varies from persons to persons that how, a person tackles his emotions. Hon'ble Apex Court Hon'ble Apex Court has held in the case of **Gulam Sarbar Vs. State of Bihar (Now Jharkhand) (2014) 3 SCC 401**, in case law Rohtash Kumar Vs. State of Haryana, Criminal Appeal No. 896 of 2011, **Bipin Kumar Mondal Vs. State of West Bengal (2010) 12 SCC 91, Balram Singh Vs. State of Punjab 2003 AIR (SC) 2213** and in **Baboolal Vs. State of U.P. 2001 SCC (Cri) 1484** that where there is direct evidence, prosecution is not needed to prove motive of offence. How the mind of an assailant reacts is not to be fathomed from a detached reflection. Criminal conspiracy in general hatched in secrecy, thus direct evidence is difficult to obtain or access. However, where there is direct evidence of witnesses, who are reliable on appreciation of evidence according to legal norms, it is not necessary to establish motive of accused persons.

21. Learned counsel for the appellants further argued that witness Pw- 1 Indra Bahadur belongs to caste of deceased and he is in relation with deceased also. Therefore, his evidence is not reliable. Witness Pw- 2 Chaini has taken the lease of land by the grace of father of deceased and witness Pw- 3 Ram Kumar is in relation with witness Pw- 1, therefore, their evidence are not trustworthy. Although, the fact reveals from the evidence of Pw- 1 that he is in relation with deceased person but there is a consistency in statement of witnesses, which establishes that they were eye-witnesses of occurrence. Witness Pw- 2 has denied in his evidence that he was not allotted any land on lease by the father of deceased, when he (father of deceased) was village pradhan rather the earlier pradhan Sudhar Singh allotted him three acres of land on lease. In rebuttal of above statement, appellants failed to produce any documentary or oral evidence. Therefore, it cannot be said that witness Pw- 2 was ever obliged by Ram Swaroop the father of deceased Suresh Chandra Mishra. There is nothing on record which may indicate that witness Pw- 3 was ever friendly with deceased or complainant. Perusal of entire evidence of Pw- 3 reveals that he was just a resident of his village who was going Rath to purchase the edible items for his daily use. After careful and proper scrutiny of evidence of witnesses Pw- 1 to Pw- 3, no contradiction is found on the substantial point of prosecution case.

22. It is also to be kept in mind that date of occurrence has been shown on 11.11.1988. The evidence of Pw- 1 was recorded on 31.08.1992. The evidence Pw- 2 was recorded on 03.11.1992 and evidence of Pw- 3 was recorded on 27.11.1992. All the witnesses Pw- 1 to Pw- 3 are living in village. Out of which age of witness Pw- 2 was 65 years at the time of recording of his evidence and he was an illiterate person also. In above situation there might be some inconsistency in their evidence. It has been held by Hon'ble Apex Court in the case of **Rizan and Anothers Vs. State of Chattisgarh 2003 CRI. L.J. 1226 SC** in Para- 6, that:-

"6.- We shall first deal with the contention regarding interestedness of the witnesses for furthering prosecution version. Relationship is not a factor to affect credibility of a witness. It is more

often than not that a relation would not conceal actual culprit and make allegations against an innocent person. Foundation has to be laid if plea of false implication is made. In such cases, the court has to adopt a careful approach and analyse evidence to find out whether it is cogent and credible."

23. The same verdict has been given by Hon'ble Supreme Court in the case of **Dharampal and others Vs. State of U.P. 2008 Cr.L.J. 1016**. The relevant part of the judgment is reproduced as under:-

"12. This takes us to the next question viz. whether the other lacunae pointed out by the learned counsel for the appellants are fatal to the prosecution case . We agree that the High Court erred in relying on the evidence of PW4, who admittedly was declared a hostile witness. Nevertheless, we fell that in the fact of the other evidence of PW2 Dannu, PW3 Om Prakash who were corroborated in all material respects by PW7 Dr. R.P. Goyal and by PW9, Dr. U. Kanchan, the evidence of PW4, even if discharged, is inconsequential. The evidentiary value of a dying declaration and the principles underlying the imprtance of a dying declaration have already been discussed herein earlier. Simply because PW2 and PW3, in their cross-examination, have been shown to be related to the deceased does not mean that their testimony has to be rejected. It is well settled that evidence of a witness is not to be rejected merely because he happens to be a relative of the deceased. In State of Himanchal Pradesh V. Mast Ram [(2004) 8 SCC 660], this Court observed as under :-

".....The law on the point is well settled that the testimony of the relative witnesses cannot be disbelieved on the ground of relationship. The only main requirement is to examine their testimony with caution. Their testimony was thrown out at the threshold on the ground of animosity and relationship. This is not a requirement of law....."

In this view of the matter and this being the well-settled law, it is difficult for us to discard the evidence of the witnesses, as discussed hereinabove, only on the ground that they were related to the deceased, in the absence of any infirmity in the said evidence."

Considering the evidence of aforesaid eye-witnesses as a whole there seems no contradiction on the point of occurrence as well as role of appellants in occurrence. It has been held by Hon'ble Apex Court in case of State of U.P. Vs. Shane Haidar and others 2015 (1) J.Cr.C 775 in Para- 34, that:-

"34. After an overall assessment of all the witnesses, produced by prosecution, we are of thhe firm view that all the witnesses are throughout cogent and consistent while deposing in court. All the factual witnesses are rustic villagers, who are bound to get confused during their cross-examination. PW-2 is an injured witnesses, which fact is evident from his injury report, duly proved by the Doctor. Apart from some minor contradictions nothing has been elicited in their statements to cause a shadow of doubt on their credibility."

24. On the same point, another Bench of this Court in case of **Tufail Ansari vs. State of U.P. 2015 (2) J.Cr.C 1086** has held that:-

"28. The contention that PW-3 Smt. Babli Jaiswal has admitted in her cross examination that the police had come to their house at about 8.00 p.m.,

and that she was unsure when she had left for the police station and that PW-1 Ramesh Kumar Jaiswal, informant had stated that he had reached the police station at about 7.00 p.m. or that the appellant Tufail was arrested at about 9.00 p.m. Even if there were some conflicts in the timings, it only suggests that the rural witnesses were a little confused about the timings of the incident or the time when the police had taken the appellant Tufail at about 2.00 a.m. to get the body recovered. Even if there are certain minor discrepancies in the timings and conduct of the investigation, as the basic structure of the prosecution evidence is intact in this case, on the basis of the factum of discovery of the dead body in the middle of the night on the pointing out of the appellant, which was admissible under section 27 of the Evidence Act and the last seen evidence against the appellant by PW-2 Suresh is also intact, little reason exist for not relying on these crucial circumstances which are sufficient to establish the complicity of the appellant in this offence."

25. In para 9 of the case **Leela Ram vs. State of Haryana and Others, 2000 SCC (Cri) 222**:- Hon'ble Supreme Court has held that:-

"9.- Be it noted that the High Court is within its jurisdiction being the first appellate court to reappraise the evidence, but the discrepancies found in the ocular account of two witnesses unless they are so vital, cannot affect the credibility of the evidence of the witnesses. There are bound to be some discrepancies between the narrations of different witnesses when they speak on details, and unless the contradictions are of a material dimension, the same should not be used to jettison the evidence in its entirety. Incidentally, corroboration of evidence with mathematical niceties cannot be expected in criminal cases. Minor embellishment, there may be, but variations by reason therefor should not render the evidence of eyewitnesses unbelievable. Trivial discrepancies ought not to obliterate an otherwise acceptable evidence. In this context, reference may be made to the decision of this Court in State of U.P. v. M.K. Anthony ; AIR 1985 SC 48. In para 10 of the Report, this Court observed: (SCC pp. 514-15)

"10. While appreciating the evidence of a witness, the approach must be whether the evidence of the witness read as a whole appears to have a ring of truth. Once that impression is formed, it is undoubtedly necessary for the court to scrutinise the evidence more particularly keeping in view the deficiencies, drawbacks and infirmities pointed out in the evidence as a whole and evaluate them to find out whether it is against the general tenor of the evidence given by the witness and whether the earlier evaluation of the evidence is shaken as to render it unworthy of belief. Minor discrepancies on trivial matters not touching the core of the case, hypertechnical approach by taking sentences torn out of context here or there from the evidence, attaching importance to some technical error committed by the investigating officer not going to the root of the matter would not ordinarily permit rejection of the evidence as a whole. If the court before whom the witness gives evidence had the opportunity to form the opinion about the general tenor of evidence given by the witness, the appellate court which had not this benefit will have to attach due weight to the appreciation of evidence by the trial court and unless there are reasons weighty and

formidable it would not be proper to reject the evidence on the ground of minor variations or infirmities in the matter of trivial details. Even honest and truthful witnesses may differ in some details unrelated to the main incident because power of observation, retention and reproduction differ with individuals."

26. In case **Shivappa and Others vs. State of Karnataka, 2008 CrLJ 2992,** Hon'ble Supreme Court has held in para 26 that:-

".....Minor discrepancies or some improvements also in our opinion, would not justify rejection of the statements of eyewitnesses if they are otherwise reliable. Some discrepancies are bound to occur because of the sociological background of the witnesses as also the time gap between the date of occurrence ad the date on which they give their depositions in Court."

27. Perusal of evidence as a whole, indicates that there is no such discrepancy in the evidence of prosecution witnesses which touches the core of prosecution version. There may be discrepancy minor/trifle in nature, but in our considered view, they are not able to destroy prosecution case.

28. It has also been argued by learned counsel for the appellants that the letter for medical examination of Chaini, Sarman and Ram Kumar Lodhi was prepared by investigating officer on 11.11.1988 but they have undergone medical examination on 12.11.1988 which also creates doubt, upon veracity of witnesses Pw- 1 to Pw- 3. No cogent reason has been shown for the said delay in medical examination. On the above point of argument records shows that the time of lodging of F.I.R. has been shown as 3.00 p.m. on 11.11.1988. Witness Pw- 1 has stated in his evidence that his statement was recorded on the place of occurrence at 5.00-5.30 p.m. Inquest report Ex. Ka- 10 indicates that the inquest was completed at 17.30 on 11.11.1988. Witness Pw- 7 the I.O. has narrated the proceedings of investigation and mentioned that he has completed the proceedings of investigation till 23.45. It was beginning of winter season. As a common observation the availability of all the facility in village area are not found. Accused persons had fled away and they were not under arrested by I.O. on 11.11.1988. In such a situation, if the above injured persons who were brought hospital by police persons on 12.11.1988 at about 7.00 a.m., it cannot be said that the medical of injured persons has been taken place with an inordinate delay. Witness Pw- 6 Dr. N.K. Joshi has stated that the injuries of injured persons are probable 1-1/2 day prior. The injuries shown in injury reports of Sarman, Chaini and Ram Kumar is not such a nature which can be fabricated. Although, witness Pw- 6 has further replied in cross-examination that if anybody will have courage, then some of the aforesaid injury may be created but this probability is not supported with facts and circumstances of the case as the deceased was not closely related with aforesaid injured persons. There is nothing on record which could show any indication towards aforesaid probabilities, therefore, the argument advanced by learned counsel for the appellants is not forceful.

29. Learned counsel for the appellants has further stated that the appellant Munna has been shown as

unknown person who was carrying *Ballam* at the time of occurrence in fact, he is the brother-in-law *(sala)* of younger brother of appellant Bal Kishan. He used to visit at the house of his sister Jai Kunwar frequently. Jai Kunwar has deposed as Dw- 1, on the above point, therefore, he has falsely been implicated in the case only due to the reason that he is relative of appellant Bal Kishan. The identity of that unknown person has not been mentioned in F.I.R., his test identification parade took place on 24.01.1989. He further argued that his identification was managed after two months of occurrence and there were all the probabilities that the persons who identified him in T.I.P. were able to identify him earlier. They were having ample chance to recognize him. It reveals from record that witness Pw- 7 has mentioned in his cross-examination that on 24.12.1988 accused appellant Munna surrendered in court and after his surrender on 27.12.1988, investigating officer (witness Pw- 7) moved application for his identification, wherein 11.01.1989 and 16.01.1989 the dates were fixed for identification proceeding. Since on the schedule date, the witnesses could not reach in jail, therefore, the test identification parade of accused appellant Munna took place on 24.01.1989. Witness Pw- 4 has narrated about the proceeding which was conducted for test identification parade, but no substantial question has been asked in his cross-examination on above point. Witnesses Pw- 1 and Pw- 3 have identified to accused appellant Munna (who was mentioned as unknown assailant in F.I.R.) in the aforesaid test identification parade. Witness Chaini wrongly identified due to the reason that he was an old rustic man who had received the injury of *Ballam* on thigh and fell down on spot immediately, even he could not move anywhere unless and until accused persons fled away from the place of occurrence as it reveals from his evidence. Although, in F.I.R. it has been mentioned by informant that the unknown person was a young man and he will recognize him it he comes again before him. Learned counsel for the complainant also submitted that if it would have been intention of complainant to indulge appellant Munna in the occurrence and if he was known by complainant earlier then there was no reason for not to mention his name, parentage and address in F.I.R. Witness Pw- 1 has stated in cross-examination that this is wrong to say that accused Munna was known by him earlier. Witness Pw- 3 has also stated that he was not acquinted with Munna prior to occurrence. The witnesses Pw- 1 to Pw- 3 has identified to accused Munna in court properly. On the above point, learned counsel for the appellants has submitted that their test identification parade should be conducted soon after the occurrence. If such parade is taken place with inordinate delay of more than 15 days and his identity has not been described earlier, then in that case, the reliance could not be placed on such test identification parade. In support of his argument he has submitted the case **Satrughana Alias Satrughana Parida and others Vs. State of Orissa 1995 Supp (4) SCC 448.**

30. On the point of test identification parade it has been held in the case of **Pramod Mandal Vs. State of Bihar (2004) 13 SCC 150** in Para- 16,17,18 & 19 is produced as under:-

"16. Learned counsel for the appellant also relied upon the decision of this Court in (1987) 3 SCC 331 : Subhash and Shiv Shankar vs. State of Uttar

Pradesh, wherein this Court held that a long interval of nearly 4 months before the Test Identification Parade was held, made it doubtful whether inspite of this interval of time the witnesses were able to have a clear image of the accused in their minds and identify him correctly at the Test Identification Parade. In the instant case the Test Identification Parade was held only a month after the occurrence and not after four months as in the case of Subhash and Shiv Shankar (supra). The delay in the instant case is not such as would cast a doubt on the ability of the witnesses to identify the accused.

17. Learned counsel for the appellant also relied upon the decision of this Court in (1982) 3 SCC 368 : Soni vs. State of Uttar Pradesh. The said judgment is a brief judgment where on the facts of the case the court doubted the identification by the witnesses in view of the delay in holding of the Test Identification Parade. However, this judgment does not lay down any principle of law which may be applied to the facts of the present case. It is a decision on the facts of the case and cannot be treated as a binding precedent. In fact the said judgment was noticed by this Court in (2003) 3 SCC 569 : Anil Kumar vs. State of Uttar Pradesh and this Court after extracting the relevant part of the judgment observed :-

"It is to be seen that apart from stating that delay throws a doubt on the genuineness of the identification parade and observing that after lapse of such a long time it would be difficult for the witnesses to remember the facial expressions, no other reasoning is given why such a small delay would be fatal."

18. Learned counsel for the State submitted that in the instant case there was no inordinate delay in holding the Test Identification Parade so as to create a doubt on the genuineness of the Test Identification Parade. In any event he submitted that even if it is assumed that there was some delay in holding the Test Identification Parade, it was the duty of the accused to question the investigating officer and the Magistrate if any advantage was sought to be taken on account of the delay in holding the Test Identification Parade. Reliance was placed on the judgment of this Court in (1973) 3 SCC 896 : Bharat Singh vs. State of Uttar Pradesh. In the aforesaid judgment this Court observed thus :-

"6. In Hasib v. State of Bihar AIR 1972 SC 283; it was observed by the Court that identification parades belong to the investigation stage and therefore it is desirable to hold them at the earliest opportunity. An early opportunity to identify tends to minimize the chances of the memory of the identifying witnesses fading away due to long lapse of time.

Relying on this decision, counsel for the appellant contends that no support can be derived from what transpired at the parade as it was held long after the arrest of the appellant. Now it is true that in the instant case there was a delay of about three months in holding the identification parade but here again, no questions were asked of the investigating officer as to why and how the delay occurred. It is true that the burden of establishing the guilt is on the prosecution but that theory cannot be carried so far as to hold that the prosecution must lead evidence to rebut all possible defences. If the contention was that the identification parade was held in an irregular manner or that there was an undue delay in holding it, the Magistrate who held the parade and the Police Officer who conducted the

investigation should have been cross-examined in that behalf".

In the instant case we find that the defence has not imputed any motive to the prosecution for the delay in holding the Test Identification Parade, nor has the defence alleged that there was any irregularity in the holding of the Test Identification Parade. The evidence of the Magistrates conducting the Test Identification Parade as well as the Investigating Officer have gone unchallenged. Learned counsel for the State is, therefore, justified in contending that in the facts and circumstances of this case the holding of the Test Identification Parade, about one month after the occurrence, is not fatal to the case of the prosecution as there is nothing to suggest that there was any motive for the prosecution to delay the holding of the Test Identification Parade or that any irregularity was committed in holding the Test Identification Parade.

19. Learned counsel for the State has also relied upon the decision of this Court in (2003) 3 SCC 569 : Anil Kumar vs. State of Uttar Pradesh wherein the Test Identification Parade was held 47 days after the arrest of the appellants. This Court after considering several decisions of this Court including the decisions in (1994) 1 SCC 413 : Brij Mohan vs. State of Rajasthan ; (2001) 3 SCC 468 : Daya Singh vs. State of Haryana and (2000) 1 SCC 471 : State of Maharashtra vs. Suresh concluded that since the identifying witness was attacked by the assailants including the appellant and another, he had a clear look at the assailants. When his younger brother came to save him he was killed by the assailants while the witness also received serious injuries. These were circumstances which would have imprinted in the memory of the witness the facial expressions of the assailants and this impression would not diminish or disappear within a period of 47 days. Similar was the case of the father and the mother of the identifying witness who had seen the assailants attacking their sons and one of their sons getting killed. In their memory also the facial expressions of the assailants will get embossed. A mere lapse of 47 days would not erase the facial expressions from their memory."

31. It has also been held by Hon'ble Apex Court in the case of **Sheo Shankar Singh Vs. State of Jharkhand and another (2011) 3 SCC 654** in Para- 46, which is reproduced as under:-

"46. It is fairly well-settled that identification of the accused in the Court by the witness constitutes the substantive evidence in a case although any such identification for the first time at the trial may more often than not appear to be evidence of a weak character. That being so a test identification parade is conducted with a view to strengthening the trustworthiness of the evidence. Such a TIP then provides corroboration to the witness in the Court who claims to identify the accused persons otherwise unknown to him. Test Identification parades, therefore, remain in the realm of investigation."

32. Identification of accused in court is a substantial piece of evidence in present case. Accused/appellants failed to mention any motive for causing voluntarily delay in test identification parade. Apart from that the accused Munna has been identified by all the eye-witnesses in court. There is consistency in evidence on the point of occurrence and on the point of roll played by each accused/appellants in evidence of

witnesses Pw- 1 to Pw- 3, which is also corroborated by medical evidence. Therefore, there is no ground to accept that accused appellant Munna was not involved in the crime. The injuries which have been found on the body of deceased Suresh Chandra and on the body of eye-witnesses indicates that weapons, as has been mentioned in F.I.R. and in evidence of witnesses, that one sharp edged weapon, one fire arm, one hard and blunt object including one sharp pointed weapon were used in occurrence. The evidence on record has proved that appellant Bal Kishan was carrying fire-arm *(tamancha)* in his hand, Lakshmi Prashad was carrying axe and appellant Munna was carrying ballam in his hand, which was used as causing the pointed injury on Chaini as well as pierced injury on deceased and injury of blunt object while using the ballam as lathi.

33. Learned counsel for the appellants has further submitted that the fact came into the F.I.R. and evidence of witnesses of fact that unknown assailants (appellant Munna) pushed his ballam in the wheel of cycle of deceased but there is no description of breaking of spokes *(tilies)* of cycle wheel. Although, I.O. has not made any description of cycle of deceased Suresh Chandra yet it may be taken as latches in investigation, which is not fatal for prosecution case. The shortcomings in investigation will not affect the credibility of eye-witnesses. It has been held by Hon'ble Apex Court in **Sukhchain Singh Vs. State of Haryana & Ors 2002 SCC (Cri.) 961, Allarakha K. Mansuri Vs. State of Gujarat 2002 SCC (Cri.) 519, Kashi Nath Mandal vs The State of West Bengal & Ors** 2013 (1) SCC 364 (SC)**, State Of Karnataka vs K. Yarappa Reddy AIR 2000 SC 185** and by the Co-ordinate Bench of this Court in **Umashankar Tivari vs State Of U.P. And Another** 2015 (89) SCC 421.

34. It has to be kept in mind that counsel for defence neither asked any explanation nor confronted on above point as according to provisions to Section 145 of Evidence Act in cross-examination of Pw- 7 (investigating officer), therefore appellants cannot raise such defence as grounds for their acquittal at appellate stage.

35. It has also been argued by learned counsel for the appellants that there is no recovery of weapons used in occurrence and there is no F.S.L. report of blood-stained soil, therefore, the prosecution version is not proved. If the investigating officer could not recover the weapons used in occurrence and failed to submit F.S.L. report of blood it may be the laches of investigating proceeding. It has been held by Hon'ble Apex Court has held in **Ram Bali Vs. State of U.P. 2004 (2) JIC 168 (SC)** that Para- 12.

"12. The investigation was also stated to be defective since the gun was not sent for forensic test. In the case of a defective investigation the Court has to be circumspect in evaluating the evidence. But it would not be right in acquitting an accused person solely on account of the defect; to do so would tantamount to playing into the hands of the investigating officer if the investigation is designedly defective. (See Karnel Singh v. State of M.P. (1995 (5) SCC 518)."

State Of Punjab vs Hakam Singh Appeal (Cri.) 130 of 2000 decided on 31.08.2005 that:-

"The High Court has disbelieved her testimony on the grounds i.e. on the manner of firing and recovery of the guns, non seizure of blood stained clothes but these short-comings hardly impeach her testimony. In order to impeach her testimony technical questions were asked to her which was not the correct approach for discarding her testimony. Therefore, we are of the opinion that the High Court has committed an error in discarding the testimony of this witness on technical grounds de hors the factual statement given by her.

Learned counsel for the respondent has also tried to make out that the defence version is more probable. The defence version was that in fact Bhola Singh who was coming for bus stop was first attacked by the prosecution party and in retaliation the accused persons went there and that the prosecution could not explain the second injury to the deceased Bhola Singh. We do not think that the defence version improbablises the prosecution story. It is just an afterthought theory put up by the defence to improbablise the prosecution story. But the facts as mentioned above particularly the testimony of P.Ws. 3 & 4 sufficiently lend support to the prosecution story.

It was also pointed out by learned counsel for the respondent that no fire arms were recovered and no seizure has been made of empties. It would have been better if this was done and it would have corroborated the prosecution story. Seizure of the fire arms and recovering the empties and sending them for examination by the Ballistic expert would have only corroborated the prosecution case but by not sending them to the Ballistic expert in the present case is not fatal in view of the categorical testimony of P.W. 3 about the whole incident."

The same view has been taken by the Hon'ble Apex Court in the case of **Krishna Mochi And Others vs State Of Bihar 2002 (2) J.Cr.C 123** that Para- 81.

"81. It has been then submitted on behalf of the appellants that nothing incriminating could be recovered from them which goes to show that they had no complicity with the crime. In my view, recovery of no incriminating material from the accused cannot alone be taken as a ground to exonerate them from the charges, more so when their participation in the crime is unfolded in ocular account of the occurrence given by the witnesses, whose evidence has been found by me to be unimpeachable"

In the case of **Gajoo vs State Of Uttarakhand 2012 (9) SCC 532** and by Co-ordinate Bench of this Court in the case **Virendra Singh @ Virendra Pratap Singh Vs. State of U.P. 2015 (2) ACR 1461**, Hon'ble Apex Court has laid down the same law.

36. Learned counsel for the appellants has failed to show any cogent reason for false implication of accused appellants.

37. In view of the facts, circumstances and evidence as discussed above, we are of the confirmed view that prosecution has succeed to prove the charges of offence under Section 307 read with Section 34, 302 read with Section 34 and 324 and 323 I.P.C. and no illegality or infirmity is found in the judgement and conviction order of sessions court. Appeals have no force. The appellants who are on bail, will surrender before the C.J.M. concerned immediately, failing which

C.J.M. concerned will issue NBW against accused appellants.

38. If accused appellants appears or brought before C.J.M. concerned they shall be sent to jail for execution of their sentence.

39. Accordingly, both the appeals are dismissed.

(2020)02ILR A726

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 28.01.2020

BEFORE
THE HON'BLE ARVIND KUMAR MISHRA-I, J.
THE HON'BLE GAUTAM CHOWDHARY, J.

Criminal Appeal No. 917 of 1992

Chet Ram & Ors. ...Appellants (In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Appellants:
Sri Subash Kumar, Sri Amit Kumar Srivastava A/C, Sri Gyanendra Prakash Srivastava, Sri Pankaj Srivastava

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

A. Criminal Law-Indian Penal Code-Sections 302/34-Appeal against conviction.

Under these circumstances, the very conduct of the informant- the sole eye-witness- becomes improbable and unnatural and his testimony requires independent corroboration, which independent corroboration is woefully lacking in this case. (Para 25)

There was ample occasion for the informant to have ascertained proper condition of the deceased in the day light, but that too was not done. We may observe that these aspects create doubt on the veracity and truthful version of testimony of P.W.1. (Para 26)

We unhesitatingly hold that the eye-witness P.W.1 is not trustworthy and his testimony is inconsistent with his natural conduct after the occurrence had taken place. Here we can safely observe that P.W.1 appears to be an interested witness and under these circumstances, we are of the considered opinion that the argument extended by the learned counsel for the appellant carries substance and the same is worth its credence. (Para 27)

On aforesaid vital aspects and particularly the withholding of the independent witness and more so in the event of non-corroboration of the testimony of P.W.1 in the prevailing facts and circumstances of the case, the trial court misjudged the situation and wrongly appraised the facts, vis-a-vis, circumstances of the case and arrived at wrong conclusion by convicting the accused for charge under Section 302/34 IPC, which finding of conviction and sentence cannot be sustained for the specific reasons aforesaid and the same is liable to be set aside. (Para 28)

Criminal Appeal allowed. (E-2)

(Delivered by Hon'ble Arvind Kumar Mishra-I, J. & Hon'ble Gautam Chowdhary, J.)

(1) Heard Sri Amit Kumar Srivastava, learned amicus curiae for appellant no.1- Chet Ram and Sri Gyanendra Prakash Srivastava, learned counsel for the appellant no.3 Nar Singh, learned A.A.G. assisted by learned A.G.As. for the State and perused the record of this appeal.

(2) By way of instant criminal appeal, challenge has been made to the validity and sustainability of the judgment and order of conviction dated 13.05.1992 passed by IV Additional Sessions Judge,

Bareilly, in Sessions Trial No.276 of 1991 (State Vs. Chet Ram and others), arising out of case crime no.258/1990, under Sections 302/34 IPC, Police Station- Subhash Nagar, District- Bareilly, whereby appellants have been sentenced to imprisonment for life.

(3) Appropriate to mention that during the course of appeal appellant no.2- Ghanshyam- and appellant no.4- Mahipal- expired, therefore, their appeal stood abated against them vide order of this Court dated 06.09.2019.

(4) Now, this appeal qua the surviving **appellant no.1 Chet Ram and appellant no.3 Nar Singh** is for adjudication.

(5) Facts relevant for adjudication of this appeal as reflected from record appear to be that first information report was lodged at Police Station- Subhash Nagar, District- Bareilly by informant- Heera Lal with allegations that yesternight on 18.09.1990 at around 9.00 P.M. he (informant) went to see off his father at the tubewell for sleeping. He was accompanied by Natthu Lal s/o Ram Lal of the village. The electric light was illuminated at the tubewell. The informant along with others arrived at the tubewell and started conversing with each other, in the meanwhile, real cousin brothers of the informant- Chet Ram, Ghanshyam s/o Durga Prasad along with co- villagers, Nar Singh s/o Natthu Lal, Mahipal s/o Durga Prasad- with whom old enmity on account of landed property is going on, possessing countrymade pistol in their hands, appeared on the spot and threatened them that he (the informant) and his father (deceased) will not be spared today, whereupon, the informant and Natthu started running away, when he saw that his father trying to run away and go up- stairs on a bamboo ladder placed at short distance, when all the aforesaid assailants with intention to commit murder, fired upon the father of the informant, whereupon, his (father of the informant) father fell down. The accused also fired on the informant and Natthu. The informant- Heera Lal along with Natthu hid themselves in the field being frightened with the incident. The dead body was stated to have been lying on the spot. It was requested that report be lodged against the accused and action be taken. This report is Exhibit Ka-1.

(6) Relevant entries were made in the concerned check F.I.R. at Case Crime No.258/90, under Sections 302/307 I.P.C. at Police Station- Subhash Nagar, District- Bareilly, which is on record as Ex. Ka.2A.

(7) Pursuant to the entries so made in the check F.I.R., a case was registered against the accused at Rapat No.9 dated 18.09.1990 at 06.10 hours in the concerned General Diary at aforesaid case crime number under aforesaid section of Indian Penal Code, copy whereof is on record as Ex.Ka.3.

(8) The investigation was entrusted to S.I. Sri Anil Kumar Malik. The Investigating Officer- Anil Kumar Malik proceeded to the spot and prepared the inquest report of deceased- Bheem Sen on 18.09.1990, which inquest report has been proved by P.W.3- Harsh Vardhan Gaud. The relevant papers were also prepared at the same time- say- photo of dead body (photo nash)- Exhibit Ka-5, Challan dead body Exhibit Ka-6, letter to R.I. Exhibit Ka-7, letter to C.M.O. Exhibit Ka-8, Specimen Seal Exhibit Ka-9 and these

have also been proved by the aforesaid prosecution witness- P.W.3 Harsh Vardhan Gaud. The cadaver of deceased was sent for postmortem examination and site plan of the place of occurrence was prepared by the Investigating Officer- Anil Kumar Malik. The site plan has been proved by the aforesaid prosecution witness- P.W.3 Harsh Vardhan Gaud as Exhibit Ka-10.

(9) Postmortem examination on the cadaver of deceased was conducted on 18.09.1990 at 04.00 P.M. by Dr. A.K. Jain P.W.2, wherein the following ante-mortem injury was noted at the time of examination:

Ante mortem injuries

1. Gun shot wound of entry 4 cm x 2½ cm x chest cavity deep on the right side of chest. 4 cm away from mid-line and 11 cm below of the right scapula. Margins inverted and lacerated blackening present around the wound.

2. A gun shot wound of entry 3 cm x 2 cm x bone deep over the medial side of right below wrist joint. Blackening present around the wound. Margins inverted and lacerated.

3. Exit lacerated wound 10 cm x 6 cm x bone deep through and through over dorsum of right hand, corresponding to injury no.2. Underneath metacarpal bones fractured with pieces.

4. A gun shot wound of entry 3 cm x 2.5 cm x bone deep over back of left hand in the middle margins inverted and lacerated. Blackening, tattooing and scorching present around the wound and over the wrist joint and partly over lower part of left forearm. Underneath metacarpal bones fractured into pieces and one yellow metallic bullet recovered.

5. A gun shot lacerated wound through and through 3 cm x 1 cm on the angle of upper and lower lips.

In the opinion of doctor, cause of death was stated to be haemorrhage and shock as a result of ante-mortem injuries. The postmortem report is Exhibit Ka-2.

(10) Record also reflects that during course of investigation empty cartridges .315 bore and one bullet .315 bore etc. were taken into possession by the police and wrapped in a polythene pack and was sealed in a cloth and after preparing the memo of the same, which is Exhibit Ka-11. The memo of bamboo ladder from the place of occurrence is Exhibit Ka-12. The investigating officer also collected simple soil as well as blood stained soil from the spot and kept it in two separate containers and memo was prepared on 18.09.1990, which is Exhibit Ka-13.

(11) Statement of the prosecution witnesses was recorded and after completing the formalities charge- sheet- Exhibit Ka-14- was filed against the accused. Consequently, the trial commenced and trial Judge charged the accused under Section 302/34 IPC for committing murder of Bheemsen on 17.09.1990 around 9 P.M. within police station- Subhash Nagar. The Charge was read over and explained to the accused, who denied the charge and opted for trial.

(12) In turn, prosecution was asked to adduce its testimony in order to prove the guilt. The prosecution produced in all three witnesses out of whom, one is witness of fact and the rest two are formal witnesses. Brief reference of the prosecution witnesses is ut-infra:-

Heera Lal P.W.1 is the first informant and he claimed himself to be an eye-witness of the occurrence. He has proved written report Ext. Ka.-1.

Dr. A.K. Jain P.W. 2 has conducted post-mortem and has proved post-mortem examination report as Exhibit Ka-2.

In this case, the Anil Kumar Malik, the Investigating Officer has not been examined, however, in order to prove the investigation and the prosecution papers Harsh Vardhan Gaud, P.W.3 has been examined and he has proved the relevant papers on behalf of the Investigating Officer.

(13) Except as above, no other evidence was produced and the statement of the accused was recorded u/s 313 Cr.P.C., wherein they claimed to have been falsely implicated on account of enmity and collusion of the informant with the police.

(14) However, no evidence was led by the defence.

(15) Consequently, the case was posted for hearing of arguments. After considering the case on its merits and appraisal of facts and circumstances and evaluation of evidence on record, the learned trial judge returned aforesaid finding of conviction against the accused and sentenced them to imprisonment for life, which paved way to this appeal.

(16) Consequently, this appeal.

(17) The moot point that arises for adjudication of this appeal relates to the fact whether the incident of murder in question was caused by the appellants and the prosecution has proved the same beyond all reasonable doubt?

(18) Crux contention of the learned counsel for the appellants rest on the anvil that the incident narrated, if assumed to be true, then it is obvious that no one saw the occurrence and it is not supported by the available independent witness- say- Natthu with whom the informant- Heera Lal (son of the deceased) was stated to have been conversing at the tubewell, when the incident occurred. The conduct of the informant is unbecoming of a reasonable prudent man and the same is not proper and it is most unnatural for the reason that assuming it to be that the father of the informant was killed by the four assailants and the informant- the son of the deceased- ran towards the field at a shot distance from the place of occurrence and hid himself in the field and remained there for the whole night, then as per his testimony emerging in his examination-in-chief, he did not care to go to the spot to take stock of the situation about the actual condition of his father after the assailants had secured their escape, instead from the field in the next morning he went straight to his village and from village went to the police station, this is highly improbable conduct. Can it be imagined under circumstance that a person who left the victim running away after being frightened by the fire caused by the assailants would not revisit the spot in the following morning (after the occurrence) and would not see the overall situation of the victim and how can he say with certainty that the victim died on the spot without revisiting on the spot after the occurrence. The examination-in-chief of P.W.1 also supplies the clue that the informant had strong motive to implicate the accused in order to grab the property of his uncle

(taau) Dharam Dass. Next contended, under what circumstances the best testimony of the independent witness-Natthu was withheld by the prosecution, this by itself is indicative of fact that Natthu was not there on the spot at the time of the occurrence and had he been so present and witnessed the incident then he must have been examined by the prosecution in corroboration of the testimony of P.W.1. In this case, the corroboration from the independent witness must have comeforth in the shape of Natthu but he has been withheld for no worthy reason. Had the occurrence taken place at 9 P.M. in the night? The assailants would not have spared the other two witnesses claimed to have been present on the spot. They (accused) being four in number must have chased the informant P.W.1 or at least a gesture chasing him must have been made in order to eliminate them so as not leave any sign of the offence intact regarding the occurrence, but no such whisper in shape of any chase or pursuation by the accused is gathered either from the first information report or from the testimony of P.W.1 Heera Lal-the eye witness informant of the occurrence. The learned trial Judge out of whim and imagination basing his finding on conjuncture and surmises erroneously recorded finding of conviction thus sentenced the accused of charge under Section 302 read with Section 34 IPC and sentenced them to imprisonment for life.

(19) Learned A.G.A. while retorting to above contention has vehemently claimed that in this case, the learned trial Judge has rightly acted on the evidence on record and it is trite law that number of the witnesses is not to determine the guilt of accused but the quality evidence and creditworthyness of witness is to be judged in its entirety and this is the crux of Section 134 of the Indian Evidence Act, 1872. In this case, the eye account testimony of P.W.1 Heera Lal cannot be brushed aside merely on account of certain behavioral aberrations because the mind set of a person cannot be said to be working systematically and under various prevailing circumstances and the attendant facts of a case it is not possible to behave soberly as a reasonable man but it is the bent of the mind compelled by existing circumstances guides a person, merely because P.W.1 Heera Lal did not revisited the place of occurrence after the occurrence and went straight to the village and from there moved to the police station and lodged the report that would not by itself create any situation for exonerating the appellants. The four appellants arrived on the spot and opened fire by their respective country-made guns. The post-mortem report is indicative of fact that gunshot entry wound and gunshot exit would apart from other gunshots were found as the ante-mortem injuries at the time of the post-mortem examination by the doctor, and this by itself will clinchingly establish harmony between the ocular version of the incident and the post-mortem examination report. These consistence circumstances cannot be by-passed and the trial Judge considered all these aspects-factual and legal in right perspective emerging in the testimony of the prosecution witnesses, vis-a-vis, the attendant facts and circumstances of the case and has justifiably recorded conviction under Section 302/34 IPC and sentenced *condingly.*

(20) Also considered the rival submissions.

(21) We have before us only one prosecution witness of fact P.W.1 Heera Lal. He has stated in his examination-in-chief that he is in possession of the land of his uncle *(taau)* Dharam Dass on the basis of will and is ploughing his field on

account of which, the accused are on inimical terms with him. Regarding the incident, he has stated that the incident occurred at 9 P.M. at the tubewell, when he went to see off (in the night) his father- Bheem Sen- at the tubewell along with one Natthu Lal s/o Ram Lal of the village. They arrived at the tubewell and all the three were conversing with each other at the door of the tubewell, when Chet Ram, Ghanshyam, Nar Singh and Mahipal possessing country-made gun in their hands appeared on the scene from the western side. There was electricity light on the spot. The accused exhorted that the son and the father will not be spared today, whereupon, all the three started running away and the father of the informant tried to go up- stairs on a bamboo ladder placed at a short distance. At the same time, the accused fired on him due to which informant's father fell down. Besides, the accused also fired towards this witness and Natthu, but they were saved. After firing the accused managed their escape towards western side. However, the informant and Natthu Lal hid themselves inside the *chari* field the whole night being frighted with the incident. In the morning, they went back to home in village from where they proceeded towards the police station, on way to police station, the informant met with Hemraj and Harvendra with whom the informant was acquainted, therefore, they also accompanied the informant.

The report was scribed by Hemraj outside the police station thereafter it was lodged at the police station. This witness has proved the written report- Exhibit Ka-1. Thereafter the informant and Natthu accompanied the police and arrived on the spot where the cadaver of the informant's father was lying on the place of occurrence. Thereafter necessary formalities were done by he police. It has been stated that Natthu Lal being under fear of the accused is not willing to give evidence. This witness was cross-examined. He has stated in his cross-examination that Sher Singh, who was also present at his tubewell, as he used to remain there during night, did not arrive on the spot and after hearing the sound of the fire, Sher Singh met the informant near the dead body of the informant's father when the informant arrived on the spot with the police.

(22) Further stated in his cross-examination about fact that some altercation has taken place previously between the accused and the informant, whereupon, proceedings under Section 107/116 was drawn between the parties. However, he has stated that this proceeding commenced after the incident of murder. He has also stated that not a single person among the assailants chased them. He has stated that the miscreants had opened fire 4-5 times on the spot. He could not see the direction of the faces of the assailants at the time firing was done. However, he has stated in his cross-examination on page 25 of the paper book that after two and a half hours of the incident, he again arrived on the spot and saw his father; and after seeing his father, informant again went to the 'chari' field and did not weep and cry.

(23) Apart from above factual aspects, no other testimony has come forth. Now, so far as the testimony of P.W.1 Heera Lal in his examination-in-chief and the lodging of the FIR is concerned then there is no whisper about the fact that the informant ever tried to revisit the spot- the place where his father was lying after the occurrence. However, it has emerged only on page no.25 of the

paper book in cross-examination that he revisited the place of occurrence two and a half hours after the occurrence. But no details of his reaction afterwards have been furnished.

(24) Now, the conduct of the informant- being son of the deceased- is highly improbable and unnatural to the magnitude that he was not far away from the dead body after the occurrence where he hid himself in a 'chari' field and the next morning after the incident (occurred), he did not think it proper to revisit the spot where his father was lying dead. Instead he went straight back to village and from there proceeded towards the police station. Here also, after reaching his village he did not strive to revisit the spot of occurrence along with the villagers and there prevails abysmal silence on this particular conduct of the informant as to how revisit to the spot under these circumstances was deferred till the arrival of the police on the spot after the report was lodged at the police station. Thus, the conduct of the informant is in itself highly improbable and does not sound and falls inline with that of a ordinary, reasonable and prudent man and cannot be accepted to be natural conduct as such.

(25) Next, under these circumstances, the very conduct of the informant- the sole eye-witness- becomes improbable and unnatural and his testimony requires independent corroboration, which independent corroboration is woefully lacking in this case. The only other eye-witness is stated to be another person- Natthu- who was admittedly there, but he was not examined by the prosecution but withheld as a prosecution witness. The reason assigned for his non- examination is suggested to be fear of the accused. But his non-examination erodes the reality of the prosecution story substantially. This witness (P.W.1) appears to be highly motivated in ensuring false conviction of each of the accused.

(26) Had the incident taken place in the manner and style suggested by the informant himself, then the natural and the proper conduct/reaction would have been that as soon as after the incident had occurred and when all the four assailants had fled away from the scene towards the western side the informant along with Natthu had also secured their escape from the scene of occurrence and hid themselves in a *'chari'* field then they had every occasion and reason to have arrived on the spot soon after (the incident) in order to ascertain the condition well being of the deceased- Bheemsen, who was lying on the spot but no such gesture was shown by the informant. Not only this, in the next morning, there was ample occasion for the informant to have ascertained proper condition of the deceased in the day light, but that too was not done. We may observe that these aspects create doubt on the veracity and truthful version of testimony of P.W.1.

(27) Lastly, when the informant reached at his village, he did not strive to come back to the spot and to take stock of the situation. This disinterestedness of the informant in not revisiting the spot after the occurrence generates doubt about the manner and the style of the occurrence that it so occurred and does not inspire confidence and the withholding of the independent witness- Natthu- works fatally to the genuineness and veracity of the prosecution case. Consequently, we unhesitatingly hold that the eye-witness

Heera Lal P.W.1 is not trustworthy and his testimony is inconsistent with his natural conduct after the occurrence had taken place. Here we can safely observe that Heera Lal P.W.1 appears to be an interested witness and under these circumstances, we are of the considered opinion that the argument extended by the learned counsel for the appellant carries substance and the same is worth its credence.

(28) On aforesaid vital aspects and particularly the withholding of the independent witness and more so in the event of non-corroboration of the testimony of P.W.1 Heera Lal in the prevailing facts and circumstances of the case, the trial court misjudged the situation and wrongly appraised the facts, vis-a-vis, circumstances of the case and arrived at wrong conclusion by convicting the accused for charge under Section 302/34 IPC, which finding of conviction and sentence cannot be sustained for the specific reasons aforesaid and the same is liable to be set aside.

(29) Consequently, the judgment and order of conviction dated dated 13.05.1992 passed by IV Additional Sessions Judge, Bareilly, in Sessions Trial No.276 of 1991 (State Vs. Chet Ram and others), arising out of case crime no.258/1990, under Sections 302/34 IPC, Police Station- Subhash Nagar, District- Bareilly is hereby set aside and the appeal is **allowed**. Accused-appellants are acquitted of all charges as above.

(30) In this case, the accused-appellants are on bail. They need not surrender in this case. Their bail bonds are cancelled and sureties are discharged. However, they shall furnish surety bonds in compliance with Section 437-A Cr.P.C.

(31) Let a copy of this order be certified to the concerned trial court for its intimation and follow up action.

(2020)02ILR A733

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 17.01.2020

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

Criminal Appeal No. 939 of 1985

Peeru & Ors. ...Appellants

Versus

State of U.P. ...Respondent

Counsel for the Appellants:
Sri S.A. Gulani, Sri Abhishek Ahuja, Sri M.J. Akhtar

Counsel for the Respondent:
C.S.C.

A. Criminal Law-Indian Penal Code-Sections 147, 148, 149 and 326 - Appeal against conviction.

The statements of these two witnesses were found to be in corroboration with the statement of doctors PW2 and PW4. The genuineness of the medical examination report of the two injured have been admitted from the side of the accused and therefore no detailed examination-in-chief has been recorded of this witness. (Para 19)

The injury memos which have been proved by doctor, show that injured person had suffered as many as 14 injuries on his person which were caused to him by acid. Another injured person was also injured in this case, has suffered as many as nine acid injuries. The other doctor which has been examined from

the side of the prosecution is Dr. T.P. Agarwal, who has stated in examination-in- chief as PW6 that he had examined the injured and had found that the skin over and below the right eye was burnt. Vision of the right eye had absolutely gone as he was not able to count fingers and has proved medical examination report prepared by him. This witness has proved that vision of right eye had been totally destroyed by this assault. (Para 20)

His testimony does not cast any doubt on the truthfulness of his statement. His evidence is absolutely believable with regard to three accused. (Para 22)

After having scanned entire fact of the case as well as evidence on record, the prosecution has been able to prove the case against the accused who were directly responsible for causing acid burn injuries but so far as the appellant, co-accused are concerned, it appears that they have been falsely implicated because of enmity as there is no role assigned to them except that of instigating the main accused. (Para 24)

Criminal Appeal partly allowed. (E-2)

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

1. Heard Sri M.J. Akhtar, learned counsel for the appellant no.4, Sri G.P. Singh, learned A.G.A. and perused the record

2. This appeal has been preferred against the judgment and order dated 04.04.1985 passed by 5th Additional and Sessions Judge, Ghaziabad in S.T. No. 413 of 1983 (State vs. Jabbar and others) whereby the accused Peeru, Jabbar, Shabban have been found guilty under section 148 and 326 IPC and they have been convicted. The accused Gaffar and Nanva have been found guilty under section 147 and 326 IPC read with section 149 IPC and they have been convicted. The accused Peeru, Jabbar and Shabban have been sentenced under section 148 IPC with one year R.I. each; under section 326 IPC five years R.I. each, Accused Gaffar, Nanva have been sentenced one year R.I. each under section 147 IPC and three years R.I. each under section 326 read with 149 IPC. All the sentences are directed to run concurrently.

3. Out of the above accused-appellants, accused-appellant no.1, Peeru, accused-appellant no.2 Jabbar, accused-appellant no.3 Shabban and accused appellant no. 5 Nanva have died and their appeals have been abated vide order dated 11.07.2019. Therefore, the appeal of accused-appellant no.4 Gaffar remains for consideration of this Court.

4. The prosecution case as per FIR is that on 20.9.1983 at about 2.30 P.M. when informant Abdul Waheed had gone to see cinema in Jaina Talkies Hapur with Shahabuddin @ Sabu (PW1) and was sitting in the class chargeable with Rs.4.00, beside them other persons were also sitting. The news reel was going on. Light was also on. All of a sudden, the accused-appellants, who belonged to the Mohalla of Shahabuddin @ Sabu, out of whom appellants, Peeru, Jabbar and Shabban were having container in their hands, rest of them were empty handed. Nanva and Gaffar instructed "Tejab Dalo Sabu aur Waheed Par". Throw acid on Sabu and Waheed. They should not be left alive. On this instigation, all the three co-accused Peeru, Jabbar and Shabban had thrown acid from the container upon the informant and Shahabuddin @ Sabu with an intention to kill them. The said acid also fell upon Mohd. Yunus, Munshi of an Advocate Devendra Kumar Tyagi, who was sitting by the side of Shahabuddin @

Sabu. By this episode, stampede followed and one of the containers fell on the spot. Jabbar and others fled from hall. The said occurrence was seen by informant, Abdul Waheed (PW3), Shahabuddin @ Sabu (PW1) (injured), Mohd. Yunus, Pavva son of Ishaq Haneef and many other persons, who were sitting in the hall. By falling of the said acid, Shahabuddin @ Sabu and Mohd. Yunus became seriously injured and the condition of Shahabuddin @ Sabu became critical. The accused Jabbar wanted to marry forcibly with the sister of Shahabuddin @ Sabu regarding which a complaint was also given by him (Sabu) at the police station. About 4-5 months prior to this occurrence, the informant and Shahabuddin @ Sabu were also beaten by accused Jabbar, Gaffar and Peeru regarding which report was lodged by the informant at police station Hapur. Thereafter about 2 ½ months ago, Shahabuddin @ Sabu was also beaten by Shabban, Nanva, Jabbar and Gaffar in Ghaziabad also. Regarding which, Shahabuddin @ Sabu had lodged report at police station Sihani Gate. Because of this enmity, Jabbar and others had given effect to the present occurrence. From the place of incident, empty container was collected and after taking it, Shahabuddin @ Sabu, Mohd. Yunus and informant went to the police station to lodge FIR.

5. On the written report (Exhibit Ka-3), chik FIR (Exhibit Ka-9) was prepared at police station, Hapur on 20.9.1983 at 3.35 P.M. After registering, the case crime no.515 of 1983 under sections 147, 148, 307 and 326 IPC against the accused-applicants, entry of which was made in G.D. on the same date, which is Exhibit Ka-10, the investigation was handed over to S.I. Mulayam Singh (PW5), who conducted investigation in this case and prepared site plan at the instance of the informant, which is Exhibit Ka-6 and submitted charge-sheet (Exhibit Ka-7) against the accused applicants.

6. On the basis of evidence on record, charge was framed against the accused-appellants Gaffar and Nanva on 15.2.1984 under sections 147, 307 read with 149, 326 read with 149 IPC and on the same day charge under sections 148, 307 read with 149 and 326 read with 149 IPC were framed against the accused Peeru, Jabbar and Shabban to which all the accused pleaded not guilty and claimed to be tried.

7. Thereafter from the side of the prosecution injured Shahabuddin @ Sabu as PW-1, Dr. R.D. Gupta as PW-2, Abdul Waheed as PW-3, Dr. N.K. Sharma, as PW-4, S.I. Mulayam Singh as PW-5, Dr. D.P. Agarwal as PW-6, Constable Mahipal as PW-7 and Mohd. Yunus as CW-1 have been examined. Thereafter, the evidence of prosecution was closed and the statements of accused were recorded under section 313 Cr.P.C. in which plea of false implication has been taken and in defence Jai Bhagwan Sharma as DW1 has been examined.

8. The court below after having considered the entire evidence on record has convicted the accused-appellants and awarded punishment as mentioned above.

9. Learned counsel for the appellant no. 4 has argued that the appellant no. 4 had no direct role in giving effect to the occurrence because he has been assigned the role of only instigation, actually main role has been assigned to co-accused namely, Jabbar, Peeru and Shabban, who were carrying container full of acid which

is said to have been thrown at the instigation of co-accused Jabbar and co-accused Nanva. The said allegation of even instigation is false as no such instigation was ever given nor there is any evidence on record and yet Gaffar has been convicted under the abovementioned sections, therefore, he should be acquitted.

10. In order to appreciate the argument of both the parties, the evidence of witnesses, which have been adduced from the side of prosecution need to be scrutinized.

11. Shahabuddin @ Sabu who is injured in this case has stated in examination in chief that about 11 months ago, he had gone to Jaina Talkies, Hapur with Abdul Waheed (PW3) at about 2.30 p.m. and was sitting in the hall. Amar Akbar Anthony film was going on. At about 2.30 to 3.00 p.m. accused Jabbar, Peeru, Shabban were having containers full with acid while Nanva and Gaffar (appellant no.4) were empty handed. Gaffar and Nanva instructed the accused Jabbar, Peeru and Shabban that they should throw acid upon Abdul Waheed and Shahabuddin @ Sabu. They should not be left alive and then Jabbar, Peeru, Shabban had thrown acid upon PW1 and Abdul Waheed (PW3). Thereafter, the informant after making him sit on a Rikshaw, had taken him to police station and there Abdul Waheed had lodged report and thereafter PW1 was referred to Hapur Medical College and from there doctor had referred him to Meerut Medical College. He was not given any treatment at Hapur. He very well recognized all the accused-appellants from before. This offence was committed because accused Jabbar wanted to marry his sister for which PW1 had declined. This led to the annoyance of the accused. He had lost his eye sight absolutely.

12. In cross examination this witness has stated that Nanva and Shabban are real brothers. He does know whether accused Peeru had lodged any report prior to this occurrence against PW1 in respect of an occurrence given effect to by knife. But further he has stated that at his complaint, he had got himself bailed out and Shabban and Nanva were witness in that report. Jabbar, Gaffar (appellant) and Peeru are three real brothers, who lived in his Mohalla. On the date of occurrence, first show started at 11.30 p.m. and it used to finish at about 2.00 to 2.30 p.m. They had entered the hall before 4-5 minutes of this occurrence. Abdul Waheed (PW3) was sitting to the left of him. He had heard after reaching the hospital that acid was also thrown upon a Munshi of an advocate. His name was Yunus and he came to know about his name subsequently. About 2-3 minutes after the acid was thrown upon him, he went to the police station. The whole body was burning although he had not fainted. He stayed at police station for about 10 minutes. He did not go inside the police station after alighting from Rikshaw rather remained stayed on the gate of the police station. Abdul Waheed has lodged the report from outside the gate of the police station in his presence. He came to know at the police station that the constable had come out because he was not in a position to see them and due to this reason, he could not tell as to who had written the report. No one had interrogated him. After lodging the report, he was taken to Hapur hospital where he was not given treatment and had stayed there hardly 2-4 minutes. His father had taken him to Merrut and with him some police personnel were also there and had reached

there at about 4.00 p.m. When he reached inside the cinema hall, advertisements were going on and when the accused came very close, then he saw them. The accused had come to the seats, which was ahead of the seat of PW1 and after coming there, Jabbar and Nanva had thrown the acid upon him. His statement was recorded by the Investigating Officer about 8-10 days after the occurrence, to whom he had stated that accused were sitting in the next row and when he saw them, immediately the accused had stood up. He had not seen them coming but he had not told the Investigating Officer that right then all of a sudden Peeru, Nanva, Jabbar, Gaffar, appellant and Shabban of his Mohalla came to cinema hall and entered in the same class, in the next row of which the PW1 was sitting. He had not told him that they were having containers in their hands. Further he has stated that all the accused had come in the row of seats which was in front and all of them had stood in a line. Gaffar, Appellant and Nanva were sitting to the left of him and rest of the three were to the right of him in standing position. When he had seen all the accused sitting in front row, he did not feel that he was having any fear but when they stood up, then he felt that there was some danger. He could not defend himself before the acid was thrown upon him. When acid fell upon him, he was sitting on the seat but cannot tell whether the acid had fallen on the seat or not. The constable remains on duty in picture hall, he does not know. There was also one gate keeper on the gate in the hall. It is wrong to say that picture was going on and somebody else had thrown acid upon him and he could not recognize them and was making false statement. His clothes were also taken at the police station. There were people sitting behind his row also. He did not pay attention to the people coming inside the hall. As soon as he sat inside the hall advertisement and news reel had started. First of all Jabbar had thrown acid upon his face and the said acid also fell in front row as well as upon him and soon thereafter he stood up. Thereafter, who had thrown acid, he could not know but the acid was thrown by the rest of the two accused but he could not see because his vision has gone. When the people in the hall started raising alarm "Pakro Pakro" all people stood up and stampede followed, this commotion started by the persons sitting about 5-7 feet away from him.

13. The statement of this witness have very emphatically come on record to the effect that it was Jabbar, who was the main culprit who had thrown acid upon him and rest of the two accused Peeru and Shabban are also stated to have thrown acid upon him and Abdul Waheed but he has rightly stated that he could not see the other two accused by then his vision has gone due to acid falling upon him, therefore, the statement of this witness is truthful in regard to throwing acid by Jabbar. The statement of this witness that the said occurrence was given effect to at the instance of Nanva and Gaffar, appellant is found to be correct since all the accused were close to each other. Nanva and Jabbar are said to be brother while Gaffar and Peeru are also said to be brother of each other, it could be possible that the name of Gaffar, appellant and Peeru would have been taken in order to implicate all of them but the occurrence was committed only by Jabbar as per this witness.

14. The other injured witness of this case is Abdul Waheed who has been examined as PW3. The said witness has

stated in examination-in-chief that he had accompanied Shahabuddin @ Sabu to cinema hall where news reel was going on, soon after five persons came to the place where they were sitting to the front first row namely, Gaffar, appellant, Peeru, Jabbar and Shabban, who are present in Court. Nanva and Gaffar, appellant were empty hands while Jabbar, Peeru and Shabban were having containers in their hands. Gaffar, appellant and Nanva told the other three accused, pointing towards Waheed and Sabu that they were sitting and that acid be thrown upon them. They should not be allowed to escape. Thereafter, Peeru, Jabbar and Shabban had thrown acid from their containers which fell upon Shahabuddin @ Sabu and PW3. Beside PW3, one Munshi of an Advocate namely, Yunus was sitting and acid also fell on him. At that time, lights were on of the hall but there were curtains on the gate. Accused person who had thrown acid upon them had fled from there. Thereafter, PW3 and his companion Shahabuddin @ Sabu also came out and went to police station. When they reached outside the gate of Tehsil, there was huge crowd assembled. He asked one gentleman to scribe report who had written the report and the same was thereafter signed by him, which is Exhibit Ka-3. He has gone to police station to lodge the report. Tehsil and police station are located in the same boundary, thereafter police personnel had taken them to hospital where he was medically examined while Shahabuddin @ Sabu was referred to Hapur forthwith and from there to Meerut.

15. In cross-examination, this witness has stated that Peeru had lodged a report against him regarding assaulting upon him with knife, which occurrence took place about 4-5 months ago. He does not know whether Nanva was a witness against him and whether hearing in this case had begun in the Court. This occurrence had taken place after 5-6 minutes of their entering the hall. They had sat on the opposite side from where they had entered the hall and were sitting on the second row. They were sitting almost in the middle of the hall. The door of the side from where people were entering after purchasing the ticket was open while the door on the other side was closed. Till the time this occurrence took place, people were still coming inside the hall. In the hall, one gate keeper was there. First of all, when he saw the accused, then they had said to throw acid. When they said to throw acid then they were standing in the next row ahead in bent condition. He was sitting after leaving two seats from gallery. Shahabuddin @ Sabu was sitting to the right side of him and Mian Munad was sitting on the left side but he does not recollect whether Mian Munad was sitting there from before or had sat there after his coming in the hall. In the front row ahead of the row in which he was sitting, the accused Jabbar, thereafter Shabban, thereafter Peeru were sitting. They were sitting to his left side and Peeru, thereafter Nanva and thereafter Gaffar and appellants were sitting and all of them had thrown together acid upon them.

16. In front of PW3 was Shabban. Acid fell upon his face, legs and neck, thereafter accused fled towards the curtain but he could not see from which gate, they fled. The accused had aluminum container in which amul milk for children is kept. Soon after having thrown the acid, he and Shahabuddin @ Sabu came to the rear gate of the hall together holding hands of each other and from there they went to police station on a rickshaw. After throwing acid

upon him till reaching the police station, he did not tell about this occurrence to anyone. After purchasing ticket till entering the hall, he had not seen any of the accused and after having sat there for 6-7 minutes, he saw the accused person. All the three accused had thrown acid simultaneously. Acid certainly must have fallen on the seat but he could not see it. Soon after throwing of acid, he had raised alarm which led to stampede, since the PW3 was not in full control of his sense.

17. It is right to say that Peeru had lodged a case against him under section 107/16 Cr.P.C. in which action was taken.

18. The said statement of the witness clearly indicates that main emphasis is that there were three accused who had together thrown acid upon him and Shahabuddin @ Sabu by which they had suffered injuries though this witness has tried to communicate that the other two accused Nanva and Gaffar also were accompanied by the other three accused namely, Jabbar, Peeru and Shabban who are said to have thrown acid together from the container taken in their hands but I find that his testimony is not very confidence inspiring with respect to Nanva and Gaffar, appellant. He has admitted about enmity between two sides and including enmity of his own with one of the accused Peeru as one case was lodged by Peeru against him for assaulting him by knife, therefore, it could be possible that due to said enmity the name of Gaffar and other appellants would also have been taken by this witness so that all the accused were implicated in this case. The evidence appears to be on record only against three accused namely, Jabbar, Peeru and Shabban who had actually thrown acid upon him and co-injured Shahab Uddin.

19. The statements of these two witnesses were found to be in corroboration with the statement of Dr. R.D. Gupta, PW2 and Dr. N.K. Gupta, PW4. The genuineness of the medical examination report of the two injured namely, Shahabuddin @ Sabu and Abdul Waheed have been admitted from the side of the accused which are Exhibit Ka-1 and Exhibit Ka-2 and therefore no detailed examination-in-chief has been recorded of this witness. This witness has stated that the injuries which have been received by them could be caused on 20.09.1983 at 2.30 p.m.

20. In cross-examination, this witness has stated that the acid was of the kind which could cause burn injury. The burns suffered by the injured were deep burn. This witness has been cross examined at length by the defence but nothing such has been said by this witness which would make it possible to disbelieve his statement given in examination-in -chief. The injury memos which have been proved by this doctor, show that Abdul Waheed had suffered as many as 14 injuries on his person which were caused to him by acid (Exhibit Ka-2). Mohd. Yunus who also was injured in this case, has suffered as many as nine acid injuries (Exhibit Ka-1). The other doctor which has been examined from the side of the prosecution is Dr. T.P. Agarwal, who has stated in examination-in- chief as PW6 that he had examined the injured Shahabuddin @ Sabu on 27.9.1983 and had found that the skin over and below the right eye was burnt. Vision of the right eye had absolutely gone as he was not able to count fingers and has proved medical examination report Exhibit Ka-8 prepared by him. This witness has proved that vision of

right eye had been totally destroyed by this assault.

21. In view of the statement of these two witnesses i.e. PW-2 and PW-6 have proved beyond doubt that it was the injuries caused by Jabbar, Peeru and Shabban but these injuries were caused by throwing acid upon them, which has resulted in serious injuries so-much-so that vision of Shahabuddin @ Sabu has absolutely gone, therefore, prosecution has succeeded in proving the case against the main accused Jabbar and Shabban.

22. Investigating Officer, S.I. Mulayam Singh PW-4 has proved the site plan as well as charge sheet, clothes and other things of the injured which were taken in possession in pursuance to the occurrence. His testimony does not cast any doubt on the truthfulness of his statement. His evidence is absolutely believable with regard to three accused namely, Jabbar, Peeru and Shabban.

23. PW-7 Constable Mahipal is formal witness who has simply prepared chik and G.D. and has proved them, therefore, no detailed analysis is required of his statement.

24. After having scanned entire fact of the case as well as evidence on record, I am of the opinion that the prosecution has been able to prove the case against the accused Jabbar, Peeru and Shabban only who were directly responsible for causing acid burn injuries to Shahabuddin @ Sabu PW-1, Abdul Waheed, PW3 and one Munshi of an Advocate Yunus but so far as the appellant Gaffar, co-accused Nanva are concerned, it appears that they have been falsely implicated because of enmity as there is no role assigned to them except that of instigating the main accused named-above to throw acid upon the injured.

25. In view of analysis, I find that the co-accused Gaffar, appellant, whose case is being considered by this Court as he is the only accused alive, whereas all of them have already died, is not found guilty of charges under sections 147 and 326 IPC read with section 149 IPC, P.S. Hapur, District Hapur, accordingly, he stands acquitted of the said charges.

26. Appeal stands allowed.

27. Let a copy of this judgment be transmitted to the trial court along with lower court record promptly for immediate compliance.

(2020)02ILR A740

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 20.01.2020

BEFORE
THE HON'BLE NAHEED ARA MOONIS, J.
THE HON'BLE RAJ BEER SINGH, J.

Criminal Appeal No. 1445 of 2015

Noor Mohammad ...Appellant (In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Appellant:
Sri Santosh Tripathi, Sri Ajay Kr. Srivastava, Sri Rajiv Lochan Shukla, Sri Sanjay Kumar Srivastava, Sri Syed Shahnawaz Shah

Counsel for the Opposite Party:

Sri Ashwani Prakash Tripathi, A.G.A.

A. Criminal Law-Indian Penal Code-Sections 304B, 498A, 302/34 and 3/4 of Dowry Prohibition Act- Appeal against conviction.

In view of evidence on record, it cannot be held that deceased suffered death due to strangulation or that the death of the deceased was homicidal in nature. If medical evidence suggests that death of deceased took place due to suicide, the accused cannot be held guilty for murder punishable under section 302 IPC. Learned trial Court has not made any discussion as to on what basis death of deceased has been found homicidal in nature and without making any such discussion and without rendering any such conclusion. (Para 27)

It is not possible to convert conviction of accused-appellant from section 302 IPC to section 304-B , 498-A IPC and section 3/4 DP Act, particularly when no appeal has been filed against acquittal of accused-appellant under section 304-B , 498-A IPC and section 3/4 DP Act. (Para 28)

The substance of evidence conclusively establishes that accused-appellant was persistently harassing and ill-treating the deceased as he was dissatisfied with the dowry. (Para 29)

In view of aforesaid, conviction and sentence of accused-appellant under section 302 IPC is set aside and the accused-appellant is convicted under Section 306 IPC. (Para 34)

Criminal Appeal partly allowed. (E-2)

List of cases cited:-

1. Javed Abdul Rajjaq Shaikh vs. St. of Mah., Criminal Appeal No.1181 of 2011,

2. Shamnsaheb M. Multtani Vs. St. of Kar. (2001)2 SCC 577,

3. Girish Singh V St. of Uttrakhand 2019 AIR (SC) 4529,

4. Hira Lal V State AIR 2003 SC 2865,

5. Dalbir Singh vs St. of U.P 2004 (5) SCC 334,

6. K. Prema S. Rao and another vs. Yadla Srinivasa Rao and others (2003)1 SCC 217,

7. Lakhjit Singh vs. St. of Punj. [1994 Supp. (1) SCC 173],

9. Ramesh Vithal Patil vs. St. of Karnataka and others 2014 (11) SCC 516,

10. St. of Punj. Vs. Gurmit Singh, (2014) 9 SCC 632,

11. Pinakin Mahipatray Rawal Vs St. of Guj., 2014 (84) ACC 348 (SC),

12. Ghulam Mustafa vs St. of Uttarakhand, AIR 2015 SC 3101,

13. Gurjit Singh V St. of Punj. 2019 Supreme (SC) 1298

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

1. This appeal has been preferred against judgment and order dated 03.03.2015 passed by the learned Additional Sessions Judgment, Court No.5, Ghaziabad in Session Trial No. 675 of 2013 (State vs. Noor Mohammad and three others) under Sections 304B, 498A, 302/34 IPC and 3/4 of Dowry Prohibition Act, Case Crime No. 318 of 2013, Police Station Loni, District Ghaziabad, whereby the accused-appellant Noor Mohammad has been convicted under Section 302 of IPC and sentenced to imprisonment for life along with fine of Rs. 20,000/-. In default of payment of fine he has to undergo one year simple imprisonment. However, he was acquitted of charge under Sections 304B, 498A IPC and 3/4 of Dowry Prohibition Act. Co-

accused Akbar Ali, Sarvari and Imran were acquitted of charge under Sections 304B, 498-A, 302/ 34 IPC and 3/4 of Dowry Prohibition Act.

2. As per prosecution version, marriage of complainant's sister Abida (deceased) was solemnized with accused-appellant Noor Mohammad, two years prior to incident but after marriage accused-appellant and his family members including father Akbar Ali, mother Sarvari and brother Imran used to demand motorcycle, golden chain and cash of Rs. 1 lakh as additional dowry and on that account they used to beat and harass the deceased. On 11.02.2013, complainant Mausam Ali (PW-1) got information that his sister has died and when he reached there he found that dead body of his sister was lying on bed and her husband and in-laws have already fled away from there.

3. Complainant Mausam Ali (PW-1) reported the matter to police by submitting written complaint Ex. Ka-1 and on that basis FIR was registered on 11.02.2013 at 19:20 hours vide FIR Ex. Ka-5, under Sections 498A, 304B IPC and 3/4 of Dowry Prohibition Act against accused-appellant Noor Mohammad and other accused persons, namely, Akbar Ali, Sarvari and Imran.

4. Police reached at the spot and inquest proceedings were conducted by PW-6 Yaduvir Singh (Naib Tehsildar) vide inquest report Ex. Ka- 2 and dead body of the deceased was sent for postmortem.

5. Postmortem on the dead body of deceased was conducted on 12.02.2013 by PW-8 Dr. Sunil Katiyar vide postmortem report Ex. Ka-6 and following injuries were found on the person of deceased:

(i) ligature mark 6 cm x 1 cm on anterior aspect of neck above thyroid cartilage and 3 cm below chin. On dissection white glistening membrane parchment like present under the ligature mark.

As per Autopsy Surgeon, cause of death of the deceased was due to asphyxia as a result of ante-mortem hanging.

6. Investigation of the case was conducted by PW-9 Circle Officer Arvind Kumar Yadav. One scarf (dupatta) of the deceased was seized from the spot vide seizure memo Ex. Ka- 3. Statements of witnesses were recorded and after investigation all the four accused persons were charge-sheeted for the offences under Sections 304B, 498A IPC and 3/4 of Dowry Prohibition Act.

7. Learned trial Court framed charges 304B, 498A IPC and 3/4 of Dowry Prohibition Act against all the four accused persons and alternative charge under Sections 302/34 IPC was also framed against all the four accused persons, namely, Noor Mohammad, Sarvari, Akbar Ali and Imran. Accused persons pleaded not guilty and claimed trial.

8. In order to bring home the guilt of accused-appellants, prosecution has examined nine witnesses. After prosecution evidence, accused persons were examined under Section 313 of Cr.P.C., wherein, they have denied the prosecution evidence and claimed false implication.

9. In defence one Islam was examined as DW-1.

10. After hearing and analyzing the evidence on record, trial Court acquitted accused persons, namely, Akbar Ali, Sarvari, Imran of charges under Sections 304B, 498A, 302/34 IPC and 3/4 of Dowry Prohibition Act whereas accused-appellant Noor Mohammad was convicted under Section 302 IPC and was sentenced as stated in paragraph no.1 of this judgment.

11. Being aggrieved by the impugned judgment, accused-appellant has preferred the present appeal.

12. Heard Sri Syed Shahnawaz Shah, learned counsel for the appellant and Sri Ashwani Prakash Tripathi, learned A.G.A for the State and perused the record.

13. Learned counsel for the appellant has submitted:

(i) that there is no evidence that accused-appellant has committed murder of his own wife. It was submitted that there is consistent evidence that deceased has committed suicide. As per postmortem report, cause of death was shown asphyxia as a result of anti-mortem hanging and in view of statement of PW-8 Dr. Sunil Katyal, who has conducted postmortem of the deceased, it is clear that deceased has committed suicide and thus, no case under Section 302 IPC is made out. It was stated that for conviction under Section 302 IPC some positive evidence is required against accused whereas in instant case there was no such evidence and in matrimonial home of accused-appellant, other inmates of house were also residing

(ii) that there is no evidence that deceased was harassed by accused-appellant on account of dowry or that she was subjected to cruelty soon before her death. It was pointed out that as per prosecution version, deceased has come at her matrimonial home only one week before the incident and before that she has resided at her parental home for about seven months and thus, during that period of seven months, there is no question of any harassment or dowry demand by the accused-appellant. It was stated that only within period of one week it is not possible that accused persons might have harassed the deceased to this extent that she would commit suicide.

(iii) that as there is no evidence of dowry demand and cruelty soon before death and thus, no offence under Section 304-B IPC is made out.

(iv) that as the deceased has resided for seven months at her parental home and she has come at her matrimonial home only one week before the incident and thus, it cannot be believed that during such period of one week deceased was abated to commit suicide. It was further submitted that at the most offence under Section 306 IPC may be made out against appellant, whereas accused-appellant has already undergone sentence of about seven years.

14. Per contra, it has been submitted by learned State counsel that there is clear and cogent evidence that the deceased was harassed for dowry as demand of motorcycle, golden chain and cash of Rs.1 lakhs was made from her as well as from the complainant. It was due to harassment meted out by accused-appellant that deceased has to resided at her parental home for seven months and after intervention of some persons she was brought back to her matrimonial home by accused-appellant by promising that he would not harass her. Deceased has suffered unnatural death within two years of her marriage at her matrimonial home.

It was further submitted that as alleged incident took place inside the matrimonial home, burden shifts to accused-appellant to explain under what circumstances deceased has suffered death, but the accused-appellant has not offered any such explanation and even in his statement recorded under Section 313 Cr.P.C. he has simply denied prosecution evidence. It was further pointed out that conduct of accused-appellant is highly inculpatory as after incident, he neither informed the police nor the family members of deceased were informed, rather he as well as his other family members have fled away from their home leaving dead body of the deceased there. It was argued that all the facts and circumstances of case and evidence on record clearly indicate that it was accused-appellant who has caused death of deceased.

15. We have considered the rival submissions and perused the record.

16. In evidence, PW-1 Mausam Ali, who is complainant and brother of deceased, stated that marriage of his younger sister Abida was solemnized with accused-appellant on 17.04.2011. At that time accused and his family members were residing at Shiv Vihar in Delhi but later on they have shifted to Loni, Ghaziabad and all family members were residing jointly. Accused persons were not satisfied with the dowry given in marriage and they used to demand golden chain, motorcycle and cash of Rs. 1 lakh and on that account, they used to beat and harass the deceased. Whenever deceased used to visit at her parental home, she used to tell about these things. PW-1 and his other family members have tried to make the appellant and his family members understand and requested them not to harass the deceased but they still persisted for demand of Rs. one lakh cash, motorcycle and golden chain and as complainant could not fulfill their demand, deceased remained at her parental home for about seven months. After that on intervention of some persons of society, accused-appellant and his family members have promised that they would not harass the deceased and would not make any demand and they have taken deceased to her matrimonial home only nine days before incident. But they again harassed her there. PW-1 further stated that on 11.02.2013 his cousin, who was residing at Loni, informed him that husband and in-laws of Abida have killed her by hanging. PW-1 and his family members went there and found that deceased was lying dead on bed and thereafter complainant has reported the matter to police by submitting written complaint Ex. Ka-1. He has also stated that during investigation one stole was seized by police vide memo Ex. Ka- 2.

17. PW-2 Rozudeen, who is father of the deceased, deposed that marriage of his daughter Abida was solemnized with accused-appellant Noor Mohammad on 17.4.2011 but the accused persons were not satisfied with dowry given at the time of marriage and they used to demand golden chain, motorcycle and cash of Rs. one lakh. Abida has told these things to him and due to this reason, deceased has resided at his home for about 8-10 months. Keeping in view the future of deceased, they have not made any complaint. However, thereafter accused persons have admitted their fault and promised that they would not give rise any occasion of making complaint and deceased was again sent with accused-appellant Noor Mohammad. After one week, on 11.02.2013 at around 6:00 p.m., his

nephew Nawab Ali has informed that in-laws of Abida have killed her by hanging. PW-2 stated that he and his family members went there and found that dead body of deceased was lying on bed and all the accused-persons have fled away from there.

18. PW-3 Mohammad Yunus stated that marriage of daughter of Rozudeen, namely Abida was solemnized with Noor Mohammad on 17.11.2014 but after 5-6 months of marriage, Abida stayed at her parental home for many days as her in-laws used to demand motorcycle, golden chain and cash of Rs. 5 lakh. However, after sometime Noor Mohammad and his father were called and by intervention of some public person, accused persons have sought pardon and thereafter deceased was sent with accused-appellant but on 11.02.2013 they received information that accused have killed deceased by hanging on account of non-fulfillment of demand of dowry.

19. PW-4 Nawab Ali is cousin of deceased and he was residing at Loni and he has stated that marriage of Abida was solemnized with Noor Mohammad on 17.11.2014. After some days of marriage she was harassed by her husband and his family members for dowry and they used to demand motorcycle, cash of Rs. one lakh and golden chain. Abida has told him about these things. PW-4 further stated that after 2-3 months of marriage, when he has gone to meet Abida at her matrimonial home, she was quite sad and she has told that her husband and her in-laws were demanding motorcycle, golden chain and cash of Rs. one lakhs and on that account, they used to harass her. Efforts were made to make them understand but they did not agree. Abida came back to her father's home and after sometime due to intervention of some persons of society, on promise of accused-appellant and his family members that they would not make any demand and would not harass her, deceased was sent with accused-appellant Noor Mohammad to her matrimonial home. After one week, when he was passing through near house of Noor Mohammad, he came to know that deceased has died and all family members of Noor Mohammad have fled away from there and thereafter he has informed family members of deceased.

20. PW-5 Qaiyum is also brother of deceased and he stated that marriage of Abida was solemnized with Noor Mohammad on 17.04.2011 but her husband and his family members were not satisfied with given dowry and they used to demand motorcycle, golden chain and cash of Rs. one lakh in dowry and on that account they used to beat her. Abida has told about these things to him and his father and brother. They have tried to make her husband and his family members understand about their inability to fulfill demand, but in vain and resultantly for about seven months, deceased has resided at her parental house. Later on due to intervention of some relatives, accused-appellant Noor Mohammad and his father have admitted their mistake and assured that now they would not harass the deceased and on such assurance, deceased was sent with Noor Mohammad. But after about one week of the same, on 11.02.2013 his cousin Nawab Ali informed that accused

persons have killed Abida by hanging, due to non fulfillment of demand of dowry.

21. PW-6 Yaduvir Singh Naib Tehsildar has conducted inquest proceedings marked as Ex. Ka.2.

22. PW-7 constable Manoj Kumar has recorded FIR who proved the chick FIR exhibited as Ex. Ka.4.

23. PW-8 Dr. Sunil Katyal has conducted postmortem on dead body of deceased and proved the postmortem report exhibited as Ex. Ka.6.

24. PW-9 Circle Officer, Arvind Kumar Yadav has investigated the case. He has prepared site plan of spot vide Ex. Ka-7 and after completion of investigation charge-sheet was filed.

25. DW-1 Islam has stated that accused persons were known to him since 15-20 years. Akabar was residing at Shiv Vihar in Delhi and Akbar and Noor Mohammad used to run a shop from 6:00 AM to 9:00 PM. wife of Noor Mohammad has died in February 2013 and on the day of incident Noor Mohammad and Akbar were at their shop. He stated that Noor Mohammad and Akbar were residing with him since last 3-4 months prior to incident as Akbar has sold his house and he has purchased a house at Loni, Mustafabad but Akbar has not shifted there.

26. In this case, it is not in dispute that deceased has suffered unnatural death at her matrimonial home within two years of her marriage and accused-appellant has been convicted under Section 302 IPC. The first question that arises for consideration is that whether the death of deceased was homicidal or suicidal in nature. As per postmortem report, deceased has died due to asphyxia as a result of anti-mortem hanging. In the case of **Javed Abdul Rajjaq Shaikh vs. State of Maharashtra, Criminal Appeal No.1181 of 2011**, Hon'ble Apex Court has dealt with the issue of determination whether death is caused by hanging or strangulation and held as under:

"The differences between hanging and strangulation have been highlighted by Modi on Medical Jurisprudence and Toxicology, 25th Edition, as follows:

Hanging	Strangulation
1. Most suicidal	1. Mostly homicidal
2. Face-Usual pale and petechiae rare.	2. Face-Congested, livid and marked with petechiae
3. Saliva-Dribbling out of mouth down on the chin and chest.	3. Saliva-No such dribbling
4. Neck-Stretched and elongated in fresh bodies.	4. Neck-Not so.
5. External signs of asphyxia	5. External signs of asphyxia, very well marked (minimal if death due to vasovagal and carotid sinus effect.

usually not well marked.	
6. Ligature mark-Oblique, Non-continuous placed high Up in the neck between the Chin and the larynx, the Base of the groove or furrow Being hard, yellow and Parachment-like.	6. Ligature mark-Horizontal or transverse continuous, round the neck, low down in the neck below the thyroid, the base of groove or furrow being soft and raddish.
7. Abrasions and ecchymoses round about the edges of the ligature Mark, rare.	7. Abrasions and ecchymoses round about the edges of the ligature mark, common.
8. Subcutaneous tissues Under the	8. Subcutaneous tissues under the mark-Ecchymosed.

mark-White, Hard and glistening.	
9. Injury to the muscles of Neck-Rare.	9. Injury to the muscles of the neck-Common.
10. Carotid arteries, Internal coats ruptured in	10. Carotid arteries, internal coats ordinarily ruptured.
11. Fracture of the larynx and trachea-Very rare and may be found that too in judicial hanging.	11. Fracture of the larynx, trachea and hyoid bone.
12. Fracture-dislocation of the cervical vertebrae - Common in judicial hanging.	12. Fracture-dislocation of the cervical vertebrae-Rare.
13.	13. Scratches, abrasions

Scratches, abrasions and bruises on the face, neck and other parts of the body- Usually not present.	fingernail marks and bruises on the face, neck and other parts of the body Usually present.
14. No evidence of sexual assault.	14. No evidence of sexual assault.
15. Emphysematous bullae on Surface of the lungs-Not present.	15. Emphysematous bullae on the surface of the lungs- May be

As to what is the distinction between strangulation and throttling is also dealt within the self-same work:

"Definition-Strangulation is defined as the compression of the neck by a force other than hanging. Weight of the body has nothing to do with strangulation.

Ligature strangulation is a violent form of death, which results from constricting the neck by means of a ligature or by any other means without suspending the body.

When constriction is produced by the pressure of the fingers and palms upon the throat, it is called as throttling. When strangulation is brought about by compressing the throat with a foot, knee, bend of elbow, or some other solid substances, it is known as mugging (strangle hold).

A form of strangulation, known as Bansdola, is sometimes practised in northern India. In the form, a strong bamboo or lathi (wooden club) is placed across the throat and another across the back of the neck. These are strongly fastened t one end. A rope is passed round the other end, which is bound together, and the unfortunate victim is squeezed to death. The throat is also pressed by placing a lathi or bamboo across the front of the neck and standing with a foot on each of lathi or bamboo.

Garrotting is another method that was used by thugs around 1862 in India. A rope or a loincloth is suddenly thrown over the head and quickly tightened around neck. Due to sudden loss of consciousness, there is no struggle. The assailant is then able to tie the ligature."

27. In the instant case perusal of postmortem report of deceased Abida shows that there was ligature mark 6 cm x 1 cm on anterior aspect of neck above thyroid cartilage and 3 cm below chin. In view of treatise of Modi as stated above, ligature mark-oblique Non-continuous placed high up in the neck between the Chin and the larynx is a characteristic of hanging. There is nothing to indicate that there was any fracture of larynx or trachea and hyoid bone and thus, it also supports the view that death of deceased was due to hanging. Further, as per postmortem report, on dissection at ligature mark, white glistening membrane parchment like were present, which is also a characteristic of hanging. Further postmortem report of deceased does not show any other characteristic of strangulation like

congestion of face non dribbling of saliva, abrasions or ecchymoses round about the edges of the ligature mark subcutaneous tissues under the mark- Ecchymosed or ruptured carotid arteries, internal coats or scratches, abrasions fingernail marks and bruises on the face neck or another part of body. Absence of these traits further support the view that death of deceased was suicidal in nature. Here it would be pertinent to mention that PW-8 Dr. Sunil Katyal, who has conducted postmortem on the dead body of deceased, categorically stated that deceased has died due to asphyxia as a result of ante-mortem hanging and that postmortem of deceased was conducted by a panel of doctors. He has also stated that weight of body might have lied on neck, which resulted into death of deceased but there was no fracture in backbone or any bone of neck. He has also ruled out the possibility that deceased might have hanged after causing her death. Considering medical evidence in its entirety, it is apparent that it was a case of hanging and thus the possibility that deceased committed suicide can not be ruled out. Here it may also be mentioned that complainant as well as other witnesses have also deposed that death of deceased has taken place due to hanging. In view of evidence on record, it can not be held that deceased suffered death due to strangulation or that the death of the deceased was homicidal in nature. It is one of the fundamental principle that to hold a person guilty under Section 302 of IPC, the death of such deceased person has to be homicidal in nature. If medical evidence suggests that death of deceased took place due to suicide, the accused can not be held guilty for murder punishable under section 302 IPC. Learned trial Court has not made any discussion as to on what basis death of deceased has been found homicidal in nature and without making any such discussion and without rendering any such conclusion, learned trial Court committed error by convicting the accused-appellant under Section 302 IPC. Thus, conviction of accused-appellant under Section 302 IPC is not in accordance with law, hence unsustainable.

28. Evidence on record reveals that deceased has committed suicide by hanging at her matrimonial home within a period of two years of her marriage. It is well as settled that death due to suicide also falls within the category of death "otherwise than under normal circumstances" as mentioned in Section 304-B IPC. All the witnesses of fact have categorically deposed that deceased was continuously harassed for dowry and she was brought to he matrimonial only one week before of incident. There is also cogent and categorical evidence that accused and his family members used to demand golden chain, motorcycle and cash of Rs. one lakh from deceased and on that account she was harassed by the accused persons but learned trial Court has acquitted accused-appellant as well as co-accused persons of charge under Sections 498A, 304B IPC and 3/4 of Dowry Prohibition Act. As no appeal has been preferred against acquittal of accused-appellant under Sections 498A, 304B IPC and 3/4 of Dowry Prohibition Act and thus, this Court can not alter conviction from under section 302 IPC to under Section 304-B, 498A and 3/4 of D.P. Act. Here it would be relevant to mention that in case reported as (2001)2 SCC 577 Shamnsaheb M. Multtani Vs. State of Karnataka, a three judge bench noted that where main ingredients of two cognate offences are common, the one punishable with lesser sentence can be said to be

minor offence. Noting that the ingredients of Section 304-B IPC were different from those of section 302 IPC, the former could not be regarded as minor offence of the latter and it was held as under:

"In such a situation, if the trial court finds that the prosecution has failed to make out the case under Section 302 IPC, but the offence under Section 304-B IPC has been made out, the court has to call upon the accused to enter on his defence in respect of the said offence. Without affording such an opportunity to the accused, a conviction under Section 304-B IPC would lead to real and serious miscarriage of justice. Even if no such count was included in the charge, when the court affords him an opportunity to discharge his burden by putting him to notice regarding the prima facie view of the court that he is liable to be convicted under Section 304-B IPC, unless he succeeds in disproving the presumption, it is possible for the court to enter upon a conviction of the said offence in the event of his failure to disprove the presumption".

In view of above discussed position of law, it is not possible to convert conviction of accused-appellant from section 302 IPC to section 304-B , 498-A IPC and section 3/4 DP Act, particularly when no appeal has been filed against acquittal of accused-appellant under section 304-B , 498-A IPC and section 3/4 DP Act. The case of Girish Singh V State of Uttrakhand 2019 AIR (SC) 4529 and Hira Lal V State AIR 2003 Supreme Court 2865, referred by learned counsel for appellant pertains about applicability of section 304-B IPC, however, in the instant case as it has been found that due acquittal of accused-appellant under section 304-B IPC by trial court, it is not permissible to convert conviction of accused-appellant from section 302 to 304-B IPC, and thus no detail examination of said case laws is required.

29. However, close scrutiny of evidence reveals that deceased was being harassed for dowry continuously since after her marriage till date of incident. PW-1 Mausam Ali, who is complainant of the case has consistently deposed that accused-appellant and his family members used to demand golden chain, motorcycle and cash of Rs. 1 lakh in dowry and when this demand could not be fulfilled, deceased has to remain for about seven months at her parental home. After intervention of some persons, deceased was taken to her matrimonial home by accused-appellant only about 8-9 days prior to incident by promising that they would not make any such demand and would not harass the deceased, but due to non-fulfillment of demand of dowry, accused-appellant and his family members caused her death by way of hanging. PW-1 has been subjected to cross-examination but no such fact could emerge so as to affect his testimony adversely. Version of PW-1 has been amply corroborated by PW-2 Rozudeen, PW-3 Mohd. Yunus, PW-4 Nawab Ali and PW-5 Qaiyum. All these witnesses have consistently and cogently stated that deceased committed suicide due to persistent demand of dowry and harassment by accused-appellant. In this regard no major contradiction or inconsistency could be shown. The fact that due to demand of dowry and harassment meted out by accused-appellant and his family members, deceased to stay for about seven months at her parental home, further supports prosecution case. The cumulative effect of entire evidence clearly indicate that

deceased was continuously harassed and ill-treated on account of non-fulfillment of demand of dowry and due to intervention of some persons, she was brought back to her matrimonial home by accused-appellant by promising that he would not make any demand and would not harass the deceased but it appears that demand of dowry and harassment of deceased remained continued and due to which deceased committed suicide. The substance of evidence conclusively establishes that accused-appellant was persistently harassing and ill-treating the deceased as he was dissatisfied with the dowry given and the demand of golden chain, motorcycle and cash of Rs. one lakh was not fulfilled.

30. At this stage, question which requires consideration is whether in view of such facts and evidence, is it possible to convict accused-appellant under Section 306 of IPC in the absence of any charge under Section 306 IPC. Dealing with similar issue in the case of **Dalbir Singh vs State Of U.P 2004 (5) SCC 334**, Hon'ble Apex Court has held as under:

"Here the Court proceeded to examine the question that if the accused has been charged under Section 302 IPC and the said charge is not established by evidence, would it be possible to convict him under Section 306 IPC having regard to Section 222 Cr.P.C. Sub-section(1) of Section 222 lays down that when a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and such combination is proved, but the remaining particulars are not proved, he may be convicted of the minor offence, though he was not charged with it. Sub-section (2) of the same Section lays down that when a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence, although he is not charged with it. Section 222 Cr.P.C. is in the nature of a general provision which empowers the Court to convict for a minor offence even though charge has been framed for a major offence. Illustrations (a) and (b) to the said Section also make the position clear. However, there is a separate chapter in the Code of Criminal Procedure, namely Chapter XXXV which deals with Irregular Proceedings and their effect. This chapter enumerates various kinds of irregularities which have the effect of either vitiating or not vitiating the proceedings. Section 464 of the Code deals with the effect of omission to frame, or absence of, or error in, charge. Sub- section (1) of this Section provides that no finding, sentence or order by a Court of competent jurisdiction shall be deemed invalid merely on the ground that no charge was framed or on the ground of any error, omission or irregularity in the charge including any misjoinder of charges, unless, in the opinion of the Court of appeal, confirmation or revision, a failure of justice has in fact been occasioned thereby. This clearly shows that any error, omission or irregularity in the charge including any misjoinder of charges shall not result in invalidating the conviction or order of a competent Court unless the appellate or revisional Court comes to the conclusion that a failure of justice has in fact been occasioned thereby. In Lakhjit Singh (supra) though Section 464 Cr.P.C. has not been specifically referred to but the Court altered the conviction from 302 to 306 IPC having regard to the principles underlying in the said Section. In Sangaraboina Sreenu (supra) the Court

completely ignored to consider the provisions of Section 464 Cr.P.C. and keeping in view Section 222 Cr.P.C. alone, the conviction of the appellant therein under Section 306 IPC was set aside.

After examining several provisions and earlier decisions, it was further held as under:.

"There are a catena of decisions of this Court on the same lines and it is not necessary to burden this judgment by making reference to each one of them. Therefore, in view of Section 464 Cr.P.C., it is possible for the appellate or revisional Court to convict an accused for an offence for which no charge was framed unless the Court is of the opinion that a failure of justice would in fact occasion. In order to judge whether a failure of justice has been occasioned, it will be relevant to examine whether the accused was aware of the basic ingredients of the offence for which he is being convicted and whether the main facts sought to be established against him were explained to him clearly and whether he got a fair chance to defend himself. We are, therefore, of the opinion that Sangarabonia Sreenu (supra) was not correctly decided as it purports to lay down as a principle of law that where the accused is charged under Section 302 IPC, he cannot be convicted for the offence under Section 306 IPC".

In **K. Prema S. Rao and another vs. Yadla Srinivasa Rao and others reported in (2003)1 SCC 217**, it has been held:-

"Mere omission or defect in framing charge does not disable the Criminal Court from convicting the accused for the offence which is found to have been proved on the evidence on record. The Code of Criminal procedure has ample provisions to meet a situation like the one before us. From the Statement of Charge framed under Section 304B and in the alternative Section 498A, IPC (as quoted above) it is clear that all facts and ingredients for framing charge for offence under Section 306, IPC existed in the case. The mere omission on the part of the trial Judge to mention of Section 306, IPC with 498A, IPC does not preclude the Court from convicting the accused for the said offence when found proved. In the alternate charge framed under Section 498A of IPC, it has been clearly mentioned that the accused subjected the deceased to such cruelty and harassment as to drive her to commit suicide. The provisions of Section 221 of Cr.P.C. take care of such a situation and safeguard the powers of the criminal court to convict an accused for an offence with which he is not charged although on facts found in evidence, he could have been charged for such offence.

Discussing provisions of section 221 CrPC, it was further held as under;

"As provided in Section 215 of Cr.P.C. ommission to frame charge under Section 306 IPC has not resulted in any failure of justice. We find no necessity to remit the matter to the trial court for framing charge under Section 306 IPC and direct a retrial for that charge. The accused cannot legitimately complain of any want of opportunity to defend the charge under Section 306, IPC and a consequent failure of justice. The same facts found in evidence, which justify conviction of the appellant under Section 498A for cruel treatment of his wife, make out a case against him under Section 306 IPC of having abetted commission of suicide by the wife. The appellant was charged for an offence of higher degree

causing "dowry death" under Section 304B which is punishable with minimum sentence of seven years rigorous imprisonment and maximum for life. Presumption under Section 113A of the Evidence Act could also be raised against him on same facts constituting offence of cruelty under Section 498A, IPC. No further opportunity of defence is required to be granted to the appellant when he had ample opportunity to meet the charge under Section 498A, IPC."

In **Lakhjit Singh vs. State of Punjab [1994 Supp. (1) SCC 173]**, the accused were charged and convicted of offence under Section 302 IPC. The High Court upheld their conviction. The Apex Court held that charge under Section 302 IPC is not established but convicted the appellants under Section 306 IPC. While rejecting the argument that in the absence of a specific charge under Section 306 IPC, the appellants cannot be convicted under that section, the Court observed:-

"9. The learned counsel, however, submits that since the charge was for the offence punishable under Section 302 Indian Penal Code, the accused were not put to notice to meet a charge also made against them under Section 306 IPC and, therefore, they are prejudiced by not framing a charge under Section 306 Indian Penal Code and; therefore, presumption under Section 113-A of Indian Evidence Act cannot be drawn and consequently a conviction under Section 306 cannot be awarded. We are unable to agree. The facts and circumstances of the case have been put forward against the accused under Section 313 CrPC and when there was a demand for dowry it cannot be said that the accused are prejudiced because the cross-examination of the witnesses, as well as the answers given under Section 313 CrPC would show that they had enough of notice of the allegations which attract Section 306 Indian Penal Code also."

In **Ramesh Vithal Patil vs. State of Karnataka and others reported in 2014 (11) SCC 516**, it has been held:-

"18. It is true that the appellant was not charged under Section 306 of the IPC. The charge was under Section 304-B of the IPC. It was, however, perfectly legal for the High Court to convict him for offence punishable under Section 306 of the IPC. In this connection, we may usefully refer to Narwinder Singh (2011) 2 SCC 47. In that case the accused was charged under Section 304-B of the IPC. The death had occurred within seven years of the marriage. The trial court convicted the accused for an offence punishable under Section 304-B of the IPC. Upon reconsideration of the entire evidence, the High Court came to the conclusion that the deceased had not committed suicide on account of demand for dowry, but, due to harassment caused by the husband in particular. The High Court acquitted the parents of the accused and converted the conviction of the accused from one under Section 304-B of the IPC to Section 306 of the IPC. This Court dismissed the appeal filed by the accused. It was observed that it is a settled proposition of law that mere omission or defect in framing charge would not disable the court from convicting the accused for the offence which has been found to be proved on the basis of the evidence on record. In such circumstances, the matter would fall within the purview of Sections 221(1) and (2) of the Code of Criminal Procedure, 1973."

31. In view of aforesaid legal position, it is clear that if an accused is tried by competent Court and he clearly understands nature of offence and case is clearly explained to him and he has been afforded fair opportunity of defending himself, ensuring substantial compliance of provisions of law, in such facts and circumstances in view of Section 464 Cr.P.C. it is possible for appellate Court to convict the accused for offence for which no charge was framed unless the Court is of the opinion that failure of justice would in fact occasion. In order to judge whether failure of justice has been occasioned, it will be relevant to examine whether the accused was aware of the basic ingredients of the offence for which he is being convicted and whether main facts sought to be established against him were explained to him clearly and he has got a fair change to defend himself. When from statement of charge framed under Section 304B IPC and Section 498A, IPC it is clear that all facts and ingredients for framing charge for offence under Section 306, IPC existed in the case, the mere omission on the part of the trial Judge to mention of Section 306 IPC does not preclude the Court from convicting the accused for the said offence when found proved.

32. In the instant case, the accused was charged under Section 498A IPC with allegation that he has physically and mentally harassed the deceased on account of dowry and he was also charged under Section 304B IPC alleging that he caused death of deceased by hanging and he was further charged under Section 3/4 Dowry Prohibition Act with the allegation that he has made demand of Rs. one lakh cash from deceased in dowry. Alternatively, he was charged under Section 302/34 IPC that he along with co-accused persons committed murder of deceased by hanging. It is apparent from record that cause of death as per postmortem report, was asphyxia as a result of ante-mortem hanging and copy of postmortem report along with other documents was supplied by committal Court to the accused. All these facts clearly indicate that accused-appellant was told and he has clearly understood the nature of offence for which he was tried and he was afforded full and fair opportunity of defending himself. There is nothing to indicate that substantial compliance of any provisions of law was not made. It is also clear that his conviction under section 302 IPC is being set aside mainly on the ground that death of deceased was not found homicidal in nature. Considering the nature of allegations and charge framed against accused-appellant, it cannot be said that conviction of accused-appellant under Section 306 IPC would occasion any failure of justice as accused was fully aware of basic ingredients of offence of Section 306 IPC. As indicated above, evidence on record clearly reveals that deceased was continuously and persistently harassed and ill-treated for dowry and for that reason even she has to stay at her parental home for about seven months, but due to intervention of some public persons, she was brought back by accused-appellant to her matrimonial home and after one week of the same, deceased suffered death due to ante-mortem hanging. As stated above, all the witnesses have consistently deposed that deceased suffered death by hanging due to continuous harassment meted out to her on account of demand of dowry. The evidence on record clearly indicate that by making continuous demand of dowry and causing harassment to deceased, accused-

appellant driven the deceased to commit suicide. It appears that her life was made so miserable that she was driven to commit suicide. At this stage we also take notice of section 113-A of Evidence Act. A bare reading of Section 113-A shows that to attract applicability of Section 113-A, it must be shown that (i) the woman has committed suicide within a period of seven years from the date of her marriage and (ii) the husband or his relatives, who are charged had subjected her to cruelty. On existence and availability of the above said circumstances, the court may presume that such suicide had been abetted by her husband or by such relatives of her husband. Though presumption is not mandatory as the employment of expression "may presume" suggests. Secondly, the existence and availability of the above said circumstances shall not, like a formula, enable the presumption being drawn; before the presumption may be drawn the court shall have to have regard to "all the other circumstances of the case". A consideration of all the other circumstances of the case may strengthen the presumption or may dictate the conscience of the court to abstain from drawing the presumption. The expression "the other circumstances of the case" used in Section 113-A Evidence Act suggests the need to reach a cause-and-effect relationship between the cruelty and the suicide for the purpose of raising a presumption. In spite of a presumption having been raised the evidence adduced in defence or the facts and circumstances otherwise available on record may destroy the presumption. The phrase "may presume" used in Section 113-A is defined in Section 4 of the Evidence Act, which says "Whenever it is provided by this Act that the court may presume a fact, it may either regard such fact as proved, unless and until it is disproved, or may call for proof of it. The proof of cruel treatment or harassment of wife by husband or his relative to force her to fulfill demand of dowry is a necessary condition to invoke the presumption under section 113-A of the Evidence Act. In State of Punjab Vs. Gurmit Singh, (2014) 9 SCC 632, it has been held in the context of section 304- B of IPC that meaning of the words "any relative of her husband" occurring in Section 304-B IPC & meaning of the words "relative of the husband" occurring in Section 498-A IPC are identical and mean such person related by blood, marriage or adoption. Presumption under Sec. 113-A and 113B is not similar in nature and burden to prove innocence is more on accused under sec. 113-B than under S. 113-A which placed a far lighter burden on the accused. In Pinakin Mahipatray Rawal Vs State of Gujarat, 2014 (84) ACC 348 (SC), it has been held that a presumption u/s 113-A Evidence Act as to offence of abetment of suicide u/s 306 IPC can be drawn when it is established that the person has committed suicide and the suicide was abetted by the accused. Where woman committed suicide within 7 years of her marriage and her husband or his near relative subjected her to cruelty in term of Section 498-A of IPC, the Court may presume that such suicide was abetted by the husband or such person.

In Ghulam Mustafa vs State of Uttarakhand, AIR 2015 SC 3101, the Court held that a casual remark or something said in a routine way or in usual conversation should not be construed or misunderstood to mean 'abetment.' A conviction on mere allegation of harassment without any positive action in proximity to the time of occurrence on the part of accused that led a person to commit

suicide is not sustainable under section 306 IPC. Again, in Gurucharan vs State of Punjab, AIR 2017 SC 74, it has been held that to constitute the offence under section 306 IPC, there should be a live link between abetment and suicide and the intention and involvement of the accused to aid or instigate the commission of suicide.

33. In the instant case it is not disputed that deceased committed suicide within 7 years of her marriage and there is consistent and cogent evidence that she was continuously harassed for dowry. In this regard evidence of PW 1, PW 2, PW 3, PW 4 and PW 5 is quite consistent. No such fact could emerge in their cross-examination, so as to affect credibility of these witnesses. As stated above, due to dowry demand and harassment by accused-appellant, deceased had to stay for about seven months at her parental home and she was brought back by the appellant only one week prior of incident, all the above stated witnesses have stated that deceased died as the accused-appellant continued his demand of dowry. The evidence on record clearly reveals that cruelty meted out to deceased was of such a nature so as to drive her to commit suicide. Learned counsel has referred case of Gurjit Singh V State of Punjab 2019 Supreme (SC) 1298. In that case, it was found by the Apex Court that cruelty was not of such nature, which left no choice to deceased than commit suicide and there was no material to show that a cause and effect relationship between the cruelty and the suicide for purpose of raising presumption. In the instant case, as discussed above, deceased has suffered continuous cruelty on account of dowry demand and due to that reason she has to stay for about seven months at her parent's house and that she was brought back by accused-appellant to matrimonial home only one week before the incident by assuring that he would not harass her but despite that he continued to make dowry demand of chain, motorcycle and cash of Rs 1 lakh and subjected her to cruelty. Thus, the only logical conclusion is that due to continuous cruelty suffered by deceased, she was left with no choice but to commit suicide. There appears direct nexus between the cruelty and the suicide of deceased. The conduct of accused-appellant is quite inculpatory as after incident he neither informed the police nor family members of deceased, rather he has fled from his house leaving dead body of deceased there. In view of specific facts and evidence on record, the presumption under section 113-A Evidence Act can be raised against appellant. The accused-appellant has failed to rebut the same. In view of evidence on record and raising presumption under section 113-A Evidence Act, a case under section 306 IPC is made out against the accused-appellant. Mere wrongful acquittal by trial court under section 498A IPC or Section 304-B IPC would not come in way of convicting the accused-appellant under section 306 IPC. Taking cumulative effect of entire evidence on record, the above discussed position of law, the accused-appellant Noor Mohammed can safely be convicted under Section 306 IPC.

34. In view of aforesaid, conviction and sentence of accused-appellant under section 302 IPC is set aside and the accused-appellant is convicted under Section 306 IPC. So far as question of sentence is concerned, it is apparent that deceased has committed suicide within short span of two years of her marriage, due to persistent demand of dowry and

harassment meted out by accused-appellant. Of late such offences and crime against women are on rise. It is well settled that sentence has to commensurate with gravity of offence and all attending facts and circumstances of the case. Considering all aspects of the matter, it would be appropriate that accused-appellant be sentenced to maximum punishment ie 10 years rigorous imprisonment along with fine of Rs. 10,000/ under 306 IPC.

35. In view of aforesaid, conviction and sentence of accused-appellant Noor Mohammed under Section 302 IPC is set aside and he is convicted under Section 306 IPC and sentenced to 10 (ten) years rigorous imprisonment along with fine of Rs 10,000/. In default of payment of fine, accused-appellant has to undergo three months additional imprisonment. Accused-appellant Noor Mohammed is stated in jail, he shall serve out remaining sentence.

36. Appeal is partly allowed in above terms.

37. Copy of this judgment be transmitted to the court concerned for information and necessary compliance.

(2020)02ILR A757

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 21.08.2019

BEFORE
THE HON'BLE AJIT SINGH, J.

Criminal Appeal No. 1542 of 1982

Jaiveer & Anr. ...Appellants (In Jail)
Versus
State ...Respondent

Counsel for the Appellants:
Sri Dhan Prakash, Sri Akhilesh Srivastava, Sri K.D. Tripathi, Sri Sudhir Agarawal

Counsel for the Respondent:
A.G.A.

A. Criminal Law-Indian Penal Code- Section 452, 323/34, 325/34 and 308/34 - Appeal against conviction.

After considering the rival submissions made by learned counsel for the appellants, considering the facts and circumstance of the case, considering the age of the accused-appellants, this Court feels it would not be proper to sent the accused appellants to jail as the accused were on bail during trial and no criminal antecedents have been shown to their credit and the accused were convicted in the year 1982 and they have suffered mental agony of conviction for a long time. Considering all these facts it would be appropriate and proper that the accused be sentenced with the period already undergone and the amount of fine be enhanced. (Para 10)C

Criminal Appeal partly allowed. (E-2)

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

1. This Criminal appeal has been filed by the appellants against the judgement and order dated 1.6.1982 passed by Vth Addl. Sessions Judge, Aligarh in S.T. No. 440 of 1980 (State vs. Jaiveer and another), whereby sentencing the appellants to undergo R.I. for a period of two years under Section 452 I.P.C. for a period of one year under Section 323/34 I.P.C. for a period of two years under Section 325/34 I.P.C. under Section 308/34 I.P.C. for a period of three years.

2. All the sentences shall run concurrently.

3. The brief facts of this case are that in the intervening night between 17/18.5.1980 at about 12:00 or 1:00 a.m. in the night the accused-appellants entered into the house of the informant Lajja Ram and belabored him and his wife Smt. Diropa, as a result of which both were injured and Lajja Ram sustained grievous injuries. The offenders were identified in the light of burning lamp kept in the varanda of the house. The alarm was raised by the inmates of the house. The daughter of the informant Km. Jaiwanti was also sleeping by the side of her parents and upon hearing the alarm some witnesses were attracted then the accused escaped from the spot. The matter was reported to the police by the informant at Police Station-Dadon and the case was registered and investigated by the police. The informant Lajja Ram and his wife Smt. Diropa were medically examined and the X-ray of the informant was also done.

4. After completion of investigation the Investigating Officer has submitted charge sheet against the accused and the cognizance was taken by the Magistrate and considering that the case was triable by the Sessions Judge and it was committed to the court of session and the session court charged the accused under Sections 452, 325 and 308 I.P.C. read with section 34 I.P.C.

5. The prosecution laid the evidence against the accused and the court after prosecution evidence examined the accused under section 313 Cr.P.C. and the accused submitted that they have been falsely implicated in the present case due to enmity but no evidence was laid by the accused in this regard in their defence.

6. After considering the evidence available on record the trial court convicted the accused as aforesaid. Being aggrieved by the conviction judgement and order this appeal had been filed.

7. I have heard the learned counsel for the appellants and learned A.G.A. for the State.

8. Learned counsel for the appellants submitted that at present both the accused are more than 75 years of age and they are suffering from age related ailments. He next submitted that it was the first offence of the accused and after conviction the accused had not indulged in any other criminal activity. He further submitted that on the question of legality of sentence he is not pressing this appeal and only pressing on the quantum of sentence and he has prayed for taking lenient view considering the age of the accused and their age related ailments.

9. Learned A.G.A. has submitted that the impugned order is valid and no interference is required in the impugned order, hence the appeal be dismissed and accused be directed to suffer the sentence.

10. After considering the rival submissions made by learned counsel for the appellants, considering the facts and circumstance of the case, considering the age of the accused-appellants, this Court feels it would not be proper to sent the accused appellants to jail as the accused were on bail during trial and no criminal antecedents have been shown to their credit and the accused were convicted in the year 1982 and they have suffered

mental agony of conviction for a long time. Considering all these facts it would be appropriate and proper that the accused be sentenced with the period already undergone and the amount of fine be enhanced.

11. The accused-appellants are sentenced to the period already undergone by them in jail and an amount of fine of Rs. 5000/- be imposed.

12. Accused-appellants are directed to deposit the fine of Rs. 5000/- before learned lower court within three months from the date of passing of the judgement out of which Rs. 4000/- shall be paid to the injured, if he is alive and in case he is dead, then it would be paid to his legal heirs and in default of payment of fine accused-appellants shall further undergo 15 days imprisonment.

13. Appeal is partly allowed in the above terms.

14. Copy of this order be transmitted to the concerned lower court forthwith for compliance.

(2020)02ILR A759

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 04.02.2020

BEFORE

THE HON'BLE RITU RAJ AWASTHI, J.
THE HON'BLE VIRENDRA KUMAR-II, J.

Criminal Appeal No. 1668 of 2003

Krishna Kumar Pandey @ Babloo
...Appellant

Versus

State of U.P. ...Respondent

Counsel for the Appellant:
Rishad Murtaza, Md Altaf Mansoor, Salik Ram Tiwari

Counsel for the Respondent:
Govt. Advocate, Alok Singh, Arun Kr. Tripathi, Ashok Kumar Tripathi, Padamkant Mishra, S.K. Upadhyaya

A. Criminal Law-Indian Penal Code - Sections 302, 506 - read with Section 7 of Criminal Law Amendment Act and Section 25/27 & 30 of Arms Act— Appeal against conviction.

The analyzation of evidence available on record, the impugned judgment and order by trial court cannot be said to be perverse or against the evidence available on record. It is liable to be upheld and it is upheld accordingly. (Para 56)

The Applicant has been released on 07.12.2019 from Central Jail Naini, Prayagraj after remission of his sentence on the basis of Government Order. (Para 57)

We have perused the aforesaid government order. The sentence of appellant has been remitted by Hon'ble Governor of Uttar Pradesh under Article 161 of the Constitution of India. His remaining period of imprisonment/ sentence has been remitted. (Para 58)

Since, none is responding on behalf of appellant, therefore, the present appeal has been disposed of accordingly in absence of the appellant's counsel. (Para 59)

Criminal Appeal disposed of. (E-2)

(Delivered by Hon'ble Ritu Raj Awasthi, J. & Hon'ble Virendra Kumar-II, J.)

1. The appellant, Krishna Kumar Pandey @ Babloo, has preferred the present criminal appeal, assailing the impugned judgment and order dated 23.09.2003 delivered by the Court of learned Additional Sessions Judge/ F.T.C.-

5, District Pratapgarh in Session Trial No. 238 of 2002, State Vs. Krishna Kumar Pandey & another, arising out of Crime No. 124 of 2001, Police Station Jethwara, under Sections 302, 506 I.P.C. read with Section 7 of Criminal Law Amendment Act and Section 25/27 & 30 of Arms Act.

2. The learned trial court has convicted the appellant, Krishna Kumar Pandey @ Babloo for the offence punishable under Section 302 I.P.C. to serve out the imprisonment for life. Fine of an amount of Rs.20,000/- has also been imposed. He has also been convicted for the offence punishable under Section 25/27 of Arms Act and convicted with rigorous imprisonment for four years. He has been acquitted for the offence punishable under Section 506 I.P.C. and Section 7 of Criminal Law Amendment Act. All the sentence were directed to run concurrently.

3. The co-accused Ramesh Chandra Pandey, who is the father of appellant, Krishna Kumar Pandey, has been acquitted for the offence punishable under Section 30 of Arms Act.

4. It is mentioned in the grounds of appeal that the investigation of this case is biased and tainted. The F.I.R. is ante timed. No independent witness has supported the prosecution version. The witnesses produced by the prosecution are related, interested and partisan witnesses. The prosecution has failed to establish its case beyond reasonable doubt. There is no motive for commission of crime. The medical evidence has not supported the prosecution case. There are major inconsistencies and contradictions in oral evidence adduced by the witnesses. The trial court has committed illegality in disbelieving the defence version. There is no proper compliance of Section 313 Cr.P.C. The findings recorded by the trial court are perverse and consequently the impugned judgment and order delivered by it is illegal, unjust and improper.

5. We have heard the learned A.G.A.

6. None is responding on behalf of appellant.

7. We have also perused the oral as well as documentary evidence available on record of the trial court.

8. As per the prosecution version narrated in the F.I.R. (Ex.Ka.-1), the complainant, Umesh Chandra Pandey lodged the F.I.R. on 07.09.2001. He went on 07.09.2001 at the residence of his uncle *(Phupha)*, Shri Ram Kishore Tiwari, S/o Shri Paras Nath Tiwari. His uncle was having conversation with him and his aunt*(Bua)*. The deceased was sitting at his shop of beetle. In the meanwhile, the accused-appellant, Krishna Kumar Pandey @ Babloo, S/o Ramesh Chandra Pandey brought his scooter from inside of his house and parked it outside his house. He brought licensed gun of his father and shot fire at 2:00 p.m. on 07.09.2001 in the stomach of Ram Kishore Tiwari, the deceased, who succumbed to gun shot injuries sustained by him. The deceased, Ram Kishore Tiwari was issue less and accused-appellant, Krishna Kumar Pandey @ Babloo wanted to obtain his property. The accused-appellant, Krishna Kumar Pandey @ Babloo threatened the deceased by asking the deceased that transfer his property in his favour otherwise he will eliminate both his *Phupha* and *Bua*. He lodged the F.I.R. after leaving the dead body of his *Phupha* on the spot. The

witness, Tribhuwan Nath Pandey, Girja Shankar Pandey and Ram Narayan Pandey as well as other residents of village saw the accused, while he was fleeing away from the place of occurrence.

9. On the basis of written report of complainant, Crime No. 124 of 2001 was registered at 2:10 p.m. for the offence punishable under Sections 302, 506 I.PC. read with section 7 Criminal Law Amendment Act. On the basis of written report submitted by the complainant, G.D. of registration of crime was prepared for the aforesaid offences.

10. The Investigating Officer inspected the place of occurrence and took in possession the dead body of the deceased. He prepared inquest report (Ex.Ka.-2) on the same day at 14:30 hours until 15:40 p.m. He collected plain and blood stained soil from the place of occurrence and prepared recovery memo (Ex.Ka.-3) and some part of *Baan* of cot. He sealed dead body of the deceased and sent it to Sadar Hospital, Pratapgarh for autopsy.

11. The Investigating officer recorded statements of witnesses. He recovered license gun and three live cartridges and one empty cartridge from the possession of accused-appellant, Krishna Kumar Pandey @ Babloo. The concerned police personnel prepared G.D.(Ex.Ka.-8) at 23:50 hours on 09.09.2002 regarding recovery of aforesaid articles. He sent these articles to the Forensic Science Laboratory, Mahanagar, Lucknow after obtaining permission from District Magistrate. He submitted charge sheet against the appellant as well as against the co-accused, his father. Postmortem report was prepared (Ex.Ka.-5) by the concerned doctor after autopsy of the deceased. G.D. (Ex.Ka.-8A) No. 16 at 8:50 hours dated 10.01.2001 and G.D. (Ex.Ka.-9) were prepared regarding submission of gun and cartridges and plain and blood stained soil and *Baan* of cot in forensic laboratory.

12. G.D. (Ex.Ka.-10) was prepared regarding receipt of aforesaid articles by Constable Shaktidhar Dubey. The aforesaid articles were sent to Forensic Science Laboratory through letter (Ex.Ka.-11) written by Circle Officer, Sadar, Pratapgarh to Forensic Science Laboratory. Letter (Ex.Ka.-12) was written by Circle officer to the District Magistrate, District Pratapgarh for obtaining permission for comparison/ chemical analysis of aforesaid articles. The District Magistrate, Pratapgarh granted prosecution sanction (Ex.Ka.-13) against the accused-appellant, Krishna Kumar Pandey @ Babloo and the co-accused Ramesh Chandra Pandey.

13. Ex.Ka.-17 is the letter sent to C.M.O. for autopsy was written by R.I. The Investigating Officer prepared site plan (Ex.Ka.-20). The Joint Director, Forensic Science Laboratory, Mahanagar, Lucknow forwarded his report (Ex.Ka.-21) after chemical analysis and comparison of gun and cartridges. A separate report (Ex.Ka.-22) was forwarded by the Joint Director, Forensic Science Laboratory, Mahanagar, Lucknow to Circle Officer, Sadar, Pratapgarh regarding chemical analysis of clothes of the deceased, plain and blood stained soil and *Baan* of cot. Recovery memo (Ex.Ka.-4) was prepared regarding arrest and recovery of aforesaid gun and cartridges from the possession of accused persons.

14. The concerned Judicial Magistrate committed this case to the court of Sessions. The learned trial court of Additional Sessions Judge/ F.T.C.-5, Pratapgarh framed charges against the accused-appellant, Krishna Kumar Pandey @ Babloo on 05.12.2002 for the offence punishable under Sections 302, 506 I.P.C. and Section 7 of Criminal Law Amendment Act. A separate charge under Section 25/27 of Arms Act was also framed against the appellant.

15. The learned trial court has also framed charge against co-accused Ramesh Chandra Pandey on the same day for the offence punishable under Section 30 of Arms Act.

16. Both the accused persons pleaded not guilty and claimed to be tried.

17. The prosecution has examined P.W.1-Umesh Chandra Pandey (complainant), P.W.2-Rajendra Prasad Pandey; P.W.3-Tribhuwan Nath Pandey; P.W.4-Smt. Shayama Devi, who is the wife of the deceased Ram Kishore Tiwari regarding facts and circumstances of the occurrence. P.W.5-Arjun Prasad Pandey has proved recovery memo (Ex.Ka.-2) of plain and blood stained soil. P.W.6, Constable Vijay Narayan Chaudhary has proved arrest and recovery of gun and cartridges from the possession of accused-appellant, Krishna Kumar Pandey @ Babloo. P.W.7, Dr. R. P. Chaubey has proved postmortem report. P.W.8, Head Constable Tarak Nath Jha Pandey has proved Check F.I.R. (Ex.Ka.-6) and G.D. (Ex.Ka.-7) of registration of crime. He also prepared G.D. (Ex.Ka.-8) on the basis of recovery memo (Ex.Ka.-4) regarding arrest of the accused and recovery of gun and cartridges. P.W.9-Constable Roshan Nath Ojha proved this fact that he submitted plain and blood stained soil and pellets recovered from the dead body of the deceased at Forensic Science Laboratory. P.W.10, D. K. Upahdyay is the Investigating Officer.

18. The learned trial court has recorded detailed statements of both the accused persons under Section 313 Cr.P.C. in the form of question and answer.

19. The accused-appellant, Krishna Kumar Pandey @ Babloo has stated that he has falsely been implicated in this crime. He has denied that he shot fire on 07.09.2001 on the deceased, Ram Kishore Tiwari in presence of P.W.1. He has further stated that the complainant lodged F.I.R. on the basis of concocted and false facts. He was arrested by the police party from Kanpur and not from the place shown by the police party. The Investigating Officer prepared forged documents which are ante timed and ante dated and submitted charge sheet against him. The witnesses have adduced false evidence against him. The report submitted by the Forensic Science Laboratory is also forged.

20. The appellant has stated in additional statement and answered to question No. 19 & 20 that he has been implicated in this case by hatching conspiracy due to enmity. The witnesses are interested and family members of the deceased. He has also stated that the deceased Ram Kishore Tiwari was a criminal and he was expelled from his earlier native place/ residence. He was having old enmity with his in-laws and family. The deceased was an informer of police personnel of Police Station Jaithwara. The deceased was used to sold

Ganja, Bhang at his shop and he was having his so many enemies and he was murdered by unknown persons. He was arrested on 08.09.2001 from Kanpur when he was getting treatment at the house of his uncle.

21. The co-accused, Ramesh Chandra Pandey has stated that on the date of occurrence, i.e., 07.09.2001 at 2:00 p.m. he was present in the court of Civil Judge, Kunda on the post of Reader and he was present and working in that court. He has further stated that his gun, license and cartridges were kept at his residence at Kunda, which is at a distance of 40 kilometers from his native place. His son, Krishna Kumar Pandey @ Babloo had not fired from his gun.

22. The co-accused has answered question No.6 and stated that police personnel contacted him on 07.09.2001 at 5:30 p.m. in Kunda and asked him regarding gun and license. They received gun, cartridges and license from him and brought it at police station Jethwara. He has further stated that his son was getting treatment at the house of his uncle at Kanpur. The police personnel on the next day brought him by a jeep at Kanpur and arrested his son. His arrest was falsely shown on another place on 10.09.2001. Ramesh Chandra Pandey has also stated that he was residing in a rented accommodation at Kunda.

23. The accused persons produced D.W.1-Moorat Singh, S/o Uttam Singh and D.W.2-Yogesh Kumar Upadhyay, Advocate, S/o Heera Lal Upadhyay as defence witnesses.

24. The learned trial court has appreciated and analyzed the evidence of prosecution and accused persons and delivered the impugned judgment and order.

25. We have perused the impugned judgment and order and record of trial court.

26. We have perused the evidence of P.W.1 and P.W.4, who are witnesses of fact. All these witnesses have witnessed the incident committed the appellant, Krishna Kumar Pandey @ Babloo. P.W.2 and P.W.3 have proved inquest report of the deceased.

27. The learned trial court has found that place of occurrence is situated at a distance of one kilometer from police station Jethwara. The complainant-P.W.1 has lodged the F.I.R. at 2:10 p.m. immediately after the incident occurred on 07.09.2001 at 2:00 p.m. P.W.1 has proved this fact that he went to meet his *Phupha*, the deceased. He was having conversation with the deceased at his beetle shop in presence of his *Bua*. The appellant, Krishna Kumar Pandey @ Babloo brought his scooter and started it twice and then parked it in front of his house. Then he brought licensed gun of his father and shot fire on the stomach of the deceased. The deceased succumbed to firearm injury sustained by him. He has corroborated the facts narrated by him in Check F.I.R.

28. P.W.1 has further stated that the deceased purchased land and constructed his house at the place of his in-laws and he was selling beetle in a small *Gomti* at the point of time of occurrence. The house of Krishna Kumar Pandey @ Babloo was situated near the house of deceased and

another house was situated inside of the village. He has proved topography of the place of occurrence also.

29. A detailed cross-examination was conducted on behalf of the accused persons, but no material contradiction was elicited from him. The learned trial court has found that in this case prompt F.I.R. was lodged by the complainant, P.W.1. He has discarded the argument of learned defence counsel that F.I.R. was lodged on the dictation of Sub Inspector. No material contradiction was elicited regarding presence of P.W.1 at the place of occurrence on date and time of incident committed by the appellant, Krishna Kumar Pandey @ Babloo. The learned trial court has considered the statement of P.W.1 that the deceased was issue less and the accused was interested to obtain property of the deceased and he threatened him also.

30. The learned trial court has also analyzed the evidence of P.W.4-Smt. Shyama Devi, who is the wife of the deceased, Ram Kishore Tiwari. P.W.4 has disclosed this fact that the appellant, Krishna Kumar Pandey @ Babloo sent a letter before the incident and he also threatened the deceased one year ago that both P.W.4 and the deceased should transfer their house in his favour, otherwise he will eliminate them.

31. P.W.4 has further stated that she brought the letter sent by the appellant, Krishna Kumar Pandey @ Babloo at the police station. He was scolded by the police personnel and released at this point of time. The deceased, Ram Kishore Tiwari made complaint against the appellant at the police station. P.W.3-Tribhuwan Nath Pandey also corroborated these facts stated by P.W.4.

32. Therefore, the learned trial court has recorded finding that the appellant, Krishna Kumar Pandey @ Babloo was having old enmity with the deceased and transfer of property of the deceased and P.W.4 was the motive for committing incident of this case. The prosecution was able to prove presence of P.W.1 and P.W.4 at the point of time of incident of this crime.

33. The learned trial court has also considered the argument of learned defence counsel that no independent witness was produced by the prosecution to prove the facts of the incident. The learned trial court has quoted expositions of law propounded by Hon'ble Apex court regarding non production of independent witness and regarding production of related and interested witness.

34. The learned trial court has found that the accused-appellant, Krishna Kumar Pandey @ Babloo was known to witness, P.W.1(complainant), P.W.3-Tribhuwan Nath Pandey and P.W.4-Smt. Shyama Devi from prior to the incident. The accused was residing near the house of the deceased, therefore, there was no case of mistaken identity. The learned trial court has also evaluated the evidence of P.W.1-Umesh Chandra Pandey and P.W.3-Tribhuwan Nath Pandey regarding facts and circumstances, in which, the appellant, Krishna Kumar Pandey @ Babloo fled away from the place of occurrence.

35. The learned trial court has analyzed and evaluated the evidence of P.W.10-Investigating Officer, Shri

Dhirendra Kumar Upadhyay and omissions made by him, but no material contradictions were elicited during his cross-examination regarding the fact that investigation conducted by him was biased and tainted as argued by the learned defence counsel.

36. P.W.10-Shri Dhirendra Kumar Upadhyay has proved recovery memo of plain and blood stained soil and arrest of accused-appellant, Krishna Kumar Pandey @ Babloo and recovery of gun and cartridges from his possession. He has also proved this fact that these articles were compared and chemically analyzed at Forensic Science Laboratory.

37. The learned trial court has also considered the defence version stated by the appellant, Krishna Kumar Pandey @ Babloo and co-accused, Ramesh Chandra Pandey that he was getting treatment at the house of his uncle, Suresh Chandra Pandey at Kanpur and he was arrested in the facts and circumstances as stated by the co-accused Ramesh Chandra Pandey. But Suresh Chandra Pandey was not produced as defence witness regarding the fact that accused-appellant, Krishna Kumar Pandey @ Babloo was arrested from his house. The learned trial court has considered this fact that no telegram was sent by Suresh Chandra Pandey when the appellant, Krishna Kumar Pandey @ Babloo was allegedly arrested from his house by the police party of P.W.10 in presence of co-accused Ramesh Chandra Pandey.

38. The learned trial court has also considered this argument of learned defence counsel that gun and cartridges were recovered on 09.09.2001, but they were kept until 23.10.2001 by P.W.10 in his possession. The learned trial court has found that these articles, plain and blood stained soil and pellets recovered from the dead body of the deceased Ram Kishore Tiwari and his clothes were sent on 23.10.2001 by the Circle Officer, Sadar to Forensic Science Laboratory through his letter (Ex.Ka.-11). The omissions made by the Circle Officer was a mere irregularity and no tampering was made at his hands.

39. The learned trial court has also discarded the arguments of learned defence counsel regarding the fact that P.W.10 had not prepared site plan of the place, from where, the appellant, Krishna Kumar Pandey @ Babloo was arrested and gun and cartridges were recovered from his possession. Likewise, this fact was also considered that P.W.4, widow of the deceased covered the body of the deceased during incident, but her clothes were not soaked with the blood. The learned trial court has also considered this fact that P.W.1 has stated that the accused-appellant fired shot from gun from blank point range, but the postmortem report(Ex.Ka.-5) has not disclosed ante mortem injury of such nature.

40. The learned trial court has perused the post mortem report (Ex.Ka.-5) and observed that lacerated wound of size 3.0 c.m. x 2.5 c.m. was found by Dr. R. P. Chaubey (P.W.7). P.W.7 has proved this fact that margins of firearm injury were inverted and blackening was present all around the wound. Small intestine was lacerated, liquid was coming out from small intestine. P.W.7 has opined that death of the deceased was caused by hemorrhage due to ante mortem firearm injury. No material contradiction was elicited during cross-examination of the doctor (P.W.7).

41. The learned trial court has found evidence of P.W.1-complainant and P.W.4, the widow of the deceased, trustworthy, cogent, reliable and acceptable. P.W.7 has recovered wading and rubber material from the dead body of the deceased, which might have decreased force of fired shot, therefore, there was no occasion of presence of exit wound, as P.W.7 has found wading and rubber material from the abdominal cavity. The cavity was filled with two liters of blood.

42. The Joint Director, Forensic Science Laboratory has sent report (Ex.Ka.-21) and opined that gun powder and lead was present in the barrel of 12 bore gun No. 2307 and empty cartridge sent for chemical examination was fired from this gun, which was recovered from the possession of the accused-appellant, Krishna Kumar Pandey @ Babloo. T.C.1 and T.C.2 cartridges were fired at Forensic Science Laboratory and mark of firing pin was found same, both on empty cartridge sent by police station Jethwara and T.C.1 and T.C.2.

43. The sealed wading and rubber material was sent to Forensic Science Laboratory, which is mentioned in report (Ex.Ka.-22), where plain and blood stained soil as well as blood stained *Baan* of cot and clothes of the deceased were chemically examined. Human blood was found on *Baan* of cot, *dhoti*, and wading and rubber material found in abdominal cavity of the deceased. Blood was found disintegrated on the blood stained soil, underwear of the deceased and watch.

44. These circumstances, as stated by P.W.7 that he had not found any exit wound or pellets in the abdominal cavity are not material. The learned trial court has recorded finding that the deceased, Ram Kishore Tiwari, sustained ante mortem firearm injury and he succumbed to this injury sustained by him.

45. As far as, this fact is mentioned in G.D.(Ex.Ka.-8A) that pellets were sealed in an envelop, it may be possible that the concerned police personnel mentioned wading and rubber material as pellets, which is the omission of the concerned police personnel. P.W.9, Roshan Nath Ojha has stated accordingly on the basis of fact mentioned in G.D.(Ex.Ka.-8A). The accused-appellant is not benefited with this fact stated by P.W.9 or by his omission to mention wading and rubber material in G.D.(Ex.Ka.-8A).

46. The witnesses, P.W.6-Constable Vijay Narayan Chaudhary and P.W.10, the Investigating officer, Dhirendra Kumar Upadhyay, have proved arrest of accused-appellant, Krishna Kumar Pandey @ Babloo and recovery of gun, live cartridges and empty cartridge from his possession, which were sent to Forensic Science Laboratory.

47. The learned trial court has also evaluated evidence of P.W.7-Dr. R. P. Chaubey and P.W.4-Smt. Shyama Devi regarding meal taken by the deceased and semi digested liquid food found in stomach. The learned trial court has observed that P.W.4 is an uneducated lady and she has disclosed time of taking food by the deceased on the basis of her memory and assumptions. Dr. R. P. Chaubey (P.W.7) has stated that the deceased took his food two hours prior to the incident as opined by him. The learned trial court has discarded the argument of the learned defence counsel in this regard

that there is any contradiction in medical and ocular evidence.

48. The learned trial court has specifically mentioned in the impugned judgment that P.W.2-Rajendra Prasad Pandey, P.W.3-Tribhuwan Nath Pandey and P.W.5-Arjun Prasad Pandey are not the eye witness of the incident committed by the accused-appellant, Krishna Kumar Pandey @ Babloo. They might have stated to have seen the incident corroborating version of the prosecution, if they were so interested being *Khandani* of the deceased.

49. The learned trial court has cautiously appreciated and analyzed the evidence of eye witnesses, P.W.1-complainant and P.W.4-widow of the deceased, and also found that no material contradiction was elicited during their cross-examination. P.W.2-Rajendra Prasad Pandey is the witness of inquest report. Likewise, P.W.3-Tribhuwan Nath Pandey reached, when the appellant, Krishna Kumar Pandey @ Babloo was leaving the place of occurrence, while gun was hanging over on his shoulder and he was sitting on his scooter. He only heard noise of fire and reached at the place of occurrence and saw that Ram Kishore Tiwari sustained firearm injury. He has stated regarding threat given by the accused-appellant to the deceased one year ago. P.W.5-Arjun Prasad Pandey is the witness of recovery of blood stained and plain soil from the place of occurrence, of which, recovery memo (Ex.Ka.-2) was prepared by the Investigating Officer.

50. The learned trial court has discarded the defence evidence adduced by D.W.2-Yogesh Kumar Upadhyay, Advocate, by recording the finding that there was no occasion for the co-accused, Ramesh Chandra Pandey to bring gun with him at the court of Civil Judge (Junior Division), Kunda, where, co-accused, Ramesh Chandra Pandey was employed as Reader of that court. The learned trial court has discarded the evidence of D.W.2 in correct perspectives, because he has stated that he is a legal practitioner at Kunda and returned back home daily at 5:30 to 6:00 p.m. He has accepted that no other employee or advocate was present while police personnel arrested the co-accused, Ramesh Chandra Pandey in the facts and circumstances stated by him.

51. On the other hand, the learned trial court has considered the recovery memo of gun, license, three live cartridges and one empty cartridge and evaluated the evidence of P.W.1, P.W.4, P.W.6 and P.W.7. The learned trial court has specifically recorded the finding that the co-accused, Ramesh Chandra Pandey was not arrested on 07.09.2001 at Kunda and gun, license and cartridges were not recovered from him, but these articles were recovered at the bridge of Bakulahi river in vicinity of Gulab Katra, where accused-appellant, Krishna Kumar Pandey @ Babloo was in possession of these articles and he was arrested from that place.

52. The learned trial court has acquitted the co-accused, Ramesh Chandra Pandey on the basis of deficit evidence available against him being licensee of gun recovered from possession of his son, Krishna Kumar Pandey @ Babloo.

53. As far as evidence of D.W.1 is concerned, the co-accused, Ramesh Chandra Pandey, who is father of the appellant, Krishna Kumar Pandey @ Babloo, has stated in his statement

recorded under Section 313 Cr.P.C. that his son, Krishna Kumar Pandey @ Babloo was arrested from the house of his uncle, where he was getting treatment, whereas, D.W.1-Moorat Singh, S/o Uttam Singh, has stated that Krishna Kumar Pandey @ Babloo was arrested by the police party while he was seeing cricket match in the ground of his school at 5:30 evening on 08.09.2001.

54. D.W.1 has accepted in his cross-examination that he never saw the house of Suresh Chandra Pandey, who is brother of co-accused, Ramesh Chandra Pandey and uncle of the appellant, Krishna Kumar Pandey @ Babloo. The facts and circumstances of arrest and recovery of gun and cartridges has been proved by the prosecution by means of evidence of P.W.6 and P.W.10 beyond reasonable doubt. Therefore, the evidence adduced by D.W.1 is not acceptable and rightly discarded by the learned trial court in correct perspectives. The recovery of gun and cartridges was made on 09.09.2001 from the possession of the appellant, Krishna Kumar Pandey @ Babloo by the police party of P.W.6 and P.W.10.

55. The learned trial court has also recorded finding that there was no old enmity of the complainant, deceased or P.W.4, his widow with Krishna Kumar Pandey @ Babloo, the appellant, and the co-accused, Ramesh Chandra Pandey or with the witnesses, Tribhuwan Nath Pandey and Rajendra Prasad Pandey, on the basis of which, appellant was allegedly implicated in this crime.

56. On the basis of above mentioned discussions, appreciation and analyzation of evidence available on record, the impugned judgment and order dated 23.09.2003 cannot be said to be perverse or against the evidence available on record. It is liable to be upheld and it is upheld accordingly.

57. Learned A.G.A. has pointed out that Senior Jail Superintendent, Central Jail Naini, Prayagraj vide its letter dated 29.01.2020 has informed him that the appellant, Krishna Kumar Pandey @ Babloo was detained in Central Jail Naini, Prayagraj, after transfer from District Jail, Pratapgarh on 25.12.2003. He has been released on 07.12.2019 from Central Jail Naini, Prayagraj after remission of his sentence on the basis of Government Order of Jail Administration & Reforms, Anubhag-2, Uttar Pradesh Government vide order No. 159/22-2-2019-17(202)/2019 dated 05.02.2019.

58. We have perused the aforesaid government order. The sentence of appellant, Krishna Kumar Pandey @ Babloo has been remitted by Hon'ble Governor of Uttar Pradesh under Article 161 of the Constitution of India. The appellant has served out sentence of 21 years, 11 months and 11 days with remission and 17 years, 04 months and 17 days without remission. His remaining period of imprisonment/ sentence has been remitted. The appellant has been released on 07.02.2019 on furnishing P.B. of Rs.50,000/- to maintain lawful conduct, peace and law and order.

59. Since, none is responding on behalf of appellant, therefore, the present appeal has been disposed of accordingly in absence of the appellant's counsel.

60. It is pertinent to mention here that the Government of U.P. has not

preferred any appeal assailing the acquittal of co-accused, Ramesh Chandra Pandey.

61. Copy of judgment be sent to the concerned trial court and the Senior Superintendent, Central Jail Naini, Prayagraj for information and further necessary action.

62. The record of trial court be sent back for compliance.

(2020)02ILR A769

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 23.01.2020

BEFORE
THE HON'BLE PRINTIKER DIWAKER, J.
THE HON'BLE DINESH PATHAK, J.

Criminal Appeal No. 3307 of 2017

Shah Mohammad & Anr.
...Appellants (In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Appellants:
Sri M.P. Yadav

Counsel for the Opposite Party:
A.G.A., Sri J.K. Upadhyaya

A. Criminal Law-Indian Penal Code Section 304-B, 326, 498-A and under Section 3/4 of Dowry Prohibition Act,— Appeal against conviction.

We have no hesitation to hold that the dying declaration was recorded in accordance with law and there is no infirmity in the same. Further there is no inconsistency in the dying declaration and the same inspire confidence of this Court. (Para 28)

it very clear as to the manner in which the deceased was burnt by the appellants. It has come in the dying declaration that the entire act has been done at his instance and at his dictates, and he did not make any effort to save his wife. As already stated that apart from the dying declaration recorded by the Executive Magistrate, oral dying declaration was also made by the deceased before PW-1 and, therefore, role assigned to the appellants has been duly proved by the prosecution. (Para 29)

Criminal Appeal rejected. (E-2)

List of cases cited:-

1. St. of Guj. v. Jayrajbhai Punjabhai Varu, (2016) 14 SCC 151,

2. Gaffar Badshaha Pathan v. St. of Mah., (2004) 10 SCC 589,

3. P. Mani v St. of Tamilnadu, 2006 (3) SCC 161,

4. Lakhan v. St. of MP, (2010) 8 SCC 514,

5. Shudhakar v. St. of MP, (2012) 7 SCC 569,

6. Ramakant Mishra v. St. of UP, (2015) 8 SCC 299,

7. Hari Om Vs. St. of Har. & Another, 2014 (10 SCC 57,7

8. Hem Chand Vs. St. of Har. 1994 (6) SCC 727,

9. Amar Singh Vs. St. of Raj.; 2010 (9) SCC 64,

10. Shanti Vs. St. of Har., 1991 (1) SCC 371,

11. Sanjay Kumar Singh Vs. St. of Delhi1; 2011 (11) SCC 733,

12. Donthula Ravindranath alias Ravinder Rao Vs. St. of A.P. (2014) 3 SCC 196,

13. Ranjit Singh Vs. St. of Punjab; (2013) 12 SCC 333,

14. Sunil Dutt Sharma Vs. State (Govt of NCT of Delhi); (2014) 4 SCC 375,

15. Pradeep Kumar Vs. St. of Har., 2009-AIR (SCW)-0-3318,

16. Banarsi Dass & others Vs. St. of Har. 2015 (1) JIC 757 (SC),

17. Smt. Rama Devi Vs. State of U.P.2017 0 Supreme (All) 2554,

(Delivered by Hon'ble Pritinker Diwaker, J.)

1. This appeal arises out of the impugned judgment and order dated 25.05.2017 passed by the Additional Sessions Judge/Special Judge, (E.C. Act), Fatehpur in Sessions Trial No. 174 of 2010 (State of U.P. Vs. Shah Mohammad and others) convicting accused-appellants Shah Mohammad and Noor Mohammad under Section 304-B, 326, 498-A of IPC and under Section 3/4 of Dowry Prohibition Act and sentencing them to undergo imprisonment for life; 10 years rigorous imprisonment, with fine of Rs.10,000/- each, in default thereof, one year additional rigorous imprisonment; three years rigorous imprisonment with fine of Rs.5,000/- each, in default six months additional simple imprisonment and two years rigorous imprisonment with fine of Rs.5000/- each, in default thereof one year additional rigorous imprisonment respectively.

2. In the present case, name of the deceased is Tahira Bano, wife of accused-appellant No.1 Shah Mohammad. Appellant No.2 Noor Mohammad is nephew of appellant No.1. Marriage of the deceased Tahira Bano was solemnized with appellant No.1 about 3-5 years prior to the date of incident i.e. 16.09.2009. It is said that deceased was subjected to cruelty for demand of dowry by appellant No.1 and his other family members and on 16.09.2009, father-in-law of the deceased namely Bafati alias Fakeere, accused-appellant No.2 Noor Mohammad and his sister-in-law caught hold the deceased, whereas other nephew of appellant No.1, namely, Nazeer Mohammad after pouring kerosene oil on the deceased set herself ablaze. It is further alleged that at the relevant time, accused appellant No.1 who was standing there, did not make any effort to save the deceased and it is at his instance the entire act has been done by other accused persons. Immediately after coming to know the burn incident, the family members of the deceased rushed to the spot and found no one to help the deceased. Smt. Quresha Bano (PW-1), mother of the deceased and other family members hired a vehicle and took the deceased to the hospital at 10.40 P.M. where her dying declaration was recorded on the next day i.e. on 17.09.2009 by Arun Kumar Srivastava (PW-9), Executive Magistrate. Before recording dying declaration, Executive Magistrate, had duly obtained certificate of Dr. Anupam Jaiswal (PW-3) who has stated that the deceased was in a fit state of mind to make the dying declaration. In the dying declaration, deceased has categorically stated as to the manner in which she was burnt by the appellants and their other family members.

3. On the basis of written report (Ex.Ka.1) lodged by Smt. Quresha Bano (PW-1), on 19.09.2009 FIR (Ex.Ka.3) was registered against appellant No.1 Shah Mohammad (husband of the deceased), deceased accused Bafati alias Fakeere (father-in-law), sister in law of the deceased and two nephews including appellant No.2 Noor Mohammad under Sections 498A, 326 of IPC read with Section 3/4 of Dowry Prohibition Act.

During treatment, deceased expired on 29.09.2009.

4. Inquest on her dead body was conducted on 29.09.2009, vide Ex.Ka.8, and the body was sent for postmortem, which was conducted by Dr. Prabhunath (PW-8), vide Ex.Ka.13, on 29.09.2009. As per medical report, deceased suffered about 81% burn injury and she died bcause of septicemia.

5. After investigation, charge-sheet was filed against appellant No.1 Shah Mohammad and his father Bafati alias Fakire. However, during trial, an application was filed by the prosecution under Section 319 Cr.P.C., which was allowed and then other accused persons, namely, appellant No.2 Noor Mohammad (nephew of appellant No.1), Saida Begum (sister-in-law/Jethani of the deceased) and Nazeer Mohammad (another nephew of appellant No.1) were also made as an accused. It has been informed that the trial of co-accused Saida Begum and Nazeer Mohammad has been separated on 30.03.2013 and the same is pending.

6. As per Autopsy Surgeon, the cause of death was due to septicemia as a result of ante mortem wound.

7. The trial Judge has framed charge on 22.05.2010 initially against the appellants under Sections 498-A, 326, 306 of IPC and 3/4 of Dowry Prohibition Act and thereafter, on 16.10.2010, alternative charge under Section 304-B of IPC was also framed against them.

8. So as to hold the accused appellants guilty, prosecution has examined nine witnesses, whereas two defence witnesses have also been examined. Statements of the accused appellants were recorded under Section 313 of Cr.P.C., in which they pleaded their innocence and false implication.

9. By the impugned judgment, the trial Judge has convicted both the appellants under Sections 304-B, 326, 498-A of IPC and under Section 3/4 of Dowry Prohibition Act and sentenced them as mentioned in paragraph No.1 of the judgment.

10. Counsel for the appellants submits:

(i) that there is material contradiction in the statements of Smt. Quresha Bano (PW-1) and Jamal Ahmad (PW-2). In fact, Jamal Ahmad (PW-2) has not fully supported the statement of Smt. Quresha Bano (PW-1) and thus both these witnesses are not reliable.

(ii) that oral dying declaration made before Smt. Quresha Bano (PW-1) is doubtful and it appears that the deceased was not in a position to make any such statement.

(iii) that dying declaration (Ex.Ka.2) allegedly made before the Executive Magistrate appears to be doubtful because, at the relevant time, deceased was not in a fit state of mind to make such statement. In the dying declaration, it has not been recorded that even till completion of the same, deceased was in a fit state of mind to make the said dying declaration. Learned counsel submits that before recording the dying declaration, even if the Doctor has given a certificate, the Executive Magistrate was under an obligation to record as to whether the deceased was in a fit state of mind to make the dying declaration.

(iv) the only role assigned to appellant no.1 is that when the deceased was being burnt by other accused persons, he was simply standing there. Learned counsel submits that even if the

prosecution case is taken as it is, no offence whatsoever has been made out against appellant No.1.

(v) that appellant No.1 is in jail since 19.09.2009 whereas appellant No.2 is in jail since 11.04.2011. Both these appellants have served more than seven years of sentence and life sentence is not mandatory under Section 304B of IPC. Therefore, their sentence be at least reduced to the period already under gone by them.

11. On the other hand, supporting the impugned judgment, it has been argued by the State counsel:-

(i) that the impugned judgment is in accordance with law and there is no infirmity in the same.

(ii) that the act of the appellants shows brutality of the offence where the appellants and other co-accused persons caught hold the deceased, poured kerosene oil on her and then she was set on fire.

(iii) In respect of appellant No.1, it has been argued that when the other accused persons were executing the act, he was simply standing there. He did not made any effort to save the deceased and the entire act has been done at his instance/under his guidance and supervision.

(iv) that even if life sentence is not mandatory, considering the heinous act of the appellants, the court below was fully justified in awarding the life sentence. He submits that there is absolutely no reason for this Court to reduce the sentence and in fact, the appellants ought to have been convicted under Section 302 of IPC.

(v) that Quresha Bano (PW-1) and Jamal Ahmad (PW-2) are firm in their statement and Quresha Bano (PW-1) has categorically stated that the deceased made oral dying declaration before her and narrated as to the manner in which she was burnt by the accused-persons. State counsel submits that minor contradiction in the statement of these two witnesses are required to be ignored, considering the fact that they are rustic villagers.

12. We have heard the parties and perused the record.

13. Smt. Quresha Bano (PW-1), is a sister of the deceased and the informant. She has stated that marriage of the deceased was solemnized with accused No.1 Shah Mohammad about 5 years back and out of the wedlock, the couple has a baby girl aged about 4 years. Accused appellant No.1 and his other family members used to demand Rupees One Lakh from the deceased and for which she was subjected to cruelty and harassment by them. On the date of occurrence, her sister was burnt by the appellants and she died in the hospital after about 13 days. She states that when she met the deceased, she informed her that by pouring kerosene oil on her, she was burnt by the accused persons. This witness was subjected to lengthy cross-examination including some unnecessary questions, however she remained firm and has reiterated as to the manner in which the deceased was burnt by the accused persons. She has made it very clear that while the deceased was being taken to hospital, on the way, she informed her that she (deceased) was burnt by the accused persons.

14. Jamal Ahmad (PW-2), a resident of the same vicinity where Quresha Bano (PW-1) was residing along with accused persons, has stated that the deceased was sister of Quresha Bano (PW-1) and on the date of occurrence, he had gone with

Quresha Bano (PW-1) to her sister's house and they have brought the deceased in a Marshal vehicle to Allahabad in a hospital. He states that he did not had any talk with the deceased, but the deceased was talking to her sister and mother and she informed them that she was burnt by the accused persons. In the cross examination, he has however stated that though the deceased was talking to her sister and mother, in a serious condition, but was only saying them to save her.

15. Dr. Anupam Jaiswal (PW-3), Director of the hospital where the deceased was treated, has stated that dying declaration of the deceased was recorded by the Executive Magistrate on 17.09.2009 between 2.30 PM to 2.35 PM and that before recording the same, he gave his certificate that the deceased was in a fit state of mind to make her dying declaration. He states that the deceased had suffered 70-80 per cent burn injury.

16. Rajendra Prasad Rai (PW-4) is a Head Constable, who recorded the chik FIR. B.N. Tiwari (PW-5) is the Investigating Officer who has duly supported the prosecution case. Rajesh Kumar (PW-6) is a second Investigating Officer. Sunil Kumar (PW-7) conducted the inquest. Dr. Prabhunath (PW-8) conducted postmortem on the body of the deceased.

17. Arun Kumar Srivastava (PW-9), is the Executive Magistrate, who recorded the dying declaration of the deceased. He has stated that after receiving notice to come in the hospital and record dying declaration, at 2.20 PM, he reached to the hospital, met Dr. Anupam Jaiswal (PW-3) and after obtaining his certificate, recorded the dying declaration of the deceased in between 2.30 to 2.35 PM. He states that at the time of recording the dying declaration, no other person was present and all the relatives of the deceased were asked to leave the said room.

18. Riyazuddin (DW-1) has stated that Noor Mohammad (accused appellant No.2) and Shah Mohammad (accused appellant No.1) were residing separately and that the deceased burnt herself in her room.

19. Om Prakash (DW-2) has also stated that Noor Mohammad and Shah Mohammad were living separately and that out of anger she set herself ablaze. He has further stated that Shah Mohammad (accused-appellant No.1) has made effort to save the deceased.

20. Close scrutiny of the evidence makes it clear, that the deceased was subjected to cruelty for demand of dowry and to fulfill the said desire, with the help of other accused persons, the appellants on 16.09.2019 burnt her after pouring kerosene oil on her. While she was taken to hospital by Quresha Bano (PW-1), she made oral dying declaration before this witness and has stated that she was burnt by the accused persons including the appellants. On the next day, her dying declaration was recorded in the hospital, vide Ex.Ka.2, wherein she has categorically assigned the role of all the accused persons including the appellants. She has stated that she was caught hold by her father-in-law Bafati alias Fakeere, her nephew Noor Mohammad and sister-in-law Saida Begum, whereas another nephew Nazeer Mohammad set herself ablaze. She has further stated that, at the relevant time, her husband Shah Mohammad (accused appellant No.1) was

standing there and he did not make any effort to save her. According to the dying declaration, it is the accused appellant No.1 at whose instance the entire offence has been committed by the accused persons. Before recording the dying declaration of the deceased, the Executive Magistrate has obtained the certificate from Dr. Anupam Jaiswal (PW-3) who has categorically stated that the deceased was in a fit state of mind to make the dying declaration. Dying declaration of the deceased reads as under:-

"ब्यान श्रीमती ताहिरो बानो पत्नी शाहमुहम्मद उम्र 40 वर्ष लगभग निवासिनी सलेमपुर गोली जिला फतेहपुर बहलफ बयान किया कि मेरी शादी करीब 6 वर्ष पूर्व हुई थी। एक लड़की 4 साल की है। आदमी मानपुर में रहता है। कारखाना प्लास्टिक का है सउदिया जाने के लिए एक लाख रूपया मांग रहा था न देने पर लड़ाई हुई। मुझे मेरे श्वसुर पकड़े थे, जेठानी के लड़के नूर मोहम्मद, जेठानी पकड़ी थी, आग जेठानी के लड़के नजीर मोहम्मद ने लगायी। मेरा आदमी वही खड़ा था। मेरा आदमी नही बचाया वह खुद ही लगवाया है।

–सर्टिफिकेट

बयान सुनकर तस्दीक किया।

ह0 अपठनीय

अंगूठा निशानी ताहिरा बानो

17/09

–सर्टिफिकेट

Dr. ANUPAM JAISWAL ह0 अपठनी;

Director Dr. ANUPAM JAISWAL

Shakuntala Hospital

Director

Allahabad-211001

Shakuntala Hospital

Reg. No.UPMC-33662"

21. Before we consider the dying declaration made by the deceased, it would be apposite to consider the legal position in respect of dying declaration.

22. In **State of Gujarat v. Jayrajbhai Punjabhai Varu**1, the Supreme Court held as under:

"15. The courts below have to be extremely careful when they deal with a dying declaration as the maker thereof is not available for the cross- examination which poses a great difficulty to the accused person. A mechanical approach in relying upon a dying declaration just because it is there is extremely dangerous. The court has to examine a dying declaration scrupulously with a microscopic eye to find out whether the dying declaration is voluntary, truthful, made in a conscious state of mind and without being influenced by the relatives present or by the investigating agency who may be interested in the success of investigation or which may be negligent while recording the dying declaration.

16. In the case on hand, there are two sets of evidence, one is the statement/declaration made before the police officer and the Executive Magistrate and the other is the oral dying declaration made by the deceased before her father who was examined as PW-1. On a careful scrutiny of the materials on record, it cannot be said that there were contradictions in the statements made before the police officer and the Executive Magistrate as to the role of the respondent herein in the commission of the offence and in such circumstances, one set of evidence which is more consistent and reliable, which in the present case being one in favour of the respondent herein, requires to be accepted and conviction could not be placed on the sole testimony of PW-1.

17. A number of times the relatives influence the investigating agency and bring about a dying declaration. The dying declarations

recorded by the investigating agencies have to be very scrupulously examined and the court must remain alive to all the attendant circumstances at the time when the dying declaration comes into being. In case of more than one dying declaration, the intrinsic contradictions in those dying declarations are extremely important. It cannot be that a dying declaration which supports the prosecution alone can be accepted while the other innocent dying declarations have to be rejected. Such a trend will be extremely dangerous. However, the courts below are fully entitled to act on the dying declarations and make them the basis of conviction, where the dying declarations pass all the above tests.

18. The court has to weigh all the attendant circumstances and come to the independent finding whether the dying declaration was properly recorded and whether it was voluntary and truthful. Once the court is convinced that the dying declaration is so recorded, it may be acted upon and can be made a basis of conviction. The courts must bear in mind that each criminal trial is an individual aspect. It may differ from the other trials in some or the other respect and, therefore, a mechanical approach to the law of dying declaration has to be shunned.

19. On appreciation of evidence on record, we are of the considered view that the dying declarations of the deceased recorded by the police officer as well as the Executive Magistrate are fully corroborated and there is no inconsistency as regards the role of the respondent herein in the commission of offence. From a perusal of the statement recorded by Bhiku Karsanbhai, P.S.O., the thumb impression of Rekhaben (since deceased) which had been identified by her father-Sri Vala Jaskubhai Suragbhai as also his cross-examination in which he admitted that police had already come there and he had identified her thumb impression and Mamlatdar had gone inside to record statement, there is no reason as to why Rekhaben would give names of her husband and her in- laws in the alleged statement given to her father. A dying declaration is entitled to great weight. The conviction basing reliance upon the oral dying declaration made to the father of the deceased is not reliable and such a declaration can be a result of afterthought. This is the reason the Court also insists that the dying declaration should be of such a nature as to inspire full confidence of the Court in its correctness. The Court has to be on guard that the statement of deceased was not as a result of tutoring, prompting or a product of imagination. The Court must be further satisfied that the deceased was in a fit state of mind after a clear opportunity to observe and identify the assailants. Once the Court is satisfied that the declaration was true and voluntary, undoubtedly, it can base its conviction without any further corroboration. It cannot be laid down as an absolute rule of law that the dying declaration cannot form the sole basis of conviction unless it is corroborated. The rule requiring corroboration is merely a rule of prudence.

20. The burden of proof in criminal law is beyond all reasonable doubt. The prosecution has to prove the guilt of the accused beyond all reasonable doubt and it is also the rule of justice in criminal law that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other towards his innocence, the view which is favourable to the accused should be adopted."

23. In **Gaffar Badshaha Pathan v. State of Maharashtra**2,it was held as under:

"5. Dr. A.U. Masurkar was the Chief Medical Officer of the hospital at the relevant time. The High Court has held that the recording of the dying declaration and story stated therein apparently appears to be false and concocted for the various reasons noticed in the impugned judgment. It has to be borne in mind that the fact whether the dying declaration is false and concocted has to be established by the prosecution. It is not for the accused to prove conclusively that the dying declaration was correct and the story therein was not concocted. The fact that the statement of the deceased was recorded at about 9.00 p.m. by the Head Constable cannot be doubted though an attempt to the contrary seems to have been made by the prosecution. The statements of the prosecution witnesses (PW 5 and PW 11) also show that the statement was recorded by the Head Constable. According to PW 5, it was only a show made by the Head Constable of recording statement, since according to the said witness, the deceased was not in a position to speak at that time. Even PW 11, a doctor in the hospital, has deposed about the recording of the statement by the Head Constable though he has not formally proved the dying declaration but has certified the correctness of the endorsement of Dr. A.U. Masurkar on the dying declaration. PW 11 was shown the dying declaration. He has deposed that the certificate recorded on the dying declaration is in the handwriting of Dr. Masurkar, Chief Medical Officer of the hospital. He has further deposed that Dr. Masurkar is in the hospital since the last 12 to 15 years and that he had degree in MS and was estimated to be an honest and expert surgeon of the area. One of the reasons which had strongly weighed with the High Court in rejecting the dying declaration is that the endorsement of the doctor is only about the deceased lady being conscious and not that she was in a fit condition to make the statement. The High Court went into distinction between consciousness and fitness to make statement. On the facts of the present case, we are unable to sustain the approach adopted by the High Court. It is one thing for an accused to attack a dying declaration in a case where the prosecution seeks to rely on a dying declaration against an accused but it is altogether different where an accused relies upon a dying declaration in support of the defence of accidental death. The burden on the accused is much lighter. He has only to prove reasonable probability. Under these circumstances, the dying declaration could not have been rejected on the ground that it does not contain the endorsement of the doctor of the fitness of the lady to make the statement as the certificate of the doctor only shows that she was in a conscious state. The endorsement of the doctor aforequoted is not only about the conscious state of the lady but is that she made the statement in a conscious state."

24. In **P. Mani v State of Tamilnadu**3, while considering the suspicious dying declaration, it has been held by the Apex Court that the conviction can be based solely on the basis of dying declaration alone, but the same must be wholly reliable and trustworthy. Para 14 of the said judgment reads thus:

"14. Indisputably conviction can be recorded on the basis of dying declaration alone but therefore the same must be wholly reliable. In a case where

suspicion can be raised as regard the correctness of the dying declaration, the court before convicting an accused on the basis thereof would look for some corroborative evidence. Suspicion, it is trite, is no substitute for proof. If evidence brought on records suggests that such dying declaration does not reveal the entire truth, it may be considered only as a piece of evidence in which event conviction may not be rested only on the basis thereof. The question as to whether a dying declaration is of impeccable character would depend upon several factors; physical and mental condition of the deceased is one of them. In this case the circumstances which have been brought on records clearly point out that what might have been stated in the dying declaration may not be correct. If the deceased had been nurturing a grudge against her husband for a long time, she while committing suicide herself may try to implicate him so as to make his life miserable. In the present case where the Appellant has been charged under Section 302 of the Indian Penal Code, the presumption in terms of Section 113A of the Evidence Act is not available. In absence of such a presumption, the conviction and sentence of the accused must be based on cogent and reliable evidence brought on record by the prosecution. In this case, we find that the evidences are not such which point out only to the guilt of the accused."

25. In **Lakhan v. State of MP**4, the Supreme Court after discussing number of judgments on the point of dying declarations summarized the law in this regard, as under:

"20. In view of the above, the law on the issue of dying declaration can be summarized to the effect that in case, the Court comes to the conclusion that the dying declaration is true and reliable, has been recorded by a person at a time when the deceased was fit physically and mentally to make the declaration and it has not been made under any tutoring/duress/prompting; it can be the sole basis for recording conviction. In such an eventuality no corroboration is required. In case, there are multiple dying declarations and there are inconsistencies between them, generally, the dying declaration recorded by the higher officer like a Magistrate can be relied upon, provided that there is no circumstance giving rise to any suspicion about its truthfulness. In case, there are circumstances wherein the declaration had been made, not voluntarily and even otherwise, it is not supported by the other evidence, the Court has to scrutinize the facts of an individual case very carefully and take a decision as to which of the declarations is worth reliance."

26. In **Shudhakar v. State of MP**5, the Supreme Court held as under:

"18. In the case of Laxman (supra), the Court while dealing with the argument that the dying declaration must be recorded by a Magistrate and the certificate of fitness was an essential feature, made the following observations. The court answered both these questions as follows:

"3. The juristic theory regarding acceptability of a dying declaration is that such declaration is made in extremity, when the party is at the point of death and when every hope of this world is gone, when every motive to falsehood is silenced, and the man is induced by the most powerful consideration to speak only the truth. Notwithstanding the same, great

caution must be exercised in considering the weight to be given to this species of evidence on account of the existence of many circumstances which may affect their truth. The situation in which a man is on the deathbed is so solemn and serene, is the reason in law to accept the veracity of his statement. It is for this reason the requirements of oath and cross-examination are dispensed with. Since the accused has no power of cross-examination, the courts insist that the dying declaration should be of such a nature as to inspire full confidence of the court in its truthfulness and correctness. The court, however, has always to be on guard to see that the statement of the deceased was not as a result of either tutoring or prompting or a product of imagination. The court also must further decide that the deceased was in a fit state of mind and had the opportunity to observe and identify the assailant. Normally, therefore, the court in order to satisfy whether the deceased was in a fit mental condition to make the dying declaration looks up to the medical opinion. But where the eyewitnesses state that the deceased was in a fit and conscious state to make the declaration, the medical opinion will not prevail, nor can it be said that since there is no certification of the doctor as to the fitness of the mind of the declarant, the dying declaration is not acceptable. A dying declaration can be oral or in writing and any adequate method of communication whether by words or by signs or otherwise will suffice provided the indication is positive and definite. In most cases, however, such statements are made orally before death ensues and is reduced to writing by someone like a Magistrate or a doctor or a police officer. When it is recorded, no oath is necessary nor is the presence of a Magistrate absolutely necessary, although to assure authenticity it is usual to call a Magistrate, if available for recording the statement of a man about to die. There is no requirement of law that a dying declaration must necessarily be made to a Magistrate and when such statement is recorded by a Magistrate there is no specified statutory form for such recording. Consequently, what evidential value or weight has to be attached to such statement necessarily depends on the facts and circumstances of each particular case. What is essentially required is that the person who records a dying declaration must be satisfied that the deceased was in a fit state of mind. Where it is proved by the testimony of the Magistrate that the declarant was fit to make the statement even without examination by the doctor the declaration can be acted upon provided the court ultimately holds the same to be voluntary and truthful. A certification by the doctor is essentially a rule of caution and therefore the voluntary and truthful nature of the declaration can be established otherwise."

27. In **Ramakant Mishra v. State of UP**6, the Supreme Court observed as under:

"9. Definition of this legal concept found in Black's Law Dictionary (5th Edition) justifies reproduction:

"*Dying Declarations* - Statements made by a person who is lying at the point of death, and is conscious of his approaching death, in reference to the manner in which he received the injuries of which he is dying, or other immediate cause of his death, and in reference to the person who inflicted such injuries or the connection with such injuries of a person who is charged or suspected of having

committed them; which statements are admissible in evidence in a trial for homicide (and occasionally, at least in some jurisdictions, in other cases) where the killing of the declarant is the crime charged to the defendant. Shepard v. U.S., Kan., 290 U.S. 96, 54 S.Ct. 22, 78 L.Ed. 196.

Generally, the admissibility of such declarations is limited to use in prosecutions for homicide; but is admissible on behalf of accused as well as for prosecution. In a prosecution for homicide or in a civil action or proceeding, a statement made by a declarant while believing that his death was imminent, concerning the cause or circumstances of what he believed to be his impending death is not excluded by the hearsay rule. Fed. Evid.R. 804 (b) (2).

10. When a person makes a statement while being aware of the prospect that his death is imminent and proximate, such a statement assumes a probative value which is almost unassailable, unlike other statements which he may have made earlier, when death was not lurking around, indicating the cause of his death. That is to say that a person might be quite willing to implicate an innocent person but would not do so when death is knocking at his door. That is why a Dying Declaration, to conform to this unique specie, should have been made when death was in the contemplation of the person making the statement/declaration."

28. Applying the above principles of law with the facts of the case and on appreciation of evidence on record, we have no hesitation to hold that the dying declaration was recorded in accordance with law and there is no infirmity in the same. Further there is no inconsistency in the dying declaration and the same inspire confidence of this Court.

29. Dying declaration makes it very clear as to the manner in which the deceased was burnt by the appellants. The mere fact that the appellant No.1 was standing there and had not taken any active participation in the actual act will not give him any benefit to him. It has come in the dying declaration that the entire act has been done at his instance and at his dictates, and he did not make any effort to save his wife. Had the appellant No.1 was so innocent, he would have definitely made some effort to save his wife, but instead of doing so, he kept quite. As already stated that apart from the dying declaration recorded by the Executive Magistrate, oral dying declaration was also made by the deceased before Quresha Bano (PW-1) and, therefore, role assigned to the appellants has been duly proved by the prosecution. We find no force in the argument of the defence that evidence on record is not sufficient to convict the appellant.

30. Considering all the above aspects of the case, we are of the view that the trial court was justified in holding the appellant guilty for committing the murder of the deceased.

31. The next question, which arises for consideration of this Court, is whether the sentence awarded to the appellants can be reduced or not.

32. Section 304-B of IPC reads as under:-

"304-B. Dowry death.-- (1) Where the death of a woman is caused by any burns or bodily injury or occurs

otherwise than under normal circumstances within seven years of her marriage and it is shown that soon before her death she was subjected to cruelty or harassment by her husband or any relative of her husband for, or in connection with, any demand for dowry, such death shall be called "dowry death", and such husband or relative shall be deemed to have caused her death.

Explanation.--For the purpose of this sub-section, "dowry" shall have the same meaning as in section 2 of the Dowry Prohibition Act, 1961 (28 of 1961).

(2) Whoever commits dowry death shall be punished with imprisonment for a term which shall not be less than seven years but which may extend to imprisonment for life."

33. A bare reading of aboresaid Section makes it clear that imposition of life imprisonment is not mandatory under Section 304-B of IPC and the minimum sentence, which has been provided in the said Section, is 7 years.

34. If we apply the above principles of law in the present case, what emerges is that the deceased was brutally burnt by the accused persons and specific role has been assigned to each one of them.

35. Learned counsel for the appellants has placed reliance on the following judgments to contend that the Apex Court has awarded fixed term sentence to the accused persons instead awarding life sentence:-

(i) **Hari Om Vs. State of Haryana & Another**7; (ii) **Hem Chand Vs. State of Haryana**8; (iii) **Amar Singh Vs. State of Rajasthan**9; (iv) **Shanti Vs. State of Haryana**10 (v) **Sanjay Kumar Singh Vs. State of Delhi**11; (vi) **Donthula Ravindranath alias Ravinder Rao Vs. State of Andhra Pradesh**12; (vii) **Ranjit Singh Vs. State of Punjab**13; (viii) **Sunil Dutt Sharma Vs. State (Govt of NCT of Delhi)**14; (ix) **Pradeep Kumar Vs. State of Haryana**15 (x) **Banarsi Dass & others Vs. State of Haryana**16 and (xi) **Smt. Rama Devi Vs. State of U.P.**17

36. The principles laid down by the Supreme Court in the cases relied on by the counsel for the appellants do not apply to the facts of the present case. Present is not a case of suicide or unnatural death by some other means, but if the facts of the present case are seen, the case may come within the ambit of Section 302 of IPC, where the minimum sentence which has been provided is a life sentence. The manner, in which the deceased was burnt, shows brutality of the offence and we are of the considered view that sentence of life imprisonment imposed by the Court below is fully justified. In the facts and circumstances of the case, we find it difficult to reduce the sentence.

37. The appeal has no substance. It is accordingly **dismissed.**

(2020)02ILR A780

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 13.02.2020

BEFORE
THE HON'BLE SURESH KUMAR GUPTA, J.

Jail Appeal No. 3490 of 2016

Ashok @ Gore Lal ...Appellant
Versus
State of U.P. ...Opposite Party

Counsel for the Appellant:

From Jail, Sri Radhey Shyam Yadav

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

A. Criminal Law-Indian Penal Code - Sections 363, 366, 376, 328, 506- Appeal against conviction.

In a case of rape, when an adult commits rape on a girl of tender age, deterrent punishment is called for, taking a lenient view is out of question. Once a person is convicted for the offence of rape, he should be treated with heavy hands and undeserved indulgence or liberal attitude in not awarding adequate sentence is improper. (Para 21)

On present scenario, the appellant is in jail since 5.1.2013 and during trial he remained in jail. Presently he is incarceration for more than 7 years. That appellant is very poor and not represented by counsel of his choice during trial so the contention of learned counsel to adopt a lenient view and award the custodial sentence to the appellant is fully acceptable. (Para 22)

Considering the peculiar facts and circumstances of the case, the appellant is acquitted. So on the point of conviction, **appeal is dismissed**. On quantum of sentence this court thinks that end of justice would be met if the appellant is sentenced to imprisonment under section 376 I.P.C. which he has already undergone. **On the point of sentence appeal is partly allowed**. (Para 23)

Criminal Appeal disposed off. (E-2)

List of cases cited:-

1. St. of Punj. Vs. Ramdev Singh 2004 (48) ACC 300,

2. St. of Raj. Vs. Om Prakash, 2002 (2) JIC Page 870 (Crime),

3. St. of H.P. Vs. Dharmapal, (2004) 9 SCC Page 681,

4. St. of Punj. Vs. Ramdev Singh 2004 (48) ACC 300,

5. St. of Har. Vs. Raja Ram AIR 1973 SC 819,

6. Gopal Singh vs St. Of Uttarakhand (2013) 3 SCC (Cri) 608,

(Delivered by Hon'ble Suresh Kumar Gupta, J.)

1. Being aggrieved with the judgment and order dated 21.5.2016 passed by Additional Sessions Judge, Fast Track Court No. 1, Kannauj, this jail appeal has been preferred by appellant in S.T. No. 139 of 2013, Case Crime No. 538 of 2012, under sections 363, 366, 376, 328, 506 I.P.C. Appellant has been convicted under section 363 I.P.C. for 7 years rigorous imprisonment alongwith fine of Rs. 5,000/-, under section 366 I.P.C. for 7 years rigorous imprisonment alongwith fine of Rs. 5,000/-, under section 376 I.P.C. for 10 years rigorous imprisonment alongwith fine of Rs. 10,000/-, under section 328 I.P.C. for 7 years rigorous imprisonment alongwith fine of Rs. 5,000/- and under section 506 I.P.C. for 3 years rigorous imprisonment alongwith fine of Rs. 5,000/-. In default of payment of fine, three moths further imprisonment in each. After depositing the fine, imposed upon the applicant, Rs. 25,000/- shall be given to the victim as a compensation. All the sentences shall run concurrently.

2. Brief facts of this case are as follows-:

The complainant (father of the victim) / PW-1 lodged an F.I.R. on 9.8.2012 against the appellant by way of filing an

application under section 156 (3) Cr.P.C. alleging that his daughter (victim) was a student of Class VIII and on 23.7.2011 at 7.30 A.M., victim (aged about 13 years) went to school at Mochipur for studying. That after some time complainant received a call on his mobile phone by Kamlesh and Hariram. They told the complainant that his daughter was seen accompanying with appellant / Ashok @ Gore Lal and two other persons in Chhebramau Civil Court, Kannauj. That after receiving this information, complainant searched his daughter in several places but he could not succeed in locating her. The daughter of the complainant came back at her home at 4.00 P.M. on the same day told that when she was on the way of her school and reached at a deserted place, accused - appellant / Ashok @ Gore Lal alongwith one unknown person were came on a moter-cycle and abducted her and thrown her books into drain and fed her some poisonous substance and raped her one by one on the point of gun. After that they have forcefully abducted his daughter and executed written marriage agreement by obtaining the thumb impression of her daughter against her will. That due to shame of society he did not make any complaint anywhere. But when the appellant constantly started threatening to complainant by saying that I will forcefully kidnapped your daughter and get married with her and now victim is his wife. Then he went to Kannauj Police Station and made a written complaint by registered post to the S.S.P. Kannauj and other higher authorities but when no action was taken by the higher authorities, then he approached to C.J.M. Kannauj and lodged an F.I.R. Ex. Ka-2 by way of application under section 156(3) Cr.P.C. as Case Crime No. 538 of 2012 was lodged on 29.8.2012 against the appellant and one unknown person under sections 363, 366, 376, 328, 506 I.P.C. at Police Station Kannauj, District Kannauj by way of G.D. Entry (Ex.Ka-3) Serial No. 32 at 15.15 P.M. Initially the investigation was conducted by S.I. Hamid Ali (who is PW-7). S.I. Hamid Ali recorded the statement of the witnesses and prepared the site plan as Ex.Ka-8. Thereafter further investigation was conducted by subsequent Investigating Officer, Tushar Dutt Tyagi as PW-8, who after conducting the formalities of investigation, filed the chargesheet Ex. Ka-9 against the appellant before the competent court and the case was committed to the Sessions Court by Chief Judicial Magistrate, Kannauj. Thereafter learned trial court framed charge against the accused under sections 376, 363, 506, 328, 366 I.P.C. The charge is read over to the appellant and appellant denied the charge and claimed to be tried.

3. In support of the prosecution case, prosecution has examined 8 witnesses i.e. PW-1 / daughter (victim) of the complainant, PW-2 Mahesh (father of the victim), who proved the written report as Ex.Ka-2, PW-3 / Smt. Urmila (Bua of the victim), PW-4-H.C. / Ram Shankar, who is chek writer and proved chek F.I.R. as Ex. Ka-2, PW-5 / Dr. Neelima Thaigal, who proved medical examination of the victim (Ex. Ka-4 & Ka-5), PW-6 / Kamlesh Katiyar, proved the date of birth certificate of the victim as well as attested photocopy of her educational qualification (Ex.Ka-6 & Ka-7), PW-7 / S.I. Hamid Ali, first IO, prepared the site plan (Ex. Ka-6) and PW-8 / S.I. Tushar Dutt Tyagi, second IO, proved the charge-sheet (Ex.Ka-9).

4. After examination of these witnesses, statement of the accused - appellant was recorded under section 313

Cr.P.C. Accused/ appellant denied all the charges levelled against him and stated that due to enmity, all the witnesses had given false statements against him. No defence witness was produced by the appellant in his defence. After hearing the argument of both the parties, learned trial court has convicted the accused-appellant as aforesaid. Aggrieved with the same, accused-appellant has preferred this appeal.

5. Learned counsel for the appellant submits that impugned judgment dated 21.5.2016 is illegal, perverse and passed only on surmises and conjectures. It is submitted by the learned counsel for the appellants that F.I.R. is lodged against the applicant after approx two months of the incident after due deliberation and consultation and there were no plausible explanation regarding the delay. It is next contended that medical examination of the victim was conducted by Dr. Neelima Thaigal but as per medical examination report there is no mark of injury on the body of the victim. It is next contended that as per opinion of Dr. Neelima Thaigal, she was not sure whether any rape was committed or not so there is no definite opinion that victim was raped. It is next contended that there was no motive for appellant to commit such offence and there are several contradictions and infirmities in the statements of PW-1, PW-2 and PW-3. Further submitted that there was love affair between the victim and appellant so the victim has voluntarily entered into relationship with the appellant. It is next contended that as no definite opinion regarding rape can be given so learned trial court wrongly convicted the appellant in this case without applying its judicial mind. Learned counsel further submitted that in this scenario appellant is liable to be acquitted from all the charges levelled upon him. It is lastly contended that there is no definite opinion regarding administering of poison as there is no medical report nor any visible sign which suggest that the poison was administered by the appellant. Learned counsel for the appellant vehemently argued above sentence being highly excessive and not in commensurate with degree of offence.

6. Per contra, rebutting the above argument, the learned A.G.A. supports the judgment of conviction and order of sentence and submitted that the prosecutrix was a minor girl and appellant abducted her forcefully and committed rape. He further argued that alleged offences against the applicant are serious in nature and due to shame of society, there is delay in lodging the F.I.R., which is clearly explained by the complainant (PW-2) in his statement. He further submits that victim has clearly stated in her statement recorded under section 164 Cr.P.C. that accused-applicant had committed rape upon her on the point of gun. It is next submitted that as per her educational certificate, victim was studying in class 8th at the time of alleged incident and as per educational record, at the time of alleged offence, she was about 13 years old. It is next submitted that as per X-ray report and supplementary report, age of victim is less than 17 years. So it is clear that at the time of alleged incident, victim was minor. He further submits that impugned judgment of conviction and order of sentence is well reasoned and there is no illegality or perversity in the impugned judgment of trial court. He further submits that keeping in view the facts and circumstances and evidences tendered before the trial court alongwith

the documentary evidence no interference warranted in this case.

7. In this case, prosecution has examined the prosecutrix as PW-1 and she clearly states in her statement that she was subjected to rape by accused on the point of gun against her wishes. On perusal of the statement of the witnesses it reveals that appellant was extending threats to victim and forcefully taken her to Chhibramau Court where a false document of marriage prepared by the appellant. She clearly denied that she was fall in love with appellant and also denied that she never solemnized marriage with appellant.

8. PW-2 is the father of the PW-1(victim). PW-2 has clearly stated in his statement that immediately after the occurrence he did not lodge a report for a fear of slander in the society and when he received threatening call from the appellant then he compel to lodge an F.I.R. against the appellant.

9. PW-3 is the Bua of the victim, who also supported the prosecution version and she clearly stated that on the date of alleged incident, she was also present in the house of his brother to celebrate Rakshabandhan festival.

10. One of the argument of the appellant is that there is delay in lodging the F.I.R.

11. Submission of learned counsel for the appellant is that the F.I.R. was lodged near about 2 month after the alleged incident so no reliance can be placed but on perusal of the statement of PW-2, it transpires that delay is clearly explained.

12. Hon'ble Apex Court held in **State of Punjab Vs. Ramdev Singh 2004 (48) ACC 300** as under:-

"Delay in lodging the FIR cannot be used as a ritualistic formula for doubting the prosecution case and discarding the same solely on the ground of delay in lodging the first information report. Delay has the effect of putting the Court in its guard to search if any explanation has been offered for the delay, and if offered, whether it is satisfactory or not. If the prosecution fails to satisfactorily explain the delay and there is possibility of embellishment in prosecution version on account of such delay, the same would be fatal to the prosecution. However, if the delay is explained to the satisfaction of the Court, same cannot by itself be a ground for disbelieving and discarding the entire prosecution version, as done by the High Court in the present case."

13. So the contention of appellant have no force that due to delay in lodging the F.I.R., no reliance can be placed against the prosecution case.

14. Learned counsel for the appellant vehemently argued that as per medical report Ex.Ka-4 & Ex.Ka-5 and as per the statement of PW-5/Dr. Neelima Thaigal as there is no mark of injury found on the body of victim and medical evidence does not support the prosecution case as no definite opinion has been recorded by the doctor with regard to the injuries inflicted on the body of prosecutrix and no definite opinion of rape has been mentioned. Before examining this aspect, it would be relevant to mention that in ***State of Rajasthan Vs. Om Prakash, 2002 (2) JIC Page 870 (Crime),*** Hon'ble Apex Court held that *"there is no force in the contention that if there was any forcible sexual intercourse, it would have resulted in some injuries upon the prosecutrix. Presence of injuries are not always sine qua non to prove the charge of rape."*

Further there are catena of decisions of Hon'ble Apex Court that it is necessary for the court to have a sensitive approach when dealing with the cases of rape. It is also trite that in the case of ***State of Himachal Pradesh Vs. Dharmapal, (2004) 9 SCC Page 681,*** Hon'ble Apex Court held that *"rape is a serious offence, as it leads to an assault on the most valuable possession of a woman i.e. character, reputation, dignity and honour."*

15. In **State of Punjab Vs. Ramdev Singh 2004 (48) ACC 300** Hon'ble Apex Court held as under:-

"Sexual violence apart from being a dehumanizing act is an unlawful intrusion on the right of privacy and sanctity of a female. It is a serious blow to her supreme honour and offends her self-esteem and dignity. It degrades and humiliates the victim and where the victim is a helpless innocent child or a minor. It leaves behind a traumatic experience. A rapist not only causes physical injuries but more indelibly leaves a scar on the most cherished possession of a woman i.e. her dignity, honour, reputation and not the least her chastity. Rape is not only a crime against the person of a woman, it is a crime against the entire society. It destroys, as noted by Apex Court in Shri Bodhisattwa Gautam v. Miss Subhra Chakraborty, AIR 1996 SC 922 the entire psychology of a woman and pushes her into deep emotional crisis. It is a crime against basic human rights, and is also violative of the victim's most cherished of the Fundamental Rights, namely, the Right to Life contained inArticle 21of the Constitution of India, 1950 (in short the 'Constitution'). The Courts are, therefore, expected to deal with cases of sexual crime against women with utmost sensitivity. Such cases need to be dealt with sternly and severely. A socially sensitized judge, in our opinion, is a better statutory armour in cases of crime against women than long clauses of penal provisions, containing complex exceptions and provisos."

16. In this case, it is not only the evidence of PW-1 but immediately after commission of rape the prosecutrix narrated the whole incident to her father and her Bua, who were produced by the prosecution as PW-2 & PW-3. It is pertinent to mention here that on the sole testimony of the prosecutrix, conviction is sustainable in the eye of law without any corroboration of medical evidence. Prosecution by cogent and credible evidence is able to prove the charge under section 376 I.P.C. against the appellant.

17. So far as regard section 363 I.P.C. is concerned, it is clearly established beyond reasonable doubt that at the time of alleged incident, victim was below the age of 17 years, regarding this charge u/s 363 I.P.C. framed against the appellant. Section 363 I.P.C. provides that *"Punishment for kidnapping.--Whoever kidnaps any person from 1[India] or from lawful guardianship, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine."* Kidnapping from lawful guardianship defined in section 361 I.P.C. *Kidnapping from lawful guardianship.--Whoever takes or entices any minor under 1[sixteen] years of age if a male, or under 2[eighteen] years of age if a female, or any person of unsound mind, out of the keeping of the lawful guardian of such*

minor or person of unsound mind, without the consent of such guardian, is said to kidnap such minor or person from lawful guardianship. Explanation.--The words "lawful guardian" in this section include any person lawfully entrusted with the care or custody of such minor or other person."

On a plain reading of this Section, the consent of the minor, who is taken or enticed, is wholly immaterial, it is only the guardian's consent which takes the case within its purview. Nor is it necessary that the taking or enticing must be shown to have been by means of force or fraud. Persuasion by the accused person, which creates willingness on the part of minor to be taken out of the keeping of the lawful guardianship would be sufficient to attract this Section 361 I.P.C., as has been held by Apex Court in ***State of Haryana Vs. Raja Ram AIR 1973 SC 819.***

18. So far as regard section 366 I.P.C. is concerned requires three principles ingredients:- *"Offence punishable under Section 366 I.P.C. requires three principal ingredients (I) kidnapping or abduction to any women (II) such kidnapping or abduction must be (i) with intent that she may be compelled or knowing it to be likely that she will be compelled to marry any person against her will; or (ii) in order that she may be forced or seduced to illicit intercourse or knowing it to be likely that she will be forced or seduced to illegal intercourse, or (iii) by means of criminal intimidation or otherwise by enticing any women to any place with intent that she may be or knowing that she will be forced or seduced to illicit intercourse. It is immaterial whether the women kidnapped is married women or not."*

In this appeal prosecution by means of credible and cogent evidence clearly established that victim was forcefully kidnapped by the appellant in order to solemnize marriage and by deceitful means appellant force the victim to sign on the marriage certificate. So prosecution is able to prove the charge under section 366 I.P.C. against the appellant.

19. So far as regard section 328 I.P.C. is concerned *"Causing hurt by means of poison, etc., with intent to commit an offence.--Whoever administers to or causes to be taken by any person any poison or any stupefying, intoxicating or unwholesome drug, or other thing with intent to cause hurt to such person, or with intent to commit or to facilitate the commission of an offence or knowing it to be likely that he will thereby cause hurt, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine."* After perusing the statement of PW-1/victim, wherein she has stated that appellant fed her some poisonous substance but no sign or any visible injury inflicted to victim of having any poisonous substance and it is also not the case of prosecution that due to administering of poisonous substance victim become unconscious. So offence under section 328 I.P.C. is not proved against the appellant.

20. Appellant was also charged under section 376 I.P.C. which provides as *"Whoever, except in the cases provided for by sub-section (2), commits rape shall be punished with imprisonment of either description for a term which shall not be less than seven years but which may be for life or for a term which may extend to ten years and shall also be liable to fine unless the women raped is his own wife and is not under twelve years of age, in which cases, he shall be punished with imprisonment of*

either description for a term which may extend to two years or with fine or with both: Provided that the court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment for a term of less than seven years." Regarding section 376 I.P.C. the maximum sentence provided for offence of rape is 7 years. Apex Court in ***Gopal Singh vs State Of Uttarakhand (2013) 3 SCC (Cri) 608*** has propounded:-

"Just punishment is the collective cry of the society. While the collective cry has to be kept uppermost in the mind, simultaneously the principle of proportionality between the crime and punishment cannot be totally brushed aside. The principle of just punishment is the bedrock of sentencing in respect of a criminal offence. A punishment should not be disproportionately excessive. The concept of proportionality allows a significant discretion to the Judge but the same has to be guided by certain principles. In certain cases, the nature of culpability, the antecedents of the accused, the factum of age, the potentiality of the convict to become a criminal in future, capability of his reformation and to lead an acceptable life in the prevalent milieu, the effect - propensity to become a social threat or nuisance, and sometimes lapse of time in the commission of the crime and his conduct in the interregnum bearing in mind the nature of the offence, etc. etc."

21. Though in a case of rape, when an adult commits rape on a girl of tender age, deterrent punishment is called for, taking a lenient view is out of question. Once a person is convicted for the offence of rape, he should be treated with heavy hands and undeserved indulgence or liberal attitude in not awarding adequate sentence is improper.

22. On present scenario, the appellant is in jail since 5.1.2013 and during trial he remained in jail. Presently he is incarceration for more than 7 years. That appellant is very poor and not represented by counsel of his choice during trial so the contention of learned counsel to adopt a lenient view and award the custodial sentence to the appellant is fully acceptable.

23. Considering the peculiar facts and circumstances of the case, the appellant is acquitted against the charge under section 328 I.P.C. levelled against him. **Conviction of the appellant is confirmed under sections 363, 376, 506 & 366 I.P.C. So on the point of conviction, appeal is dismissed.** On quantum of sentence this court thinks that end of justice would be met if the appellant is sentenced to imprisonment under section 376 I.P.C. which he has already undergone. It is hereby clear that fine clause shall be unaltered. After depositing fine of Rs. 20,000/-, the victim shall entitle of Rs. 15,000/- under section 357 (2) Cr.P.C. **On the point of sentence appeal is partly allowed.**

24. On above terms, appeal is finally **disposed off.**

25. Let a copy of the judgment alongwith lower court record be transmitted to the trial court for necessary compliance.

(2020)02ILR A787

APPELLATE JURISDICTION
CRIMINAL SIDE

DATED: ALLAHABAD 19.02.2020

BEFORE
THE HON'BLE B. AMIT STHALEKAR, J.
THE HON'BLE ALI ZAMIN, J.

Criminal Appeal No. 3653 of 2004

Laeeque @ Dharmanga
...Appellant (In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Appellant:
Sri Jitendra Pal Singh, Sri Gaurav Sharma, Sri M.K. Shukla, Sri Sushil Pandey, Sri Vijai Puri

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

A. Criminal Law-Indian Penal Code-Sections 302, 504 . and Section 4/25 of the Arms Act r/w 34 I.P.C.— Appeal against conviction.

The point of number of persons sitting on the slab at the time of the incident, evidence of P.W.2 and P.W.4, the alleged eye witnesses is contradictory. On points of sitting place of witnesses, place of incident and seat of injury to the deceased, statement of P.W.1, P.W.2 and P.W.4 are contradictory to each other. All contradictions indicate that this witness is also not an eye witness of the incident that is why the above contradictory statements have been made. (Para 17)

The spot map has been prepared by the I.O. on the pointing out of the P.W.1, , the informant. Therefore, from the evidence led by the prosecution the place of incident is not proved. (para 18)

The knife used in the incident has also not been produced before the trial court. Forensic report is not available on record, so that it can be said that the knife was used in the incident and it is linked with the incident. (Para 22)

In view of the above discussion, prosecution has failed to prove its case against the accused-appellant for commission of offence. (Para 23)

Criminal Appeal allowed. (E-2)

List of cases cited:-

1. Syed Ibrahim vs. St. of A.P., (2006) 10 SCC 601,

2. Gautam Chaturvedi vs. St. of U.P., 2019 SCC Online All 4307,

3. Raghubir and others vs. St. of U.P., 1996 ALL.L.J. 551

(Delivered by Hon'ble Ali Zamin, J).)

1. Heard Sri Gaurav Sharma, learned counsel for the appellant and learned A.G.A. for the State.

2. This is an appeal against the judgment and order dated 30.06.2004 passed in S.T. No.373 of 2003 (State vs. Laeeque @ Dharmanga & others) arising out of Case Crime No.140 of 2003, under Sections 302, 504 I.P.C. and S.T. No. 374 of 2003 arising out of Case Crime No.268 of 2003, under Section 4/25 of the Arms Act registered at P.S. Puranpur, District Pilibhit whereby the Additional Sessions Judge, Court No.1, Pilibhit has convicted the accused appellant Laeeque @ Dharmanga under Sections 302, 504 I.P.C. and Section 4/25 of the Arms Act and sentenced to undergo life imprisonment under Section 302 I.P.C., one year rigorous imprisonment under Section 504 I.P.C. and one year rigorous imprisonment under Section 4/25 of the Arms Act and acquitted Jalaluddin and Mashroof under Section 302 I.P.C read with Section 34 and 504 I.P.C.

3. Prosecution case, in brief, is that on 28.03.2003 at about 7:00 P.M. Akram son of the informant Shamshuddin had gone to Babboo Pradhan to take money. On the slab, in front of the house of Babboo Pradhan, Raffique, Aslam his son and several persons of the Mohalla were sitting. At that time, Laeeque @ Dharmanga, Jalaluddin and Mashroof came there. Laeeque @ Dharmanga abusing his son Akram by saying that he had pushed him at the time of filling water, all of a sudden he took out a knife and stabbed him on his chest. On the shrieks of his son, the persons sitting on the slab rushed there immediately and all the three accused persons fled away. Hearing shriek, informant also reached the spot and he took his son to the hospital in an injured condition where he succumbed to his injuries. The incident has been witnessed by the persons present on the spot.

4. On the basis of the written report (Ext.Ka-1) same day at 20.10 P.M., Chik FIR (Ext.Ka-3) under Section 304, 504 read with 34 I.P.C. was registered and G.D. Entry (Ext.Ka-4) was prepared. Investigation of the case was entrusted to S.I., Rampal Singh (P.W.9), who proceeded to the spot along with S.I., S.D. Mahesh Prasad. He recorded the statements of informant Shamshuddin, scribe of written report and prepared spot map (Ext.Ka-10) on the pointing out of the informant. On his instruction S.I. Mahesh Prasad prepared the inquest memo (Ext.Ka-14). He also prepared challan lash, photo lash, letter to the Chief Medical Officer, letter to R.I. and Specimen Seal (Ext.Ka-15 to 19) and dispatched the dead body for post mortem.

5. Dr. Vimal Kumar (P.W.3), conducted autopsy on the body of the deceased and prepared the post mortem report (Ext.Ka-2). According to post-mortem report following injuries were found on the body of the deceased:

"1. Stab wound 2.8 cm x 1.2 cm x chest cavity deep just below and lateral to left nipple. Margin of wound are sharp."

In internal examination 5th rib deep below the injury no. 1, was found cut. Left lung was punctured. Left chamber of the heart was incised as well, which was through and through its wall. In the cavity of the left chest, around 600 ml blood was found.

In opinion of the doctor death of the deceased is possible on 28.03.2003 at 7.00 P.M. due to haemorrhage and shock caused by aforesaid injury with a sharp edged weapon like knife.

The death of the deceased is likely to have occurred around 24 hours before the conducting of the post mortem on 29.03.2003 at 3.30 P.M..

6. During investigation, on the pointing out of the accused Laeeque @ Dharmanga, Investigating Officer recovered the knife on 28.05.2003 and prepared recovery memo (Ext.Ka-5). On the basis of the recovery memo, first information report under Section 4/25 Arms Act, Case Crime No. 268 of 2003 was registered at 21:10 P.M. on 28.05.2003. Investigation of the case was entrusted to S.I., Vivek Malik (P.W.8). After completing investigation, on 30.05.2003 the investigating officer (P.W.9) of the Case Crime No. 140 of 2003 submitted charge-sheet (Ext.Ka-12) under Sections 304, 504 and 34 I.P.C. against the accused Laeeque @ Dharmanga, Jalaluddin and Mashroof. Investigating Officer of Case Crime No. 268 of 2003 also completing the investigation submitted charge-sheet under

Section 4/25 of the Arms Act (Ex.Ka-9) against the accused Laeeque @ Dharmanga on the same day.

7. Since the offence under Section 304 I.P.C. was exclusively triable by the court of sessions, the Chief Judicial Magistrate, Pilibhit committed the accused for trial to the court of sessions where the Case Crime No.140 of 2003, under Section 304, 504 and 34 I.P.C. was registered as S.T. No.373 of 2003 and Case Crime No.268 under Section 4/25 of the Arms Act was registered as S.T. No. 374 of 2003. The Sessions Judge made over the above cases for trial to the Additional Sessions Judge, Court No.1, Pilibhit. Learned Additional Sessions Judge framed charge under Section 302 and 504 I.P.C. and 4/25 Arms Act against appellant.

8. Prosecution, to prove its case, produced 9 (nine) witnesses namely, P.W.1 Shamshuddin, informant of the case, P.W.2 Aslam and P.W.4 Mohd. Rafique are the witnesses of the fact. P.W.3 Dr. Vimal Kumar conducted the autopsy of the deceased, P.W.5 Constable Narpat Singh, scribe of the F.I.R., Case No.140 of 2003, under Sections 304, 504 I.P.C. and P.W.6 Constable Raghunath Singh, witness of the recovery of knife, P.W.7 Constable Har Prasad, scribe of F.I.R. Case Crime No. 268 of 2003, under Section 4/25 of the Arms Act and G.D., P.W.8 S.I. Vivek Kumar Malik, Investigating Officer of Case Crime No. 263 of 2003, under Section 4/25 of the Arms Act and P.W.9 S.I. Rampal Singh, Investigating Officer of Case Crime No.140 of 2003, under Sections 304, 504, 34 I.P.C. are the formal witnesses of the case.

9. Statements of the accused persons were recorded under Section 313 Cr.P.C.. Appellant-accused Laeeque @ Dharmanga in his statement has stated that on account of groupism the case proceeded against him. Mashroof has stated that he does not know why the case proceeded against him and accused Jalaluddin has stated that case proceeded against him due to enmity. Accused persons led no evidence in their defence.

10. Learned Additional Sessions Judge after hearing the argument of the parties and perusal of the record has passed the impugned judgment and order as disclosed in para 2 of the judgment. Hence, the present appeal.

11. Learned counsel for the appellant submits that according to prosecution version incident took place in front of the house of Babboo Pradhan but P.W.9 Rampal Singh, Investigating Officer has stated that near the place of incident there is no house of Babboo Pradhan and the place of incident is not the house of Babboo Pradhan. Therefore, place of incident is not proved. He further submits that no independent witness has been examined although according to prosecution, four-five independent witnesses were present at the time of incident. From the prosecution evidence recovery of knife is also doubtful. Prosecution has miserably failed to prove its case. Learned Trial Judge without proper appreciation of evidence has convicted the appellant, which is not sustainable and it is liable to set aside.

12. Per contra learned A.G.A. submits that P.W.2 Aslam and P.W.4 Mohd. Rafique are the eye witnesses of the incident and they have supported the prosecution version. Learned Trial Judge properly appreciating the evidence adduced by the prosecution has convicted and sentenced the

appellant. No interference is required by this Court.

13. From the evidence, it is evident that Akram died of homicidal violence. It is evident from the medical evidence adduced in the evidence in the case. P.W.3 Dr. Vimal Kumar has prepared post mortem report, Ext.Ka-2, according to which an stab wound injury of 2.8 c.m. x 1.2 c.m. chest cavity deep below of lateral left nipple and margin of wound was found sharp. In internal examination 5th rib was found cut and left lung was found punctured. Cause of death was excess bleeding and shock due to the ante mortem injury. From the above, it is clear that Akram died due to injury sustained by him.

14. According to Ext.Ka-1, incident occurred at about 7:00 P.M. on 28.03.2003. Akram son of informant Shamsuddin had gone to Babboo Pradhan. In front of house of Babboo Pradahn on the slab Mohd. Rafique, Aslam, the son of informant and several persons were sitting, at that time Laeeque @ Dharmanga, Jalaluddin, Mashroof came there. Laeeque @ Dharmanga abusing Akram, all of sudden took out a knife and stabbed him on his chest. On his shriek the persons sitting on the slab rushed there to save him but all the three accused persons fled away. Hearing the shriek informant also rushed to the place of incidence and took him away to the hospital in injured condition where he died.

15. P.W.1 Shamshuddin has supported the first information report version through his testimony and stated that knife injury was caused to the left side of the chest. In cross-examination on asking that Jalaluddin and Mashroof were involved in the assault, he has replied that he could not see them causing the incident and has admitted that on the telling of the people he mentioned the wrong name in the first information report. He has further stated that he had seen the dead body at the place of incidence. From the content of Ext.Ka-1 and his deposition, it transpires that he is not an eye witness of the incident and has lodged the report on the telling by others.

16. P.W.2 Aslam has stated that he along with Mohd. Rafique and other persons of the village was sitting on a slab in front of the house of Babboo Pradhan. His brother Akram had come to Babboo Pradhan. Laeeque @ Dharmanga, Jalaluddin and Mashroof also came there. Laeeque @ Dharmanga abusing him, all of sudden took out a knife and stabbed him on the left side of his chest. On his shrieks the witness and other persons sitting on the slab rushed to him, but the accused persons fled away towards north side. In cross-examination he has stated that when he heard shrieks he rushed to the place of incidence. At the time of shrieks he was on the road. He was at a distance of near about 200 yards from the place where the deceased was stabbed. When he reached the spot, the crowd had not assembled, only about four-five persons were present. On hullabaloo his mother and father came there. From his statement in cross-examination, it transpires that at the time of the incident this witness was not sitting on the said slab. Thus, the testimony of P.W.2 Aslam is not supported by Ext.Ka-1, regarding his sitting on the slab at the time of incident. P.W.1 in his cross-examination has also stated that at the time of incident there was less darkness. In that situation being at a place situated at a distance of 200 yards, it would not be

possible to see the incident. As such P.W.2 Aslam is also not an eye witness of the incident.

17. P.W.4 Mohd. Rafique has been produced by the prosecution as eye witness of the incident, who has stated that he was sitting on the slab on the side of the Pradhan, whose name he does not know; at that time Aslam, he and one more person were sitting, whose name he is not able to remember. Akram had come to take his wage from the Pradhan, Laeeque @ Dharmanga, Jalaluddin and Mashroof also came there. Laeeque @ Dharmanga started abusing and catching the deceased Akram stabbed him in his right side of the chest. They rushed to rescue him but the accused persons fled away. As per his statement, he was sitting on a slab in front of house of a person situated on the side of the house of Pradhan and the place of incident is not in front of house of Pradhan. He has also stated that the accused stabbed the deceased with a knife on the right side of the chest, whereas according to statement of P.W.1 Shamshuddin and P.W.2 Aslam as well as post mortem report, Ex.Ka-2, the injury to the deceased was caused on the left side of the chest. As per statement of P.W.2 Aslam, apart from him P.W.4 Mohd. Rafique and several persons were sitting on the slab whereas as per P.W.4 Mohd. Rafique, alongwith him only P.W.2 Aslam and one other person were sitting on the slab. Thus, on the point of number of persons sitting on the slab at the time of the incident, evidence of P.W.2 Aslam and P.W.4 Mohd. Rafique, the alleged eye witnesses is contradictory. On points of sitting place of witnesses, place of incident and seat of injury to the deceased, statement of P.W.1 Shamshuddin, P.W.2 Aslam and P.W.4 Mohd. Rafique are contradictory to each other. All contradictions indicate that this witness is also not an eye witness of the incident that is why the above contradictory statements have been made.

18. As per statement of P.W.1 Shamshuddin and P.W.2 Aslam incident occurred in front of the house of Babboo Pradhan. P.W.9 S.I. Rampal Singh, I.O., in his cross-examination has stated that at the place of incident there is no house of Babboo Pradhan. In Ext.Ka-10, place of incidence has been shown by mark 'X'. Place of falling of deceased Akram is shown by mark 'B'. Around mark 'X' and mark 'B', no house of Babboo Pradhan has been shown while the spot map has been prepared by the I.O. on the pointing out of the P.W.1, Shamshuddin, the informant. Therefore, from the evidence led by the prosecution the place of incident is not proved.

19. In the case of ***Syed Ibrahim vs. State of A.P., (2006) 10 SCC 601***, P.W.1 therein had indicated four different places to be the place of occurrence. The Hon'ble Supreme Court held that when the place of occurrence itself has not been established, it would not be proper to accept the prosecution version.

20. In ***Gautam Chaturvedi vs. State of U.P., 2019 SCC Online All 4307***, as per F.I.R. the incident occurred when P.W.1 therein, his nephew P.W.4 Amit Gupta and the deceased were talking amongst themselves standing in the lane outside their house, and the deceased parted company to leave for some place where he had to go. He had reached a point in front of the house of Rajendra, bearing premises no.2/32, when the appellant arrived in an inebriated condition and after a sharp exchange of words between appellant and

the deceased, the appellant stabbed him in the presence of witnesses but in his dock evidence, he stated that the appellant arrived at the entrance to the deceased's home, premises no.2/123, where after some exchange of words, the appellant stabbed the deceased. Therefore, it was held that the prosecution has not been able to formally establish the place of occurrence.

21. In the instant case as discussed above, testimony of P.W.1, Shamshuddin, P.W.2 Aslam and P.W.4 Mohd. Rafique are not consistent with regard to sitting on the slab situated in front of house of the Babboo Pradhan, place of incident, seat of injury to the deceased, sitting of persons on the slab. According to the prosecution, apart from appellant two more persons also participated in the offence but prosecution failed to prove their participation.

22. According to P.W.9 S.I. Rampal Singh, I.O., he recovered the knife used in the incidence on pointing out of the accused-appellant and prepared recovery memo Ext.Ka-5. He has also proved spot of recovery of knife as Ex.Ka-13. In cross examination he has stated that the house from which the recovery was made has three doors. One is in the North side, one is in the East side and one is in the West side. He has also stated that towards door of East there is a court-yard. P.W.8 S.I. Vivek Malik, I.O. of the Case Crime No. 268 of 2003, under Section 4/25 Arms Act has proved the spot of recovery as Ext.Ka-8. According to Ex.Ka-8 as well Ex.Ka-13, spot map prepared by P.W. 9 Rampal himself, there is no door and courtyard towards East side of the house. Thus, testimony of P.W.9 S.I. Rampal Singh, I.O. is contradictory to spot map Ex.Ka-8 and Ex.Ka-13. P.W. 8 S.I. Vivek Malik also has recorded the statement of Zahoor Ahmad and Irfan, who have not supported the recovery of the knife. P.W.9 S.I. Rampal Singh has also stated in the cross-examination that he prepared the spot map on 15.06.2003 and proved it as Ext.Ka-13. While knife was recovered on 28.05.2003 and investigation was entrusted to P.W.8 S.I. Vivek Malik. After entrustment of investigation to P.W.8 S.I. Vivek Malik preparing of the spot map by him on 15.06.2003 indicates that the investigation is not fair. S.I. Vivek Malik (P.W.8) in his cross-examination has admitted that S.I. Rampal Singh is senior to him, who recovered the knife. Investigation by a junior officer in a case registered by a senior officer also can not be said to be fair as held by this Court in **Raghubir and others vs. State of U.P., 1996 ALL.L.J. 551**. The knife used in the incident has also not been produced before the trial court. Forensic report is not available on record, so that it can be said that the knife was used in the incident and it is linked with the incident.

23. In view of the above discussion, we find that investigation of the case relating to recovery is vitiated. There is no evidence to prove that recovered knife was used in the alleged incident. The evidence adduced on the point of alleged recovery also does not inspire confidence. Consequently, recovery is not proved beyond reasonable doubt.

In view of the above discussion, prosecution has failed to prove its case against the accused-appellant for commission of offence under Section 302, 504, I.P.C. and 4/25 Arms Act.

24. Therefore, on conspectus of facts and circumstances of the case we find that

prosecution evidence of P.W. 1 Shamshuddin and P.W.2 Aslam is inconsistent with P.W.4 Mohd. Rafique regarding place of sitting of the witnesses, place of the incident, seat of injury to the deceased and persons sitting on the slab. P.W.1 Shamshuddin, P.W.2 Aslam and P.W.4 Mohd. Rafique are not eye witnesses of the incident. Recovery of knife on the pointing out of the appellant is also not proved. The prosecution has miserably failed to prove its case against the appellant. The judgment and order passed by the learned Trial Judge is, therefore, not sustainable and is liable to set aside.

The appeal is, therefore, allowed. The impugned judgment and order mentioned above convicting and sentencing the appellant Laeeque @ Dharmanga is set aside. He is acquitted of the charges under Sections 302, 504 I.P.C. and 4/25 Arms Act. The appellant is in jail. If he is not wanted in any other case, he shall be released forthwith provided he files his personal bond and two sureties in accordance with Section 437 (A) Cr.P.C. to the satisfaction of the Court concerned.

Office is directed to communicate this decision to the Court concerned forthwith and send back the record.

Before concluding, this Court must put on record its appreciation of the efforts put in by Mr. Gaurav Sharma, learned Amicus Curiae in providing valuable assistance to the Court. It is, therefore, directed that a sum of Rs. 15,000/- be paid to Mr.Gaurav Sharma, learned Amicus Curiae towards fees.

The above amount shall be paid to Mr. Gaurav Sharma, learned Amicus Curiae by the Registry of this Court within 15 days.

(2020)02ILR A794

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 17.01.2020

BEFORE
THE HON'BLE NAHEED ARA MOONIS, J.
THE HON'BLE ANIL KUMAR-IX, J.

Criminal Appeal No. 4689 of 2009

Jawahar @ Babu Ram
...Appellant (In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Appellant:
Sri B.K. Tripathi, Sri Pradeep Kumar-VI, Sri Tarkeshwar Prasad Tripathi

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

A. Criminal Law-Indian Penal Code Section 302 and Sections 25/27 of the Arms Act,— Appeal against conviction.

Learned counsel appearing on behalf of the appellant was unable to place before us as to what in fact was the circumstances, which was not put to the accused while recording his statement under Section 313 Cr.P.C. (Para 104)

The statement of the accused under Section 313 Cr.P.C., all incriminating materials were not put to the accused, has no leg to stand. (Para 105)

In the instant case, the accused appellant has brutally assassinated his father initially by firing a shot and thereafter hacking him to death. The accused-appellant is also involved in the commission of murder of his step mother for which trial is pending in the court below. This is a case of patricide where the accused-appellant has not only committed the murder of an innocent old and feeble person, but also slurred the relation of father and son. (Para 106)

Criminal Appeal rejected. (E-2)

List of cases cited:

1. Jai Ram and others Vs. St. of U.P., 2015(1) JIC 589 (All),

2. Mehraj Singh Vs. St. of U.P., 1994 SCC (5) 188,

3. St. of U.P. Vs. Naim Uddin and others, 2015(3) JIC 929 (All),

4. Mangu Khan and others Vs. St. of Raj., AIR 2005 SC 1912,

5. Baso Prasad and others Vs. St. of Bihar, AIR 2007 SC 1019,

6. Patti Pati Venkatah Vs. St. of A.P., 1985(4) SCC 80,

7. St. of U.P. Vs. Hari Chand (2009) 13 SCC 542,

8. Arjun and others Vs. St. of Raj., 1994 Suppl (1) SCR 616,

9. Hari Obula Reddy and others Vs. St. of A.P., (1981) 3 SCC 675,

10. Ramashish Rai Vs. Jagdish Singh, (2005) 10 SCC 498,

11. Shahid Khan Vs. St. of Raj., 2016(2) JIC 1(SC),

12. Mahavir Singh Vs. St. of M.P. (2017) 1 SCC (Cri) 45,

13. Brahm Swaroop and another Vs. St. of U.P. (2011) 6 SCC 288,

14. St. of Punj. Vs. Hardam Singh, 2005 SCC (Cr) 834,

15. Ishwar Singh Vs. St. of U.P., 1976 CAR 381 (SC),

16. Pritam Nath and other Vs. St. of Punj., 2002 AAR 147 (SC)

17. Machindra Vs. Sajjan Galfa Rankhamb and others, (2018)1 SCC (Cri) 381,

18. Jaskaran Singh Vs. St. of Punj., 1997 SCC (Cri) 651,

19. St. of Raj. Vs. Teja Ram, AIR 1999 SC 1776,

20. Galakonda Venkateshwara Rao Vs. St. of A.P., AIR 2003, SC 2846,

21. Pala Singh Vs. St. of Punj., 1972 (2) SCC 640,

22. Rabindra Mahto and another Vs. St. of Jharkhand, 2006 (10) SCC 432,

23. Tahir Vs. State of (Delhi) (1996) 3 SCC 338,

24. State Government of NCT of Delhi Vs. Sunil and another, (2001) SCC 652,

25. Sukhjit Singh Vs. St. of Punj., (2015) 1 SCC (Cri) 76,

26. Ranvir Yadav Vs. St. of Bihar, (2009)3 SCC (Cri) 92,

27. Reena Hazarika Vs. St. of Assam, 2018(3) JIC 752,

28. Wasim Khan Vs. St. of U.P., AIR 1956 SC 400,

29. Bhoor Singh and another Vs. St. of Punj., AIR 1974 SC 1256,

30. State (Delhi) Administration Vs. Dharampal (2001) 10 SCC 372,

31. Santosh Kumar Singh Vs. St. through CBI, (2010)9 SCC 747,

(Delivered by Hon'ble Naheed Ara Moonis, J.)

1. This Criminal Appeal has been filed against the judgement and order dated 17.07.2009 passed by the learned Additional Sessions Judge (Fast Track) Court No. 3, Maharajganj in Session Trial No. 158 of 2004 arising out of Case Crime No. 115 of 2004, under Section 302 IPC and Session Trial No.

159 of 2004 arising out of Case Crime No. 121 of 2004, under Sections 25/27 of Arms Act, police station Ghughli, district Maharajganj whereby the learned Judge convicted and sentenced the appellant to life imprisonment and a fine of Rs. 5,000/- under Section 302 IPC and five years rigorous imprisonment and a fine of Rs. 1000/- under Sections 25/27 of the Arms Act. In case of default, the appellant was further directed to undergo rigorous imprisonment for six months in both the session trials. However, both the sentences were directed to run concurrently.

2. The emanation of facts giving rise to the case of the prosecution are that a written report was handed over by the first informant Hari Narayan, son of Maniraj Chaudhary, village Harkhi Tola police station Ghughli, district Maharajganj to the effect that the complainant is the permanent resident of village Harkhi Tola Nipaniya, police station Ghughli, district Maharajganj. On the fateful day, i.e. (01.9.2004) at about 6.00 AM, when his *Samdhi* Lalman Chaudhary, son of Ram Kishun (daughter's father-in-law), who resided in the same village, was coming back to his village from Harkhi Miner situated in south-east after attending the call of nature, Jawahar alias Baburam (appellant) who is the son of the first wife of Lalman Chaudhary shot at him at the canal as he was inimical with his father due to litigation in respect of family property. After Lalman Chaudhary fell down, his son (the appellant) hacked him to death with a sharp edged weapon. On hearing the sound of firing Mahendra Gaud, Rakesh, Pauhari and several other persons who were present at the spot rushed towards and tried to chase the accused to nab Jawahar alias Baburam, but he managed to escape towards southern side by taking shelter of paddy and sugar-cane crops. It was further mentioned in the report that dead body is lying at the spot.

3. On the basis of the aforesaid report, which was scribed by Ram Suresh, son of Ugai, village Sonevarsa, the FIR was registered at 8.15 AM on the same day as Case Crime No. 115 of 2004, under Section 302 IPC, police station Ghughli, district Maharajganj.

4. After the registration of the case, the criminal law set into motion and investigation of the case was entrusted to PW-17, SI Kushal Pal Singh, who copied the FIR in the case diary and thereafter left for the place of occurrence along with PW-12, SI B.L. Chaudhary, Constable Sushil Singh, Constable Brij Bhushan Tiwari and Constable Kishun Dev Prasad where Constable Adha Singh, Constable Jagat Pati Mishra, Constable Uma Shanker Yadav and Constable Vishwanath Chaurasia were already present. Complainant and other villagers also reached at the spot where the cadaver of deceased Lalman Chaudhary was lying. The investigating officer after nominating Kapil Dev Shukla, Pauhari, Kanhai, Harakhman and Hari Shanker as witnesses of inquest, conducted the inquest on the cadaver of the deceased Lalman Chaudhary between 9.30 AM to 11.15 AM on 01.9.2004 in accordance with the procedure prescribed and also prepared papers in respect of inquest, photonash, police paper, report of RI, letter to the Chief Medical Officer and sample. He got the dead body of the deceased sealed and handed over to Constable Jagpat Mishra and Constable Brij Bhushan Tiwari for the post mortem examination. The investigating officer recorded the statement of the first informant Hari

Narayan and witnesses Mahendra Gaud and Rakesh Gaud and inspected the spot and prepared site plan on the pointing out of the witnesses (Ext. Ka-14). He also collected bloodstained and simple earth, one pair sleeper and one steel pot *(Lota)* and prepared memos thereof. The investigating officer kept the bloodstained and simple earth in two separate containers and got it sealed. On 01.9.2004, the investigating officer recovered the sleeper of left foot of the accused from the paddy field of Mahesh Chaudhary, which was left while he was running away and prepared its memo (Ext. Ka-15). Thereafter, the investigating officer left for village Harkhi Tola Nipania where he recorded the statement of Ram Suresh, scribe of the FIR. Thereafter, the investigating officer ensued the investigation and raided the house of the accused, but he could not be arrested. On 03.9.2004, he again left for the arrest of the accused, but his whereabouts could not be known. On 04.9.2004, 06.9.2004, 07.9.2004 and 10.9.2004 he raided several places, but accused could not be apprehended. On 11.9.2004, on the information of the informer, accused was arrested from Kaptanganj. On interrogation he confessed that due to property dispute, he has committed the murder of his father and narrated the manner in which he committed the murder. The accused got one country made pistol 315 bore, one empty cartridge 315 bore, one live cartridge 315 bore and one household knife with sharp edge, which contained bloodstained, recovered, in the presence of police personnel, which were kept in white polythene and concealed under the ground after removing shrubs and soil near an old well. The accused also got his own sleeper of right foot recovered. The recovered items were sealed vide Exhibit Ka-17. A copy of the memo was also handed over to the accused duly signed by the witnesses. The aforesaid items were sent to the Forensic Science Laboratory, Lucknow on the order of the Chief Judicial Magistrate, Maharanganj.

5. After the recovery of country made pistol, cartridges and knife, a case was also registered against the accused-appellant as Case Crime No. 121 of 2004, under Section 25/27 of the Arms Act, police station Ghughli, district Maharajganj.

6. The investigating officer prepared the site plan of the place from where weapons of assault and other incriminating articles were recovered on the pointing out of the accused-appellant (Ext. Ka-18.) He also recorded the statement of the accused under Section 161 Cr.P.C. and also got the statement of the accused under Section 164 Cr.P.C. recorded.

7. In the interregnum period, the post-mortem of the deceased Lalman Chaudhary was conducted on 02.9.2004 at 3.00 PM in the District Hospital by Dr. H.S. Lal Sonkar, PW-14. The investigating officer collected clinching and credible evidence and after completion of investigation, the investigating officer submitted charge sheet against the accused-appellant on 18.10.2004 under Section 302 IPC (Ext. Ka-20).

8. The investigation of Case Crime No. 121 of 2004, under Sections 25/27 of the Arms Act was carried out by PW-16, SI Jai Prakash Singh. On 17.9.2004, he recorded the statement of SO Shri Kushal Pal Singh Yadav, PW-17 and on his pointing out he prepared site plan, which

he proved as Ext. Ka-7. Thereafter, he recorded the statement of Nar Singh, Deena, Harendra Shukla and Ram Adhar Pandey. On 20.9.2004, he sought permission from the District Magistrate for prosecution of the accused-appellant and thereafter submitted charge sheet, which he proved as Ext. Ka-8.

9. As the case was exclusively triable by the Court of Sessions, learned Magistrate committed the case to the Court of Sessions, where case was registered as ST Nos. 158 of 2004 and 159 of 2004 and the learned Sessions Judge, Maharajganj vide order dated 22.11.2005 framed the charges against the accused under Section 302 IPC in ST No. 158 of 2004 and under Sections 25/27 of the Arms Act in ST No. 159 of 2004, which were read over and explained to the accused. The accused-appellant abjured the charges by pleading not guilty and claimed to be tried, hence the prosecution was called upon to lead the evidence.

10. To bring home the guilt of the accused-appellant beyond the hilt, the prosecution has examined as many as 18 witnesses, out of whom PW-1, Hari Narayan is the first informant of the case, PW-2, Rakesh, PW-3, Pauhari and PW 6 Mahendra are the witnesses of facts, PW-4, Ram Raksha Singh and PW-7 Kapil Dev Shukla are the witnesses of inquest and recovery of bloodstained earth, PW-5, Ram Suresh is the scribe of the FIR, PW-8, Kanhaiya Singh and PW-10, Hari Shanker are the witnesses of inquest, PW-9, Ram Adhar Pandey, PW- 12, SSI B.L. Chaudhary and PW-13, Surendra Shukla and PW-18, Adya Singh are the witnesses of recovery of weapon of assault, PW-11, Constable-Muharrir R.S. Prasad prepared chik FIR at case crime No. 115 of 2004, under Section 302 IPC, PW-14, Dr. H.S. Lal Sonkar conducted the post-mortem examination on the cadaver of the deceased, PW-15, Constable Chandra Bhushan prepared chik FIR of case crime No. 121 of 2004, under Sections 25/27 of the Arms Act, PW-16, SI Jai Prakash is the investigating officer of case crime No. 121 of 2004, under Section 25/27 of the Arms Act, PW-17, SI Kushal Pal Singh, the investigating officer of case crime No. 115 of 2004, under Section 302 IPC, PS Ghughli, district Maharajganj.

11. PW-1, Hari Narayan is the first informant of the case. He has deposed that his daughter was married to another son of the deceased. Accused Jawahar alias Babu Ram is also the son of the deceased and resides in his village. Deceased was killed at 6.00 AM while he had gone to attend the call of nature at Harkhi Miner. When he was coming back, accused Jawahar alias Babu Ram Chaudhary fired at him and as soon as he fell down, accused Jawahar Slashed his throat with the knife. On hearing the fire of country made pistol, several persons hailing to the same village rushed to the spot. He (P.W-1) also rushed to the spot while he was going to attend nature's call and saw that accused slit the neck of the deceased and ran away. He tried to chase the accused, but in vain. He further deposed that he Knew Jawahar alias Baburam, who is standing in the court. The report of the incident scribed by PW-5, Ram Suresh, resident of Sonvarsa and signed by him was handed over at the police station, which he proved as Ext. Ka-1. Ram Suresh had come to the village on the date of incident. Deceased-Lalman had purchased 3 acres and 70 decimal of land in the name of his son Babu Ram alias Jawahar and Janardan. Lalman had two wives. Accused Jawahar and Janardan

were the son of Israrwati, the first wife of the deceased. The name of his second wife was Vimla, with whom were three children namely Mahavir, Durgawati and Kumari Sati. Deceased Lalman had given one acre and 87 decimal of land in favour of Mahavir whereas the rest of land was sole in favour of Medhai alias Arjun. He had also given some land to his daughter Durgawati and Kumari Sati but accused-Jawahar was demanding his share from the ancestral land also, due to which accused-appellant Jawahar was angry with the deceased-Lalman. He also deposed that three years ago, Janardan, his wife Rambha, Jawahar alias Babu Ram and his wife, all the four persons had assaulted Lalman and his second wife Vimla. Later on, Vimla succumbed to the injury on the way to hospital. In the murder case of Vimla, deceased-Lalman was doing Pairvi, due to which Jawahar was nurturing animus and grudge, hence eliminated him.

12. In the lengthy cross-examination, nothing has been come out contrary to the examination-in-chief.

13. PW-2, Rakesh has deposed in his examination-in-chief on oath that accused-Jawahar and deceased-Lalman were son and father. Lalman was murdered less than 2 years ago at about 6.00 AM in the morning. Both of them resided in his village. Deceased-Lalman was murdered at the canal of Harkhi Tola. On hearing the sound of fire, when he rushed to the spot, several persons of the village were already gathered at the spot. He saw that the deceased fell down on receiving firearm injuries. He did not see that Jawahar fired at the deceased or hacked the deceased to death. He further deposed that he did not see the occurrence nor he chased the accused Jawahar along with other person. When he reached at the spot, he had seen the dead body of the deceased Lalman. He was already dead. At this stage, PW-2, Rakesh was declared hostile and the prosecution was permitted to cross-examine him. He denied that his statement under Section 161 Cr.P.C. was never recorded. He has not seen Jawahar murdered Lalman with firearm weapon. He reached at the spot firstly. Later on, Hari Narayan (PW-1) reached at the spot after half an hour. It was dark when Lalman was decimated .

14. PW-3, Pauhari, in his evidence has deposed that he knew the deceased. Accused-Jawahar was the son of the deceased. Lalman has been killed. On the date of incident at about 6.00 AM, Lalman was coming towards the village after attending the call of nature from west to east, whereas accused Jawahar was going to west towards the canal Harkhi Miner. When they crossed each other, at that juncture accused Jawahar fired at the deceased-Lalman. He saw the accused firing at the deceased. He also heard the sound of fire. On receiving the shot, deceased fell down at the northern side track of the canal. Thereafter accused Jawahar had slit his throat. He rushed to the spot and asked the accused as to what is he doing. Thereupon accused Jawahar ran away through paddy and sugar cane field towards south of the canal. Effort was made to apprehend the accused, but due to fear and trepidation, they did not enter in the field of sugar cane. Deceased succumbed to the injuries at the spot and blood was found scattered. He further deposed that two years prior to the incident, there was dispute between accused-Jawahar and deceased-Lalman in respect of farming and litigation was going on in the Court. In the fued, Lalman and

wife of deceased Vimla had sustained injuries. Vimla had lost her life for which a case is pending against the accused-Jawahar. He also deposed that police arrived at 9.00 AM at the place of incident. He had divulged to the police that the deceased died as Jawahar had fired at him and slit his throat with sharp edged weapon. Inquest of the deceased was conducted in the presence of witnesses and he also put his thumb impression on the inquest and signed by other witnesses. Thereafter the dead body of the accused Lalman was sealed in his presence and was sent to the mortuary for the autopsy. He was interrogated by the police. PW-3 was put to lengthy cross-examination by the defence to create doubt about his presence at the time of incident.

15. PW-4, Ram Raksha Singh, in his evidence, had deposed that on 01.9.2004 in his presence, the investigating officer has collected bloodstained earth, simple earth and recovered sleeper and one steel water pot *(Lota)* from the place of occurrence where deceased was killed, memos whereof duly signed by him, which he proved as Ext. Ka-2. In the cross-examination, he showed his acquaintance with the complainant and the family of the deceased.

16. PW-5, Ram Suresh has deposed that he is the Gram Pradhan of village Sonvarsa, district Maharajganj. A day before the occurrence, he had come to his in-laws house at village Harkhi tola Nipaniya. He reached at the place where the cadaver of Lalman was lying. On the request of Hari Narayan, he has written the report in respect of the incident on the dictation of Hari Narayan, which was signed by him. He had identified and proved paper No. 4-Ka-2 as Ext. Ka.1. In this cross-examination, he denied that report was written after he was called upon by the police and after inquest of the dead body.

17. PW-6, Mahendra has deposed that both accused Jawahar and deceased-Lalman are known to him. Deceased was killed prior to two years ago. On the date of occurrence, at about 6.00 AM, while he was going to attend the call of nature at canal Harkhi Miner, he saw that accused Jawahar was standing at the roadside beside the machine of Ramagya and deceased-Lalman was coming back after attending the call of nature. Several persons of the village were attending the call of nature at the canal and some persons were commuting. This witness has further deposed that on hearing the sound of fire, when he turned back and had seen that deceased Lalman after being struck by the bullet, fell down on the pavement of canal and his son accused-Jawahar was hacking his throat with a sharp edged weapon. When this witness along with Rakesh, Pauhari and several other persons rushed to the spot, accused ran away. He has also deposed that when he reached near deceased-Lalman, he was dead. Deceased has been killed due to the enmity between the deceased and the accused over the partition of 1/3rd of the land. Prior to the present occurrence, the accused-Jawahar along with his brother has killed Vimla, wife of deceased-Lalman.

18. PW-7, Kapil Dev Shukla is the witness of inquest of the deceased Lalman and recovery of bloodstained earth. He has deposed that after the occurrence, police reached at the spot. He has further deposed that he along with Ram Raksha Singh and several persons of the village have also

reached at the spot. Inquest was conducted by the police in his presence. Ram Raksha Singh and other persons were also present there. During the inquest proceeding, on being questioned by the investigating officer as to how deceased died, he divulged that he was killed by fire made by country made pistol and thereafter by hacking his neck. He proved his signature at paper Nos. 6-Ka/1, 6-Ka/2 and 6-Ka/3.

19. He has further deposed that the investigating officer collected bloodstained and simple earth from the place of occurrence and kept in separate containers. The investigating officer also recovered one pair sleeper and one steel pot and sealed them after keeping in separate clothes and got his signature thereon. The investigating officer also recovered sleeper of left foot of the accused and sealed it and got the same signed by this witness. He proved his signature at paper No. 13-Ka/1 and 13-Ka/2.

20. PW-8- Kanhaiya Singh is the witness of inquest. He has deposed that on hearing about the killing of the deceased, Lalman when he reached the place of occurrence, police and several persons were present there. Inquest on the body of the deceased was conducted in his presence. First informant Har Narayan and Pauhari were also present at the time of inquest. He has further deposed that he put his signature on the inquest report.

21. PW-9 is the witness of recovery of weapon of assault. He has deposed that country made pistol and knife were recovered by the police in his presence. Accused-Jawahar got one country made pistol, two cartridges, and a knife recovered by digging the ground and confessed his crime. The investigating officer sealed country made pistol and cartridges separately and prepared their memos, on which his signature was obtained. This witness proved Paper Nos. 4-Ka/3 and 4-Ka/4 of Case Crime No. 121 of 2004.

22. PW-10, Hari Shanker is the witness of inquest. He has deposed that on the date of incident, he had gone to see the dead body of deceased, Lalman where police and villagers were present. On being questioned by the investigating officer about the death, he told him that deceased was killed and has not died a natural death. The investigating officer got the inquest report prepared and obtained the signature of this witness.

23. PW-11, Constable-Muharrir Ram Suranjan Prasad has deposed that on 01.9.2004, he was posted as Constable-Muharrir at the police station Ghughli, district Maharajganj. On that date, on the basis of the written report of Har Narayan, he prepared chik FIR at case crime No. 115 of 2004, under Section 302 IPC, police Station Ghughli, district Maharajganj, which he proved at Ext. Ka-3.

24. PW-12, S.S.I. Bachchu Lal Chaudhary was the witness of arrest of the appellant and recovery of weapon of assault. He has deposed that on 11.9.2004, on the information of the informer that accused will go via Khuta Maidan, he along with Station House Officer Shri Kushal Pal Singh and his companion rushed to the spot and after keeping the official jeep behind the bushes, they made a siege and waited for the accused to come. At about 12.30 noon, a person was seen coming from the village Kudana and

was going towards Kaptanganj. On the indication of the informer that he is the accused Jawahar, he was apprehended. On being interrogated, he disclosed his name as Jawahar alias Babu Ram. The investigating officer SO Kushal Pal Singh arrested him and told him the reasons for his arrest and recorded the statement of the accused. The accused confessed his crime and agreed to get the weapon of the assault recovered, which he has concealed in his village Siwan. Thereafter the accused got recovered one country made pistol 315 bore, one empty cartridge and one live cartridge, one household sharp edged knife, which contained bloodstains. He further deposed that the investigating officer got the aforesaid articles sealed and prepared their memos which was duly signed by him.

25. PW-13, Surendra Shukla is the witness of recovery of weapon of assault. In his evidence, he has deposed that on the date of occurrence, at about 2.30 PM, police of police station Ghughli brought the accused-Lalman to the village. This witness was told by the investigating officer that accused Jawahar wants to get the weapon with which he killed his father, recovered and asked him to accompany him. This witness has further deposed that he along with police personnel, accused and several persons of the village reached at old well situated across the canal Harkhi Miner. Near the well there were bushes and trees. Near the well, some portion of the land was dig from before on which some grasses were lying. Accused took out one plastic bag from there. The bag contained one country made pistol, one empty cartridge, one live cartridge, one household knife having bloodstains on it. The accused admitted that he had fired at his father from the recovered country made pistol and thereafter hacked his father to death by the knife. The investigating officer kept country made pistol and cartridge in one cloth and knife in another and sealed them and prepared memos thereof, which was signed by this witness.

26. PW-14, Dr. H.S. Lal has conducted post-mortem on the body of the deceased-Lalman. He has deposed that on 02.9.2004, he was posted as Senior Dermatologist at District Hospital, Gorakhpur. On 02.9.2004 at about 3.00 PM, he conducted the post-mortem examination on the body of the deceased, who was brought by Constable CP 568 Jagat Pal and Constable 062 Brij Bhushan of police station Ghughli in a sealed condition. Doctor H.S. Lal, found the following ante-mortem injuries on the body of the deceased:

"1. Incised wound 10 cm x 3 cm bone deep on right side neck underline muscle, vessels, trachea, oesophagus cut.

2. Gun shot wound of entry 1 cm x 1 cm bone deep on the left side back upper part. Metallic shaped shot recovered from surface of lower end of scapula left side . Direction- back to forward, margins inverted, blackening around the wound."

27. In the opinion of the doctor, the cause of death was due to shock and haemorrhage as a result of ante-mortem injuries.

28. Doctor further opined that death was caused about one and a half day ago. The death might have been caused at about 6.00 AM on 01.9.2004. He proved the post-mortem report as Ext. Ka 4.

29. In his cross-examination, PW-14, Dr. H.S. Lal, has further deposed that the large intestine contained faecal matter and gases and stomach contained 3 oz. of fluids. Bladder was empty. It was possible that he had urinated before his death. Looking to the large intestine, it transpired that he did not attend the call of nature. In September generally lower limb rigor mortis passes off between 36 and 48 hours. Doctor further opined that rigor mortis had passed off. Looking to the condition of the body, doctor further stated that the death might have been caused between 12.00 night of 31.8.2004 and 3.00 AM of 01.9.2004.

30. In respect of gun shot wound, Dr. Lal has deposed that he found gun shot wound on the back side of upper part, which had only entry wound and no exit was there. He also recovered one metallic shaped bullet. He further deposed that only expert can ascertain whether it was bullet or not. It was of 'D' shaped. Blackening was present near the wound, which suggested that injury was caused from 1-½ to 6 feet. Charring and Tattooing were not present around the wound.

31. PW-15, Constable Chandra Bhushan has deposed that on 11.9.2004, he was posted as Constable at the police station Ghughli, district Maharajgnj. On that date on the basis of recovery of weapon of assault, he prepared chik FIR against accused Jawahar alias Baburam at case crime No. 121 of 2004, under Sections 25/27 of the Arms Act, which he proved as Ext. Ka-5. Three sealed bundle of country made pistol, cartridge and knife were kept in Malkhana and accused-Jawahar was kept in lock up. The papers were prepared by him exhibited as Ka-6.

32. PW-16, SI Jai Prakash Singh was the investigating officer of Case Crime No. 121 of 2004, under Sections 25/27 of the Arms Act, PS Ghughli, district Maharajganj and PW-17 SI Kushal Pal Singh Yadav was the investigating officer of Case Crime No. 115 of 2004, under Section 302 IPC, police station Ghughli, district Maharajganj, and their evidences have already been discussed above.

33. PW-18, Constable C.P. 78 Ram Adya Singh was the witness of recovery of weapon of assault. He has deposed that on 11.9.2004 he was posted as Constable at Police Station Ghughli and was the companion (Hamrah) of the Station House Officer. When accused was arrested, he confessed his guilt and agreed to get the weapon of assault recovered. This witness further deposed that he along with the SHO and other police personnel reached at village Harkhi, from where through the pavement, he reached to an old well situated at Harkhi Tota Nipaniya. At about 2.30 PM, accused took out one plastic bag, which was hid under the earth. The bag contained one country made pistol 315 bore, cartridges and one knife having bloodstains on it. Accused also got recovered his one sleeper of right hand. The investigating officer after keeping country made pistol and cartridges in one cloth and knife and the sleeper in separate cloth, got them sealed and prepared memos thereof, which this witness has proved as Ext. Ka-17.

34. After the closure of the prosecution evidence, the statement of the accused was recorded under Section 313 Cr.P.C., in which he denied the charges levelled against him. He further stated that investigating officer has not conducted the investigation in right perspective and false charge sheet has been submitted against him. He also stated that he has been roped in the present case due to enmity and that

nothing has been recovered at his instance. To a specific question by the Court that country made pistol, one live cartridge and a knife were recovered on his pointing out, which were used by him in the commission of crime, the accused has only stated that nothing has been recovered at his instance.

35. Learned Additional Sessions Judge, Court No. 3, Maharajganj after hearing thelearned counsel for the parties and assessing, evaluating and scrutinizing the evidence on record, convicted and sentenced the accused-appellant as indicated herein above.

36. Hence, this appeal.

37. Heard Shri Tarkeshwar Prasad Tripahi and Shri B.K. Tripathi, learned counsel for the appellant and Shri Ajit Ray, learned Additional Government Advocate for the State and perused the record of the case.

38. Learned counsel for the appellant has made the following submissions:

1. The first information report has been lodged ante timed.

2. The incident took place in the night as suggested by Dr. H.S. Lal Sonker in his cross-examination and no one has seen the incident and the appellant has been falsely implicated in this case due to enmity.

3. The statement of the first informant under Section 161 Cr.P.C. was recorded belatedly.

4. All the witnesses are interested and partisan and no independent witness has been examined.

5. Conduct of Mahavir, who is also the son of the deceased in not coming to the place of occurrence and fleeing away, who returned after 16 days of the occurrence, which belies the prosecution story.

6. The weapons of assault were not placed before the doctor to derive his opinion as to whether the injuries were caused by the said weapons.

7. The recovery memo of weapons does not contain the signature/thump impression of the appellant.

8. At the time of obtaining sanction of the District Magistrate, weapons were not produced before him.

9. There was no mention in the GD as to when first information report was sent to the Court concerned.

10. In the FIR sharp edged weapon has been mentioned, whereas only domestic knife was allegedly recovered at the instance of the appellant.

11. The witnesses of recovery of weapons, i.e. country made pistol, live cartridge and knife are not reliable as they are police official.

12. While recording the statement of the accused, all the incriminating circumstances were not put to the accused.

39. On the other hand, learned Additional Government Advocate contended that prosecution was successful in bringing home the guilt of the appellant to the hilt. The statements of PWs 1, 3 and 6 are consistent throughout the trial. Learned Additional Government Advocate further submits that presence of faecal matter in the intestines was only a probability stated by the doctor and its quantity cannot be measured, which cannot negate the ocular testimony. Learned Additional Government Advocate also contended that the appellant was

depressed with the act of his father and had earlier committed the murder of his step mother about which a case was also pending before the court below and after being released on bail, he committed the murder of his father.

40. The first contention of learned counsel for the appellant is that the first information report is ante-timed. In support of his contention, learned counsel for the appellant has relied upon the decision of this Court in **Jai Ram and others Vs. State of U.P.,** 2015(1) JIC 589 (All). To buttress his submission, learned counsel for the appellant has contended that the first information report has been lodged after the inquest proceedings and with due deliberation.

41. As per prosecution case, the occurrence in question took place at 6.00 AM and the first information report has been promptly lodged at 8.15 AM. The distance of the police station is 16 kms. PW-1, Hari Narayan, the first informant of the case has stated that after the incident, he got the report scribed by PW-5, Ram Suresh and handed over the same at the police station. In his cross-examination, PW-1, Ram Narayan has deposed that he reached the police station at about 7.15 AM and handed over the written report at the police station and left for the place of occurrence. When he reached the place of occurrence at about 8.15 AM, the investigating officer was present. The inquest on the cadaver was completed at about 9.15 AM. PW-11, who prepared the chik FIR, in his cross examination has stated that he wrote the FIR at 8.15 AM on 01.9.2004 on the basis of written report submitted by the first informant Hari Narayan.

42. In **Jai Ram and others Vs. State of U.P (Supra)** relied upon by the learned counsel for the appellant, the incident in question took place at about 1.00 AM (in the night intervening 29/30.10.1979 and the FIR of the incident was lodged at 2.55 AM on 30.10.1979. The contents of the FIR was that *aaj beeti raat mein*, which goes to suggest that this word was usually used if the FIR was lodged in the morning rather than if it was lodged in the night of the incident itself. Moreover, the post-mortem on the body of the deceased was conducted after 48 hours on 31.10.1979 at 1.00 PM. In the aforesaid fact, the Court held that the FIR was ante-timed. In the present case the incident in question took place at 6.00 AM and the FIR was promptly lodged at 8.15 AM, the distance of police station was 16 kms. Therefore, contention of the learned counsel for the appellant that the FIR was ante-timed or doctored one is contrary to the documents on record. We are of the view that it was lodged at the time and date as disclosed by the prosecution.

43. Hon'ble Supreme Court in **Mehraj Singh Vs. State of U.P.**, 1994 SCC (5) 188 held thus:

"FIR in a criminal case and particularly in a murder case is a vital and valuable piece of evidence for the purpose of appreciating the evidence led at the trial. The object of insisting upon prompt lodging of the FIR is to obtain the earliest information regarding the circumstance in which the crime was committed, including the names of the actual culprits and the parts played by them, the weapons, if any used, as also the names of the eyewitnesses, if any. Delay in lodging the FIR often results in embellishment, which is a creature of an afterthought. On account of delay, the FIR not only gets bereft of the advantage of spontaneity, danger also creeps in of the introduction of a coloured version or exaggerated story. With a view to determine whether

the FlR was lodged at the time it is alleged to have been recorded, the courts generally look for certain external checks. One of the checks is the receipt of the copy of the FIR, called a special report in a murder case, by the local Magistrate. If this report is received by the Magistrate late it can give rise to an inference that the FIR was not lodged at the time it is alleged to have been recorded, unless, of course the prosecution can offer a satisfactory explanation for the delay in dispatching or receipt of the copy of the FIR by the local Magistrate. The second external check equally important is the sending of the copy of the FIR along with the dead body and its reference inquest report. Even though the one with in the, inquest report, prepared under Section 174 Cr.P.C., is aimed at serving a statutory function, to lend credence to the prosecution case, the details of the FIR and the gist of statements recorded during inquest proceedings get reflected in the report. The absence of those details is indicative of the fact that the prosecution story was still in an embryo state and had not been given any shape and that the FIR came to be recorded later on after due deliberations and consultations and was then ante- timed to give it the colour of a promptly lodged FIR."

44. The second contention of the learned counsel for the appellant is that the incident took place in the night and no one has seen the incident and the appellant has been falsely implicated in this case due to enmity. In support of this contention, learned counsel for the appellant has placed reliance upon the opinion of the doctor that large intestine contained faecal matter and gases. In his cross-examination, doctor further opined that in the month of September generally rigor mortis from the lower limb passes off between 36 to 48 hours. Looking to the condition of the body, doctor further opined that death might have been caused between 12.00 in the night of 31.8.2004 and 3.00 AM of 01.9.2004. In support of his contention, learned counsel for the appellant has placed reliance upon the decision of this Court in **State of U.P. Vs. Naim Uddin and others,** 2015(3) JIC 929 (All).

45. The medical evidence is only an advisory in character given on the basis of symptoms found on examination. The expert witness is expected to put before the Court all materials inclusive of the data which induced him to come to the conclusion and enlighten the Court on the technical aspect of the case by explaining the terms of science so that the court although, not an expert, may form its opinion on those materials after giving due regard to the expert's opinion because once the expert's opinion is accepted, it is not the opinion of the medical officer, but of the Court.

46. So far as presence of faecal matter in the intestines is concerned, it is to be noted that digestive process differs from man to man. It depends upon several factors. Process of digestion being not uniform and varies from individual to individual. Merely because faecal matter was found in the intestines, it cannot be held that murder was committed in the night.

47. So far rigor mortis is concerned, doctor opined that rigor mortis of the deceased has completely passed off. Doctor further opined that in September process of passing of rigor mortis begins after 18 hours and completely passed off in 36 hours.

48. Passing off rigor mortis depends upon several factor and it cannot be said that in the month of September rigor mortis completely passed off in 36 hours. So far as the opinion of the doctor that death might have been caused between 12.00 in the night of 31.8.2004 and 3.00 AM of 01.9.2004, that does not mean that doctor has fixed the time of death.

49. it is to be noted that this case is based on ocular evidence. It is settled legal proposition that the ocular evidence would have primacy unless it is established that oral evidence is totally irreconcilable with the medical evidence. Further, the ocular testimony of a witness has a greater evidentiary value than medical evidence.

50. A similar issue has cropped up before Hon'ble Supreme Court in **Mangu Khan and others Vs. State of Rajasthan**, AIR 2005 SC 1912 wherein the post-mortem report indicated that the death had occurred within 24 hours prior to the post-mortem. In that case, the opinion of the doctor did not match with the prosecution case. Hon'ble Apex Court examined the issue elaborately and held that physical condition of the body after death would depend on a large number of circumstances/factors and nothing can be said with certainty. In determining the issue, various factors such as age and health condition of the deceased, climatic and atmospheric conditions of the place of occurrence and the conditions under which the body is preserved, are required to be considered. There has been no cross-examination of the doctor on the issue as to elicit any of the material fact on which a possible argument could be based in this regard. The acceptable ocular evidence cannot be dislodged on such hypothetical basis for which no proper grounds were made.

51. In **Baso Prasad and others Vs. State of Bihar**, AIR 2007 SC 1019, Hon'ble Supreme Court while considering a similar issue held that exact time of death cannot be established scientifically and precisely.

52. In **Patti Pati Venkatah Vs. State of Andhra Pradesh**, 1985(4) SCC 80, Hon'ble Apex Court held that medical science is not yet so perfect as to determine the exact time of death nor can the same be determined in a computerised or mathematical fashion so as to accurate to the last second.

53. In **State of U.P. Vs. Hari Chand** (2009) 13 SCC 542, Hon'ble Supreme Court held as under:

"14. It is trite that where the eye-witnesses' account is found credible and trustworthy, medical opinion pointing to alternative possibilities is not accepted as conclusive. Witnesses, as Bentham said, are the eyes and ears of justice. Hence the importance and primacy of the quality of the trial process. Eye witnesses' account would require a careful independent assessment and evaluation for their credibility which should not be adversely prejudged making any other evidence, including medical evidence, as the sole touchstone for the test of such credibility. The evidence must be tested for its inherent consistency and the inherent probability of the story; consistency with the account of other witnesses held to be credit-worthy; consistency with the undisputed facts; the `credit' of the witnesses; their performance in the witness-box; their power of observation etc. Then the probative value of such evidence becomes eligible to be put into the scales for a cumulative evaluation.

54. The enmity between the accused-appellant and the deceased is admitted as is evident from the FIR as well as from the statement of the accused-appellant recorded under Section 313 Cr.P.C, in which the accused has stated that he has been roped in the present case due to enmity. No specific enmity of the accused with the informant has been alleged. However, to a suggestion put to the informant in the cross-examination, he denied that he used to put pressure upon the deceased not to give any property to accused-Jawahar and his brother Janardan, which cannot be a ground for false implication of the accused-appellant leaving the real culprit to go scot free. On the other hand, enmity may be a motive for the appellant to commit the murder of deceased who was doing Pairvi in the murder case of Vimla, wife of the deceased, who was also done to death by the accused-appellant There is eyewitness account coupled with injury report. Evidence of PW-1, Hari Narayan, the informant of the case, PW-3, Pauhari and PW-6, Mahendra is consistent that accused-appellant assaulted the deceased. Although PW-2, Rakesh did not support the prosecution case in toto, but in his evidence he admitted the place of occurrence, time and assault, but he stated that did not see the accused firing a shot from country made pistol and slitting the neck of the deceased.

55. We are not convinced with the contention of learned counsel for the appellant that either on account of enmity or relationship, the witnesses are not deposing the correct facts and framed a false case against the appellant leaving the real culprits to go scot free. Moreover, the witnesses were put to lengthy cross-examination, but nothing adverse could be elicited from their evidence to discard the prosecution case.

56. In **Arjun and others Vs. State of Rajasthan**, 1994 Suppl (1) SCR 616, it was argued before the Hon'ble Supreme Court that as the parties were on inimical terms and some criminal proceedings were pending between them even at that time when the occurrence took place. Further PW-1 in that case was the brother of the deceased and informant in that case was son of the deceased.

57. The Hon'ble Supreme Court brushed aside the argument of the learned counsel for the appellants therein and has held as under:

"We are not convinced by the aforesaid argument that either on account of animosity or on account of relationship, the witnesses did not divulge the truth but fabricated a false case against the appellants. It is needless to say that enmity is a double edged sword which can cut both ways. However, the fact remains that whether the prosecution witnesses are close relatives of the deceased victim or on inimical terms with the deceased involved in the crime of murder, the witnesses are always interested to see that the real offenders of the crime are booked and they are not, in any case, expected to leave out the real culprits and rope in the innocent persons simply because of the enmity. It is, therefore, not a safe rule to reject their testimony merely on the ground that the complainant and the accused persons were on inimical terms. Similarly the evidence could not be rejected merely on the basis of relationship of the witnesses with the deceased."

58. In **Hari Obula Reddy and others Vs. State of Andhra Pradesh,**

(1981) 3 SCC 675, a three Judge Bench of the Supreme court has observed thus:

" It is well settled that interested evidence is not necessarily unreliable evidence. Even partisanship by itself is not a valid ground for discrediting or rejecting sworn testimony, nor can it be laid down as an invariable rule that interested evidence can never form the basis of conviction unless corroborated to a material extent in material particulars by independent evidence."

59. *The Supreme Court in* ***Ramashish Rai Vs. Jagdish Singh, (2005) 10 SCC 498***, has held that the requirement of law is that the testimony of inimical witnesses has to be considered with caution. If otherwise the witnesses are true and reliable their testimony cannot be thrown out on the threshold by branding them as inimical witnesses. By now, it is well-settled principle of law that enmity is a double- edged sword. It can be a ground for false implication. It also can be a ground for assault. Therefore, a duty is cast upon the court to examine the testimony of inimical witnesses with due caution and diligence.

60. The next contention of learned counsel for the appellant is in respect of delayed recording of the statement of the first informant and the witnesses under Section 161 Cr.P.C. Learned counsel for the appellant has relied upon the decision of Hon'ble Supreme Court in **Shahid Khan Vs. State of Rajasthan**, 2016(2) JIC 1(SC).

61. The object and purpose of Section 161 Cr.P.C. is to collect evidence regarding commission of an offence by examining and recording the statements of the witnesses in respect of commission of the offence. In the case in hand, PW-17, SI K.P. Singh Yadav, the investigating officer of the case has deposed that after receipt of the information, he immediately rushed to the spot and after completing necessary formalities, he recorded the statement of the first informant Hari Narayan and witnesses Mahendra Gaud and Rakesh Gaud on the same day and on their pointing out, he sketched the site plan.

62. **Shahid Khan Vs. State of Rajasthan** (Supra), relied upon by the learned counsel for the appellant was a case in which the witnesses PW-25 Mirza Majid Beg and PW-24 his driver Mohammad Shakir, who came from Kota to Jhalawar to meet the deceased, allegedly saw the occurrence in which accused inflicted injuries with weapons on the deceased. However, due to fear they hid themselves in the factory and did not inform about the incident to the family or relatives of the deceased. Their statements were recorded after three days of the occurrence for which no explanation was tendered by the prosecution. In the aforesaid background, Hon'ble Supreme Court held that delay in recording the statements of PW-25, Mirza Majid Beg and PW-24, Mohammad Shakir and their unexplained silence and delayed statement to the police, does not appear to us to be wholly reliable witnesses.

63. In the present case the statements of the first informant and other witnesses present at the spot were recorded on the same day. Therefore, the contention of the learned counsel for the appellant that there was inordinate delay in recording the statement has no leg to stand.

64. The next limb of argument of learned counsel for the appellant is that the prosecution had examined only highly interested witnesses and it has not produced any independent witness in

support of its case. In support of his contention learned counsel for the appellant has placed reliance upon the decision of Hon'ble Supreme Court in **Mahavir Singh Vs. State of Madhya Pradesh** (2017) 1 SCC (Cri) 45.

65. Interested witnesses are those who want to derive certain benefit out of the result of the case. In case the circumstances reveal that a witness was present on the scene of the occurrence and had witnessed the crime, his deposition cannot be discarded merely on the ground of being closely related to the victim. Generally close relations of the victim are unlikely to falsely implicate anyone. Relationship is not sufficient to discard a witness unless there is motive to give false evidence to spare the real culprit and falsely implicate an innocent person is proved.

66. In **Brahm Swaroop and another Vs. State of U.P**. (2011) 6 SCC 288, Hon'ble Apex Court has observed as under:

" Merely because the witnesses were closely related to the deceased persons, their testimonies cannot be discarded. Their relationship to one of the parties is not a factor that effects the credibility of a witness, more so, a relation would not conceal the actual culprit and make allegations against an innocent person. A party has to lay down a factual foundation and prove by leading impeccable evidence in respect of its false implication. However, in such cases, the court has to adopt a careful approach and analyse the evidence to find out whether it is cogent and credible evidence."

67. In **State of Punjab Vs. Hardam Singh**, 2005 SCC (Cr) 834, it has been held by the Hon'ble Apex Court that ordinarily the mere relations of the deceased would not depose falsely against innocent persons so as to allow the real culprit to escape unpunished, rather the witness would always try to secure conviction of real culprit.

68. **Mahavir Singh (Supra)** relied upon by the learned counsel for the appellant was a case in which the trial court acquitted the accused. However, on appeal by the State, the High Court partly allowed the appeal and while setting aside the conviction of the appellant under Section 148 IPC, convicted the appellant therein for the offence under Section 302 IPC and sentenced him to life imprisonment on the ground that the trial court did not appreciate the prosecution evidence in the right perspective and ignored the evidence of the eyewitnesses. Hon'ble Supreme Court set aside the order of the High Court on the ground that the High Court has attached a lot of weight to the evidence of PW-9 as he was an independent witness. However, records depicts that PW-9 had already deposed for the victim family on a number of previous occasions, that too against the same accused for the deceased and, therefore, he was termed as a pocket witness by the Hon'ble Supreme Court.

69. In the present case, the incident took place in village at 6.00 AM. PW-1, Hari Narayan, who is the first informant of the case is the resident of Harkhi Tola Nipaniya. The deceased was also resident of the same village. At the time of occurrence, his presence at the scene of offence appears natural. The first information has been lodged by PW-1 without any delay. No such fact could emerge in his cross examination so as to create any doubt about his presence at the spot. The evidence of PW-1, Hari Narayan is consistent with the FIR as well as with his statement recorded during

investigation. In view of these facts and circumstances, merely because PW-1, Hari Narayan is related to the deceased, it cannot be a ground to discard his testimony. As indicated above, it is well settled that evidence of interested witnesses cannot be discarded on the sole ground that they are interested, but their evidence should be subjected to a close scrutiny. Interested witness are not necessarily false witnesses. Evidence of interested witness cannot be equated with that of a tainted witness. There is no absolute rule that the evidence of an interested witness cannot be accepted without corroboration. There is no proposition in law that relatives are to be treated as untruthful witnesses. On the contrary reason has to be shown when a plea of partiality is raised to show that the witnesses had reason to shield the actual culprit and falsely implicate the accused. In view of the evidence on record, the evidence of PW-1, Hari Narayan cannot be disbelieved on the ground that he is *Samdhi* of the deceased.

70. PW-3, Pauhari and PW-6, Mahendra are also resident of Harkhi Tola Nipaniya. Their presence at the spot was also natural. Both the witnesses have consistently deposed against the appellant. The witnesses were subjected to lengthy cross examination, but no major contradiction or infirmity could be elicited from their evidence.

71. Therefore, contention of the learned counsel that the prosecution has only produced interested witnesses has no leg to stand.

72. Learned counsel for the appellant has also attacked the conduct of Mahavir, who is the son of deceased, who went away after the incident and returned after 16 days of the occurrence, which makes the entire prosecution story doubtful that a son after hearing the demise of his father did not come to the place of occurrence and left the home and returned after the 16 days of the occurrence. Learned Trial Court has specifically mentioned that from the evidence of witnesses it is clear that deceased had two wives. Jawahar and Janardan were born out of the wedlock of first wife, whereas from the other, one son namely Mahavir and two daughters were born. In connection with property dispute, the accused-appellant, his wife and brother Jarandan and his wife had beaten to death second wife of the deceased namely Vimla, for which a case of murder was pending against them in the lower court. At the time of incident, Mahavir was aged about 15 years and hence, he was very much apprehensive and therefore, he did not come to the place of occurrence. Therefore, the contention of the learned counsel that the Mahavir being the son of the deceased should have lodged the FIR, has no leg to stand.

73. Next submissions raised by the learned counsel for the appellant is that Doctor who conducted the post-mortem examination on the cadaver was not shown the weapon of assault to elicit his opinion as to whether injuries on the deceased could have been caused with such weapon or not. Learned counsel for the appellant has relied upon the judgements of Hon'ble Supreme Court in **Ishwar Singh Vs. State of U.P.**, 1976 CAR 381 (SC), **Pritam Nath and other Vs. State of Punjab**, 2002 AAR 147 (SC) and **Machindra Vs. Sajjan Galfa Rankhamb and others**, (2018)1 SCC (Cri) 381.

74. The ratio laid down in the aforesaid cases is that it is the duty of the prosecution, and no less of the Court, to see that the alleged weapon of the offence, if available, should be shown to the doctor,

who has conducted autopsy on the cadaver and his opinion be invited as to whether all or any of the injuries on the victim could be caused with that weapon. Failure to do so may sometimes, cause aberration in the course of justice.

75. In the instant case PW-14, Dr. H.S. Lal, Senior Dermatologist, who conducted the autopsy on the cadaver of the deceased appeared before the trial court as medical witness. He has stated that while conducting the autopsy, he found the following injuries:

"1. Incised wound 10 cm x 3 cm bone deep on right side neck underline muscle, vessels, trachea, oesophagus cut.

2. Gun shot wound of entry 1 cm x 1 cm bone deep on the left side back upper part. Metallic shaped shot recovered from surface of lower and of scapula left side . Direction- back to forward, margins inverted, blackening around the wound."

76. Injury No. 1 noted in the post-mortem examination of the deceased was caused by sharp cutting weapon, such as knife, whereas injury No. 2 was caused by country made pistol. Eyewitnesses in their deposition stated that first of all the accused-appellant fired at the deceased and when the latter fell down, he was hacked with knife. Thus, there was no inconsistency with the medical evidence and the ocular evidence. The death of the deceased was homicidal in nature. The fact that weapon was not shown to the doctor nor in the cross-examination attention of the doctor was invited towards the weapon is not of much consequence in the fact of the present case where there was clear medical evidence that injury Nos. 1 and 2 could be caused by knife and country made pistol respectively. Moreover, both knife and country made pistol were recovered at the instance of the accused-appellant. As per the report of the Forensic Science Laboratory knife contained disintegrated blood whereas the fire was made by the country made pistol as per report of the Forensic Science Laboratory.

77. Next submission of learned counsel for the appellant is that memo of recovery of weapon does not contain the signature/thumb impression of the appellant. Learned counsel for the appellant has placed reliance upon the decisions of Supreme Court in **Jaskaran Singh Vs. State of Punjab**, 1997 SCC (Cri) 651.

78. In **Jaskaran Singh** (Supra), Hon'ble Supreme Court has held that the absence of the signature or the thumb impression of the accused on the disclosure statement recorded under Section 27 of the Evidence Act detracts materially from the authenticity and the reliability of the disclosure statement.

79. In **Jaskaran Singh** (Supra), there was dispute regarding the ownership of a revolver and the cartridge recovered therein. The prosecution in that case was unable to lead evidence to show that the crime weapon belonged to the said appellant and, therefore, the observation was made by the Hon'ble Supreme Court in that context. In the instant case, both knife and country made pistol belonged to the appellant and therefore, the ratio laid down by Hon'ble Supreme Court in **Jaskaran Singh** (Supra) is not applicable to the facts of the present case.

80. However, in **State of Rajasthan Vs. Teja Ram**, AIR 1999 SC 1776,

Hon'ble Supreme Court examined the said issue at length and considered the provisions of Section 162(1) Cr.P.C, which reads that a statement made by any person to a police officer in the course of an investigation done, if reduced to writing, be not signed by the person making it. Therefore, it is evident from the aforesaid provision that there is a prohibition in peremptory terms and law requires that a statement made before the Investigating Officer should not be signed by the witness. The same was found to be necessary for the reasons that a witness will then be free to testify in court, unhampered by anything which the police may claim to have elicited from him. In the event that a police officer ignorant of the statutory requirement asks a witness to sign his statement, the same could not stand vitiated. At the most the Court will inform the witness, that he is not bound by the statement made before the police. However, the prohibition contained in Section 162(1) Cr.P.C. is not applicable to any statement made under Section 27 of the Indian Evidence Act as explained by the provision under Section 162(1) Cr.P.C. The Court further held as under:

"The resultant position is that the investigating officer is not obliged to obtain the signature of an accused in any statement attributed to him while preparing seizure memo for the recovery of any article covered by Section 27 of the Evidence Act. But if any signature has been obtained by an investigating officer, there is nothing wrong or illegal about it.

81. In **Galakonda Venkateshwara Rao Vs. State of Andhra Pradesh**, AIR 2003, SC 2846, Hon'ble Supreme Court has again considered the entire issue and held that merely because the recovery memo was not signed by the accused, will not vitiate the recovery itself as every case has to be decided on its own facts. In the event that the recoveries are made pursuant to the disclosure statement of the accused, then despite the fact that statement has not been signed by him, there is certainly some truth in what he said, for the reason that the recovery of the material objects was made on the basis of his disclosure statement.

82. The Court further held thus:

"The facts that the recovery is in consequence of the information given is fortified and confirmed by the discovery of wearing apparel and skeletal remains of the deceased which leads to believe that the information and the statement cannot be false."

83. In view of the aforesaid legal position and the fact that weapon of assault, i.e. country made pistol and knife were recovered on the pointing out of the accused-appellant, merely because the recovery memo does not bear the signature or thumb impression of the accused-appellant shall not vitiate the recovery. All the articles were sent to Forensic Science Labortory, Lucknow. As per report of the Forensic Science Laboratory dated 4.2.2005, the recovered knife contained disintegrated blood. Moreover, the Forensic Science Laboratory, Lucknow vide its report dated 13.4.2005 has also confirmed that recovered empty cartridge was fired from the country made pistol recovered at the instance of accused-appellant.

84. Now, so far as the contention of learned counsel for the appellant that at the time of obtaining sanction of the District

Magistrate, weapons of assault were not produced before him also does not have any substance. The country made pistol, cartridges and knife were recovered at the instance of the accused and the memos thereof were prepared, which was signed by the accused and the witnesses of recovery. Further, PW-16, SI Jai Prakash Singh, the investigating officer of Case Crime No. 121 of 2004, under Section 25 of the Arms Act has deposed in his cross examination that when he took up the investigation, the recovered country made pistol, cartridges and knife were kept in the Maalkhana. He further deposed that on 20.9.2004 when he produced the aforesaid weapons before the District Magistrate, the same were in sealed condition. He also stated that he kept the sealed bundle containing country made pistol, cartridges and knife in the office of the District Magistrate and he could not say as to whether the District Magistrate has seen them or not as the sealed bundle was produced before the District Magistrate by his office clerk. He received the aforesaid bundle with the seal of the District Magistrate. He also deposed that the office clerk of the District Magistrate has handed over him the prosecution sanction along with the sealed bundle.

85. In view of the aforesaid fact, it cannot be said that the recovered country made pistol, cartridges and knife were not produced before the District Magistrate for obtaining the sanction.

86. So far as the other contention of learned counsel for the appellant in respect of non-mentioning of the date and time in the GD for sending the report to the court is concerned, it is to be noted that PW-11, Constable Ram Suranjan Prasad, who has prepared the chik FIR of case crime No. 115 of 2004, under Section 302 IPC against the accused appellant has deposed in his examination-in-chief that he prepared chik FIR at 8.15 AM 01.9.2004 on the basis of written information handed over by the first informant Hari Narayan, which he proved as Ext. Ka-3. He further stated that as to on what date, the Circle Officer has put his signature on the FIR, he did not know as he did not write the general diary. In the general diary, it was mentioned that special report shall be sent to the officer concerned at the earliest and information whereof is being given to the superior officer concerned on R.T. set. This case rests on the eyewitness account coupled with medical evidence and merely because of non-mention of time in the general diary, the whole prosecution story cannot be thrown out as it might have been an oversight. Moreover, pursuant to the first information report, the investigation of the case started immediately and inquest proceedings have been concluded within an hour of lodging of the first information report.

87. Hon'ble Supreme Court in **Pala Singh Vs. State of Punjab**, 1972 (2) SCC 640 has held that delay in forwarding the first information report to the court is not fatal in a case in which investigation has commenced promptly on its basis.

88. In **Rabindra Mahto and another Vs. State of Jharkhand**, 2006 (10) SCC 432, Hon'ble Supreme Court has held that in every case mere delay in sending the first information report to the Magistrate, the Court would not conclude that the FIR has been recorded much later in time than shown. It is only extraordinary and unexplained delay, which may raise doubts regarding the authenticity of the FIR.

89. The next point urged by the learned counsel for the appellant is that in the FIR sharp edged weapon was mentioned, but only a domestic knife was allegedly recovered at the instance of the appellant.

90. It may be noted that the place where the deceased was done to death and the place from where the informant had witnessed the occurrence is about 150 steps. The word described in the first information report is only sharp edged weapon. PW-14, Dr. H.S. Lal, who has conducted autopsy on the cadaver of the deceased has noted the following injuries:

"1. Incised wound 10 cm x 3 cm bone deep on right side neck underline muscle, vessels, trachea, oesophagus cut.

2. Gun shot wound of entry 1 cm x 1 cm bone deep on the left side back upper part. Metallic shaped shot recovered from surface of lower and of scapula left side . Direction- back to forward, margins inverted, blackening around the wound."

91. Perusal of injury No. 1 suggest that it was caused by sharp edged weapon. Even if, the knife, which was used in the commission of the crime, was of domestic use, but it was very much sharp edged and merely because it was mentioned in the FIR that accused-appellant slit the neck of the deceased by sharp edged weapon and the recovered knife was for domestic use, does not make any difference.

92. The next submission of learned counsel for the appellant is that witnesses of recovery of weapons of assault are not reliable as they are police personnel. PW-9 Ram Adhar Pandey is an independent witness, who resides in village Harkha Pyas, police station Ghughli, district Maharajganj. He has deposed that country made pistol and knife were recovered by the police in his presence. Accused-Jawahar got one country made pistol, two cartridges, and a knife recovered by digging the ground and confessed his crime. The investigating officer sealed country made pistol and cartridges separately and prepared their memos, on which his signature was obtained. PW-13, Surendra Shukla is also an independent witness, who resides at Harkhi Tola Nipaniya, police station Ghughli. In his evidence, he has deposed that on the date of occurrence, at about 2.30 PM, police of police station Ghughli brought the accused to the village. This witness was told by the investigating officer that accused Jawahar wants to get the weapons from which he killed his father, recovered and asked him to accompany him. This witness has further deposed that he along with police personnel, accused and several persons of the village reached old well situated across the canal Harkhi Miner. Near the well there were bushes and trees. Near the well, some portion of the land was dig from before on which some grasses were lying. Accused took out one plastic bag from there. The bag contained one country made pistol, one empty cartridge, one live cartridge, one household knife having bloodstained on it. The accused admitted that he has fired at his father from the recovered country made pistol and thereafter hacked his father to death by the knife. The investigating officer kept country made pistol and cartridge in one cloth and knife in another and sealed it and prepared memos thereof, which was signed by this witness. In Addition to the aforesaid two independent witnesses, PW-12, SSI B.L. Chaudhary and PW-18, Adya Singh, who were also the witnesses of

recovery, have fully supported the prosecution case and have stated that accused got the weapons from which he killed his father recovered in their presence.

93. It is fallacious impression that when recovery is effected pursuant to any statement made by the accused and the document is prepared by the investigating officer on the basis of recovery must necessarily be attested by the independent witnesses. Of course, if any such statement leads to recovery of any article, it is for the investigating officer to take the signature of any persons present at that time, on the document prepared for such recovery. But if no witness was present or if no person had agreed to affix his signature on the document, it is difficult to lay down as a proposition of law that the document so prepared by the police officer must be treated as tainted and the recovery evidence unreliable. In the instant case, the document of recovery prepared by the investigating officer was attested by two independent witnesses, i.e. PW-9, Ram Adhar Pandey and PW-13, Surendra Shukla and, therefore, the submission of the learned counsel that there is no independent witness of the recovery has no substance. Moreover, the evidence of the police personnel cannot be discarded merely on the ground that they are police official.

94. **In Tahir Vs. State of (Delhi)** (1996) 3 SCC 338, Hon'ble Supreme Court held thus:

"In our opinion no infirmity attaches to the testimony of the police officials, merely because they belong to the police force and there is no rule of law or evidence which lays down that conviction cannot be recorded on the evidence of the police officials, if found reliable, unless corroborated by some independent evidence. The Rule of Prudence, however, only requires a more careful scrutiny of their evidence, since they can be said to be interested in the result of the case projected by them. Where the evidence of the police officials, after careful scrutiny, inspires confidence and is found to be trustworthy and reliable, it can form basis of conviction and the absence of some independent witness of the locality to lend corroboration to their evidence, does not in any way affect the creditworthiness of the prosecution case."

95. In **State Government of NCT of Delhi Vs. Sunil and another**, (2001) SCC 652, Hon'ble Supreme Court held that it is an archaic notion that actions of the police officer should be approached with initial distrust. We are aware that such a notion was lavishly entertained during British period and policemen also knew about it. Its hang over persisted during post-independent years but it is time now to start placing at least initial trust on the actions and the documents made by the police. At any rate, the court cannot start with the presumption that the police records are untrustworthy. As a proposition of law the presumption should be the other way around. That official acts of the police have been regularly performed is a wise principle of presumption and recognized even by the legislature. Hence when a police officer gives evidence in court that a certain article was recovered by him on the strength of the statement made by the accused it is open to the court to believe the version to be correct if it is not otherwise shown to be unreliable. It is for

the accused, through cross-examination of witnesses or through any other materials, to show that the evidence of the police officer is either unreliable or at least unsafe to be acted upon in a particular case. If the court has any good reason to suspect the truthfulness of such records of the police the court could certainly take into account the fact that no other independent person was present at the time of recovery. But it is not a legally approvable procedure to presume the police action as unreliable to start with, nor to jettison such action merely for the reason that police did not collect signatures of independent persons in the documents made contemporaneous with such actions.

96. The last contention voiced by the learned counsel appearing on behalf of the appellant is that while recording the statements of the accused under Section 313 Cr.P.C., all the incriminating circumstances were not put to the accused. In support of his contention, learned counsel for the appellant has relied upon the decision of Hon'ble Supreme Court **Sukhjit Singh Vs. State of Punjab**, (2015) 1 SCC (Cri) 76, **Ranvir Yadav Vs. State of Bihar**, (2009)3 SCC (Cri) 92 and **Reena Hazarika Vs. State of Assam**, 2018(3) JIC 752.

97. In **Sukhjit Singh Vs. State of Punjab** (Supra) Hon'ble Supreme Court has held that on a studied scrutiny of the questions put to the accused under Section 313 Cr.P.C. in entirety, we find that no incriminating material has been brought to the notice of the accused while putting questions.

98. The ratio laid down in **Ranvir Yadav Vs. State of Bihar (Supra)** was that when the incriminating materials have not been put to the accused under Section 313 Cr.P.C., it tantamounts to serious lapse on the part of the trial court convicting the accused, which is vitiated in law.

99. In **Reena Hazarika Vs. State of Assam (Supra)** the Hon'ble Supreme Court held that if the accused takes a defence after the prosecution evidence is closed, the Court is duty bound to consider the same and if the same is not considered, the conviction may stand vitiated.

100. The provisions of Section 313 Cr.P.C. clearly states that it is obligatory for the Court to question the accused on the evidence adduced by the prosecution and circumstances against him so as to enable him to explain it. However, it would not be enough for the accused to contend that he has not been questioned or examined on a particular fact or circumstances, instead he must show that such non-examination has actually and materially prejudiced him and has resulted in failure of justice. In other words, in the event of an inadvertant omission on the part of the trial court to question the accused on any incriminating circumstance cannot ipso facto vitiate the trial unless it is shown that some material prejudice was caused to the accused by the omission of the Court.

101. A three-Judge Bench of Hon'ble Supreme Court in **Wasim Khan Vs. State of U.P.**, AIR 1956 SC 400, and **Bhoor Singh and another Vs. State of Punjab**, AIR 1974 SC 1256, Hon'ble Supreme Court held that every error or omission in compliance of the provisions of Section 342 of the old Cr.P.C. does not necessarily vitiate the trial. The accused must show

that some prejudice has been caused or was likely to have been caused to him.

102. In **State (Delhi) Administration Vs. Dharampal** (2001) 10 SCC 372, Hon'ble Supreme Court held thus:

"Thus it is to be seen that where an omission, to bring the attention of the accused to an inculpatory material has occurred that does not ipso facto vitiate the proceedings. The accused must show that failure of justice was occasioned by such omission. Further, in the event of an inculpatory material not having been put to the accused, the appellant court can always make good that lapse by calling upon the accused to show that explanation the accused has as regards the circumstances established against the accused but not put to him.

This being the law, in our view, both the Sessions Judge and the High Court were wrong in concluding that the omission to put the contents of the certificate of the Director, Central Food Laboratory, could only result in the accused being acquitted. The accused had to show that some prejudice was caused to him by the report not being put to him. Even otherwise, it was the duty of the Sessions Judge and/or the High Court, if they found that some vital circumstance had not been put to the accused, to put those questions to the counsel for the accused and get the answer of the accused. If the accused could not give any plausible or explanation, it would have to be assumed that there was no explanation. Both the Sessions Judge and the High Court have overlooked this position of law and failed to perform their duties and thereby wrongly acquitted the accused."

103. In **Santosh Kumar Singh Vs. State through CBI**, (2010)9 SCC 747, Hon'ble Supreme Court held as under:

" The provisions in Section 313 Cr.P.C., therefore, make it obligatory on the court to question the accused on the evidence and circumstance appearing against him so as to apprise him the exact case which he is required to meet. But it would not be enough for the accused to show that he has not been questioned or examined on a particular circumstance but he must also show that such non-examination has actually and materially prejudiced him and has resulted in failure of justice. In other words in the event of any inadvertent omission on the part of the court to question the accused on any incriminating circumstance appearing against him, the same cannot ipso facto vitiate the trial unless it is shown that some prejudice was caused to him."

104. In the case in hand, it may be noted that no such point was raised and no such objection seems to have been advanced before the trial court and it is being raised for the first time before this Court, which appears to be an afterthought. Secondly, learned counsel appearing on behalf of the appellant was unable to place before us as to what in fact was the circumstances, which was not put to the accused while recording his statement under Section 313 Cr.P.C.

105. In view of the above, the submission of learned counsel appearing on behalf of the appellant that while recording the statement of the accused under Section 313 Cr.P.C., all incriminating materials were not put to the accused, has no leg to stand.

106. Criminal law is designed as a mechanism for achieving social control and its purpose is to regulate and control the activities within the society. Criminal justice system has a larger objective to achieve, i.e. safety and protection of the people at large and it would be a lesson not only to the offender, but to the individual at large so that such crime would not be committed by anyone. Taking a lenient view of a serious offence will leave a wrong impression about the criminal justice system and will encourage further criminal acts, which will endanger the peaceful co-existence and welfare of the society. In the instant case, the accused appellant has brutally assassinated his father initially by firing a shot and thereafter hacking him to death. The accused-appellant is also involved in the commission of murder of his step mother Vimla for which trial is pending in the court below. This is a case of patricide where the accused-appellant has not only committed the murder of an innocent old and feeble person, but also slurred the relation of father and son.

107. In view of what has been indicated herein above, we are of the view that the impugned judgement and order dated 17.07.2009 passed by the learned Additional Sessions Judge (Fast Track) Court No. 3, Maharajganj does not call for any interference by this Court.

108. Accordingly, the appeal is dismissed.

109. The appellant Jawahar alias Babu Ram is in jail. He shall remain in jail to serve out the sentence as awarded to him by the learned Trial Court and affirmed by us.

110. Office is directed to transmit a copy of this order to the Court below for information and compliance.

(2020)02ILR A819

REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 19.12.2019

BEFORE
THE HON'BLE MANISH KUMAR, J.

Criminal Revision Defective No. 27 of 2000

Munuwa ...Revisionist
Versus
Parshuram & Ors. ...Opposite Parties

Counsel for the Revisionist:
Sri Sri N.K. Saxena, Sri Ashutosh Pandey, Sri Ram Kishore Gupta, Arti Saxena

Counsel for the Opposite Parties:
A.G.A., Sri A.R.B. Kher, Sri Rajaram Kushwaha

A. Criminal Law-Code of Criminal Procedure,1973-Sections-397/401 & Indian Penal Code,1860-Sections-323.325,504-acquittal of accused after appreciation of evidence by trial court-revisional jurisdiction cannot be invoked to only correct wrong appreciation of evidence-it is exercised in exceptional cases when there is some glaring defect in the procedure or a manifest error on a point of law resulting flagrant miscarriage of justice-no illegality in the impugned order-hence, dismissed. (Para 13)

Criminal Revision dismissed. (E-6)

List of Cases Cited:

1. K. Chinnaswamy Reddy Vs. St.of A.P.,AIR (1962) SC 1788

2. Mahendra Pratap Singh Vs. Sarju Singh, AIR (1968) SC 707

3. Jagannath Chaudhary & Ors. Vs. Ramayan Singh & Anr.,(2002) 5 SCC 659

4. Ram Briksh Singh & Ors Vs. Ambika Yadav & Anr. (2004) 7 SCC 665

(Delivered by Hon'ble Manish Kumar, J.)

1. Case has been called in the revised list. No one is present on behalf of any of the parties. Learned A.G.A. is present.

2. Office has reported some defect but not exactly what is the defect in the revision.

3. From the perusal of records, there is delay of few days in filing of the revision.

4. The dealy in filing of present criminal revision is condoned.

5. The present criminal revision has been preferred against the judgment and order dated 6.10.1999 passed by Chief Judicial Magistrate, Mahoba in Case No.2456 of 1997 acquitting the opposite party nos.1, 2 & 3 of the offence under Sections 323, 325 and 504 I.P.C. The prosecution case is that at 5:00 p.m. in the evening of 22.1.1993, the complainant Munuwa was in his field alongwith his wife, sons and daughters, the accused Parasuram, Juguva and Kishori armed with lathis started quarrelling with him and started beating with lathis. Against the said incident, an F.I.R. was lodged and Crime Case No.2456 of 1997, under Section 323, 325 and 504 of I.P.C. was registered.

6. In the said case, the judgment and order has been passed by the Chief Judicial Magistrate on 6.10.1999 acquitting all the accused persons against which the present criminal revision has been preferred.

7. Learned A.G.A. has argued that the judgment has been passed after appreciation of evidence available on the record and that no such incident has occurred as alleged by the complainant.

8. Heard the arguments of the learned A.G.A. and perused the judgment passed by Chief Judicial Magistrate which is impugned in the present criminal revision as well as examined the grounds taken in the present criminal revision.

9. The judicial review in exercise of revisional jurisdiction is not like an appeal. It is a supervisory jurisdiction which is exercised by the Court to correct the manifest error in the orders of subordinate courts but should not be exercised in a manner so as to turn the Revisional court in a Court of Appeal. The legislature has made different provisions for appeal and revision and the distinction of two jurisdiction has to be maintained.

10. It could be exercised only in exceptional cases where the interests of justice require interference for the correction of a manifest illegality, or the prevention of a gross miscarriage of justice. In other words, the revisional jurisdiction of the High Court cannot be invoked merely because the lower Court has taken a wrong view of law or mis-appreciated the evidence on record.

11. The law has been settled in catena of decisions wherein it has been held that there is a distinction between the appellate jurisdiction and the revisional

jurisdiction. In the revisional jurisdiction the evidence cannot be re-appreciated for looking the the mere invalidity of the order passed by the Court below.

12. In ***K.Chinnaswamy Reddy Vs. State of Andhra Pradesh, AIR 1962 SC 1788*** it was held that revisional jurisdiction should be exercised by the High Court in exceptional cases only when there is some glaring defect in the procedure or a manifest error on a point of law resulting flagrant miscarriage of justice.

13. Again in the case of ***Mahendra Pratap Singh Vs. Sarju Singh, AIR 1968 SC 707, Jagannath Chaudhary and others Vs. Ramayan Singh and another, 2002(5) SCC 659. In Ram Briksh Singh and others Vs. Ambika Yadav and another 2004(7) SCC 665*** wherein it has been held that under Sections 397 to 401 of the Court are group of sections conferring higher and superior courts a sort of supervisory jurisdiction. These powers are required to be exercised sparingly though the jurisdiction under Section 401 cannot be invoked to only correct wrong appreciation of evidence and the High Court is not required to act as a Court of appeal, but at the same time it is duty of the Court to correct manifest illegality resulting in gross miscarriage of justice.

14. After hearing learned A.G.A. and considering the grounds taken in the criminal revision and the judgment, I do not find any infirmity or illegality in the impugned judgment.

15. In view of above, the revision lacks merit.

16. Hence, the present criminal revision is dismissed.

17. Interim order, if any, stands vacated.

18. Certified copy of this judgment be transmitted to court below for necessary action.

(2020)02ILR A821

REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 09.01.2020

BEFORE
THE HON'BLE MRS. MANJU RANI CHAUHAN, J.

Criminal Revision No. 66 of 2020

Harish Shankar ...Revisionist
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Revisionist:
Sri Priyanshu Kumar Srivastava

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

A. Criminal Law-Code of Criminal Procedure,1973-Section 156(3)-rejection-calling the report or collecting the evidence from the police station concerned, if the Magistrate is satisfied that no prima facie case is made out, he is not bound to order for registration of the case-He may or may not allow the application in his discretion-Hence,dismissed.(Para 7 to 18)

It is not incumbent upon a Magistrate to allow an application u/s 156(3) Cr.P.C. for registration of the case, he can exercise judicial discretion in the matter and can pass order for treating it as complaint or to reject it in suitable cases.(Para 7)

Criminal Revision dismissed. (E-6)

List of Cases Cited:

1. Sukhwasi Vs. St. Of U.P. (2007) 59 ACC 739

2. Smt. Masuman Vs. St. Of U.P. & Ors. (2007) 1 ALJ 221

3. Ram Babu Gupta & Ors Vs. St. Of U.P. (2001) 43 ACC 50

4. Rajendra Singh Katoch Vs. Chandigarh Administration & Ors (2008) 60 ACC 347

5. Father Thomas Vs. St. Of U.P. and Anr. (2011) Crl. Law Journal 2278

6. Aleque Padamsee & Ors. Vs. U.O.I.& Ors. (2007) Crl. Law Journal 3729

7. All Institute of Medical Sciences Employees Union Vs. U.O.I. (1996) 4 Crimes 189(SC)

8. Hari Singh Vs. St. Of U.P. (2006) Crl. Law Journal 3283

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

1. Heard Mr. Priyanshu Kumar Srivastava, learned counsel for the revisionist and Mr. Amit Singh, Chauhan, learned A.G.A. for the State.

2. The present criminal revision under Section 397/401 Cr.P.C. has been filed to quash the impugned order dated 27th November, 2019 passed by the Special Judge (S.C./.S.T. Act), Bareilly in Misc. Case No. 1117 of 2019 (Hari Shanker Vs. Shishupal), whereby the application made by the revisionist under Section 156 (3) Cr.P.C. has been rejected.

3. Learned counsel for the revisionist submits that the marriage of the revisionist was solemnized with Geeta Devi, daughter of Teeka Ram Diwakar on 23rd April, 2019. On 6th August, 2019 at 07:30 a.m., the opposite party no.2 entered into the house of the revisionist and took away his wife forcefully. When revisionist objected, opposite party no.2 also abused and assaulted the revisionist. Opposite party no.2 has also taken away ornaments and Rs. 1000/- cash. Opposite party no.2 immediately went to Police Station for lodging of the first information report but his report has not been registered. Thereafter he made applications to the Senior Superintendent of Police, Bareilly 8th August, 2019, 23rd August, 2019, 17th September, 2019 and 8th October, 2019, but all went in vain. Thereafter the revisionist made an application under Section 156 (3) Cr.P.C. before the concerned Court but the same has also been rejected by the court below vide the impugned order dated 27th November, 2019. It is further submitted that from perusal of the contents made in the application under Section 156 (3) Cr.P.C., cognizable offence is made out but the court below has illegally rejected the same while passing the impugned order. Since the opposite party no.2 had illegally taken away the wife of revisionist and ornament and cash, as per Section 156 (3) Cr.P.C. the Magistrate is empowered under section 190 Cr.P.C. to direct investigation of any cognizable case. It is vehemently contended by the learned counsel that a Magistrate, was bound to pass an order for registration of the FIR and its investigation by the police on the application under section 156 (3) Cr.P.C. as a cognizable offence of serious nature requiring investigation is made out on the basis of averments made in that application.

4. Per contra, Mr. Amit Singh Chauhan, learned A.G.A. for the State

submits that if the application under section 156 (3) Cr.P.C. contains the allegations of commission of a cognizable offence, then the Magistrate is under obligation to direct investigation after registration of the FIR in each and every case. However, in the application made by the revisionist under Section 156 (3), court below has not found any substance and he has rightly rejected the application of the revisionist. The court below has not committed any error while passing the impugned order. The court below has recorded pure finding of fact. He, therefore, submits that the impugned order passed by the court below is legal and just and the same does not warrant any interference by this Court.

5. I have considered the submissions made by the learned counsel for the parties and have gone through the record of the present criminal revision.

6. Before coming to the merits of the case, it would be worthwhile to peruse certain Sections of the Code of Criminal Procedure. Information under section 154 of Cr.P.C is generally known as F.I.R. It is pertinent to see that the word " first" is not used in Cr.P.C in section 154 of Cr.P.C. Yet, it is popularly known as FIRST INFORMATION REPORT. Nevertheless a person,who is a grievance that police officer is not registering FIR under section 154 of Cr.P.C, such a person can approach Superintendent of Police (SP), with written application, under sub-section 3 of section 154 of Cr.P.C. In case of SP also does not still register FIR, or despite FIR is registered, no proper investigation is done, in such a case, the aggrieved person can approach Magistrate concerned under section 156 (3) of Cr.P.C. If that be so, it is very essential and interest to know the powers conferred on Magistrate under section 156 (3) of Cr.P.C. Therefore, I deem that it is very useful if it is discussed with relevant case law as to the powers of Magistrate under section of 156 (3) of Cr.P.C. Section 156(3) is very briefly worded. The powers of Magistrate are not expressly mentioned in section 156 (3) of Cr.P.C. If that be so, a paucity will be crept mind that whether there is an implied power in the Magistrate under Section 156(3) Cr.P.C. to order registration of a criminal offence and /or to direct the officer in charge of the concerned police station to hold a proper investigation and take all such necessary steps that may be necessary for ensuring a proper investigation including monitoring the same or not.

7. The issue whether the Magistrate is bound to pass an order for registration of the FIR and its investigation by the police on each and every application under section 156 (3) Cr.P.C. containing allegation of commission of a cognizance offence is not 'res-integra' now, as this controversy has been settled by the Division Bench of the Court in the case of **Sukhwasi vs. State of U.P.** reported in 2007 (59) ACC 739. In the case of **Smt. Masuman vs. State of U.P. & others** reported in 2007 (1) ALJ 221 and some other cases, the single judges of the Court had taken a view that if the application under section 156 (3) Cr.P.C. discloses the commission of a prima-facie cognizable offence, then it is obligatory for the magistrate to direct investigation after registration of

the FIR on the basis of that application. Disagreeing with this view, the following question was referred to the larger Bench for decision in the case of Sukhwasi (Supra):-

"Whether the Magistrate is bound to pass an order on each and every application under section 156(3) Cr.P.C. containing allegations of commission of a cognizable offence for registration of the FIR and its investigation by the police even if those allegations, prima-facie, do not appear to be genuine and do not appeal to reason, or he can exercise judicial discretion in the matter and can pass order for treating it as 'complaint' or to reject it in suitable cases"?

8. After having considered the full Bench decision of the Court in the case of **Ram Babu Gupta & others vs. State of U.P.** reported in 2001 (43) ACC 50 and many other cases, the Division Bench in the case of Sukhwasi vs. State of U.P. has answered the question in paragraph 23 of the report as under:-

"The reference is, therefore, answered in the manner that it is not incumbent upon a Magistrate to allow an application under section 156(3) Cr. P . C. and there is no such legal mandate. He may or may not allow the application in his discretion. The second leg of the reference is also answered in the manner that the Magistrate has a discretion to treat an application under section 156(3) Cr.P.C. as a complaint."

9. Therefore, in view of the law laid down by the Division Bench in the aforesaid case, the above mentioned contention of the learned counsel for the revisionist has got no force. In the case of **Rajendra Singh Katoch vs. Chandigarh Administration & others** reported in 2008 (60) ACC 347, the Apex Court has made the following observation in para 8 of the report at page 348:-

"Although the officer-in-charge of a police station is legally bound to register a first information report in terms of section 154 of the Code of Criminal Procedure, if the allegations made by them gives rise to an offence which can be investigated without obtaining any permission from the Magistrate concerned; the same by itself, however, does not take away the right of the competent officer to make a preliminary enquiry, in a given case, in order to find out as to whether the first information sought to be lodged had any substance or not."

10. From the aforesaid observations made by the Hon'ble Apex Court, this fact is borne out that before lodging the FIR, the competent police officer can make a preliminary enquiry in order to find out as to whether the first information sought to be lodged had any substance or not. If the police officer is competent to make a preliminary enquiry in a given case in order to find out as to whether the first information sought to be lodged had any substance or not, then how the Magistrate can be bound to direct registration of FIR and its investigation on each and every application under section 156 (3) Cr.P.C. containing allegations of commission of a cognizable offence without applying its mind to find out whether the allegations made on the application have any substance or not. In my considered opinion, the Magistrate is required to apply its mind to find out whether the first information sought to be lodged by the

applicant had any substance or not. If the allegations made in the application under section 156(3) Cr.P.C. prima-facie appear to be without any substance, then in such case the Magistrate can refuse to direct registration of the FIR and its investigation by the police, even if the application contains the allegations of commission of a cognizable offence. In such case, the Magistrate is fully competent to reject the application. Even in the cases, where prima facie cognizable offence is disclosed from the averments made in the application under section 156 (3) Cr.P.C. in appropriate case according to facts and nature of the offences alleged to have been committed, the Magistrate can decline to direct investigation and in such cases the application under section 156(3) Cr.P.C. can be treated as complaint, as held by the Division Bench in the case of Sukhwasi vs. State of U.P. (supra).

11. The Magistrates should not shirk their legal responsibility to pass an order for registration of the FIR and its investigation by the police on the applications under section 156 (3) Cr.P.C. in the cases where on the basis of the averments made therein and the material, if any, brought on record in support thereof, prima facie cognizable offence of serious nature requiring police investigation is made out and in such cases the aggrieved person should not be compelled to collect and produce the evidence at his cost to bring home the charges to the accused by passing an order to treat the application under section 156 (3) Cr.P.C. as complaint thereby forcing the aggrieved person to proceed in the manner provided by chapter XV Cr.P.C.

12. In the case of **Father Thomas Vs. State of U.P and Anr.** reported in 2011 Crl. Law Journal 2278 though the matter was that an application under Section 156(3) Cr.P.C. was allowed and when revision came before court for decision, the court was of the view that the accused has no locus standi to challenge an order passed, and an order directing investigation is purely interlocutory in nature in view of statutory bar contain under section 397(2) of the Code.

13. In the case of **Aleque Padamsee and Ors. Vs. Union of India (U0I)** and Ors. 2007 reported in Criminal Law Journal 3729; the Apex Court has held that Whenever any information is received by the police about the alleged commission of offence which is a cognizable one there is a duty to register the FIR. There can be no dispute on that score. The only question is whether an order can be issued to the police authorities to register the same. The basic question is as to what course is to be adopted if the police does not do it. The correct position in law, therefore, is that the police officials ought to register the FIR whenever facts brought to its notice show that cognizable offence has been made out. In case the police officials fail to do so, the modalities to be adopted are as set out in Section 190 read with Section 200 of the Code.

14. In the case of **All Institute of Medical Sciences Employees Union Vs. Union of India** reported in 1996 (4) Crimes 189 (Supreme Court), the Apex Court has held Para 4:

"4. When the information is laid with the police but no action in that behalf was taken, the complainant is given power under Section 190 read with Section 200 of the Code to lay the complaint before the Magistrate having jurisdiction to take

cognizance of the offence and the Magistrate is required to inquire into the complaint as provided in Chapter XV of the Code. In case the Magistrate after recording evidence finds a prima facie case, instead of issuing process to the accused, he is empowered to direct the concerned police to investigate into the offence under Chapter XII of the Code and to submit a report. If he finds that the complaint does not disclose any offence to take further action, he is empowered to dismiss the complaint under Section 203 of the Code. In case he finds that the complaint/ evidence recorded prima facie discloses offence, he is empowered to take cognisance of the offence and would issue process to the accused."

15. Similarly, the Apex Court has again in the Case of **Hari Singh Vs. State of U.P** reported in 2006 Criminal Law Journal 3283 held that para 4:

"4. When the information is laid with the police, but no action in that behalf is taken, the complainant can under Section 190 read with Section 200 of the Code lay the complaint before the Magistrate having jurisdiction to take cognizance of the offence and the Magistrate is required to enquire into the complaint as provided in Chapter XV of the Code. In case the Magistrate after recording evidence finds a prima facie case, instead of issuing process to the accused, he is empowered to direct the police concerned to investigate into offence under Chapter XII of the Code and to submit a report. If he finds that the complaint does not disclose any offence to take further action, he is empowered to dismiss the complaint under Section 203 of the Code. In case he finds that the complaint/evidence recorded prima facie discloses an offence, he is empowered to take cognizance of the offence and would issue process to the accused. These aspects have been highlighted by this Court in All India Institute of Medical Sciences Employees' Union (Reg) through its President v. Union of India and Ors. MANU/SC/1769/1996 : (1996)115CC582 . It was specifically observed that a writ petition in such cases is not to be entertained. The above position was again highlighted recently in Gangadhar Janardan Mhatre v. State of Maharashtra MANU/SC/0830/2004 : 2004CriLJ4623 and in Minu Kumari and Ant v. State of Bihar and Ors. MANU/SC/8098/2006: 2006CriLJ2468."

16. Perusal of the certain provisions of Code of Criminal Procedure and the law laid down herein above, this Court is of the firm opinion that it is for the satisfaction of the Magistrate concerned and if after calling the report or collecting the material evidence from the police station concerned, he is of the satisfaction that no prima facie case is made out against the opposite parties, Magistrate is not bound to order for registration of the case. The court below after appreciating the contents of the application made under Section 156 (3) as well as other evidence on record has also found any substance in the contents of the revisionist that he has made several applications before the Station House Officer concerned and Senior Superintendent of Police, Bareilly, as the revisionist has failed to produce any receipt or other documents in support thereof.

17. In light of the above facts and above proposition of law, this Court is of the view that there is no illegality or irregularity in the order impugned and

after collecting the report from the police station concerned or the report otherwise the Magistrate was of the view that no prima facie case was made out. Thus, the application has rightly been rejected by the court below under the order impugned.

18. In light of above facts, this Court is of the view that no interference is required in the order impugned. The present criminal revision lacks merit and deserves to be dismissed. It is accordingly dismissed.

(2020)02ILR A827

REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 21.01.2020

BEFORE
THE HON'BLE RAM KRISHNA GAUTAM, J.

Criminal Revision No. 166 of 2020

Lalit ...Revisionist
Versus
State of U.P. ...Opposite Party

Counsel for the Revisionist:
Sri Raghuraj Kishore

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

A. Criminal Law- Code of Criminal Procedure, 1973-Sections 397/401 & Indian Penal Code, 1860- Section 316-rejection-causing miscarriage to victim-meticulous analysis or requirement of medical evidence is not required at the time of framing of charges-framing of charges for offence punishable under various section of IPC, for which cognizance is taken, only ingredients are required-no illegality in the order passed by revisional court-Hence, dismissed.(Para 6)

Criminal Revision dismissed. (E-6)

List of Cases Cited:

1. Palwinder Singh Vs. Balwinder Singh & Ors. (2008) 14 SCC 504

(Delivered by Hon'ble Ram Krishna Gautam, J.)

1. Present Revision, under Sections 397/401 of the Code of Criminal Procedure, 1973 (In short 'Cr.P.C.'), has been filed by the revisionist, Lalit, assailing order, dated 14.11.2019, passed by the Sessions Judge, Baghpat, with this contention that the Revisional court failed to appreciate facts and law placed before it and passed impugned order, under failure of exercise of appropriate jurisdiction and the order, being apparently erroneous on the face of record, deserves to be set aside.

2. Learned counsel for revisionist argued that there is no evidence for offence, punishable, under Section 316 of Indian Penal Code, 1860, (In short 'IPC'), whereas, occurrence was said to have occurred at the parental house of the informant and mother of the victim and it was said to be the month of November, whereas, medical report of hospital reveals that it was a case of June, 2017, i.e., not corroborating with the accusation levelled by the informant and her daughter-victim. Hence, it was asked specifically that is there any medical document or reference regarding miscarriage and it was answered that no such medical document is there. Hence, above conclusion of trial court was apparently against fact on record. Hence, this revision with above prayer.

3. From very perusal of the impugned order, dated 14.11.2019, it is apparent that

an Application, bearing no. 5B, was moved by the accused/revisionist, Lalit, on 31.10.2019, with this contention that chargesheet contained Section 316 of IPC, but, there is no evidence regarding above offence, hence, charge for above offence, be not levelled against accused-applicant. This was objected by learned Public Prosecutor and revisional court, vide impugned order, dismissed above Application 5B and this Criminal Revision is against above order.

4. First information report was got lodged by Smt. Bhagwani on 22.1.2018 with this contention that her daughter, Manisha, was married with accused-revisionist, Lalit, on 1.2.2017, wherein, dowry was given as per capacity, but, after marriage, in-laws demanded cash of Rs. One Lakh, with a Motorcycle in dowry, and with regard to this demand she was subjected to cruelty. Manisha, victim, received conception, but, owing to assault made by the accused-applicant, Lalit, she faced miscarriage. Accused persons took entire belongings of Manisha, victim, and they ousted her from her nuptial house on 12.12.2017. In the absence of informant, at the victim's parental house, accused persons gave assault to victim and attempted to throttle her, extended threat and abused her. In this case crime number, during investigation, statements of informant and victim were recorded, under Section 161 of Cr.P.C. Victim was examined, under Section 164 of Cr.P.C. also. In her statement, recorded, as above, she had reiterated contention of accused, though alleged assault was said to have been made by her husband. Hence, other in-laws were not charge-sheeted and revisionist, Lalit, was chargesheeted, wherein, a proceeding, under Section 482 of Cr.P.C. was filed and this Court stayed proceeding against other accused persons, but, for revisionist, Lalit, no relief was granted, hence, trial proceeded against revisionist, Lalit, wherein, this application was moved, with above prayer, but, the Revisional court rejected said application on the ground that offence, punishable, under Section 316 of IPC was in existence, hence, charge was to be framed.

5. As per law laid down by the Apex Court, as well as by this Court, preferable, in the case of **Palwinder Singh vs. Balwinder Singh and others, reported in (2008) 14 SCC 504**, it has been held by the Apex Court that pre trial acquittal may not be given and for framing of charge, a meticulous analysis of evidence is not required. At this stage, even on the strong suspicion, charges can be framed.

6. In present case, this Court had given no relief to accused, revisionist-Lalit, and at this stage, charge for offence, punishable, under Section 316 is there. Once relief was rejected, thenafter, trial proceeded and Sessions Judge, on the basis of statements, recorded, under Sections 161 and 164 of Cr.P.C., concluded that framing of charge for offence, punishable, under various Sections of IPC, for which cognizance was taken, alongwith Section 316 of IPC, ingredients required are there. It was an order on the basis of evidences on record. Meticulous analysis or requirement of medical evidence or support by medical evidence is not to be analysed at that juncture of framing of charges. These all are to be seen at the time of judicial decision making.

7. Hence, in view of what has been discussed, hereinabove, admittedly, there is no illegality or irregularity in the impugned order, passed by the Revisional

Court. Thus, this Criminal Revision, being devoid of merits, deserves dismissal and it stands **dismissed** as such.

(2020)02ILR A829

REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 09.01.2020

BEFORE

THE HON'BLE VIKAS KUNVAR SRIVASTAV, J.

Criminal Revision No. 1101 of 2019

Dipendra Kumar Singh @ Bittu
...Revisionist
Versus
State of U.P. & Anr. ...Opposite Party

Counsel for the Revisionist:
Surendra Pratap Singh, Ajai Kumar Gupta

Counsel for the Opposite Party:
Govt. Adv.

A. Criminal Law-Code of Criminal Procedure,1973-Sections 397/401,319 & Indian Penal Code,1860-Sections 147, 148, 149, 504,506, 307, 302- challenge to-summoning of proposed accused for trial u/s 319 Cr.P.C.-examination-in-chief is sufficient if it satisfactorily proves the presence and role of accused in the crime-complainant himself got examined on oath as PW-1 and his statement is in support of contents of the FIR-revisionist actively participated in the commission of crime by firing gun shot upon the deceased persons-trial judge has committed no error of law to summon the revisionist for trial along with other co-accused-Hence, dismissed.(Para 4 to 32)

B. Criminal Law-Power u/s 319 Cr.P.C. can be exercised by Court against a person in FIR r no chargesheet is filed by Police against him and the accused can be summoned only on the basis of examination-in-chief of witness and need not wait for cross-examination etc. the degree of satisfaction that will be required for summoning a person would be the same as for framing a charge.(Para 29, 30)

C. A person not named in the FIR or a person though named in the FIR but has not been chargesheeted or a person who has been discharged can be summoned under section 319 Cr.P.C., provided from the evidence it appears that such person can be tried along with the accused already facing trial. However, in so far as an accused who has been discharged is concerned the requirement of Section 300(5) and 398 Cr.P.C. has to be complied with before he can be summoned afresh.(Para 29)

Criminal Revision dismissed.(E-6)

List of Cases Cited:-

1. Sunil Kumar Gupta & Ors.Vs. St. Of U.P. & Ors., (2019) 2 JIC 64 SC

2. Khushbu Gupta Vs. St. Of U.P. & Ors. (2019) 2 JIC 64 SC

3. Labhuji Amratji Thakor & Ors. Vs. St. Of Guj. & Anr.,SLP (Crl.) No. 6392 of 2018

4. Hardeep Singh Vs. St. Of Punjab & Ors.,(2014) 1 JIC 539 (SC)

5. Raja Ram@ Raj Kumar & Ors. Vs. St. Of U.P. & Anr., (2019) 2 JIC 139 (All)

6. Rajol & Ors. Vs. St. Of U.P.& Anr., (2010) 2 JIC 920 (All)

7. Brijendra Singh Vs. St. Of Rajasthan, AIR (2017) SC 2839

8. Sugreev Kumar Vs. St. Of Punjab

9. Municipal Corporation of Delhi Vs. Ram Kishan Rohatgi & Ors.,AIR (1983) SC 67

(Delivered by Hon'ble Vikas Kunvar Srivastav, J.)

1. The present revision is moved to seek interference of court in the impugned

order dated 31.7.2019 on the ground of illegality, irregularity and arbitrariness committed by the Trial Judge in S.T No.467/2016, Crime Case No. 299/2016 registered under Sections 147, 148, 149, 504, 506, 307 and 302 I.P.C. in Police Station-Jamo, District Amethi (State of U.P. Vs. Shivendra Pratap Singh & Anr.) allowing the application of informant of the case under Section 319 Cr.P.C. By the said order the revisionist, proposed accused is summoned for trial along with the other named accused in the First Information Report of the incidence and charge-sheeted by the police after investigation.

2. Heard learned counsel Sri S.P. Singh, Advocate appearing on behalf of the revisionist (the proposed accused), learned counsel Sri S.K. Singh, Advocate appearing on behalf of the complainant and for prosecution, learned A.G.A Sri Abhay Kumar, Advocate.

3. The crux of the argument delivered by learned counsel Sri S.P. Singh are that-

i. The presence of accused at the spot of the crime is not established satisfactorily by cogent and material evidence before the court.

ii. Though, the name of accused was given in FIR but so far as the materials and evidence collected by the Investigating Officer during the investigation, there is no evidence on record against the revisionist to show him committing any offence.

iii. The Investigating Officer dropped the name of revisionist and submitted the charge sheet to the Magistrate for cognizance of offence against remaining accused persons named in the FIR.

iv. That even the evidence recorded by the court is also not satisfactory and sufficient to establish the presence of the accused on the spot of the crime when it was committed.

4. In support of above arguments, learned counsel took reliance on the case laws propounded in ***Sunil Kumar Gupta & Ors. Vs. State of U.P. & Ors. with Khusbu Gupta Vs. State of U.P. & Ors.*** reported in ***2019 (2) JIC 64 SC, Labhuji Amratji Thakor & Ors. Vs. The State of Gujarat & Anr.*** arising out of ***SLP (Crl.) No. 6392 of 2018, Hardeep Singh Vs. State of Punjab & Ors.*** with connected matters reported in ***2014 (1) JIC 539 (SC), Raja Ram @ Raj Kumar & Ors. Vs. State of U.P. & Anr.*** reported in ***2019 (2) JIC 139 (All), Rajol & Ors. Vs. State of U.P. & Anr.*** reported in ***2010 (2) JIC 920 (All), Brijendra Singh Vs. State of Rajasthan reported in AIR 2017 SC 2839*** and ***Sugreev Kumar Vs. State of Punjab.*** He argued that though a person may be called upon by trial judge in the course of trial and the court concerned is empowered by the statute itself to do so but this power is not arbitrary, it is to be governed by the provisions of Section 319 of Cr.P.C. strictly and under the guidelines laid down by the superior courts. He submitted that in the present case the learned trial judge resiled from the principle and norms laid down by the superior courts while exercising it's power under Section 319 Cr.P.C. to call upon the revisionist for participation in trial along with other accused.

5. Learned counsel prays that the impugned order under revision should be

examined in the light of the above decisions and be set aside.

6. On the other hand, learned counsel for the complainant - Sri S.K. Singh, Advocate, drew the attention towards the averment made into first information report which clearly indicates not only the presence but the role assigned by the complainant to the proposed accused/revisionist. Secondly, so far as the evidence to be taken into consideration by the Court while exercising it's power under Section 319 Cr.P.C., it is well defined not only under Section 319 Cr.P.C. but also by the decisions even cited by the revisionist, that even the examination-in-chief is sufficient if it satisfactorily proves the presence and role of accused in the crime. Complainant himself got examined on oath as PW-1 and his statement recorded by the court itself in support of contents of the first information report along with the materials brought by the Investigating Officer is available on record. The said evidence and material are satisfactory and sufficient to show that the revisionist actively participated in the commission of crime by firing gun shot upon the deceased persons Pawan Kumar and Anirudha Singh.

7. Learned A.G.A. argued that in the facts, circumstances and evidences available before the Court commission of any irregularity, error or arbitrariness in exercise of power under Section 319 Cr.P.C. is not obvious as the evidence taken into consideration by the Court is much more than necessary for framing of charge and prima facie satisfactory for the court that a conviction would lead in case the said evidence remains un-rebutted.

Position of Law:-

8. Before discussing the arguments of the parties for and against the impugned order in revision it would be pertinent to go through the case laws cited by learned counsel for the revisionist in context of the facts involved in respective case before the Hon'ble Supreme Court. In the case of ***Sunil Kumar Gupta Vs. State of U.P. & Ors.*** along with ***Khusboo Gupta Vs. State of U.P. & Ors. (Supra)***. The case was of bride burning where the victim in her dying declaration specifically mentioned the name of only one accused and even the prosecution witnesses could not deposed about the role of proposed accused summoned by the trial court in exercise of power given to it under Section 319 Cr.P.C. in para 10 and 11 of the said judgment the Hon'ble Court held as under:-

"10. Observing that for exercising jurisdiction and its discretion in terms of Section 319 Cr.P.C., the courts are required to apply stringent tests, in Sarabjit Singh and Another vs. State of Punjab and Another (2009) 16 SCC 46, it was held as under:-

"21. An order under Section 319 of the Code, therefore, should not be passed only because the first informant or one of the witnesses seeks to implicate other persons(s). Sufficient and cogent reasons are required to be assigned by the court so as to satisfy the ingredients of the provisions. Mere ipse dixit would not serve the purpose. Such an evidence must be convincing one at least for the purpose of exercise of the extraordinary jurisdiction. For the aforementioned purpose, the courts are required to apply stringent tests; one of the tests being whether evidence on record is such which would reasonably lead to conviction of the person sought to be summoned.

22. ..... Whereas the test of prima facie case may be sufficient for taking cognizance of an offence at the stage of framing of charge, the court must be satisfied that there exists a strong suspicion. While framing charge in terms of Section 227 of the Code, the court must consider the entire materials on record to form an opinion that the evidence if unrebutted would lead to a judgment of conviction.

23. Whether a higher standard be set up for the purpose of invoking the jurisdiction under Section 319 of the Code is the question. The answer to these questions should be rendered in the affirmative. Unless a higher standard for the purpose of forming an opinion to summon a person as an additional accused is laid down, the ingredients thereof viz. (i) an extraordinary case, and (ii) a case for sparingly (sic sparing) exercise of jurisdiction, would not be satisfied."

"11. Applying the above principles to the case in hand, in our considered view, no prima facie case is made out for summoning the appellants and to proceed against the appellants for the offence punishable under Section 302 IPC. As pointed out earlier, in the dying declaration, deceased Shilpa has only mentioned the name of Chanchal @ Babita; but she has not mentioned the names of others. In his complaint lodged before the police on the next day i.e. 20.08.2012, Sudhir Kumar Gupta-PW-1 has stated that his daughter Shilpa told him that Chanchal @ Babita and all other people set her on fire after pouring kerosene. PW-1 has neither stated the names of the appellants nor attributed any overt act. Likewise, in their evidence before the court, PWs 1 and 3 have only stated that Shilpa told them that Chanchal @ Babita and all others have set fire on deceased Shilpa. Neither the complaint nor the evidence of witnesses indicates as to the role played by the appellants in the commission of the offence and which accused has committed what offence. Under such circumstances, it cannot be said that the prosecution has shown prima facie material for summoning the accused for the offence punishable under Section 302 IPC."

9. Learned counsel further relied on the judgment of Hon'ble Supreme Court in ***Brijendra Singh Vs. State of Rajasthan*** reported in ***AIR 2017 SC 2839***. Hon'ble Supreme Court in this judgment has elaborately discussed the power under Section 319 Cr.P.C., its object and when can such power be invoked by trial court. Hon'ble Supreme Court has further discussed about the degree of satisfaction i.e., required for invoking it. The situation under which power should be exercised in respect of persons named. in the FIR but not charge-sheeted. Hon'ble Supreme Court in para 13 of the judgment observed as under:-

"In order to answer the question, some of the principles enunciated in Hardeep Singh's case may be recapitulated:

Power under Section 319 Cr.P.C. can be exercised by the trial court at any stage during the trial, i.e., before the conclusion of trial, to summon any person as an accused and face the trial in the ongoing case, once the trial court finds that there is some ''evidence' against such a person on the basis of which evidence it can be gathered that he appears to be guilty of offence. The ''evidence' herein means the material that is brought before the Court during trial. Insofar as the material/evidence collected by the IO at

the stage of inquiry is concerned, it can be utilised for corroboration and to support the evidence recorded by the Court to invoke the power under Section 319 Cr.P.C. No doubt, such evidence that has surfaced in examination-in-chief, without cross- examination of witnesses, can also be taken into consideration. However, since it is a discretionary power given to the Court under Section 319 Cr.P.C. and is also an extraordinary one, same has to be exercised sparingly and only in those cases where the circumstances of the case so warrants. The degree of satisfaction is more than the degree which is warranted at the time of framing of the charges against others in respect of whom chargesheet was filed. Only where strong and cogent evidence occurs against a person from the evidence led before the Court that such power should be exercised. It is not to be exercised in a casual or a cavalier manner. The prima facie opinion which is to be formed requires stronger evidence than mere probability of his complicity."

10. Learned counsel for the revisionist cited the case law in ***Labhuji Amratji Thakor & Ors. Vs. State of Gujarat & Anr.,*** arising out of ***SLP (Crl.) No.6392 of 2018,*** the facts before the court was that the complainant of the case lodged an F.I.R. on 27.5.2015 under Sections 363 and 366 of the I.P.C. read with Section 3/4 POCSO Act, 2012 that her daughter aged about 14 years has been abducted by one Natuji Bachaji Thakor some time in the last night on 26.5.2015 in morning hours of 27.5.2015. It was however alleged that the aforesaid accused used to visit the victim, the aforesaid 14 years old girl and has given a mobile phone to her, when the complainant knew about this fact he had warned Natuji. After receiving F.I.R., the police investigated into the matter and submitted a charge-sheet under Sections 363, 366 of the I.P.C. and Section 3/4 of the POCSO Act, 2012 against Natuji Bachchuji Thakor, the accused. The statement of the victim was recorded by the investigating officer, she had taken the name of Natuji alone, trial proceeded against the accused in special court under POCSO Act. The statement of mother of victim was recorded, she also did not named any other person than Natuji, the accused. It is only when the statements were recorded by the Special Court of POCSO Judge of the victim who in her statement taken name of Labuji Amratji Thakor, Shashikant and Jituji also, who had taken the victim into *'morvi'* in Jeep.

In the light of the said statement the prayer was made to proceed against the appellant Labuji Amratji Thakor etc., also by initiating appropriate legal proceedings.

11. Learned POCSO Judge after considering the statements rejected the application holding, prima facie it appears that with malafide intention, the names of the appellants have been disclosed. The complainant filed a criminal revision against the order dated 1.12.2016 aforesaid rejecting the application which has been allowed by the High Court. The order of POCSO Judge rejecting the application under Section 319 Cr.P.C. was reversed.

12. Before Hon'ble The Supreme Court, the said order passed in revision was challenged and it was submitted that there was no evidence on record on the basis of which it can even to be prima facie found that appellants had also committed the offence. Before Hon'ble Supreme Court the appellant took reliance on the judgment delivered by it earlier in

Hardeep Singh Vs. State of Punjab & Ors. reported in ***2014 (1) JIC 539 (SC)***

13. Hon'ble The Supreme Court in para-6,7,8,9,10,11 of the aforesaid judgment of constitution bench in ***Hardeep Singh (Supra)*** observed as under:-

"6. Section 319 Cr.P.C. provides that where, in the course of any inquiry into, or trial of, an offence, it appears from the evidence that any person not being the accused has committed any offence for which such person could be tried together with the accused, the Court may proceed against such person for the offence which he appears to have committed. The Court, thus, during the trial on the basis of any evidence is fully empowered to proceed against any person, whose name was not even included in the F.I.R. or the Charge Sheet. The parameters of exercise of power under Section 319 Cr.P.C has been explained by this Court time and again. It is sufficient to refer to Constitution Bench judgment in Hardeep Singh (supra), where this Court had considered the following issue amongst others:-

"6.4. (iv) What is the nature of the satisfaction required to invoke the power under Section 319 CrPC to arraign an accused? Whether the power under Section 319(1) CrPC can be exercised only if the court is satisfied that the accused summoned will in all likelihood be convicted?"

7. The Constitution Bench judgment in the above judgment has held that under Section 319 Cr.P.C. Court can proceed against any person, who is not an accused in a case before it. The Constitution Bench, however, has held that the person against whom the Court decides to proceed, "has to be a person whose complicity may be indicated and connected with the commission of the offence".

8. Answering the Issue No.(iv) as noticed above, in Paragraph Nos. 105 and 106 of the judgment, following was laid down by the Constitution Bench:-

"105. Power under Section 319 CrPC is a discretionary and an extraordinary power. It is to be exercised sparingly and only in those cases where the circumstances of the case so warrant. It is not to be exercised because the Magistrate or the Sessions Judge is of the opinion that some other person may also be guilty of committing that offence. Only where strong and cogent evidence occurs against a person from the evidence led before the court that such power should be exercised and not in a casual and cavalier manner.

106. Thus, we hold that though only a prima facie case is to be established from the evidence led before the court, not necessarily tested on the anvil of cross-examination, it requires much stronger evidence than mere probability of his complicity. The test that has to be applied is one which is more than prima facie case as exercised at the time of framing of charge, but short of satisfaction to an extent that the evidence, if goes unrebutted, would lead to conviction. In the absence of such satisfaction, the court should refrain from exercising power under Section 319 CrPC. In Section 319 CrPC the purpose of providing if "it appears from the evidence that any person not being the accused has committed any offence" is clear from the words "for which such person could be tried together with the accused". The words used are not "for which such person could be convicted". There is, therefore, no scope for the court acting under Section 319

CrPC to form any opinion as to the guilt of the accused."

9. The Constitution Bench has given a caution that power under Section 319 Cr.P.C. is a discretionary and extraordinary power, which should be exercised sparingly and only in those cases where the circumstances of the case so warrant. The crucial test, which has been laid down as noted above is "the test that has to be applied is one which is more than prima facie case as exercised at the time of framing of charge, but short of satisfaction to an extent that the evidence, if goes unrebutted, would lead to conviction." The present is a case, where the trial court had rejected the application filed by the prosecution under Section 319 Cr.P.C. Further, in the present case, the complainant in the F.I.R. has not taken the names of the appellants and after investigation in which the statement of victim was also recorded, the names of the appellants did not figure.

After carrying investigation, the Charge Sheet was submitted in which the appellants names were also not mentioned as accused. In the statement recorded before the Police, the victim has named only Natuji with whom she admitted having physical relations and who took her and with whom she went out of the house in the night and lived with him on several places. The mother of victim in her statement before the Court herself has stated that victim girl returned to the house after one and a half months. In the statement, before the Court, victim has narrated the entire sequence of events. She has stated in her statement that accused Natuji used to visit her Uncle's house Vishnuji, where she met Natuji. She, however, stated that it was Natuji, who had given her mobile phone. Her parents came to know about she having been given mobile phone by Natuji, then they went to the house of Natuji and threatened Natuji.

After one month, Natuji gave another mobile phone to the victim, who had taken it. She stated that in the night at 12 'o' clock, Natuji alongwith his three friends had taken her to Morbi in a jeep. She further stated that she and Natuji stayed for three days at the said place and Natuji had intercourse with her at the said place. When Natuji came to know about lodging of complaint, he took her to Modasa in the jeep. The jeep was given by Labhuji and other two appellants were also in the jeep. She further stated that Labhuji, Shashikant and Jituji came in the jeep and took her and Natuji to the Police Station, where the police interrogated her and she recorded her statement. Natuji was charged with Sections 363 and 366 I.P.C. and Sections 3 and 4 of the POCSO Act.

10. In the present case, there are not even suggestion of any act done by appellants amounting to an offence referred to in Sections 3 and 4 of the POCSO Act. Thus, there was no occasion to proceed against the appellants under POCSO Act.

11. Now, we come back to the reasons given by the High Court in allowing the Criminal Revision and setting aside the order of the POCSO Judge. The judgment of the High Court runs into four paragraphs and the only reason given by the High Court for allowing the revision is contained in paragraph No.3, which is to the following effect:-

"3. On going through the depositions of the victim as well as her mother, some overtact and participation on the part of the respondent nos. 3 to 5 are clearly revealing. But, this Court is not inclined to opine either way as the said fact was not stated before the police at the

time of recording of their statements. But, taking into consideration the provision of Section 319 of the Criminal Procedure Code, this Court deems it appropriate to summon them and put them to trial.....…"

14. On the basis of above discussion, the three Judges Bench of Hon'ble Supreme Court in aforesaid case of ***Labhuji (Supra)*** held that the mere fact that court has power under Section 319 Cr.P.C. to proceed against any person who is not named in the FIR or the charge sheet does not mean that whenever in a statement recorded before the court, name of any person is taken, the court has to consider substances of the evidence which has come before it and as laid down by the Constitution Bench in ***Hardeep Singh's*** case, it should be more than prima facie case which is needed at the time of framing of charges, but short of satisfaction to an extent that evidence, if goes unrebutted would lead to conviction. Since, the High Court has not adverted to test laid down by the Constitution Bench nor has given any cogent reason in exercise of power under Section 319 Cr.P.C., then also Hon'ble Supreme Court for its own satisfaction examined evidence came before the trial court and held that the victim in her statement before POCSO Judge has only stated that Natuji, the accused had come along with his three friends i.e., the appellants and she was taken in the Jeep to *'morvi'* she does not even alleged complicity of the appellants in the offence. Her further statement was that she was taken to morvi in the Jeep driven by Labuji and specifically was taken to the Modasa from *'morvi'* in the Jeep. The mere facts of being in the Jeep wherein the victim was taken into modasa cannot be treated as to be any allegation of complicity of the appellants in the offence. For want of sufficient reason in the order of High Court reversing the order of POCSO Judge whereby application under Section 319 Cr.P.C. was rejected. The Hon'ble Supreme Court set aside the order of the High Court holding the same unsustainable and allowed the appeal.

15. Learned counsel for the revisionist has relied on the case of ***Raja Ram @ Raj Kumar & Ors. Vs. State of U.P. & Anr.*** reported in ***2019 (2) JIC 139 (All).*** The case before Hon'ble The Supreme Court the case of bride burning registered under Sections 498-A, 304-B IPC and Section 3/4 D.P. Act against the named accused persons. The additional accused persons were summoned by the court exercising the power under Section 319 Cr.P.C. whereas the investigating officer concluded all materials with regard to the facts of the case, had dropped the name of revisionist holding that their names were purposely dragged into the offence without any credible evidence. According to him it was established that the revisionist were not present on the date and time of the incident as alleged in the F.I.R. and thus there is no question of their participation in the commission of offence. The High Court observed that during investigation it was unearthed by the investigating officer that on the date and time of the incident the revisionist who is uncle-in-law of the deceased were at Aligarh in connection with the treatment of their own daughter-in-law and this fact is supported by the various CCTV footage, relevant affidavits, relevant attendance registered of revisionist no.3, the CCTV footage coverage of the Librarian where the revisionist no.3 is attend, statement under Section 161 Cr.P.C. of Arvind Kumar all these facts if taken together at

least prima facie indicates that there possibility for participating in the offence are very sketchy and remote. The court further held that order of Sessions Judge impugned in the revision was virtually a mini trial instead of recording of his prima facie satisfaction while exercising extraordinary powers under Section 319 Cr.P.C. he has ventured into that arena which could be easily stated that he has tried and held the Hon'ble accused persons (the revisionist) guilty at the stage of 319 Cr.P.C., while discarding the defence of the revisionist which is not permissible in the ratio laid down in the ***Hardeep Singh's Case.***

16. The underlying concept of Section 319 Cr.P.C. is there must be more than a prima facie case that is required at the time of framing of charge but short of satisfaction to an extent that evidence which if remains un-rebutted would lead to conviction.

17. In the light of the principle underlying the provision of Section 319 of the Cr.P.C. which confers power to a court in criminal jurisdiction, while in the course of any enquiry into, or trial of, an offence, when it appears to it from the evidence that any person not being the accused has committed any offence for which such person could be tried together with the accused, may proceed against such person for the offences which he appears to be committed, it could be relevant to examine the proceeding of investigation, trial and impugned order of the court below and impugned order involved in this revision.

18. As emerging out from the First Information Report made Annexure-1 to the revision petition, the incidence reported and registered in P.S. Jamo, District Amethi on 28 July 2018 Case Crime No.0299 of 2018 under Sections 147, 148, 149, 504, 506, 307 and 302 I.P.C., the accused persons are named therein namely Shivendra Pratap Singh @ Guddu, Dipendra Kumar Singh @ Bittu, Alok Pratap Singh @ Golu, Narsingh, Hari Bhan Singh and Ramnath Singh total six in number. The fact in brief is that on 28 July 2018 at about 8 a.m. in morning the complainant/informant, Rajkumar Yadav along with his brother Anirudh Kumar Yadav @ Daddan and a friend Pawan Kumar Singh @ Pappu were standing by the road, the accused persons Shivendra Pratap Singh, Dipendra Kumar Singh @ Bittu, Alok Pratap Singh, Narsingh, Hari Bhan Singh Fauji and Ramnath Singh, respondents of the same village appeared on the spot armed with fire arms began to abuse and threatened them either to ran away from the spot otherwise they will be killed. When the complainant and his companions refused to do so all the accused persons ran them, complainant and his companions ran away from the spot but when they reached in a field, Shivendra Pratap, Dipendra Kumar Singh @ Bittu, Alok Pratap Singh @ Golu fired from the rifle and Narsingh from a gun, the friend of the complainant namely Pawan Kumar Singh and brother Aniruddh Yadav got injured therein, thereafter accused persons fled away. When the victims were carried on to the hospital, Pawan Kumar Singh @ Pappu was declared dead. The brother of the complainant was referred to Trauma Center, Lucknow, when he reached to Trauma Center, he too died. The said incidence was seen by the Pradhan of the village Ravindra Pratap Singh @ Baby, Abhay Pratap Singh and Rajat Singh. This would be pertinent here to mention that the revisionist, Dipendra Kumar Singh @

Bittu had also been named in the aforesaid F.I.R. The investigation was done. While recording the statement under Section 161 Cr.P.C., Ravindra Pratap Singh one of the eyewitness though he named Dipendra Kumar Singh @ Bittu to be on spot but added he came after the commission of offence on the spot. Even the second eyewitness named by the informant Abhay Pratap Singh in his statement under section 161 Cr.P.C. did not state Dipendra Kumar Singh @ Bittu, the revisionist participating in the commission of offence. He named all the co-accused. When specific question was asked by investigating officer as to whether anyone else except 5 named by him was there, he answered after the incident Dipendra Kumar Singh @ Bittu was seen on the spot however he did nothing. One Rajat Singh whose statement was recorded under section 161 of the Cr.P.C. by the investigating officer had also named five out of six named accused committing the offence but stated that during his presence on the spot Dipendra Kumar Singh @ Bittu was not seen by him in the course of commission of offence, but he appeared on the spot thereafter. The charge sheet was prepared after completing the investigation which is made Annexure-2 to the petition. On perusal whereof it appears that the name of one of six named accused in the FIR, Dipendra Kumar Singh @ Bittu was omitted and same was submitted in the Court against the other five accused named in the FIR. A police report was submitted separately under Section 169 Cr.P.C. with regard to accused Dipendra Kumar Singh @ Bittu that he was wrongly named in the FIR as no evidence of his involvement was found.

19. During trial the complainant, Rajkumar when was examined on oath, during examination-in-chief he narrated the incidence happened on 28 July 2018 in between 7 to 8 a.m. morning. He named in his statement along with the charge sheeted five accused, Dipendra Kumar Singh @ Bittu also. The statement by trial court was recorded on 4.9.2018, he disclosed in his statement that the reason of dispute is with regard to land purchased by his grandfather and father in the year 1984, and the complainant continued in possession of the said land. The coparcener of the vendor was litigating with the complainant's family, wherein the decree was passed in his favour starting from C.O., S.O.C. and D.D.C. Litigation went up to the High Court and complainants' party was succeeded. Still civil suit and revenue suit are pending, since opponents in the said case wanted to dispossess them forcibly and accused persons are from their family, therefore, they had enmity and bitterness with the complainant's family which led them to commit the offence reported.

20. On 27 September 2019 an application under Section 319 Cr.P.C., was moved before the court with the prayer to summon the accused (not charge sheeted by the police) Dipendra Kumar Singh @ Bittu, the present revisionist for trial along with the other accused persons. The revisionist preferred objection against the said application on 10th September, 2018 alleging that there is no evidence on record with regard to his participation in the crime and even a plea that that while the police submitted a final report to this effect, no protest petition was filed, therefore, at the stage of trial or reason of police report under section 169 Cr.P.C. submitted before the court with regard to no evidences of participation in crime by Dipendra Kumar Singh @ Bittu.

Application under section 319 CrPC is not maintainable. The court heard the parties in detail.

21. On perusal of impugned order dated 31.7.2019 the matter is found discussed quoting various decisions of the Honourable Supreme Court with regard to the power under Section 319 Cr.P.C. of the Court for the summoning of accused during trial under the circumstances given in the Section. The trial judge has observed that in the F.I.R. in unambiguous words the information has reported that *"while the accused persons were abusing and threatening the complainant and his companions to run away from the spot otherwise they will be killed and when the complainant refused to do so, Shivendra Singh @ Guddu, Dipendra Kumar @ Bittu and Alok @ Golu from their rifle and Narsingh from his gun began firing wherein Pawan Kumar Singh, friend of the complainant had died on the spot and brother of the complainant to Trauma on reference from the local hospital and too died there".*

22. The trial judge observed that the name of Dipendra Kumar Singh @ Bittu was given in the FIR assigning specific role of firing on the deceased and even stated in examination-in-chief before the court as PW-1. As such in the totality and circumstances, the proposed accused, Dipendra Kumar Singh @ Bittu whose presence at the time of incident is even established from the other material and statement taken prior to trial, should be summoned for trial.

23. So far as the observation made by the learned trial judge with regard to the motive is concerned. It is established by law that the FIR is not an encyclopedia mere information as to the incident the accused and the mode of committing offence is sufficient to start the machinery of investigation by the police after registering the report. So far as the police report under Section 169 of the Cr.P.C. by the investigating officer is concerned. It does not bar the court during trial to exercise power under Section 319 Cr.P.C., when it appears to it by evidences coming before it someone else not charge sheeted or not made accused has also role in commission of the offence and should be tried along with the accused persons. Section 319 Cr.P.C. reads as under:-

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

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

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

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

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

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

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

24. The name of the revisionist, Dipendra Kumar Singh @ Bittu is reported in the F.I.R., even then disbelieving the FIR contents without trial and believing on the statement under Section 161 Cr.P.C. which is untestified the investigating officer submitted the report of no evidences under Section 169 Cr.P.C. However, the PW-1 when supported the F.I.R. lodged by him instantly after the incidence and named again the revisionist accused Dipendra Kumar Singh @ Bittu. The question is whether the trial judge was bound by the police report or had to satisfy itself from the evidences before it.

25. From the discussions made hereinabove with regard to fact in the FIR and materials collected by the investigating officer, it is undoubted that the complainant named categorically 6 accused persons namely Shivendra Pratap Singh @ Guddu, Dipendra Kumar Singh @ Bittu, Alok Pratap Singh @ Golu, Narsingh, Hari Bhan Singh and Ramnath Singh.

26. The trial judge recorded its satisfaction on the basis of evidence during the trial of PW-1 to summon the revisionist for trial along with the other accused, therefore, question arises whether the nature of his satisfaction was that as required to invoke the power under Section 319 Cr.P.C. to arraign the accused and whether it is necessary for exercise of power under Section 319 (1) Cr.P.C. when the court is satisfied that the proposed accused in all likelihood be convicted. In this context, it would be relevant here to quote para 82-86 of the judgment of Hon'ble Supreme Court ***Hardeep Singh (Supra):-***

"82. Though the facts so received by the magistrate or the court may not be evidence, yet it is some material that makes things clear and unfolds concealed or deliberately suppressed material that may facilitate the trial. In the context of Section 319 Cr.P.C. it is an information of complicity. Such material therefore, can be used even though not an evidence in stricto sensuo, but an information on record collected by the court during inquiry itself, as a prima facie satisfaction for exercising the powers as presently involved.

83. This pre-trial stage is a stage where no adjudication on the evidence of the offences involved takes place and therefore, after the material alongwith the charge-sheet has been brought before the court, the same can be inquired into in order to effectively proceed with framing of charges. After the charges are framed, the prosecution is asked to lead evidence and till that is done, there is no evidence available in the strict legal sense of Section 3 of the Evidence Act. The actual trial of the offence by bringing the accused before the court has still not begun. What is available is the material that has been submitted before the court along with the charge-sheet. In such situation, the court only has the preparatory material that has been placed before the court for its consideration in order to proceed with the trial by framing of charges.

84. It is, therefore, not any material that can be utilised, rather it is that material after cognizance is taken by a court, that is available to it while making

an inquiry into or trying an offence, that the court can utilize or take into consideration for supporting reasons to summon any person on the basis of evidence adduced before the Court, who may be on the basis of such material, treated to be an accomplice in the commission of the offence. The inference that can be drawn is that material which is not exactly evidence recorded before the court, but is a material collected by the court, can be utilised to corroborate evidence already recorded for the purpose of summoning any other person, other than the accused.

85. This would harmonise such material with the word "evidence' as material that would be supportive in nature to facilitate the exposition of any other accomplice whose complicity in the offence may have either been suppressed or escaped the notice of the court.

86. The word "evidence" therefore has to be understood in its wider sense both at the stage of trial and, as discussed earlier, even at the stage of inquiry, as used under Section 319 Cr.P.C. The court, therefore, should be understood to have the power to proceed against any person after summoning him on the basis of any such material as brought forth before it. The duty and obligation of the court becomes more onerous to invoke such powers cautiously on such material after evidence has been led during trial."

27. Para 96 of the Judgment of ***Hardeep Singh (Supra)*** is also material in this regard which reads as under:-

"96. At the time of taking cognizance, the court has to see whether a prima facie case is made out to proceed against the accused. Under Section 319 Cr.P.C., though the test of prima facie case is the same, the degree of satisfaction that is required is much stricter. A two-Judge Bench of this Court in Vikas v. State of Rajasthan, 2013 (11) SCALE 23, held that on the objective satisfaction of the court a person may be 'arrested' or 'summoned', as the circumstances of the case may require, if it appears from the evidence that any such person not being the accused has committed an offence for which such person could be tried together with the already arraigned accused persons."

28. In the context of fact and materials available before the trial court it would be relevant to give the reference of finding given by Hon'ble Supreme Court in similar circumstances in the judgment in ***Municipal Corporation of Delhi Vs. Ram Kishan Rohatgi & Ors.*** reported in ***AIR 1983 SC 67*** that if the prosecution can at any stage produce evidence which satisfies the court that those who have not been arraigned as accused or against whom proceedings quashed have also committed the offence, the court can take cognizance against them under Section 319 Cr.P.C. and try them along with the other accused.

29. Lastly, para-118-119 of the judgment in the case of ***Hardeep Singh's*** case which answered all the question arisen in the present revision learned, revisionist is being quoted:-

118. Thus, it is evident that power under Section 319 Cr.P.C. can be exercised against a person not subjected to investigation, or a person placed in the Column 2 of the Charge-Sheet and against whom cognizance had not been taken, or a person who has been discharged. However, concerning a person who has been discharged, no proceedings can be

commenced against him directly under Section 319 Cr.P.C. without taking recourse to provisions of Section 300(5) read with Section 398 Cr.P.C.

119. We accordingly sum up our conclusions as follows:

Question Nos.1 & III

Q.1 What is the stage at which power under Section 319 Cr.P.C. can be exercised?

AND Q.III Whether the word "evidence" used in Section 319(1) Cr.P.C. has been used in a comprehensive sense and includes the evidence collected during investigation or the word "evidence" is limited to the evidence recorded during trial?

A. In Dharam Pal's case, the Constitution Bench has already held that after committal, cognizance of an offence can be taken against a person not named as an accused but against whom materials are available from the papers filed by the police after completion of investigation. Such cognizance can be taken under Section 193 Cr.P.C. and the Sessions Judge need not wait till 'evidence' under Section 319 Cr.P.C. becomes available for summoning an additional accused.

Section 319 Cr.P.C., significantly, uses two expressions that have to be taken note of i.e. (1) Inquiry (2) Trial. As a trial commences after framing of charge, an inquiry can only be understood to be a pre-trial inquiry. Inquiries under Sections 200, 201, 202 Cr.P.C.; and under Section 398 Cr.P.C. are species of the inquiry contemplated by Section 319 Cr.P.C. Materials coming before the Court in course of such enquiries can be used for corroboration of the evidence recorded in the court after the trial commences, for the exercise of power under Section 319 Cr.P.C., and also to add an accused whose name has been shown in Column 2 of the chargesheet.

In view of the above position the word 'evidence' in Section 319 Cr.P.C. has to be broadly understood and not literally i.e. as evidence brought during a trial.

Question No. II Q.II Whether the word "evidence" used in Section 319(1) Cr.P.C. could only mean evidence tested by cross-examination or the court can exercise the power under the said provision even on the basis of the statement made in the examination-in-chief of the witness concerned?

?A. Considering the fact that under Section 319 Cr.P.C. a person against whom material is disclosed is only summoned to face the trial and in such an event under Section 319(4) Cr.P.C. the proceeding against such person is to commence from the stage of taking of cognizance, the Court need not wait for the evidence against the accused proposed to be summoned to be tested by cross-examination.

Question No. IV Q.IV What is the nature of the satisfaction required to invoke the power under Section 319 Cr.P.C. to arraign an accused? Whether the power under Section 319 (1) Cr.P.C. can be exercised only if the court is satisfied that the accused summoned will in all likelihood be convicted?

A. Though under Section 319(4)(b) Cr.P.C. the accused subsequently impleaded is to be treated as if he had been an accused when the Court initially took cognizance of the offence, the degree of satisfaction that will be required for summoning a person under Section 319 Cr.P.C. would be the same as for ?framing a charge. The difference in the degree of satisfaction for summoning the original accused and a subsequent accused is on account of the fact that the trial may have

already commenced against the original accused and it is in the course of such trial that materials are disclosed against the newly summoned accused. Fresh summoning of an accused will result in delay of the trial - therefore the degree of satisfaction for summoning the accused (original and subsequent) has to be different.

Question No.V Q.V Does the power under Section 319 Cr.P.C. extend to persons not named in the FIR or named in the FIR but not chargesheeted or who have been discharged?

A. A person not named in the FIR or a person though named in the FIR but has not been chargesheeted or a person who has been discharged can be summoned under Section 319 Cr.P.C. provided from the evidence it appears that such person can be tried along with the accused already facing trial. However, in so far as an accused who has been discharged is concerned the requirement of ?Sections 300 and 398 Cr.P.C. has to be complied with before he can be summoned afresh.

30. On the basis of above discussions, it is sufficiently clear that there was evidence of PW-1 as statement recorded in his examination-in-chief supporting the allegation against the revisionist accused, a named accused therein along with other accused persons. The said evidence in terms of Section 319 Cr.P.C. could very well be taken as evidence to satisfy the trial judge so as to summon the revisionist for trial along with other co-accused. The learned trial judge has committed no error of law, nor any irregularity while passing the order impugned in this revision.

31. The revision therefore has no force and there is no reason to interfere with the order of Trial Judge dated 31.7.2019 in S.T No.467/2016, Crime Case No. 299/2016 registered under Sections 147, 148, 149, 504, 506, 307 and 302 I.P.C. in Police Station-Jamo, District-Amethi (State of U.P. Vs. Shivendra Pratap Singh & Anr.) exercised its power under Section 319 Cr.P.C. to summon the revisionist, Dipendra Kumar Singh @ Bittu for trial along with the other accused.

32. With the aforesaid, the present criminal revision is ***dismissed.***

(2020)02ILR A843

REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 04.02.2020

BEFORE
THE HON'BLE ANANT KUMAR, J.

Criminal Revision No. 1306 of 2018

Sheebu @ Shabe Kadar Khan
...Revisionist
Versus
State of U.P. & Anr. ...Opposite Party

Counsel for the Revisionist:
Sandeep Kumar Ojha, Man Mohan Singh, Maneesh Kumar Singh, Navita Sharma

Counsel for the Opposite Party:
Govt. Advocate, Ravindra Shukla

A. Criminal Law-Indian Penal Code,1860-sections 302/34, 120B and Arms Act,1959-section 3/25 & Juvenile Justice (Care and Protection of Children)Act, 2000-section 7A-rejection-claim of juvenility-conduct of inquiry is mandatory-trial court failed to conduct inquiry regarding determination of age as laid out in section 7A of the 2000 Act and Rule 12 of the 2007 Rules-trial court committed manifest error-hence, the revision is allowed-the matter is

remanded back to trial court to decide afresh.(Para 5 to 9)

The age determination inquiry contemplated under J.J. Act and Rules has nothing to do with an inquiry under any other legislation. There may be a situation where matriculation certificate, date of birth certificate from school first attended and even birth certificate given by a corporation or a municipal authority, or panchayat may not be correct, but the Court or the Juvenile Justice Board or the committee under J.J. Act is not expected to conduct such a roving inquiry and to go behind those certificates t examine correctness of those documents,kept during normal course of business. (Para 7)

Criminal Revision allowed.(E-6)

List of cases cited:-

1. Raju Vs. St. Of Haryana,{2019(2) JIC 11 (SC)}

2. Mohd. Yunus Vs. St. Of U.P. & Anr.{2018(3) JIC 74 (All)}

(Delivered by Hon'ble Anant Kumar, J.)

(1) Counter affidavit filed on behalf of complainant is taken on record.

(2) Heard learned counsel for the revisionist, learned A.G.A. for the State, the learned counsel for private opposite parties and perused the record.

(3) This revision has been filed with the prayer that this Hon'ble Court may kindly be pleased to set aside the judgment and order dated 13.09.2018 passed by Fourth Additional Session Judge, Sultanpur passed in Session Trial No.433 of 2014 (State Versus Kamruddin and others) by which application for declaration of juvenile has been rejected by him arising from Case Crime No.255 of 2014, under Sections 302/34, 120B of I.P.C. and Section 3/25 Arms Act relating to Police Station - Dostpur, District – Sultanpur.

(4) Brief facts relevant for disposal of this revision are that an application was moved for declaring the revisionist juvenile on the ground that on the date of occurrence i.e. 14th July, 2014 he was juvenile as the date of birth of the revisionist is 20.09.1998, as such on the date of occurrence, he was 15 years 10 months and 24 days old. In support of the application, a birth certificate purportedly issued from Nagar Panchayat, Dostpur, Sultanpur, has been filed. The trial court after hearing the counsel for the applicant/ revisionist as well as learned counsel for the State came to the conclusion that date of birth of the appellant was got registered in Nagar Panchayat on 26.04.2017 i.e. after three years of occurrence, hence the certificate issued by Nagar Panchayat, Dostpur is not trustworthy and on this very ground the said application has been rejected, hence this revision.

(5) The sole arguments of learned counsel for the appellant is that as per **Juvenile Justice (Care and Protection of Children) Act, 2000** (hereinafter referred to as 'Act, 2000'), Section 7A of the Act, 2000, the inquiry has not been conducted by the court concerned. Section 7A of the Act, 2000 provids as under :

"Section 7A in The Juvenile Justice (Care and Protection of Children) Act, 2015

[7A. Procedure to be followed when claim of juvenility is raised before any court.--

(1) Whenever a claim of juvenility is raised before any court or a court is of the opinion that an accused

person was a juvenile on the date of commission of the offence, the court shall make an inquiry, take such evidence as may be necessary (but not an affidavit) so as to determine the age of such person, and shall record a finding whether the person is a juvenile or a child or not, stating his age as nearly as may be: Provided that a claim of juvenility may be raised before any court and it shall be recognised at any stage, even after final disposal of the case, and such claim shall be determined in terms of the provisions contained in this Act and the rules made thereunder, even if the juvenile has ceased to be so on or before the date of commencement of this Act.

(2) If the court finds a person to be a juvenile on the date of commission of the offence under sub-section (1), it shall forward the juvenile to the Board for passing appropriate orders and the sentence, if any, passed by a court shall be deemed to have no effect.]"

(6) It is further stated that instead of following to the said provision, the trial Court has simply held that birth certificate produced by the applicant/ revisionist is not trustworthy but the trial court should have conducted inquiry for the same and by not conducting such inquiry the trial Court has committed manifest error, which required interference by this Court.

(7) In this regard, a case law reported in ***[2019 (2) JIC 11 (SC)]; Raju vs. State of Haryana***, has been cited, wherein the Hon'ble Apex Court has held as under:

"2. The brief facts leading to the instant appeal are that an FIR was lodged against the Appellant Raju s/o Rajendar Singh, and two other persons, viz. Raju s/o Bhim and Raja @ Raj Kumar s/o Makhsi, alleging that the three persons had intercepted the prosecutrix when she was passing by some fields along with her one year old brother and had taken her to a field nearby, whereupon Raju s/o Bhim and Raja @ Raj Kumar s/o Makhsi engaged in the gang rape of the prosecutrix, while the Appellant stood outside the field. The prosecutrix was aged fifteen years at the time of the incident, which occurred on 14.09.2000. The three accused were convicted for the offence punishable under Section 376(2)(g) of the IPC, and sentenced to 10 years' rigorous imprisonment and a fine of Rs. 500/, and further two months' rigorous imprisonment in default of payment of fine. Aggrieved by the same, the three accused appealed to the High Court.

3. The Appellant, inter alia, raised the defence before the High Court that he was aged less than 18 years at the time of commission of the offence, i.e. 14.09.2000, and hence was entitled to the benefit of the provisions of the Juvenile Justice (Care and Protection of Children) Act, 2000 (in short, "the 2000 Act"). The High Court, however, rejected such contention and affirmed the conviction of the three accused, including the Appellant.

4. Aggrieved by the above judgment, the Appellant filed the instant appeal, inter alia raising the plea of juvenility again. The Appellant relied upon a transfer certificate issued in his favour by the Dayanand Middle School, Sohna, Gurgaon which showed his date of birth to be 12.07.1984. He also relied upon a certificate issued by the Government Senior Secondary School (Boys), Sohna which showed his date of birth to be the same. It was submitted by the Appellant before this Court that the certificates in question prima facie entitled him to claim the conduct of an inquiry in terms of

Section 7A of the 2000 Act. The Appellant referred to the decisions of this Court in Murari Thakur v. State of Bihar, (2009) 16 SCC 256, Dharambir v. State (NCT of Delhi), (2010) 5 SCC 344, and Jitendra Singh @ Babboo Singh v. State of U.P., (2010) 13 SCC 523.

5. Keeping in mind such circumstances and the certificates relied upon, this Court vide order dated 09.08.2012 directed the Registrar (Judicial) of this Court to conduct an inquiry in respect of the age of the Appellant in terms of Section 7A of the 2000 Act read with the rules framed thereunder, and to submit a report to this Court within four months from the order.

6. This Court received such report on 07.01.2013, which determined that the age of the Appellant was 16 years, 2 months and 2 days at the time of commission of the offence and that he was thus a juvenile at that time. Thereafter, arguments were heard and judgement reserved. However, subsequently, the State raised the argument that the Court had not looked into the question of whether the plea of juvenility as decided by the Registry of this Court should be given precedence over the view of the High Court. By an order dated 25.04.2014, this Court directed that the appeal be heard further. Shri Siddhartha Dave was subsequently appointed as amicus curiae to assist the Court.

7. It was submitted by the learned amicus curiae that the learned Registrar (Judicial) of this Court had, after duly calling for records and appreciating the material adduced, reached the conclusion that the Appellant was a juvenile at the time of commission of the offence, and there was no reason to deny the Appellant the benefit of such finding. Moreover, he submitted that seeing that it was upon the direction of this Court that the learned Registrar had conducted the inquiry under Section 7A of the 2000 Act and the rules framed thereunder, and had submitted his report to this Court after conducting such inquiry in accordance with law, the report may be treated as having been made by this Court itself.

8. Heard the learned amicus curiae and advocate for the State, and perused the material on record.

9. It is by now well-settled, as was held in Hari Ram v. State of Rajasthan, (2009) 13 SCC 211, that in light of Sections 2(k), 2(l), 7A read with Section 20 of the 2000 Act as amended in 2006, a juvenile who had not completed eighteen years on the date of commission of the offence is entitled to the benefit of the 2000 Act (also see Mohan Mali v. State of Madhya Pradesh, (2010) 6 SCC 669; Daya Nand v. State of Haryana, (2011) 2 SCC 224; Dharambir v. State (NCT) of Delhi (supra); Jitendra Singh @ Babboo Singh v. State of Uttar Pradesh, (2013) 11 SCC 193). It is equally wellsettled that the claim of juvenility can be raised at any stage before any Court by an accused, including this Court, even after the final disposal of a case, in terms of Section 7A of the 2000 Act (see Dharambir v. State (NCT) of Delhi, (supra), Abuzar Hossain v. State of West Bengal, (2012) 10 SCC 489; Jitendra Singh @ Babboo Singh v. State of UP, (supra); Abdul Razzaq v. State of Uttar Pradesh, (2015) 15 SCC 637).

10. In light of the above legal position, it is evident that the Appellant would be entitled to the benefit of the 2000 Act if his age is determined to be below 18 years on the date of commission of the offence. Moreover, it would be irrelevant that the plea of juvenility was not raised before the Trial Court, in light of Section

7A. As per the report of the inquiry conducted by the Registrar (Judicial) of this Court, in this case, the Appellant was below 18 years of age on the date of commission of the offence. The only question before us that needs to be determined is whether such report may be given precedence over the contrary view taken by the High Court, so that the benefit of the 2000 Act may be given to the Appellant.

11. Before proceeding further, it would be useful to refer to Section 7A of the 2000 Act and Rule 12 of the Juvenile Justice (Care and Protection of Children) Rules, 2007 (in short, "the 2007 Rules"), which deal with the making of an inquiry by the Court in case of a claim of juvenility. Section 7A of the 2000 Act is as follows:

"7A. Procedure to be followed when claim of juvenility is raised before any court-- (1) Whenever a claim of juvenility is raised before any court or a court is of the opinion that an accused person was a juvenile on the date of commission of the offence, the court shall make an inquiry, take such evidence as may be necessary (but not an affidavit) so as to determine the age of such person, and shall record a finding whether the person is a juvenile or a child or not, stating his age as nearly as may be:

Provided that a claim of juvenility may be raised before any court and it shall be recognised at any stage, even after final disposal of the case, and such claim shall be determined in terms of the provisions contained in this Act and the rules made thereunder, even if the juvenile has ceased to be so on or before the date of commencement of this Act.

(2) If the court finds a person to be a juvenile on the date of commission of the offence under subsection (1), it shall forward the juvenile to the Board for passing appropriate orders and the sentence, if any, passed by a court shall be deemed to have no effect." (emphasis supplied)

12. Sub-rule (3) of Rule 12 of the 2007 Rules states the following regarding the procedure to be followed for age determination:

"In every case concerning a child or juvenile in conflict with law, the age determination inquiry shall be conducted by the court or the Board or, as the case may be, the Committee by seeking evidence by obtaining -

(a) (i) the matriculation or equivalent certificates, if available; and in the absence whereof;

(ii) the date of birth certificate from the school (other than a play school) first attended; and in the absence whereof;

(iii) the birth certificate given by a corporation or a municipal authority or a panchayat;

(b) and only in the absence of either (i), (ii) or (iii) of clause (a) above, the medical opinion will be sought from a duly constituted Medical Board, which will declare the age of the juvenile or child. In case exact assessment of the age cannot be done, the Court or the Board or, as the case may be, the Committee, for the reasons to be recorded by them, may, if considered necessary, give benefit to the child or juvenile by considering his/her age on lower side within the margin of one year, and while passing orders in such case shall, after taking into consideration such evidence as may be available, or the medical opinion, as the case may be, record a finding in respect of his age and either of the evidence specified in any of the clauses (a)(i), (ii), (iii) or in the absence whereof, clause (b) shall be the conclusive proof of the age as regards such

child or the juvenile in conflict with law." (emphasis supplied)

13. It is evident from a perusal of the above that if any Court, including this Court, is of the opinion that an accused person was a juvenile on the date of commission of the offence, or if a claim of juvenility is raised before it, the Court must conduct an inquiry regarding the determination of the age of the accused. The evidence collected by way of such inquiry, as is specified in clauses (a)(i), (ii), and (iii) of Rule 12(3), or in the absence whereof, clause (b) of the same, is treated as conclusive proof of the age of the accused. In such a situation, it would be clear that such an inquiry conducted by this Court would be given precedence over a view of the age of the accused taken by the High Court. It is relevant to note here itself that in this case, the High Court decided the issue merely upon an assessment of the material on record without resorting to the procedure governing inquiries for the determination of age as laid out in Section 7A of the 2000 Act and Rule 12 of the 2007 Rules.

14. At this point, it is necessary to briefly discuss the findings of the High Court in the impugned judgment regarding the age of the accused to underscore that it has not conducted the inquiry stipulated as per Section 7A and Rule 12. Before the High Court, the Appellant submitted a report of the Assistant Commissioner of Police, Bhondsi, Gurgaon to the effect that his date of birth was 12.07.1984, thereby claiming the benefit of the 2000 Act. This plea was rejected on the grounds of failure to raise the plea of juvenility before the Trial court; nonproduction of birth certificate in spite of an opportunity being granted to do so; absence of the Appellant's name in the birth register dated 12.07.1984 and for the years 198384 and 1984-85; non-corroboration of the date of birth certificates issued by schools attended by the Appellant through other documentary evidence; non-matching of the name on such certificates (Raj Kumar) with the name of the Appellant as brought on record (Raju); and non-corroboration of the address of the Appellant through such certificates, which simply stated that the date of birth of the student named Raj Kumar was 12.07.1984.

15. The High Court evidently did not even frame its discussion in terms of whether the evidence brought on record was sufficient to conduct an inquiry under the 2000 Act and the 2007 Rules, let alone order and conduct such an inquiry. On the contrary, it simply recorded that the evidence did not go to show that the Appellant was a juvenile at the time of the commission of the offence, and proceeded to affirm the conviction of the Appellant on merits.

16. Therefore, it is evident that the only inquiry as stipulated under the 2000 Act and the 2007 Rules was conducted by the Registrar (Judicial) upon the directions of this Court, after the Court was satisfied upon going through the school certificates adduced by the Appellant that the certificates in question prima facie entitled him to claim the conduct of such an inquiry. In such a situation, the question regarding whether precedence may be given to the inquiry of a Registrar (Judicial) of this Court over the opinion of the High Court regarding the age of an accused can be restated as whether such inquiry conducted by the Registrar (Judicial) upon the direction of this Court, if thereafter affirmed by this Court, would amount to an inquiry conducted by this Court itself. If this be the case, the findings of such inquiry would prevail over the view taken by the

High Court, as is evident from the preceding discussion.

17. We are of the opinion that the above question must be answered in the affirmative. This Court, on previous occasions as well, has adopted the practice of directing the Registrar (Judicial) to conduct the inquiry in terms of Rule 12 of the 2007 Rules on behalf of this Court, and accepted the findings made therein (see Dharambir v. State (NCT) of Delhi, (supra). Seeing that the Registrar (Judicial) is a District Judge serving on deputation at the Supreme Court, recourse to his or her assistance in the form of collecting evidence and arriving at a finding regarding the claim of juvenility of the person concerned may be undertaken by this Court in order to save its judicial time. However, it must be stressed that the findings in an inquiry conducted by the Registrar (Judicial) would not per se prevail upon a contrary view taken by the High Court. Only after this Court applies its judicial mind to such report with due regard to the confines of the procedure stipulated in Section 7A of the 2000 Act and Rule 12 of the 2007 Rules, and only if it thereafter confirms the findings in such report would the same prevail upon a contrary view taken by the High Court which is not based upon any such inquiry."

In view of the said circumstances, the Hon'ble Apex Court has held that while disposing of the application of the accused claiming juvenality, an inquiry under Section 7A of the 2000 Act is mandatory and the application cannot be disposed of any slip short manner."

(8) Another case law of this Court cited on behalf of appellant reported in ***[2018 (3) JIC 74 (All)] Mohd. Yunus v. State of U.P. & Anr.***, wherein this Court has held as under:

"8. The above provisions shows that the procedure to be followed under J.J. Act in conducting an inquiry is the procedure laid down in the statute itself. We cannot import other procedure laid down in the Code of Criminal Procedure or any other enactment while making inquiry with regard to the juvenility of a person. The age determination inquiry contemplated under J.J. Act and Rules has nothing to do with an inquiry under any other legislation. There may be situation where the entry made in the Matriculation or equivalent certificates, date of birth certificate from school first attended and even birth certificate given by a corporation or a municipal authority, or a panchayat may not be correct, but the Court or the Juvenile Justice Board or the Committee functioning under J.J. Act is not expected to conduct such a roving inquiry and to go behind those certificates to examine correctness of those documents, kept during normal course of business. In Ashwani Kumar Saxena (supra), it has been observed by the Apex Court that in this situation, only in cases where those documents/certificates are found to be fabricated or manipulated, the Court, Juvenile Justice Board or the Committee need to go for medical report for age determination. In the present case, the Transfer Certificate of NAS Inter College, Meerut from where High School was done by the accused- Asif Saifi is also available on record which shows that Neetu Bal Academy, Junior High School was the earlier school of accused. The T.C. of Neetu Bal Academy aforesaid is also on record which shows that accused Asif Saifi passed out 6th,7th and 8th classes from the School and in that T.C. also the date of birth is mentioned as 01.06.2000. In the case of Parag Bharti (Juvenile) Vs. State of U.P. Passed in Criminal Appeal no. 486 of 2016 arising out of SLP No. 5893 of 2013, the Apex Court has considered so many

decisions including the decision given in the case of Om Prakash Vs. State of Rajsthan (Supra) relied upon by the revisionist and it has been observed that it is a settled proposition of law that if the Matriculation or equivalent certificates are available and there is no other material to prove the correctness, the date of birth mentioned in the Matriculation Certificate has to be treated as a conclusive proof of the date of birth of the accused.

9. This Court is of the view that in the situation of present case, there was no necessity for medical examination of the accused as the inquiry was confined to the provisions of J.J. Act and Rules. In Ashwani Kumar Saxena (supra) the inquiry was conducted even there was High School Certificate on record. The Apex Court has deprecated the procedure adopted as in the present case by the Court below . In the facts and circumstances of the present case, the law cited by learned Counsel for the revisionist do not help him.

10. In view of discussions made above, this Court comes to the conclusion that the learned Appellate Court has dealt with the question of juvenility as per the procedure laid down in the J.J. Act and Rules and has rightly relied upon the date of birth mentioned in the High School Certificate, according to which the accused Asif Saifi is minor. I find no justifiable ground for making any interference in the impugned order.

11. Hence, this revision fails and is hereby dismissed. "

(9) In view of above, the trial court has committed manifest error in disposing of the application of the revisionist without holding an inquiry as stated above, so the revision is liable to be allowed.

(10) Accordingly, the revision is allowed. Order impugned dated 13.09.2018 passed by Fourth Additional Session Judge, Sultanpur passed in Session Trial No.433 of 2014 (State Versus Kamruddin and others) by which application for declaration of juvenile has been rejected by him arising from Case Crime No.255 of 2014, under Sections 302/34, 120B of I.P.C. and 3/25 Arms Act relating to Police Station - Dostpur, District - Sultanpur is set aside and the matter is remanded back to the trial court to decide the matter afresh in the lite of observation made above and conduct an inquiry under Section 7A of the Act, 2000 after giving opportunity of hearing to the revisionist.

(11) Since the matter is old one, it is expected that the inquiry shall be conducted without granting unnecessary adjournment to either of the parties.

(2020)02ILR A850

REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 22.11.2019

BEFORE
THE HON'BLE NARENDRA KUMAR JOHARI, J.

Criminal Revision No. 1451 of 2017

Kuldeep(Minor) ...Revisionist (In Jail)
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Revisionist:
Sri Umesh Yadav, Sri Awadhesh Kumar, Sri Babu Lal Ram, Sri Nayab Ahmad Khan, Sri Ravindra Sharma

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

A. Criminal Law-Code of Criminal Procedure,1973-Section 397/401 & Indian Penal Code,1860-Sections 302, 411, 394, 34, 120-B- grant of bail to juvenile-rejection of bail by lower court-However, Section 12(1) provides for bail to a child in conflict with law-juvenile justice Act is meant for minors who are innocent law breakers-accused-juvenile granted bail on his father furnishing a personal bond with two sureties.(Para 11 to 22)

B. Section 12(1) of juvenile justice act provides for If release is likely to bring that person into association with any known criminal or be exposed to any moral, physical or psychological danger or the person's release would defeat the ends of justice. Board shall record the reasons for denying bail.(Para 11)

Criminal Revision allowed.(E-6)

List of Cases Cited:

1. Sanjay Chaurasia Vs. St. Of U.P.(2006) Cr.L.J. 2957

2. A.Juvenile Vs. St. Of Orissa,(2009)Cr.L.J.,2002

3. Sunil Kumar Sambhudayal Gupta Vs. St. Of Mah. (2011) 72 ACC 699

4. Amit Kumar Vs. St. Of U.P. (2010) 3 J.I.C. 768 (All)

(Delivered by Hon'ble Narendra Kumar Johari, J).)

1. The instant Revision has been filed on behalf of Revisionist-Kuldeep (minor) S/o Gautam through his uncle Subhash Chandra S/o Jiv Rakkhan, against the order dated 16.03.2017 passed by Additional Sessions Judge, Court No.1, Jaunpur in Criminal Appeal No.37 of 2017 (Kuldeep Vs. State), arising out of Case Crime No.664 of 2016, under Section 302, 411, 394, 34, 120-B I.P.C., Police Station-Kheta Sarai, District-Jaunpur.

2. Heard learned counsel for the revisionist, learned A.G.A. for the State and perused the record.

3. Opposite party no.2 has been served personally, but he did not turn up before this Court.

4. The fact of the case in brief is that complainant-Ram Teerath has lodged the F.I.R. on 19.09.2016 at about 11.30 a.m. stating that his maternal brother-Lalji is a teacher in Delhi. At present, Lalji along with his mother-Bhagirathi and son-Rinku is residing at Delhi. His wife-Sudama Devi is alone residing in her house at Lakhmapur. Lalji telephonically called complainant and said that he could not talk to his wife, as mobile-phone of his wife-Sudama Devi is switched off for last 2-3 days. He further directed him to go his residence and arrange talks with his wife. On the request of Lalji, complainant along with Gautam, son of Jiv Rakkhan went at the residence of Sudama Devi, he found that room was locked. He watched through window, then he saw that Sudama Devi was lying on the bed in dead condition. There was cut mark on her neck. There was dispute of Sudama Devi regarding the agricultural land and pathway with Vishram, Sochan, Mahendra, Surendra, Revindra and Virendra Kumar, all residents of the same village. Resultantly, they all have murdered Sudama Devi. He created doubt on Ravindra and Virendra Kumar, residents of Lakhmapur also.

5. On the aforesaid F.I.R., investigation was started. During investigation, the name of Gautam Kumar, his wife-Chandrama Devi and son-

Kuldeep came into light for committal of murder and Police recovered mobile-phone, ornaments of deceased from them. The weapon-knife has also been recovered. Accordingly, they have been arrested by the police.

6. Revisionist approached Juvenile Justice Board stating that at the time of incident he was minor. Principal Magistrate Juvenile Justice Board vide order dated 05.01.2017 declared him minor as on 19.09.2016 i.e. on date of occurrence, his age was 16 years 2 months 9 days. Revisionist further moved application for granting bail which was rejected by Principal Magistrate, Juvenile Justice Board, Jaunpur on 09.02.2017. Against the said rejection order, revisionist approached Session Court by way of Criminal Appeal No.37 of 2017. Lower appellate court heard the appeal on merits and rejected the same vide order dated 16.03.2017. Against the said rejection order, the instant revision has been filed.

7. Learned counsel for the revisionist has submitted that the mother of revisionist-Smt. Chandrama Devi was released on bail on 08.02.2017 and his father Gautam was also released on bail on 28.02.2017 in Case Crime No.664 of 2016. The present revision has been filed through uncle of minor revisionist on 24.04.2017.

8. Learned counsel for the revisionist has further submitted that revisionist has falsely been implicated in the present case. He has no other previous criminal history. He has not been named in F.I.R. also. There was no motive to commit offence. The mobile-phone as shown recovered from the possession of revisionist has been planted falsely with connivance with real culprit. During the course of the proceedings, Gautam Kumar, father of revisionist has given affidavit on 22.04.2019 stating that if his son be released on bail, he will supervise him and will provide better atmosphere and education him and he will assure that his son will not misuse the liberty on bail and he will not be involved in any criminal activities. Revisionist has been kept in observation home since 04.10.2016. The case of revisionist is still pending in Juvenile Justice Board.

9. Learned counsel for the revisionist has also submitted that Principal Magistrate, Family Court considered the nature of offence and mentioned that there exists reasonable grounds to believe that there is likelihood of minor coming into association with criminals. The observation of learned Principal Judge, Family Court is baseless. There is nothing on record which may indicate any reasonable grounds for so belief. Learned appellate court has rejected the appeal on the ground that the parents of revisionist are accused in the case, if revisionist be released on bail he will fall in their association. The observation of learned appellate court is also erroneous and against the principles of law. The orders of both the courts are based upon the surmises and conjectures.

10. Per contra, learned A.G.A. has contended that considering the nature of the offence, the revision is liable to be dismissed. It has also been argued that the parent of revisionist have committed a heinous offence in which juvenile was also involved. If juvenile will be released on bail he will remain with his parent, then in that case their son (revisionist) will inclined towards criminal mentality. The

order passed by the Juvenile Justice Board in declining the bail and also the order passed by appellate court upholding the order of Principal Magistrate, Juvenile Justice Board are based on materials on record.

11. Before dealing with the matter, it would be appropriate to take into account Section 12 of Juvenile Justice (Care and Protection of Children) Act, 2015 which is reproduced as under:-

"12. Bail to a person who is apparently a child alleged to be in conflict with law. *1.When any person, who is apparently a child and is alleged to have committed a bailable or non-bailable offence, is apprehended or detained by the police or appears or brought before a Board, such person shall, notwithstanding anything contained in the Code of Criminal Procedure, 1973 or in any other law for the time being in force, be released on bail with or without surety or placed under the supervision of a probation officer or under the care of any fit person:*

Provided that such person shall not be so released if there appears reasonable grounds for believing that the release is likely to bring that person into association with any known criminal or expose the said person to moral, physical or psychological danger or the person's release would defeat the ends of justice, and the Board shall record the reasons for denying the bail and circumstances that led to such a decision.

2. When such person having been apprehended is not released on bail under subsection (1) by the officer-in-charge of the police station, such officer shall cause the person to be kept only in an observation home in such manner as may be prescribed until the person can be brought before a Board.

3. When such person is not released on bail under sub-section (1) by the Board, it shall make an order sending him to an observation home or a place of safety, as the case may be, for such period during the pendency of the inquiry regarding the person, as may be specified in the order.

4. When a child in conflict with law is unable to fulfill the conditions of bail order within seven days of the bail order, such child shall be produced before the Board for modification of the conditions of bail."

12. According to the provisions of Section 12 (1), the wording used "notwithstanding anything contained in the Code of Criminal Procedure or in any other law for the time being in force" is non-obstante clause which has been used by legislation, therefore, the delinquent juvenile may be released on bail irrespective of the provisions of Code of Criminal Procedure. The exception of such release has been mentioned in proviso of Section 12 (1) i.e. if there appears reasonable grounds for believing that release is likely to bring the juvenile into association of known criminals or expose the said juvenile to moral, physical or psychological danger or the person's release would defeat ends of justice.

13. The Act, namely, Juvenile Justice (Care and Protection of Children) Act, 2015 being beneficiary and social reforms oriented legislation, should be given full effect by all concerned whenever matters relating to juvenile comes for consideration before them. There must be any material or evidence reflecting reasonable ground to believe that delinquent juvenile, if released on bail is likely to fall into association with known

criminal persons or such liberty may expose him to moral, physical or psychological danger, or his release would defeat the ends of justice. In absence of such reasonable grounds the bail of juvenile should not be refused. In **Sanjay Chaurasia Vs. State of U.P. 2006 Cr.L.J. 2957** it has been observed that:-

"10. In case of the refusal of the bail, some reasonable grounds for believing above-mentioned exceptions must be brought before the Courts concerned by the prosecution but in the present case, no such ground for believing any of the above-mentioned exceptions has been brought by the prosecution before the Juvenile Justice Board and Appellate Court. The Appellate Court dismissed the appeal only on the presumption that due to commission of this offence, the father and other relatives of other kidnapped boy had developed enmity with the revisionist, that is why in case of his release, the physical and mental life of the revisionist will be in danger and his release will defeat the ends of justice but substantial to this presumption no material has been brought before the Appellate Court and the same has not been discussed and only on the basis of the presumption, Juvenile Justice Board has refused the Bail of the revisionist which is in the present case is unjustified and against the spirit of the Act. It appears that the impugned order dated 27.06.2005 passed by the learned Sessions Judge, Meerut and order dated 28.05.2005 passed by the Juvenile Justice Board are illegal and set aside."

14. Learned Magistrate by its order dated 09.02.2017 has rejected the bail of revisionist mentioning that the offence committed by juvenile is heinous and non-bailable in nature.

15. In the case of **A. Juvenile** Vs. **State of Orissa, 2009 Cr.L.J., 2002**, it has been held that:

"(6) A close reading of the aforementioned provision shows that it has been mandated upon the Court to release a person who is apparently a juvenile on bail with or without surety, howsoever heinous the crime may be and whatever the legal or other restrictions containing in the Cr.P.C. or any other law may be. The only restriction is that if there appears reasonable grounds for believing that his release is likely to bring him into association with any moral, physical or psychological danger or his release would defeat the ends of justice, he shall not be so released."

16. During enquiry before Juvenile Justice Board, District Probation Officer, Jaunpur has submitted his report indicating that " the social status of juvenile's family is general." Juvenile has good relation with their neighbours. There is no criminal history of juvenile. Elder brother of juvenile is studying at Delhi. The family of juvenile is simple. Involvement of juvenile in offence is doubtful.

17. So far as the reason as indicated by learned Sessions Judge while rejecting the appeal that the parent of delinquent juvenile is also involved in offence as accused, if the juvenile will be released under the supervision of his parents, he will fall in their company which is not good. So far as the observation of appellate court is concern. It is also be kept in mind that although father is involved as accused in the Crime No.664 of 16, yet the trial has not been concluded. This fact has not been disputed by learned A.G.A. It is the cardinal principle of

criminal jurisprudence that unless and until the offence is proved, every accused shall be kept in the rank of innocence.

18. In the case of **Sunil Kumar Sambhudayal Gupta Vs. State of Maharastra 2011 (72) ACC 699** Hon'ble Apex Court has held that:-

"Every accused is presumed to be innocent unless his guilt is proved. The presumption of innocence is a human right. Subject to the statutory exceptions, the said principle forms the basis of criminal jurisprudence in India. The nature of the offence, its seriousness and gravity has to be taken into consideration.

The Appellate Court should bear in mind the presumption of innocence of the accused, and further, that the Trial Court's acquittal bolsters the presumption of his innocence. Interference with the decision of the Trail Court in a casual or cavalier manner where the other view is possible should be avoided, unless there are good reasons for such interference."

19. No criminal history of his parent has been shown, therefore, in my opinion, the parent of accused will not be treated as "known criminal." The father is natural guardian of delinquent juvenile. The report of District Probation Officer indicates that the delinquent was also a student of class 11th at the time of occurrence. Their another son is already taking education in Delhi. The above fact indicates that the parent of delinquent intends to provide education to their children which is for betterment in their life.

20. A perusal of District Probation Officer's report goes to show that nothing has been written against revisionist in enquiry regarding him as it has been provided in Section 12 (1) of the Act. The bail of the delinquent juvenile could be rejected only on the exigencies or of the grounds mentioned in above exception. Similar view has been expressed in **Amit Kumar Vs. State of U.P. reported in 2010 (3) J.I.C. 768 (All)** and **Naurang Vs. State of U.P. 2010 (71) A.C.C. 255 (All).**

21. Keeping in view the fact of the case, arguments advanced by learned counsel for the parties and legal provisions, I find that in present revision no ground is available on the record on the basis of which application of juvenile could be dismissed. Hence, the revision deserves to be allowed. The order dated 09.02.2017 passed by Principal Magistrate, Juvenile Justice Board, Jaunpur and order dated 16.03.2017 passed by Appellate Court are not sustainable in law. Both the courts below could not appreciate the legal position while rejecting bail application of delinquent juvenile.

22. Consequently, the revision is **allowed**. The aforesaid impugned orders of Principal Magistrate, Juvenile Justice Board and Appellate Court are set aside.

23. It is directed that the revisionist shall be released on bail executing personal bond by his natural guardian/father with two solvent sureties each in the like amount to the satisfaction of Principal Magistrate, Juvenile Justice Board, Jaunpur with the stipulation that on subsequent dates of hearing, he shall produce the delinquent juvenile before the Board during the pendency of the matter. His guardian/father shall also submit an undertaking before the Board that he shall keep proper control and look after the

juvenile. He will keep away him from the company of known criminals and will try to improve his future. In case of default, the Board would be competent to cancel the bail of revisionist after giving opportunity of hearing to him.

(2020)02ILR A856

REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 07.01.2020

BEFORE
THE HON'BLE RAJENDRA KUMAR-IV, J.

Criminal Revision No. 2045 of 2017

Smt. Kamla Devi & Ors. ...Revisionists
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Revisionists:
Sri Udai Karan Saxena, Sri A.K. Singh Solanki, Sri Pashali Slolanki

Counsel for the Opposite Parties:
A.G.A., Sri Birendra Singh, Sri Niklank Kumar Jain, Sri Pardeepta Kr. Shahi, Sri Pradeep Kumar

A. Criminal Law-Code of Criminal Procedure,1973-Section 397/401 & Indian Penal Code, 1860-Sections 307,326,504 & Code of Criminal Procedure,1973-Section 319-accused subsequently impleaded is to be treated as if he had been an accused when the court initially took cognizance of the offence-degree of satisfaction of Court for summoning the accused ,the test are same as applicable for framing charge-Hence,dismissed.(Para 11 to 14)

B. Power u/s 319 Cr.P.C. can be exercised by Court against a person in FIR r no chargesheet is filed by Police against him and the accused can be summoned only on the basis of examination-in-chief of witness and need not wait for cross-examination etc.(Para 11)

Criminal Revision dismissed. (E-6)

List of Cases Cited:-

1. Anil Arya Vs. St. Of U.P. & Ors., Cr.Rev. No. 1216 of 2005

2. Hardeep Singh Vs. St. Of Punjab & Ors. (2014) 3 SCC 92

3. Dharam Pal & Ors. Vs. St. Of Haryana & Anr. (2004) 13 SCC 9

(Delivered by Hon'ble Rajendra Kumar-IV, J).)

1. Heard Sri A.K. Singh Solanki, learned counsel for revisionists and Sri Pradeep Kumar, learned counsel Opposite Party No.2 and learned AGA for State and perused the material available on record.

2. Revision is directed against the impugned order dated 11.05.2017, passed by Additional District and Sessions Judge, Court No.3, Etah, in Sessions Trial No. 9 of 2016 (Crime No. 630 of 2014) State v. Sher Bahadur, whereby Trial Court invoking jurisdiction under Section 319 Cr.P.C. allowed the application paper No. 20(A) and summoned the accused-revisionist for facing trial in Crime No. 630 of 2014 under Sections 307, 326 and 504 IPC, Police Station Aliganj, District Etah.

3. Brief facts giving rise to present revision are that Informant-Pravendra Singh submitted a written Tehrir before the Police Station Aliganj, District Etah stating that on 22.10.2014 accused-Kamla Devi provoked other co-accused to open fire with intention to kill when Shakti Singh, Bhakti Singh and Sher Bahadur came there. Accused-Shakti Singh and Bhakti Singh opened fire on victim

Shailendra Singh and Informant. Accused Sher Bahadur, Shakti Singh and Bhakti Singh chased them. Victim Shailendra Singh received serious gun shot injuries whereas informant got injured.

4. On the basis of written Tehrir, case was registered as Case Crime No. 630 of 2014, under Sections 307 and 504 IPC against four persons including the accused revisionists. Medical of injured persons were done on 22.10.2019. After investigation, Investigating Officer submitted charge-sheet against one Sher Bahadur Singh only exonerating accused-revisionists. During trial PW-1 (Pravendra Singh), PW-1 (Shailendra) were recorded and on the application of Informant, Trial Court passed impugned order.

5. Feeling aggrieved and dissatisfied with the impugned order, present revision is filed.

6. Learned Counsel for revisionist submits that revisionists have been falsely implicated on account of enmity; all the four persons are of one family; revisionist Nos. 2 and 3 are serving outside and on this count only, they have been implicated in the FIR. Investigating Officer did not find any evidence against the revisionist, therefore, exonerating them he filed charge-sheet only against one accused i.e. Sher Singh. It is further contended by him that accused persons are innocent, Trial Court did not appreciate evidence in the right perspective and there is no evidence to connect him with the present case. He pointed out on some documents in support of his contention.

7. On the other hand, learned counsel for respondents supported the impugned order and submitted that accused is named in the FIR. On the application of Informant, under Section 319 Cr.P.C. Trial Court rightly summoned the accused-revisionist for facing trial with other co-accused. During trial, PW-1 and PW-2 supported the prosecution case in the Court. Statement of PW-1 and 2 are not annexed by the revisionist but as per impugned order it clearly shows the involvement of accused-revisionist in the incident and they have active participation in the crime.

8. Section 319 of The Code Of Criminal Procedure, 1973 reads as under :-

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

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

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

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

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

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

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

9. In **Anil Arya v. State of U.P. and Others, Criminal Revision No. 1216 of 2005, decided on 09.09.2016**, this Court held as under :-

"Whether evidence is correct or not or credible enough or not to sustain conviction and punishment is a matter which would be seen after revisionist put in appearance, lead evidence and thereafter Trial Court examine the entire evidence and record its finding thereon, but at the stage of summoning of revisionist on the basis of aforesaid statement in Trial under Section 319 Cr.P.C., the probable defence of accused summoned under Section 319 Cr.P.C. cannot be examined for the first time in a revisional jurisdiction by this Court."

10. In **Hardeep Singh Vs. State of Punjab and others 2014 (3) SCC 92**, Court examined following five questions:

"(i) What is the stage at which power under Section 319 Cr.P.C. can be exercised?

(ii) Whether the word "evidence" used in Section 319 (1) Cr.P.C. could only mean evidence tested by cross-examination or the court can exercise the power under the said provision even on the basis of the statement made in the examination-in-chief of the witness concerned?

(iii) Whether the word "evidence" used in Section 319(1) Cr.P.C. has been used in a comprehensive sense and includes the evidence collected during investigation or the word "evidence" is limited to the evidence recorded during trial?

(iv) What is the nature of the satisfaction required to invoke the power under Section 319 Cr.P.C. to arraign an accused? Whether the power under Section 319(1) Cr.P.C. can be exercised only if the court is satisfied that the accused summoned will in all likelihood be convicted?

(v) Does the power under Section 319 Cr.P.C. extend to persons not named in the FIR or named in the FIR but not charged or who have been discharged?"

11. The aforesaid questions have been answered in para 117 of judgment as under :-

Question Nos. (i) and (iii)

A. **In Dharam Pal and Ors. v. State of Haryana and Anr. 2004 (13) SCC 9**, the Constitution Bench has already held that after committal, cognizance of an offence can be taken against a person not named as an accused but against whom materials are available from the papers filed by the police after completion of investigation. Such cognizance can be taken under Section 193 Cr.P.C. and the Sessions Judge need not wait till 'evidence' under Section 319 Cr.P.C. becomes available for summoning an additional accused.

Section 319 Cr.P.C., significantly, uses two expressions that have to be taken note of i.e. (1) Inquiry (2) Trial. As a trial commences after framing of charge, an inquiry can only be understood to be a pre-trial inquiry. Inquiries under Sections 200, 201, 202 Cr.P.C.; and under Section 398 Cr.P.C. are

species of the inquiry contemplated by Section 319 Cr.P.C. Materials coming before the Court in course of such enquiries can be used for corroboration of the evidence recorded in the court after the trial commences, for the exercise of power under Section 319 Cr.P.C., and also to add an accused whose name has been shown in Column 2 of the charge-sheet.

In view of the above position the word 'evidence' in Section 319 Cr.P.C. has to be broadly understood and not literally i.e. as evidence brought during a trial.

Question No. (ii)

A. Considering the fact that under Section 319 Cr.P.C. a person against whom material is disclosed is only summoned to face the trial and in such an event under Section 319(4) Cr.P.C. the proceeding against such person is to commence from the stage of taking of cognizance, the Court need not wait for the evidence against the accused proposed to be summoned to be tested by cross-examination.

Question No. (iv)

A. Though under Section 319(4)(b) Cr.P.C. the accused subsequently impleaded is to be treated as if he had been an accused when the Court initially took cognizance of the offence, the degree of satisfaction that will be required for summoning a person under Section 319 Cr.P.C. would be the same as for framing a charge. The difference in the degree of satisfaction for summoning the original accused and a subsequent accused is on account of the fact that the trial may have already commenced against the original accused and it is in the course of such trial that materials are disclosed against the newly summoned accused. Fresh summoning of an accused will result in delay of the trial therefore the degree of satisfaction for summoning the accused (original and subsequent) has to be different.

Question No. (v)

A. A person not named in the FIR or a person though named in the FIR but has not been charge-sheeted or a person who has been discharged can be summoned under Section 319 Cr.P.C. provided from the evidence it appears that such person can be tried along with the accused already facing trial. However, insofar as an accused who has been discharged is concerned the requirement of Sections 300 and 398 Cr.P.C. has to be complied with before he can be summoned afresh.

12. The aforesaid judgment in fact lay down very clearly that power under Section 319 Cr.P.C. can be exercised by Court against a person not named in First Information Report or no charge-sheet is filed by Police against him and the accused can be summoned only on the basis of examination-in-chief of witness and need not wait for cross-examination etc. With regard to degree of satisfaction of Court for summoning the accused under Section 319 Cr.P.C, Court has said that test are same as applicable for framing charge.

13. From the above discussion, it is clear that order of summoning has been passed by Court below in view of evidence placed before it in the form of statement of informant-PW-1 and PW-2 along with other material. I, therefore, do not find any legal or otherwise error in the impugned summoning order warranting interference in this criminal revision.

14. Dismissed.

15. Interim order, if any, stands vacated.

16. Certify this judgment to the lower Court immediately.

(2020)02ILR A860

REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 17.12.2019

BEFORE
THE HON'BLE RAM KRISHNA GAUTAM, J.

Criminal Revision No. 2226 of 2019

Madan Singh ...Revisionist
Versus
State of U.P. & Ors. ...Opposite Parties

Counsel for the Revisionist:
Sri Kamal Dev Rai

Counsel for the Opposite Parties:
G.A.

A. Criminal Law-Code of Criminal Procedure,1973-Sections 397/401 & Setion 156(3),203-complaint dismissed-Magistrate is empowered either for dismissal of the complaint or summoning of accused persons on the basis of evidence collected in the inquiry, by way of application of judicial mind-in the instant case dismissal of complaint is well within jurisdiction of the Magistrate-Hence, dismissed.(Para 6 to 10)

Criminal Revision dismissed.(E-6)

List of Cases Cited:

1. Ram Babu Gupta Vs. St. Of U.P. & Ors, (2001) 43 ACC 50

2. Sukhwasi Vs. St. Of U.P.,(2007) 59 ACC 739

3. Suresh Chandra Jain Vs. St. Of M.P. & Anr,(2001) 42 ACC 459

4. Aleque Padamsee & Ors Vs. UOI & Ors, (2007) 6 SC 171

(Delivered by Hon'ble Ram Krishna Gautam, J).)

1. As per office report, opposite parties were served with notice, but no counter affidavit got filed.

2. Heard learned counsel for revisionist as well as learned A.G.A. for State.

3. This criminal revision under Section 397/401 Cr.P.C. has been filed by Madan Singh with a prayer for setting aside impugned order dated 11.03.2019, passed by learned Additional Chief Judicial Magistrate, Court No. 8, Farrukhabad, in Complaint Case No. 1756 of 2019 (Madan Singh Versus Jagdish and others), under Section 203 Cr.P.C. and thereby direction to court concerned for reconsidering at the point of summoning.

4. Learned counsel for revisionist argued that in application under Section 156(3) Cr.P.C. was moved for registration and investigation of case. It was treated as complaint, wherein statements under Section 200 and 202 Cr.P.C. were got recorded. Thereafter, complaint was dismissed under Section 203 Cr.P.C., whereas statements were fully intact and cognizable offence was made out. The complainant Madan Singh came in interaction with Jagdish, father-in-law of his nephew Rohit, who was there to attend his first marriage anniversary ceremony, on 22.11.2016, along with his relative Raja Ram and his daughter-in-law Kiran. They pursued for marriage of Mohit with Sheetal. Under their persuasion, complainant along with his family members visited home of accused persons at village Kankapur on 13.12.2016, but they were pressurized for seeing Km. Sheetal in that very night and after it proposal was refused. But a threat of coercion was exercised, whereupon a

golden chain worth Rs.15,000/- with Sarees and other articles along with sweets worth Rs.5,000/- was given. Thereafter complainant could return back at 12 O' Clock in the night. On 05.04.2017, complainant along with Jagdish went to house of accused persons no. 5 to 6, at about 2 P.M. and asked for return of above articles, but he was badly abused. He tried to get the case lodged at police station and after its denial, this complaint was filed. Complainant was examined under Section 200 Cr.P.C. wherein there was complete reiteration of contention of complaint. It was corroborated by testimony recorded under Section 202 Cr.P.C., but even after sufficient evidence, constituting offence punishable, the impugned order of dismissal of complaint was passed. This was failure to appreciate facts and law placed on record, thereby mis-exercise of jurisdiction vested in the court of Magistrate as well as apparent error on the face of record. Hence, this revision.

5. Learned A.G.A. has vehemently opposed the application with this contention that it was highly improbable. Neither boy, for whom bride was selected, was examined nor there is any mark of specification regarding articles given, whereas a case has already been registered against complainant, wherein demand of dowry and refusal of marriage was complained. The order was well within jurisdiction of Magistrate. Hence, this revision be dismissed.

6. From the very perusal of impugned order, it is apparent that Magistrate has rejected the claim regarding registration of case crime number in an application moved under Section 156(3) Cr.P.C. Division Bench of this Court in **Ram Babu Gupta vs. State of U.P. and Ors.; 2001 (43) A.C.C. 50,** and **Sukhwasi Versus State of Uttar Pradesh; 2007 (59) A.C.C. 739** and apex court in **Suresh Chandra Jain Vs. State of Madhya Pradesh and another; 2001 (42) A.C.C. 459** and **Aleque Padamsee and others Vs. Union of India and others; (2007) 6 Supreme Court Cases 171,** has propounded that Magistrate is not bound to direct for registration and investigation of each and every case, wherein application under Section 156(3) Cr.P.C. has been moved. Rather, it may take cognizance by itself and proceed as a complaint case. Hence, this registration of complaint case and thereby proceeding by Magistrate itself over an application moved under Section 156(3) Cr.P.C. was well within jurisdiction of Magistrate.

7. Passing order for summoning under Section 204 Cr.P.C. or dismissing complaint under Section 203 Cr.P.C., on the basis of evidence collected in the inquiry, made by Magistrate, by way of application of judicial mind, is jurisdiction vested in Magistrate. He may either summon under Section 204 Cr.P.C., in cases where prima facie offence are made out, or may dismiss complaint under Section 203 Cr.P.C., wherein situation is otherwise. Hence, Magistrate is empowered either for dismissal of the complaint or summoning of accused persons. Hence, impugned order of dismissal of complaint is well within jurisdiction of the Magistrate.

8. Regarding appreciation of fact, this Court, under exercise of revision jurisdiction is not to analyze the fact. But apparently what is clear, that this complainant made entire sequence of fact, narrated by him, but neither marriage was ever solemnized nor he was father of the

groom nor the groom had been examined nor the specific mark of identification is there on the articles, which was ought to be given nor single iota was said either in the complaint or in the statement recorded under Section 200 Cr.P.C. regarding criminal case, which was lodged against complainant and his family members, for this proposed marriage. It itself shows that it was an attempt to counter the previously instituted case against complainant.

9. A bride is not a physical commodity. It could never be said that one is having option to see her and then select or reject her for marriage. Rather, bride itself is with fundamental rights, guaranteed under Part III of the Constitution of India, and she herself is having all rights of life and liberty. It can never be permitted to male chauvinism to see photograph and then select or reject for marriage, as has been said by complainant. What may be a criteria for selecting a girl for marriage or for rejecting a girl for marriage? that too not by a person with whom marriage is going to be performed, rather his father or uncle, is nothing more than a case of male chauvinism. Hence, on the evidence collected by Magistrate, this impugned order was well within jurisdiction of Magistrate having no illegality or irregularity.

10. Accordingly, the revision merits its dismissal. The revision is **dismissed** as such.

(2020)02ILR A862

REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 20.11.2019

BEFORE
THE HON'BLE RAM KRISHNA GAUTAM, J.

Criminal Revision No. 2490 of 2018

Aftab Alam ...Revisionist
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Revisionist:
Sri Lakshmi Kant Trigunait, Sri Dev Kant Trigunait

Counsel for the Opposite Parties:
A.G.A., Sri Mohammad Maseeh, Sri Wahaj Ahmad Siddiqui

A. Criminal Law-Code of Criminal Procedure,1973-Sections 397/401 & Protection of Woman from Domestic Violence Act,2005-Section 23-challenge to-interim maintenance of Rs. 3000/-was awarded-husband challenged this order before High Court u/s 482 Cr.P.C. ,side by side same was challenged by Appellate court-which too was dismissed-again husband filed criminal revision-this shows litigating attitude of husband, who had filed all these proceeding, but not ready to make payment to his wife-order of lower courts is confirmed by this court directing husband to pay maintenance.Hence, dismissed.

(Para 6 to 8)

Criminal Revision dismissed.(E-6)

The revision is dismissed.

(Delivered by Hon'ble Ram Krishna Gautam, J).)

1. This criminal revision under Section 397/401 of Cr.P.C. has been filed by Aftab Alam against State of U.P. and Another, with a prayer for setting aside impugned order of an appellate Court Additional District Judge F.T.C., Court No. 20, Allahabad, passed in Criminal Appeal No. 184/2017, Aftab Alam vs. State of U.P. and another, dated 13.7.2018, whereby appeal was dismissed and order

of Magistrate dated 3.6.2014, passed over an application moved under Section 23 of Protection of Woman from Domestic Violence Act, 2005, was confirmed.

2. learned counsel for the applicant argued that appellate failed to appreciate facts and law placed before it. Order dated 3.6.2014 was against fact on record. Applicant had deserted her husband and husband who was a workman at petrol pump was not in a position to maintain as above but Magistrate failed to take notice of this fact and this was challenged before Appellate Court. Wherein, Appellate court has not decided matter in issue. Rather, it dismissed appeal on the basis of finding given by this Court in a proceeding under Section 482 of Cr.P.C. Hence, it was apparently erroneous on the face of record and jurisdiction exercised by Appellate Court was not proper in its exercise. Hence, this criminal revision with above prayer.

3. Learned counsel for the respondent vehemently opposed that this Court in a proceeding under Section 482 of Cr.P.C., wherein, order dated 3.6.2014, was challenged, had decided by way of dismissing above proceeding and confirming impugned order. Hence, once this order was confirmed, then, Appellate Court was well within jurisdiction to pass impugned order. Hence, this revision be dismissed.

4. Learned has AGA also opposed the above prayer.

5. Having heard learned counsel for the parties and gone through the material placed on record, it is apparent that in a proceeding under Section 23 of Protection of Woman from Domestic Violence Act, 2005, in a complaint Case No. 540 of 2014, pending before Court of Chief Judicial Magistrate-Ist, Allahabad, (Smt. Asma Bano Vs. Aftab Alam), it was requested that some interim maintenance be awarded and learned Magistrate, vide order dated 3.6.2014, directed opposite party husband of applicant for providing Rs. 3,000/-, per month as maintenance to Smt. Asma Bano. This order was challenged in a proceeding under Section 482 of Cr.P.C. and the same was dismissed by High Court, wherein, above order was got confirmed. Though, this order was challenged in a proceeding before Hon'ble Court, side by side, it was challenged in an appeal before Appellate Court of Session Judge, Allahabad, wherein, Appellate Court dismissed appeal by impugned order, mentioning the order of this Court, passed in a proceeding under Section 482 of Cr.P.C.

6. From the very perusal of revision, it is apparent that it is an admitted fact that Smt. Asma Bano, is married wife of revisionist. She is having separate living. It was said to be a desertion by husband, whereas, husband has said desertion by wife. But, it is a question of trial court and it is admitted fact that both of them are living in desertion. The maintenance awarded is Rs. 3,000/-, per month, a very meagre amount at the rupees of 100 per day. Nobody can survive in 100 rupees per day and even husband is working at petrol pump, is always expected to maintain his wife. A direction for paying Rs. 3,000/-, per month, is well withing jurisdiction of Magistrate. This order was challenged in a proceeding under section 482 of Cr.P.C., which too, was dismissed and order was confirmed. Upon the request of learned counsel for the revisionist, matter was referred for mediation wherein, assurance

was made for making deposit of interim maintenance by above order of Magistrate's Court. This mediation appears to have been failed and this further appeal and criminal revision against same maintenance order, has been filed. It shows litigating attitude of husband, who had filed all these proceeding, but not ready to make payment to his wife. High Court, in its general superintendence of power under Article 227 of Constitution of India, is also to look all such type of affairs, which are to be cured for enabling Constitution and its system to get the goal of welfare state enshrined in Chapter IV of the Constitution of India.

7. Under all above facts and circumstances, learned trial Court as well as learned Appellate Court was well within jurisdiction. There is no illegality or irregularity apparent on record or failure of jurisdiction by any above court. Though, this petition deserves to be dismissed with special cost but the cost is not being imposed. But a direction is being made for making payment of maintenance as ordered by lower Courts.

8. The Criminal Revision is **dismissed**, accordingly.

9. With the aforesaid directions, this application is finally **disposed of**.

(2020)02ILR A864

REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 18.10.2019

BEFORE
THE HON'BLE PRADEEP KUMAR SRIVASTAVA, J.

Criminal Revision No. 2509 of 2014

Jubair Ahmad ...Revisionist
Versus
Ishrat Bano ...Opposite Party

Counsel for the Revisionist:
Sri Abhishek Kumar

Counsel for the Opposite Party:
A.G.A., Sri Manvendra Singh, Sri S.K. Nigam

A. Criminal Law-Code of Criminal Procedure,1973-Sections 397/401-Section 125-challenge to-award of maintenance to the divorced wife when she did not marry-revisionist contended that Second maintenance application u/s 125 is not maintainable-subsequent application is barred by the principle of res-judicata-the amount of maintenance u/s 125 is not restricted for the iddat period only u/s 3(1)(a) of the Muslim women (Protection of Rights on Divorce) Act-section 125 Cr.P.C. overrides the personal law of the parties-she is entitled to take recourse to section 125 Cr.P.C. if she is unable to maintain herself till she remarries-Family court is justified-hence, dismissed.(Para 1 to 37)

B. Criminal Law-Section 125 Cr.P.C. is a piece of social legislation which provides for a summary and speedy relief by way of maintenance to a destitute wife and helpless children.(Para 38 to 46)

Criminal Revision dismissed.(E-6)

List of Cases Cited:

1. Pradeep Kumar Maskara Vs. St. Of W.B.,(2015) 2 SCC 653

2. Kalinga Mining Corpn. Vs. UOI, (2013) 5 SCC 252

3. Mohd.Ahmed Khan Vs. Shah Bano Begum, AIR (1985) SC 945

4. Bai Tahira Vs. Ali Hussain Fidaalli Chothia, (1979) 2 SCC 316

5. Fuzlunbi Vs. K. Khader Vali (1980) 4 SCC 125

6. Danial Latifi Vs. UOI, AIR (2001) SC 3958

7. Shabana Bano Vs. Imran Khan (2010) 1 SCC 666

8. Iqbal Bano Vs. St. Of U.P.(2007) 6 SCC 785

9. Vijay Kumar Prasad Vs. St. Of Bih., (2004) 5 SCC 196

10. Shamim Bano Vs. Asraf Khan (2014) 12 SCC 636

11. Shamima Farooqui Vs. Shahid Khan, AIR (2015) SC 2025

12. Khatoon Nisa Vs. St. Of U.P. (2002) 6 SCALE 165

13. Chander Prakash Bodhraj Vs. Shila Rani Chandr Prakash, AIR (1968),Delhi 174

14. Jasbir Kaur Sehgal Vs. Distt Judge Dehradoon(1997) 7 SCC 7

15. Capt. Ramesh Chander Kaushal Vs. Veena Kaushal, AIR,(1978) SC 1807

16. Chaturbhuj Vs. Sita Bai (2008) 2 SCC 316

17. Nagendrappa Natikar Vs. Neelamma, AIR (2013) SC 1541

18. Badshah Vs. Sou. Urmila Badshah Godse,AIR (2014) SC 869

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

1. This criminal revision has been preferred against the impugned judgment and order dated 14.07.2014 passed by Principle Judge, Family Court, Kaushambi in Case No. 150 of 2014 (Smt. Ishrat Bano Vs. Jubair Ahmad) under section 125 Cr.P.C. by which opposite party no. 2 Ishrat Bano (divorced wife) has been awarded Rs. 3000/- per month from the date of judgment as maintenance.

2. Before the learned court below, the wife gave an application under section 125 Cr.P.C. stating that she was married with revisionist according to Muslim Personnel Law on 22.10.1998. After marriage she went to her husband's house and performed her matrimonial obligation. A daughter Km. Saniya was born from their wedlock. In the year 1999 her husband and his family members demanded Motorcycle, Refrigerator and Rs. 25000/- in dowry and on account of non-fulfillment of dowry, she along with her daughter was expelled from matrimonial house after being beaten and since then, she and her daughter are living with her parents. The husband divorced her on 27.09.2001 and till the presentation of this application she has not remarried. Earlier one application was given by her, bearing case no. 34 of 2002, under section 125 Cr.P.C. which was decided and Rs 800/- per month applicant (wife) and Rs. 500/- per month to her daughter was awarded from date of application till the date of divorce. After divorce she did not remarry. The Supreme Court has now laid down a law that a divorced Muslim lady is entitled for maintenance under section 125 Cr.P.C. When she came to know this law she immediately filed this petition. She is a domestic women and totally dependent on her father. In April 2010 her father died and since then she is in a serious financial trouble and is not able to maintain herself. The husband is a teacher in a Government school and is earning Rs. 25,000/- in a month and therefore, she claim Rs. 10,000/- as maintenance.

3. The opposite party filed a written statement and admitted the marriage and birth of daughter. He has also stated that on 27.09.2001 after he divorced her wife, by the order of the court he gave maintenance of 13 months and expenses till the period of *iddat*. The amount of dower Rs. 11,786/- was paid by him on the

very first night of their marriage. Thereafter, nothing remained payable by him to her nor she is entitled to any further maintenance. She is an independent mind women and she always insisted him to live with her parents which he could not do because of his responsibility towards his family and brothers. The wife is arrogant enough and told him to either live with her parents or give her divorce. She is not there to cook food for his family members and she was married with him because of his job. She regularly mentally harassed him and forced by this situation, he divorced her. He also filed a suit for restitution of conjugal rights numbered as 305 /2005 (Jubair Ahmad Vs. Ishrat Bano) in Allahabad and due to which she got angry and lodged false Criminal Case in Case Crime No. 134 of 2000, under section 498A, 323 IPC and section ¾ Dowry Prohibition Act. But the same was found to be false during investigation and final report was submitted. He thereafter, solemnized second marriage in 2003 and with the second wife, he has two children. He is bearing the expenses of his daughter from the opposite party. She is also educated enough to earn and she gives tuition and earn Rs. 5000/- to Rs. 7000/- and she also works as beautician and earns Rs. 3 to 4 thousand in a month and as such she is earning Rs. 10 to 11 thousand in a month. Just to further harass him this application has been filed which is not maintainable and is liable to be dismissed.

4. From the side of wife, the judgment dated 09.07.2002 in Case No. 34/2002 (Ishrat Bano vs. Jubair Ahmad), under section 125 Cr.P.C. passed by Civil Judge (JD), Kaushambi has been filed. She has also examined herself as PW-1. The husband has filed question answer dated 02.08.2000 and resignation letter of Ishrat Bano from her school. He has examined himself as DW-1 and DW-2 Akbar Ali has also been examined in support.

5. On the basis of the pleadings of the parties the learned court below found following points for consideration in this case:

(1) Whether the application under section 125 Cr.P.C. of the applicant Ishrat Bano, a divorcee, is maintainable?

(2) Whether the applicant is living separately with the respondent for reasonable cause and the opposite party has neglected the applicant in providing maintenance?

(3) Whether the applicant is not able to maintain herself?

(4) Whether the opposite party is capable of maintaining the applicant?

6. After considering the evidence of the parties, the learned court below passed the impugned judgment.

7. Aggrieved by the impugned judgment this revision has been filed challenging the impugned judgment on the ground that earlier a case under section 125 Cr.P.C. for maintenance was filed by the wife bearing Case No. 34 of 2002 which was decided on 09.07.2002 and by that order, the maintenance claim of the wife was rejected on the ground that being Muslim she is not entitled for maintenance after divorce beyond period of *Iddat* and by this impugned Judgment, the said judgment has been reviewed, which is contrary to law. Successive petition for maintenance is not maintainable. When an application has been filed and heard and decided on merit, a second application for the same relief is not permissible under law. The judgment is totally perverse and

it is not correct that the revisionist did not pay maintenance after the date of divorce, as applicant was directed to make payment of maintenance since the date of presentation of application till the date of divorce at the rate of Rs. 800/- per month and that order was fully complied with. Moreover, his old mother, his two younger unemployed brothers and two daughters of second wife and second wife of the revisionist are dependent upon him and being only earning person of family he cannot afford to pay the maintenance to the divorced wife, more so, she is not entitled under law for such maintenance. After the disposal of the first maintenance application on 09.07.2002, in year 2012 almost after the lapse of 10 years this present application was filed by the wife. In view of the provisions of the Muslim Women (Protection of Rights on Divorce) Act 1986, the revisionist is not liable to maintain the wife after the divorce beyond the period of Iddat, but the learned court below did not consider this statutory provision and passed the impugned judgment which is liable to be set aside.

8. The point for consideration no. 2 appears to have been unnecessarily framed as admittedly the applicant is a divorced wife and therefore, she is living separately from the ex-husband after divorce with her parents. The husband has himself admitted that a demand for maintenance was made in the earlier application and the same was paid and beyond the period of *Iddat*, he has not provided any maintenance to the applicant. Therefore, on point number 2, the facts being admitted, there is no need for giving a finding.

9. So far as point no. 4 is concerned, the husband is a teacher in a Government School and it has been admitted by the husband that his basic pay is Rs. 14,000/-, therefore, his ablity to maintain and provide maintenance is very much established. There is no cogent evidence with regards to any income of the applicant. The fact that she is giving tuition or she is running a beauty parlor is not established by any cogent evidence. Therefore, the finding on issue number 2, 3 and 4 did not require reconsideration.

10. The legal issue as argued by the counsel to the revisionist is when an earlier application for maintenance has been decided between the parties after full contest and the maintenance awarded in that case has been fully paid by the husband, a second application in view of a subsequent Supreme Court judgment is not maintainable and no maintenance can be awarded on the basis of the second application. The further argument is that the divorced Muslim wife is not entitled to maintenance under the law applicable to parties and the subsequent application is barred by the principle of res-judicata. In support of this submission, the learned counsel to the revisionist has taken reference of the judgment in **Pradeep Kumar Maskara vs State of WB, (2015) 2 SCC 653** and **Kalinga Mining Corpn vs Union of India, (2013) 5 SCC 252**.

Scope of the Right of Muslim Divorced Wife to Claim Maintenance

11. In **Mohd. Ahmed Khan v. Shah Bano Begum , AIR 1985 SC 945**, the issue before the court was that where a Muslim woman had been divorced by her husband and paid her mahr, would it indemnify the husband from his obligation to pay maintenance under the provisions of Section 125 Cr.P.C.. A Five-judge Bench of the Supreme Court held that the Code of Criminal Procedure controls the

proceedings in such matters and overrides the personal law of the parties and in case of conflict between the terms of the Code and the rights and obligations of the individuals under personal law, the Code would prevail.

12. In this case the husband appealed against the judgment of the High Court directing him to pay to his divorced wife Rs. 179/- per month as maintainence under section 125 of CrPC, enhancing the sum of Rs. 25 per month originally granted by the Magistrate. The parties had been married for 43 years before the ill and elderly wife had been thrown out of her husband's residence. For about two years the husband paid maintenance to his wife at the rate of Rs. 200/- per month. When these payments ceased she petitioned under Section 125 Cr.PC. The husband immediately dissolved the marriage by pronouncing triple talaq. He paid Rs.3000/- as deferred mahr and a further sum to cover arrears of maintenance and maintenance for the iddat period and he sought thereafter to have the petition dismissed on the ground that she had received the amount due to her on divorce under the Muslim law applicable to the parties. The important feature of the case was that the wife had managed the matrimonial home for more than 40 years and had borne and reared five children and was incapable of taking up any career or independently supporting herself at that late stage of her life - remarriage was an impossibility in that case. The husband, a successful Advocate, with an approximate income of Rs. 5,000/- per month provided Rs. 200/- per month to the divorced wife, who had shared his life for half a century and mothered his five children and was in desperate need of money to survive.

13. The Supreme Court, reiterating the view expressed earlier in **Bai Tahira v. Ali Hussain Fidaalli Chothia, (1979) 2 SCC 316** and **Fuzlunbi v. K. Khader Vali (1980) 4 SCC 125**, held:

"The true position is that, if the divorced wife is able to maintain herself, the husband's liability to provide maintenance for her ceases with the expiration of the period of iddat but if she is unable to maintain herself after the period of iddat, she is entitled to take recourse to Section 125 of the Code. The outcome of this discussion is that there is no conflict between the provisions of Section 125 and those of the Muslim Personal Law on the question of the Muslim husband's obligation to provide maintenance for a divorced wife, who is unable to maintain herself."

14. After the decision in **Shah Bano**, the Parliament enacted the Muslim Women (Protection of Rights on Divorce) Act,1986 (hereinafter referred as Act) to protect the rights of Muslim women who have been divorced by, or have obtained divorce from, their husbands and to provide for matters connected therewith or identical thereto. A "divorced woman" is defined under Section 2(a) of the Act to mean a divorced woman who was married according to Muslim Law, and has been divorced by, or has obtained divorce from her husband in accordance with Muslim Law; " Iddat period" is defined under Section 2(b) of the Act to mean, in the case of a divorced woman,- (i) three menstrual courses after the date of divorce, if she is subject to menstruation; (ii) three lunar months after her divorce, if she is not subject to menstruation; and (iii) if she is enceinte at the time of her divorce, the period between the divorce and the delivery of her child or the termination of her pregnancy whichever is earlier.

15. Section 3 of the Act overrides all other laws and provides that a divorced

woman shall be entitled to - (a) a reasonable and fair provision and maintenance to be made and paid to her within the period of iddat by her former husband; (b) where she maintains the children born to her before or after her divorce, a reasonable provision and maintenance to be made and paid by her former husband for a period of two years from the respective dates of birth of such children; (c) an amount equal to the sum of mahr or dower agreed to be paid to her at the time of her marriage or at any time thereafter according to Muslim Law; and (d) all the properties given to her before or at the time of marriage or after the marriage by her relatives, friends, husband and any relatives of the husband or his friends.

16. The constitutional validity of the Muslim Women (Protection of Rights on Divorce) Act, 1986 was upheld in **Danial Latifi vs Union of India, AIR 2001 SC 3958.** The Supreme Court laid emphasis that in interpreting the provisions where matrimonial relationship is involved, the social conditions prevalent in our society should be taken into consideration. In society, apparently there exists a great disparity in the matter of economic resourcefulness between a man and a woman. The Court observed:

"Our society is male dominated both economically and socially and women are assigned, invariably, a dependent role, irrespective of the class of society to which she belongs. A woman on her marriage very often, though highly educated, gives up her all other avocations and entirely devotes herself to the welfare of the family, in particular she shares with her husband, her emotions, sentiments, mind and body, and her investment in the marriage is her entire life - a sacramental sacrifice of her individual self and is far too enormous to be measured in terms of money. When a relationship of this nature breaks up, in what manner we could compensate her so far as emotional fracture or loss of investment is concerned, there can be no answer. It is a small solace to say that such a woman should be compensated in terms of money towards her livelihood and such a relief which partakes basic human rights to secure gender and social justice is universally recognised by persons belonging to all religions and it is difficult to perceive that Muslim law intends to provide a different kind of responsibility by passing on the same to those unconnected with the matrimonial life such as the heirs who were likely to inherit the property from her or the wakf boards. Such an approach appears to us to be a kind of distortion of the social facts. Solutions to such societal problems of universal magnitude pertaining to horizons of basic human rights, culture, dignity and decency of life and dictates of necessity in the pursuit of social justice should be invariably left to be decided on considerations other than religion or religious faith or beliefs or national, sectarian, racial or communal constraints. Bearing this aspect in mind, we have to interpret the provisions of the Act in question."

17. Referring to various religious texts of Islam and opinions of eminent authors of Muslim Personal Law on the concept of *mata* or provision, the Supreme Court pointed out that a careful reading of the provisions of the Act would indicate that a divorced woman is entitled to a reasonable and fair provision for maintenance. Parliament seems to intend

that the divorced woman gets sufficient means of livelihood, after the divorce and, therefore, the word 'provision' indicates that something is provided in advance for meeting some needs. In other words, at the time of divorce the Muslim husband is required to contemplate the future needs and make preparatory arrangements in advance for meeting those needs. Reasonable and fair provision may include provision for her residence, her food, her clothes, and other articles. The Court said that the wordings of Section 3 of the Act appear to indicate that the husband has two separate and distinct obligations : (1) to make a 'reasonable and fair provision' for his divorced wife; and (2) to provide 'maintenance' for her. The emphasis of this section is not on the nature or duration of any such 'provision' or 'maintenance', but on the time by which an arrangement for payment of provision and maintenance should be concluded, namely, 'within the iddat period'. If the provisions are so read, the Act would exclude from liability for post-iddat period maintenance to a man who has already discharged his obligations of both 'reasonable and fair provision' and 'maintenance' by paying these amounts in a lump sum to his wife, in addition to having paid his wife's mahr and restored her dowry as per Section 3(1)(c) and 3(1)(d) of the Act. The words 'a reasonable and fair provision and maintenance to be made and paid' as provided under Section 3(1)(a) of the Act cover different things. The use of two different verbs - "to be made and paid to her within the iddat period", clearly indicates that a fair and reasonable provision is to be made while maintenance is to be paid. It is why no such expression has been used in section 4 of the Act, which empowers the magistrate to issue an order for payment of maintenance to the divorced woman against various of her relatives.

18. Therefore, the Supreme Court held:

"While upholding the validity of the Act, we may sum up our conclusions: Court holds that - 1) A Muslim husband is liable to make a reasonable and fair provision for the future of the divorced wife which obviously includes her maintenance as well. Such a reasonable and fair provision extending beyond the iddat period must be made by the husband within the iddat period in terms of Section 3(1)(a) of the Act. 2) Liability of Muslim husband to his divorced wife arising under Section 3(1)(a) of the Act to pay maintenance is not confined to iddat period."

19. In **Shabana Bano v. Imran Khan (2010) 1 SCC 666**, in a petition for maintenance under section 125, one of the objections raised by the husband was that he has already divorced the wife prior to filing of petition in accordance with Muslim Law and under the provisions of Muslim Women (Protection of Rights on Divorce) Act, 1986 she is not entitled to any maintenance after the divorce and after the expiry of the iddat period. The learned Family Court partly allowed the wife's application directing the husband to pay Rs.2000/- per month as maintenance allowance from the date of institution of petition to the date of divorce, and thereafter to the period of iddat but amount of maintenance thereafter was denied. The order was upheld by the High Court. The question that arose for consideration before the Supreme Court was whether a Muslim divorced wife would be entitled for maintenance from her divorced husband under Section 125 of the Cr.P.C. and, if yes, then through which forum?

20. The Supreme Court mentioned that the purpose the Family Court Act was essentially to set up family courts for the

early settlement of family disputes, emphasizing on conciliation and achieving socially desirable results without adherence to rigid rules of procedure and evidence. The Act seeks to exclusively provide within jurisdiction of the family courts the matters relating to maintenance, including proceedings under Chapter IX of the Cr.P.C. Section 7 of the Family Act deals with Jurisdiction and Section 20 of the Family Court Act makes it crystal clear that the provisions of this Act shall have overriding effect on all other enactments in force dealing with this issue. Therefore, a Family Court established under the Family Act shall exclusively have jurisdiction to adjudicate upon the applications filed under Section 125 of Cr.P.C. Thereafter, the Court referred to the various provisions of the Muslim Women (Protection of Rights on Divorce) Act and quoted with approval the following observation made in **Danial Latifi (supra)**:

"A comparison of these provisions with Section 125, CrPC will make it clear that requirements provided in Section 125 and the purpose, object and scope thereof being to prevent vagrancy by compelling those who can do so to support those who are unable to support themselves and who have a normal and legitimate claim to support are satisfied. If that is so, the argument of the petitioners that a different scheme being provided under the Act which is equally or more beneficial on the interpretation placed by us from the one provided under the Code of Criminal Procedure deprive them of their right, loses its significance. The object and scope of Section 125, CrPC is to prevent vagrancy by compelling those who are under an obligation to support those who are unable to support themselves and that object being fulfilled,..... ."

21. The Supreme Court referred **Iqbal Bano v. State of UP (2007) 6 SCC 785** which followed **Vijay Kumar Prasad v. State of Bihar, (2004) 5 SCC 196** to hold that proceedings under Section 125, Cr.P.C. are civil in nature and laid down that a petition under Section 125 of the Cr.P.C. filed by a divorced woman would be maintainable before the Family Court as long as appellant does not remarry and the amount of maintenance to be awarded under Section 125 of the Cr.P.C. cannot be restricted for the iddat period only. It was held:

"Cumulative reading of the relevant portions of judgments of this Court in Danial Latifi, (2001 AIR SCW 3932) (supra) and Iqbal Bano, (2007 AIR SCW 3880) (supra) would make it crystal clear that even a divorced Muslim woman would be entitled to claim maintenance from her divorced husband, as long as she does not remarry. This being a beneficial piece of legislation, the benefit thereof must accrue to the divorced Muslim women.

In the light of the aforesaid discussion, the impugned orders are hereby set aside and quashed. It is held that even if a Muslim woman has been divorced, she would be entitled to claim maintenance from her husband under Section 125 of the Cr.P.C. after the expiry of period of iddat also, as long as she does not remarry."

22. In **Shamim Bano v. Asraf Khan (2014) 12 SCC 636**, again the issue was

whether the appellant's application for grant of maintenance under Section 125 of the Code is to be restricted to the date of divorce and because of filing of an application under Section 3 of the Act after the divorce for grant of mahr and return of gifts would disentitle the wife to sustain the application under Section 125 of the Code.

23. Referring to **Shabana Bano (supra)** in which, following **Danial Latifi (supra)**, it has been ruled that *'The appellant's petition under Section 125, CrPC would be maintainable before the Family Court as long as the appellant does not remarry. The amount of maintenance to be awarded under Section 125, CrPC cannot be restricted for the iddat period only*,' the Supreme Court held:

"The aforesaid principle clearly lays down that even an application has been filed under the provisions of the Act, the Magistrate under the Act has the power to grant maintenance in favour of a divorced Muslim woman and the parameters and the considerations are the same as stipulated in Section 125 of the Code."

24. Regarding the plea that the wife had already taken recourse to Section 3 of the Act after divorce took place and obtained relief, the application for grant of maintenance under Section 125 of the Code would only be maintainable till she was divorced, the Court pointed out that during the pendency of her application under Section 125 of the Code the divorce took place and on the application of wife under Section 3 of the Act, the learned Magistrate directed for return of the articles, payment of quantum of mahr and also thought it appropriate to grant maintenance for the iddat period. Thus no maintenance had been granted to the wife beyond the iddat period by the learned Magistrate as the petition was different. That apart, the authoritative interpretation in Danial Latifi (supra) was not available. Saying that it would be travesty of justice if the wife is made remediless and therefore, if an application under Section 3 of the Act for grant of maintenance is filed, the parameters of Section 125 of the Code would have been made applicable. The Court observed:

"Another aspect which has to be kept uppermost in mind is that when the marriage breaks up, a woman suffers from emotional fractures, fragmentation of sentiments, loss of economic and social security and, in certain cases, inadequate requisites for survival. A marriage is fundamentally a unique bond between two parties. When it perishes like a mushroom, the dignity of the female fame gets corroded. It is the law's duty to recompense, and the primary obligation is that of the husband."

25. In **Shamima Farooqui v. Shahid Khan AIR 2015 SC 2025**, the application of wife for grant of maintenance was resisted by the husband alleging that he had already given divorce to her and has also paid the Mehar to her. The Supreme Court referred with approval the view expressed in **Shamim Bano v. Asraf Khan (supra), Shabana Bano v. Imran Khan (supra), Danial Latifi (supra)** and **Khatoon Nisa v. State of UP (2002) 6 SCALE 165** and laid down that there can be no shadow of doubt that the divorced Muslim woman is entitled to claim maintenance under Section 125, CrPC.

27. Thus from the above discussion, it is clear that after the passing of the Act, from the judgment in **Danial Latifi (supra)** to **Shamima Farooqui (supra)**, it is clear that the Supreme Court has interpreted the provisions of the Act and section 125 of the Code in such a way so as to give recognition to the right of divorced Muslim wife to claim maintenance under section 125 even for the period beyond iddat period and for the whole life unless she is disqualified for the reasons such as entering into marriage with someone else. Therefore, I find no force in the argument that the divorced Muslim wife is not entitled to maintenance beyond iddat period.

Inability to Pay and Quantum of Maintenance

28. In every petition, generally, a plea is advanced by the husband that he does not have the means to pay, for he does not have a job or his business is not doing well. In this case it has been submitted on behalf of the revisionist that after more than 10 years from the date of decision of the first case, this application has been filed. The revisionist has already married after divorce from the respondent wife and he has children by her second wife and moreover he has to support his ailing parents and other members of the family. Therefore, for him it will not be possible to spare money for his divorced wife against her maintenance. Regarding such pleas, the judicial response has been always very clear that it is the personal liability of the husband to pay maintenance to his wife which includes the divorced wife. The husband is not discharged from his this liability on such grounds. Thus, in **Chander Prakash Bodhraj v. Shila Rani Chander Prakash AIR 1968 Delhi 174**, it was laid down:

"An able-bodied young man has to be presumed to be capable of earning sufficient money so as to be able reasonably to maintain his wife and child and he cannot be heard to say that he is not in a position to earn enough to be able to maintain them according to the family standard. It is for such able-bodies person to show to the Court cogent grounds for holding that he is unable to reasons beyond his control, to earn enough to discharge his legal obligation of maintaining his wife and child. When the husband does not disclose to the Court the exact amount of his income, the presumption will be easily permissible against him."

29. Further in **Jabsir Kaur Sehgal v. District Judge Dehradun (1997) 7 SCC 7**, the Supreme Court laid down the following yardstick for determining the liability as well as the amount of maintenance:

"The court has to consider the status of the parties, their respective needs, the capacity of the husband to pay having regard to his reasonable expenses for his own maintenance and of those he is obliged under the law and statutory but involuntary payments or deductions. The amount of maintenance fixed for the wife should be such as she can live in reasonable comfort considering her status and the mode of life she was used to when she lived with her husband and also that she does not feel handicapped in the prosecution of her case. At the same time, the amount so fixed cannot be excessive or extortionate."

30. In **Shamima Farooqui (supra)**, the Supreme Court referred to the aforesaid observation on the point and held

the reduction of 50% in the amount of maintenance made by the High Court is based on no reasoning and is illegal and not sustainable under law. Upholding and restoring the order passed by the learned Family Court, it was observed by the Supreme Court:

"Be it clarified that sustenance does not mean and can never allow to mean a mere survival. A woman, who is constrained to leave the marital home, should not be allowed to feel that she has fallen from grace and move hither and thither arranging for sustenance. As per law, she is entitled to lead a life in the similar manner as she would have lived in the house of her husband. And that is where the status and strata of the husband comes into play and that is where the legal obligation of the husband becomes a prominent one. As long as the wife is held entitled to grant of maintenance within the parameters of Section 125, CrPC, it has to be adequate so that she can live with dignity as she would have lived in her matrimonial home. She cannot be compelled to become a destitute or a beggar."

31. Saying such pleas to be *'only bald excuses'* and have *'no acceptability in law'*, the Court said:

"If the husband is healthy, able bodied and is in a position to support himself, he is under the legal obligation to support his wife, for wife's right to receive maintenance under Section 125, CrPC, unless disqualified, is an absolute right."

32. In the present case, the admitted fact on behalf of the husband is that he is a teacher in a government school and his monthly basic pay is 14000/- and naturally, if DA is added, the monthly income would reach to 25 to 30 thousands. It is pertinent to mention that the wife, alleging the income of the husband to be 25 thousands monthly, has claimed 10 thousands monthly maintenance. The learned Family Court has awarded 3000/- monthly as maintenance to wife which is not at all in the higher side. It is held that the amount of maintenance must be according to status of parties and to satisfy the minimum and basic needs of the wife. Being a teacher, the plea of the husband regarding his financial constraint cannot be given any weight.

Applicability of the Principles of Res-judicata and Maintainability of Second Application

33. The other limb of argument is regarding maintainability of second application and applicability of principle of res-judicata. It is admitted case that a case was filed by the wife under section 125 Cr.P.C. claiming maintenance for herself and her daughter as case no. 34 of 2002 which has been decided by the judgment dated 09.07.2002 by Civil Judge (Junior Division), Kaushambi and copy of the judgment has been filed by the wife. The husband divorced the respondent wife on 27.09.2001 and thereafter the said case was decided keeping in view the provisions of the Act, and the husband was directed to give maintenance till the date of divorce. The application for the maintenance of the daughter, however, was allowed, granting a maintenance of Rs. 500/- monthly to her. Therefore, it has been argued that when the claim of maintenance has been rejected after contest by the court below, a further application demanding maintenance under section 125 Cr.P.C. is not permissible and the same is barred by the principle of res-

judicata. Therefore, the question for consideration before the court is that the decision in the earlier case will preclude the husband and prevent the wife from claiming maintenance under section 125 Cr.P.C. From the perusal of the said judgment, it appears that the learned court below took the view that Muslim divorced wife in a case pending under section 125 Cr.P.C. can be awarded maintenance till the period of Iddat and not beyond it. Clearly the said judgment is based on the provisions of the Act.

34. Section 125 of the Code of Criminal Procedure has been enacted to achieve a social object and the object is to prevent vagrancy and destitution and to provide speedy remedy to deserted or divorced wife, minor children and infirm parents in terms of food, clothing and shelter and minimum needs of one's life. The Supreme Court has been always of the view that maintenance to the wife is an issue of gender justice and the obligation of the husband is on a higher pedestal. In **Capt. Ramesh Chander Kaushal v. Veena Kaushal, AIR 1978 SC 1807**, the Supreme Court remarked:

"The brooding presence of the Constitutional empathy for the weaker sections like women and children must inform interpretation if it has to have social relevance."

35. In **Chaturbhuj vs Sita Bai (2008) 2 SCC 316**, the Supreme Court expressed the view that section 125 is a measure of social justice and is specially enacted to protect women and children and it gives effect to fundamental rights and natural duties of a man to maintain his wife, children and parents when they are unable to maintain themselves. The Supreme Court observed:

"Section 125, CrPC is a measure of social justice and is specially enacted to protect women and children and as noted by this Court in Captain Ramesh Chander Kaushal v. Veena Kaushal (1978) 4 SCC 70 falls within constitutional sweep of Article 15(3) reinforced by Article 39 of the Constitution of India. It is meant to achieve a social purpose. The object is to prevent vagrancy and destitution. It provides a speedy remedy for the supply of food, clothing and shelter to the deserted wife. It gives effect to fundamental rights and natural duties of a man to maintain his wife, children and parents when they are unable to maintain themselves. The aforesaid position was highlighted in Savitaben Somabhai Bhatiya v. State of Gujarat (2005) 3 SCC 636."

36. In **Shabana Bano v. Imran Khan (supra)** in a petition for maintenance under section 125, one of the objections raised by the husband was that he has already divorced the wife prior to filing of petition in accordance with Muslim Law and under the provisions of Muslim Women (Protection of Rights on Divorce) Act, 1986 she is not entitled to any maintenance after the divorce and after the expiry of the iddat period. The Supreme Court however held that even after the disposal of application under section 3 of the Act, the divorced wife is entitled to claim maintenance under section 125 beyond the iddat period and till she remarries. The same view has been followed in **Shamim Bano v. Asraf Khan (supra)**. Reiterating the same view, in **Shamima Farooqui (supra)**, the Supreme Court made very following observation:

"When the woman leaves the matrimonial home, the situation is quite different. She is deprived of many a comfort. Sometimes the faith in life reduces. Sometimes, she feels she has lost the tenderest friend. There may be a feeling that her fearless courage has brought her the misfortune. At this stage, the only comfort that the law can impose is that the husband is bound to give monetary comfort. That is the only soothing legal balm, for she cannot be allowed to resign to destiny."

37. In **Nagendrappa Natikar vs Neelamma, AIR 2013 SC 1541**, the question was whether a compromise entered into by husband and wife under Order XXIII, Rule 3 of the Code of Civil Procedure (CPC) agreeing for a consolidated amount towards permanent alimony and thereby giving up any future claim for maintenance, accepted by the Court in a proceeding under Section 125 of the Code of Criminal Procedure (CrPC), would preclude the wife from claiming maintenance in a suit filed under Section 18 of the Hindu Adoptions and Maintenance Act, 1956 ? In this case, after the petition was disposed on the basis of compromise, the respondent wife filed a Misc. Application under Section 127, Cr.P.C. before the Family Court for cancellation of the earlier order and also for awarding future maintenance. While the application under Section 127, Cr.P.C. was pending, respondent wife also filed a suit before the Family Court under Section 18 of the Hindu Adoption and Maintenance Act claiming maintenance at the rate of Rs.2,000/- per month. Both the petitions were resisted by the husband stating that the parties had already reached a compromise with regard to the claim for maintenance. The question of maintainability was raised as a preliminary issue. The Family Court held by its order dated 15.9.2009 that the compromise entered into between the parties in a proceeding under Section 125, Cr.P.C. would not be bar in entertaining a suit under Section 18 of the Act. The suit was then finally heard on 30.9.2010 and the Family Court decreed the suit holding that the respondent is entitled to monthly maintenance of Rs.2,000/- per month from the defendant husband from the date of the filing of the suit. The High Court also confirmed the same.

38. Upholding the judgment, the supreme court pointed out that section 25 of the Contract Act provides that any agreement which is opposed to public policy is not enforceable in a Court of Law and such an agreement is void, since the object is unlawful. The Court held that *'Proceeding under Section 125, Cr.P.C. is summary in nature and intended to provide a speedy remedy to the wife and any order passed under Section 125, Cr.P.C. by compromise or otherwise cannot foreclose the remedy available to a wife under Section 18(2) of the 1956 Act'* and observed:

"Section 125, Cr.P.C. is a piece of social legislation which provides for a summary and speedy relief by way of maintenance to a wife who is unable to maintain herself and her children. Section 125 is not intended to provide for a full and final determination of the status and personal rights of parties, which is in the nature of a civil proceeding, though are governed by the provisions of the Cr.P.C. and the order made under Section 125, Cr.P.C. is tentative and is subject to final determination of the rights in a civil court."

39. **Badshah v. Sou. Urmila Badshah Godse, AIR 2014 SC 869**, though related to standard of proof of legal marriage in a case under section 125 of the Code, the Supreme Court made a very emphatic observation regarding the ambit and object of the law provided by section 125 of the Code.

"Thirdly, in such cases, purposive interpretation needs to be given to the provisions of Section 125,Cr.P.C. While dealing with the application of destitute wife or helpless children or parents under this provision, the Court is dealing with the marginalized sections of the society. The purpose is to achieve "social justice" which is the Constitutional vision, enshrined in the Preamble of the Constitution of India. Preamble to the Constitution of India clearly signals that we have chosen the democratic path under rule of law to achieve the goal of securing for all its citizens, justice, liberty, equality and fraternity. It specifically highlights achieving their social justice. Therefore, it becomes the bounden duty of the Courts to advance the cause of the social justice. While giving interpretation to a particular provision, the Court is supposed to bridge the gap between the law and society."

40. The Supreme Court further observed:

"Of late, in this very direction, it is emphasized that the Courts have to adopt different approaches in "social justice adjudication", which is also known as "social context adjudication" as mere "adversarial approach" may not be very appropriate. There are number of social justice legislations giving special protection and benefits to vulnerable groups in the society. Prof. Madhava Menon describes it eloquently: "It is, therefore, respectfully submitted that "social context judging" is essentially the application of equality jurisprudence as evolved by Parliament and the Supreme Court in myriad situations presented before courts where unequal parties are pitted in adversarial proceedings and where courts are called upon to dispense equal justice. Apart from the social-economic inequalities accentuating the disabilities of the poor in an unequal fight, the adversarial process itself operates to the disadvantage of the weaker party. In such a situation, the Judge has to be not only sensitive to the inequalities of parties involved but also positively inclined to the weaker party if the imbalance were not to result in miscarriage of justice. This result is achieved by what we call social context judging or social justice adjudication."

41. It further observed:

"The law regulates relationships between people. It prescribes patterns of behavior. It reflects the values of society. The role of the Court is to understand the purpose of law in society and to help the law achieve its purpose. But the law of a society is a living organism. It is based on a given factual and social reality that is constantly changing. Sometimes change in law precedes societal change and is even intended to stimulate it. In most cases, however, a change in law is the result of a change in social reality. Indeed, when social reality changes, the law must change too. Just as change in social reality is the law of life, responsiveness to change in social reality is the life of the law. It can be said that the history of law is the history of adapting the law to society's changing needs. In both Constitutional and statutory

interpretation, the Court is supposed to exercise direction in determining the proper relationship between the subjective and objective purpose of the law."

42. Therefore, the Court held:

"Provision of maintenance would definitely fall in this category which aims at empowering the destitute and achieving social justice or equality and dignity of the individual. While dealing with cases under this provision, drift in the approach from "adversarial" litigation to social context adjudication is the need of the hour."

43. In the case in hand, admittedly the first case was filed by the wife on 18.8.2000 and the husband gave divorce during the proceeding on 27.9.2001. Therefore, the learned court below disposed the application of the wife treating the same to be under the provision of section 3 of the Muslim Women (Protection of Rights on Divorce) Act, 1986. As such, the claim of the wife under section 125 was not decided nor any maintenance beyond the period of iddat was granted nor fair and reasonable provision was made towards the maintenance of wife. It is to be noted that that in both **Shamim Bano v. Asraf Khan (supra)** and **Shabana Bano v. Imran Khan (supra)**, the application under section 3 of the Act was disposed and it was held that an application of the wife under section 125 is maintainable and not barred and maintenance to divorced wife was awarded. There are other decisions also to the effect that even a compromise decree in which the wife has accepted lump sum alimony will not bar such application. As such and in view of the above discussion and referred decisions of the Supreme Court, I find that the second application of the wife is maintainable and not barred. When the Supreme Court has interpreted and clarified the law and has laid down that the Muslim divorced wife can still claim maintenance under section 125 of the Code despite the provisions of the Muslim Women (Protection of Rights on Divorce) Act, 1986, her claim cannot be defeated on the basis of earlier decision of the court below and the earlier judgment cannot operate as res-judicata.

44. It is to be noticed that the right of maintenance available to wife from husband is absolute right and even divorce cannot effect this right unless the wife is disqualified on account of remarriage or her sufficient earning. Section 125 of the Criminal Procedure Code has been enacted with a specific purpose to protect women and children and to prevent vagrancy and destitution among them. This law is not community centric or religion centric and perhaps, one of the most secular enactment ever made in the country. It is an instrument of social justice and aims to render justice on the basis of equality to wife in particular, may be divorced including a divorced Muslim wife. Gender justice is a constitutional promise and the provision of maintenance provided under section 125 of the Code is one of the tools to translate the constitutional promise into social reality. Moreover, Article 21 of the Constitution guarantees every person a right to live with dignity and a dignified life is not possible unless a fair and reasonable provision is made by the husband towards the maintenance of his divorced wife. Therefore, while interpreting and applying this beneficial legislation, the Constitutional vision of equality, liberty and justice, more particularly social justice to the women

and marginalized sections of society, must be present when the courts are dealing with an application of destitute wife or helpless children and aged and infirm parents. Social justice adjudication or social context adjudication requires application of equality jurisprudence where the parties to a litigation are unequally situated in terms of socio-economic structure and dilution of the technical procedure often followed in adversarial system.

45. In view of the above discussion, I find that the view and approach of the learned Family Court is completely justified and legal and there is no material irregularity or illegality or jurisdictional error in the impugned judgment and order. Hence, the revision has got no force and is liable to be dismissed.

46. The revision is **dismissed**. Stay, if any shall stand vacated.

47. The office is directed to send a copy of this judgment to the learned Family Court for information and necessary compliance.

(2020)02ILR A879

REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 21.01.2020

BEFORE
THE HON'BLE RAM KRISHNA GAUTAM, J.

Criminal Revision No. 2881 of 2019

Atul Singh Sengar
...Revisionist (In Juvenile Jail)
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Revisionist:
Sri Vijay Singh Sengar, Sri Ajay Singh Sengar

Counsel for the Opposite Parties:
A.G.A., Sri Rajeev Kumar Saxena

A. Criminal Law-Code of Criminal Procedure,1973-Section 397/401 & Indian Penal Code,1860-Sections 498A, 304-B & Dowry Prohibition Act,1961-Section 3/4-rejection-claiming juvenility-juvenile justice Board determined juvenile on the basis of high school certificate-Appellate court considered date of birth of school first attended-manipulation, overwriting and tampering in subsequent transfer certificate-elder brother date of birth and year may not be less than a year from younger brother-revisionist claims himself juvenile while he gets married by saying himself to be major-revisionist may not blow cold and hot together at one place-Appellate Court rightly appreciated facts and law-revisionist was major- Hence, dismissed.(Para 3 to 6)

B. Provision for determing age, firstly,High School Certificate, Second option school first attended,if the same is not available, birth certificate given by a corporation or municipal authority or a panchayat and only in the absence of above three certificate, age shall be determined by an ossification test or any other medical age determination test.(Para 4)

Criminal Revision dismissed. (E-6)

(Delivered by Hon'ble Ram Krishna Gautam, J.)

1. This Criminal Revision under Section 397/401 of Code of Criminal Procedure, has been filed by Atul Singh Sengar, agaisnt order dated 3.7.2019, passed by Sessions Judge, Auraiya, in Criminal Appeal No. 13/2019 (State Vs. Atul Singh Sengar), arising out of Case

Crime No. 132/2017, under Sections 498A, 304-B I.P.C. and 3/4 of D.P. Act, P.S. Auraiya, District Auraiya, with a prayer for setting aside impugned order, whereby, order of Juvenile Justice Board, Auraiya, dated 16.4.2019, has been set aside.

2. Learned counsel, for the revisionist, argued that Juvenile Justice Board, Auraiya, vide order dated 16.4.2019, determined revisionist accused-Atul Singh Sengar, juvenile under conflict with law and it was on the basis of date of birth entered in matriculation Mark-sheet-cum-Certificate, wherein date of birth was 10.8.1999. This occurrence was of 27.1.2017, hence, on the date of occurrence, revisionist was of age 17 years, 5 months and 17 days, i.e. below 18 years. Hence, was juvenile in conflict with law. Against this order, an appeal before Sessions Judge, Auraiya No. 13 of 2019 (State Vs. Atul Singh Sengar) was filed, wherein, impugned order of Juvenile Justice Board, Auraiya, was set aside. Accordingly, appeal was allowed. The date of birth entered in Basic School, was taken by learned Appellate Court and on the basis of it, impugned order was passed. Whereas, it was a conclusive proof of age, which was entered in High School Certificate and it was very well there on record. Once, the same was there, then no further school document was to be taken in consideration. But erroneously another school record was taken in consideration and on the basis of it, impugned order was passed. It was apparently error, on the face of record, under erroneous exercise of jurisdiction by Appellate Court. Hence, this revision with above prayer.

3. Learned AGA as well as learned counsel for the informant vehemently opposed. It was argued that school first attended was Basic School, wherein, revisionist himself had entered his date of birth and it was there in its admission form. This could not be tampered and it was 10.8.1997. But there was manipulation, overwriting and tampering in subsequent transfer certificate, wherein, date of birth was written as 10.8.1999. The same was there in alleged Mark-sheet-cum-Certificate of High School, wherein, date of birth was writtten as 10.8.1999, but the Board itself during inquiry had obtained report of Basic Shiksha Adhikari as well as Block Organiser, wherein, this fact was cogently pressed that there is tampering with manipulation in subsequent papers including scholar register regarding date of birth of accused Atul Singh Sengar, but a tampering could not be there in the admission form, which was filled by applicant-revisionist himself and therein date of birth was 10.8.1997. The same was further been substantiated and fortified by the date of birth entered for younger brother, which is of 1998. Meaning thereby, elder brother may not be of 1999, when younger brother is of 1998. This itself shows the manipulation and false averment by accused. Beside this, marriage was performed and a marriage by juvenile is not permissible under law. At that time, marriage was solemnized by mentioning Atul Singh Sengar as major. Subsequently, it is being said that he was juvenile. Revisionist may not blow cold and hot together at one place, he said himself to be major and then after gets married. Subsequently, he claimed himself to be juvenile. Appellate Court has rightly appreciated facts and law and impugned order has been passed in accordance with material placed on record. There is neither any illegality or apparent error on face of record or mis-exercise of jurisdiction.

Hence, this revision merits dismissal. Be dismissed, accordingly.

4. Having heard learned counsels for both sides and gone through order of Juvenile Justice Board, Auraiya as well as of Appellate Court of Sessions Judge, Auraiya, it is apparent that Sessions Judge, has not added something from his side, rather, whatever is there on record, had been taken by him in his judicial decision making. The material on record is the oral testimony of Mahendra Singh, under who signature, school leaving certificate was issued and he had categorically said before Court that it was with no signature of him. Rather, it was a manipulated, fabricated and tampered documents. The entry of date of birth of 10.8.1999 in scholar register is also fabricated with overwriting, as was filed as Exhibit Kha, before Board. The admission form of revisionist is there and it is of no manipulation or overwriting, therein, date of birth is 10.8.1997. This date of birth has been duly verified by public servant, examined by Board that while getting admission in school first attended, date of birth was said and accepted to be of 10.8.1997 and this is the date of birth in school first attended and was duly verified by Basic Shiksha Adhikari, on record. Hence, prior to this Act of Juvenile Justice (Care and Protection of Children) Act, 2015, the situation of determination of age was otherwise. Therein, the provision was that firstly High School Certificate is to be taken and the date of birth entered, therein is to be taken for consideration. In case of failure, the second option was of school first attended, if the same is not available, then date of birth entered in local bodies' register or gram sabha register was to be taken and if all these three categories were not available, then the option was of medical age determination by Medical Board. But in the new Act of 2015 and Rules made therein, Section 94 of Act provides that presumption and determination of age, wherein, sub-Section 2 provides :

(2) In case, the Committee or the Board has reasonable grounds for doubt regarding whether the person brought before it is a child or not, the Committee or the Board, as the case may be, shall undertake the process of age determination, by seeking evidence by obtaining -

(i) the date of birth certificate from the school, or the matriculation or equivalent certificate from the concerned examination Board, if available; and in the absence thereof;

(ii) the birth certificate given by a corporation or a muncipal authority or a panchayat;

(iii) and only in the absence of (i) and (ii) above, age shall be determined by an ossification test or any other latest medical age determination test conducted on the orders of the Committee or the Board:

Provided such age determination test conducted on the order of the Committee or the Board shall be completed within fifteen days from the date of such order.

5. Meaning thereby, date of birth certificate from the school or matriculation or equivalent certificate from the concerned examination Board, if available; and in the absence thereof---- Meaning thereby, school first attended has been kept prior to matriculation certificate. Meaning thereby, now there is no preference of High School Certificate and date of birth entered in it, rather, all

education certificates have been kept at par and school first attended comes first. Hence, in the present case, which was of year 2017 i.e. after enforcement of above Rules, the school first attended was with priority. The citations discussed by Juvenile Justice Justice Board, Auraiya, relates with prior situations, whereas, the present case is to be governed by new Act and Rules made therein, as above. The school first attended is with date of birth 10.8.1997 and that is to be taken as a date of birth, for consideration of juvenility of accused Atul Singh Sengar. On the basis of it, learned Appellate Court of Sessions Judge, Auraiya, has passed impugned order that on the date of occurrence, present revisionist was not juvenile in conflict with law. Rather, he was major. This determination of learned Appellate Court is on the basis of material placed on record and in other attending circumstances, like younger brother may not be elder to elder brother and juvenile may not get married against the age of marriage under majority Act. Under all above facts and circumstances, this revision merits its dismissal.

6. **Dismissed**, as such.

(2020)02ILR A882

REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 02.12.2019

BEFORE
THE HON'BLE PRADEEP KUMAR SRIVASTAVA, J.

Criminal Revision No. 3516 of 2005

Daya Ram & Ors. ...Revisionists (In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Revisioniss:
Sri S.K. Tiwari

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

A. Criminal Law-Code of Criminal Procedure,1973-Sections-397/401,Section 360 & Indian Penal Code,1860-Sections 147, 323/149,325/149 & Probation of Offenders Act,1958-Section 3 & 4-lower court didnot pay heed to the provisions u/s 3 & 4 of Probation of Offenders Act and Section 360 Cr.P.C. while passing sentences in trivial issues occurred in fit of anger between the parties-lower court failed to determine who was aggressor on technical ground in the instant case-however, power is granted to court to release certain offenders on probation of good conduct but the aforesaid beneficial provision has been lost sight of which is provided u/s 3 & 4 Probation of Offenders Act and section 360,361 of Cr.P.C.-if it is a fit case in which the accused should be released on probation by directing them to execute bond of one year for good behaviour-Held-instead of sending the revisionists to jail, they shall get benefit of Section 4 of Probation of Offenders Act.(Para 5 to 18)

Criminal Revision disposed of.(E-6)

List of Cases Cited:-

1. Subhash Chand & Ors. Vs. St. Of U.P. {2015 Law Suit (All) 1343}

2. St. Of Mah. Vs. Jagmohan Singh Kuldip Singh Anand & Ors.,(2004) 7 SCC 659

3. Jagat Pal Singh & Ors. Vs. St. Of Haryana, AIR (2000) SC 3622

4. Soney Lal Pasi Vs. St. Of U.P., Cr.Rev. No. 2820 of 2003

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

1. Heard Shri S.K. Tiwari, learned counsel for the revisionists, learned AGA for the State and perused the record.

2. Learned counsel for the revisionists without entering into the merits of the case, has confined his argument to the effect that the revisionist have been convicted for the offence under sections 147, 323/149 and 325/149 IPC and the maximum sentence which has been awarded to the revisionist is one year.

3. This revision pertains to the judgement passed by Additional Sessions Judge/Fast Track Court No. 1, Gorakhpur in Criminal Appeal No. 26 of 2005 by which the appeal of the revisionist has been dismissed which was filed against the conviction and sentence dated 23.02.2005 passed by Judicial Magistrate Ist, Gorakhpur in Criminal Case No. 49/02/88 (State Vs. Sahdev and others), under sections 147, 323/149, 325/149 IPC, P.S. Nautanwa, District Gorakhpur by which revisionists were convicted and sentenced for the offence under section 147 for 3 months simple imprisonment, for the offence under section 323/149 IPC for six months simple imprisonment and for the offence under section 325/149 for one year simple imprisonment. It is pertinent to mention that the conviction and sentence was maintained by the judgement in appeal and the appeal was dismissed.

4 The submission of the learned counsel is that the said criminal case in respect of a criminal incident dated 28.10.1988 and it was in between related parties through their ancestral and a marpeet took place between the two and a NCR was also lodged from the side of the revisionists in which charge-sheet was submitted. But prior to decision of this Court, the same resulted in acquittal. Further submission is that a reference of that cross case finds mention in the judgement of the lower court. It has been further submitted by the learned counsel that the case which was lodged from the side of the revisionists resulted in acquittal and the learned trial court failed to determine who was aggressor on technical ground. That the police papers which were filed in this case from the side of the revisionist were photostat and they were not proved by the adducing evidence. He has submitted that what ever was the result, it was specifically requested from the side of the revisionist all the accused persons before the learned Magistrate for giving benefit of probation in view of the sentence passed by them, but the same was not legally considered. Further submission is that in the criminal incident the accused persons were not assigned with any deadly weapon and all the injuries were caused by lathi and danda. It has been further submitted that only two injured persons sustained fracture and the fracture was not on vital parts but on finger and elbow. The further submission is that it is a case pertaining to a criminal offence of the year 1998.

5. So far as conviction under Sections 147, 323/149, 325/149 IPC are concerned, learned counsel to the revisionists requested that looking to the fact that revision is pending since 2005 and awarded sentence is not more than one year simple imprisonment, revisionists may be released on probation for maintaining peace and good behavior for specified period. Learned counsel for the revisionist has further argued that the effect of Sections 3 and 4 of the Probation of Offenders Act, 1958, in the background of what is stated in Section 360 of the

Code of Criminal Procedure, 1973, has not been kept in view. Learned counsel for the revisionists has also relied upon the judgment in the case of **Subhash Chand & others Vs State of UP (2015 Law Suit (All) 1343)** and the judgment in Criminal Revision No. 1319 of 1999 (Hargovind & Others vs. State of U.P.) passed by this Court on 11.01.2019.

Section 3 of the Probation of Offenders Act reads as follows:

"3. Power of court to release certain offenders after admonition.- When any person is found guilty of having committed an offence punishable under section 379 or section 380 or section 381 or section 404 or section 420 of the Indian Penal Code, (45 of 1860) or any offence punishable with imprisonment for not more than two years, or with fine, or with both, under the Indian Penal Code, or any other law, and no previous conviction is proved against him and the court by which the person is found guilty is of opinion that, having regard to the circumstances of the case including the nature of the offence, and the character of the offender, it is expedient so to do, then, notwithstanding anything contained in any other law for the time being in force, the court may instead of sentencing him to any punishment or releasing him on probation of good conduct under section 4 release him after due admonition.

Explanation.- For the purposes of this section, previous conviction against a person shall include any previous order made against him under this section or section 4."

6. Thus, this was the bounden duty of the learned trial court and also the appellate court to consider why they did not proceed to grant the benefit of Probation of Offenders Act. Section 4 of the Probation of Offenders Act reads as follows:

"4. Power of court to release certain offenders on probation of good conduct.-(1) When any person is found guilty of having committed an offence not punishable with death or imprisonment for life and the court by which the person is found guilty is of opinion that, having regard to the circumstances of the case including the nature of the offence and the character of the offender, it is expedient to release him on probation of good conduct, then, notwithstanding anything contained in any other law for the time being in force, the court may, instead of sentencing him at once to any punishment direct that he be released on his entering into a bond, with or without sureties, to appear and receive sentence when called upon during such period, not exceeding three years, as the court may direct, and in the meantime to keep the peace and be of good behaviour:

Provided that the court shall not direct such release of an offender unless it is satisfied that the offender or his surety, if any, has a fixed place of abode or regular occupation in the place over which the court exercises jurisdiction or in which the offender is likely to live during the period for which he enters into the bond.

(2)Before making any order under sub-section (1), the court shall take into consideration the report, if any, of the probation officer concerned in relation to the case.

(3) When an order under sub-section (1) is made, the court may, if it is of opinion that in the interests of the offender and of the public it is expedient so to do, in addition pass a supervision order

directing that the offender shall remain under the supervision of a probation officer named in the order during such period, not being less than one year, as may be specified therein, and may in such supervision order, impose such conditions as it deems necessary for the due supervision of the offender.

(4) The court making a supervision order under sub-section (3) shall require the offender, before he is released, to enter into a bond, with or without sureties, to observe the conditions specified in such order and such additional conditions with respect to residence, abstention from intoxicants or any other matter as the court may, having regard to the particular circumstances, consider fit to impose for preventing a repetition of the same offence or a commission of other offences by the offender.

(5) The court making a supervision order under sub-section (3) shall explain to the offender the terms and conditions of the order and shall forthwith furnish one copy of the supervision order to each of the offenders, the sureties, if any, and the probation officer concerned.

7. A similar provision finds place in the Code of Criminal Procedure. There, Section 360 provides:

360. Order to release on probation of good conduct or after admonition.

(1) When any person not under twenty- one years of age is convicted of an offence punishable with fine only or with imprisonment for a term of seven years or less, or when any person under twenty-one years of age or any woman is-convicted of an offence not punishable with death or imprisonment for life, and no previous conviction is proved against the offender, if it appears to the Court before which he is convicted, regard being had to the age, character or antecedents of the offender, and to the circumstances in which the offence was committed, that it is expedient that the offender should be released on probation of good conduct, the Court may, instead of sentencing him at once to any punishment, direct that he be released on his entering into a bond with or without sureties, to appear and receive sentence when called upon during such period (not exceeding three years) as the Court may direct and in the meantime to keep the peace and be of good behaviour:

Provided that where any first offender is convicted by a Magistrate of the second class not specially empowered by the High Court, and the Magistrate is of opinion that the powers conferred by this section should be exercised, he shall record his opinion to that effect, and submit the proceedings to a Magistrate of the first class, forwarding the accused to, or taking bail for his appearance before, such Magistrate, who shall dispose of the case in the manner provided by sub-section (2).

(2) Where proceedings are submitted to a Magistrate of the first class as provided by sub- section (1), such Magistrate may thereupon pass such sentence or make such order as he might have passed or made if the case had originally been heard by him, and, if he thinks further inquiry or additional evidence on any point to be necessary, he may make such inquiry or take such evidence himself or direct such inquiry or evidence to be made or taken.

(3) In any case in which a person is convicted of theft, theft in a building, dishonest misappropriation cheating or any offence under the Indian

Penal Code (45 of 1860), punishable with not more than two years' imprisonment or any offence punishable with fine only and no previous conviction is proved against him, the Court before which he is so convicted may, if it thinks fit, having regard to the age, character, antecedents or physical or mental condition of the offender and to the trivial nature of the offence or any extenuating circumstances under which the offence was committed, instead of sentencing him to any punishment, release him after due admonition.

(4) An order under this section may be made by any Appellate Court or by the High Court or Court of Session when exercising its powers of revision.

(5) When an order has been made under this section in respect of any offender, the High Court or Court of Session may, on appeal when there is a right of appeal to such Court, or when exercising its powers of revision, set aside such order, and in lieu thereof pass sentence on such offender according to law: Provided that the High Court or Court of Session shall not under this sub- section inflict a greater punishment than might have been inflicted by the Court by which the offender was convicted.

(6) The provisions of sections 121, 124 and 373 shall, so far as may be, apply in the case of sureties offered in pursuance of the provisions of this section.

(7) The Court, before directing the release of an offender under sub- section (1), shall be satisfied that an offender or his surety (if any) has a fixed place of abode or regular occupation in the place for which the Court acts or in which the offender is likely to live during the period named for the observance of the conditions.

(8) If the Court which convicted the offender, or a Court which could have dealt with the offender in respect of his original offence, is satisfied that the offender has failed to observe any of the conditions of his recognizance, it may issue a warrant for his apprehension.

(9) An offender, when apprehended on any such warrant, shall be brought forthwith before the Court issuing the warrant, and such Court may either remand him in custody until the case is heard or admit him to bail with sufficient surety conditioned on his appearing for sentence and such Court may, after hearing the case, pass sentence.

(10) Nothing in this section shall affect the provisions of the Probation of Offenders Act, 1958 (20 of 1958), or the Children Act, 1960 (60 of 1960), or any other law for the time being in force for the treatment, training or rehabilitation of youthful offenders.

8. Again, Section 361 reads as below:

"361. Special reasons to be recorded in certain cases.- Where in any case the Court could have dealt with-

(a) an accused persons under section 360 or under the provisions of the Probation of Offenders Act, 1958 (20 of 1958), or

(b) a youthful offender under the Children Act, 1960 (60 of 1960), or any other law for the time being in force for the treatment, training or rehabilitation of youthful offenders, but has not done so, it shall record in its judgment the special reasons for not having done so."

9. These statutory provisions very emphatically lay down the reformatory and correctional object of sentencing and obligates the trial court as well as appellate courts to give benefit of probation in fit cases as provided under law. Unfortunately, this branch of law has not

been much utilized by the trial courts. It becomes more relevant and important in our system of administration of justice where trial is often concluded after a long time and by the time decision assumes finality, the very purpose of sentencing looses its efficacy as with the passage of time the penological and social priorities change and there remains no need to inflict punishment of imprisonment, particularly when the offence involved is not serious and there is no criminal antecedent of the accused person.The facts and given circumstances in each case, the nature of the crime, the manner in which it was planned and committed, the motive for commission of the crime, the conduct of the accused, the nature of weapons used and all other attending circumstances are relevant facts which would enter into the area of consideration. It is, therefore, the duty of every court to award proper sentence having regard to the nature of the offence and the manner in which it was executed or committed.

10. In this instant case, the court below has not considered the probation law, although, the revisionists were only convicted for the offence under Sections 147, 323/149, 325/149 IPC for the maximum period of one year. Therefore, the benefit of probation could have been given in view of the law referred above. But, while awarding sentence this aspect was not considered. The learned court below did not even write a single word as to why the benefit of this beneficial legislation was not given to the accused whereas it was mandatory to do so under the provisions of Section 361 Cr.P.C. Moreover, the occurrence relates to the year 1988 and this revision is pending since 2005 and therefore, no purpose of justice will be served if the revisionists are sent to jail to undergo the terms of sentence after lapse of such long time.

11. In **Subhash Chand Case** (supra), this court has emphatically laid down the need to apply the law of probation and give benefit of the beneficial legislation to accused persons in appropriate cases. This court issued following directions to all trial courts and appellate courts:

30. "It appears that the aforesaid beneficial legislation has been lost sight of and even the Judges have practically forgotten this provision of law. Thus, before parting with the case, this Court feels that I will be failing in discharge of my duties, if a word of caution is not written for the trial courts and the appellate courts. The Registrar General of this Court is directed to circulate copy of this Judgement to all the District Judges of U.P., who shall in turn ensure circulation of the copy of this order amongst all the judicial officers working under him and shall ensure strict compliance of this Judgement. The District Judges in the State are also directed to call for reports every months from all the courts, i.e. trial courts and appellate courts dealing with such matters and to state as to in how many cases the benefit of the aforesaid provisions have been granted to the accused. The District Judges are also directed to monitor such cases personally in each monthly meeting. The District Judges concerned shall send monthly statement to the Registrar General as to in how many cases the trial court/appellate court has granted the benefit of the aforesaid beneficial legislation to the accused. A copy of this order be placed before the Registrar General for immediate compliance."

12. In addition to the above judgment of this Court, I perused the judgment of Hon'ble the Apex Court in **State of Maharashtra Vs. Jagmohan Singh Kuldip Singh Anand & others (2004) 7 SCC 659** in which, giving the benefit of Probation of Offenders Act, 1958, the Court has observed as below:

"The learned counsel appearing for the accused submitted that the accident is of the year 1990. The parties are educated and neighbors. The learned counsel, therefore, prayed that benefit of the Probation of Offenders Act, 1958 may be granted to the accused. The prayer made on behalf of the accused seems to be reasonable. The accident is more than ten years old. The dispute was between the neighbors over a trivial issue of claiming of drainage. The accident took place in a fit of anger. All the parties educated and also distantly related. The accident is not such as to direct the accused to undergo sentence of imprisonment. In our opinion, it is a fit case in which the accused should be released on probation by directing them to execute a bond of one year for good behaviour."

13. Similarly, in **Jagat Pal Singh & others Vs. State of Haryana, AIR 2000 SC 3622**, the Hon'ble Apex Court has given the benefit of probation while upholding the conviction of accused persons under Sections 323, 452, 506 IPC and has released the accused persons on executing a bond before the Magistrate for maintaining good behaviour and peace for the period of six months.

14. This Court vide order dated 28.11.2019 in case of **Soney Lal Pasi Vs. State of U.P.** passed in Criminal Revision No. 2820 of 2003 has also released the accused persons convicted under sections 323, 324, 354 IPC on probation after giving benefit of section 4 of the Probation of Offenders Act.

15. In the light of above discussion, I find no illegality, irregularity or impropriety nor there is any jurisdictional error in the impugned Judgment and I am of the considered view that the conviction recorded by the court below under Sections 147, 323/149, 325/149 IPC and upheld by the learned appellate court below is not required to be disturbed. Consequently, the impugned judgment of conviction and sentence is upheld.

16. However, instead of sending the revisionists namely Daya Ram, Sri Ram and Bali Ram to jail, they shall get the benefit of Section 4 of the Probation of Offenders Act. Consequently, the revisionists shall file two sureties to the tune of Rs.25,000/- coupled with personal bonds to the effect that they shall not commit any offence and shall observe good behaviour and shall maintain peace during the period of one year. If there is breach of any of the conditions, they will subject themselves to undergo sentence before the Magistrate. The bonds and sureties aforesaid be filed by the accused persons within two months from the date of the Judgment as per law and Rules.

17. Accordingly, the revision is disposed of finally.

18. Let a certified copy of this order be sent alongwith lower court record to the court concerned for compliance.

(2020)02ILR A889

REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 09.12.2019

BEFORE
THE HON'BLE MRS. SUNITA AGARWAL, J.

Criminal Revision No. 4629 of 2019

Vishwanath ...Revisionist
Versus
State of U.P. & Ors. ...Opposite Parties

Counsel for the Revisionist:
Sri Harish Chandra Singh, Sri Anand Pal Singh

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

A. Criminal Law-Code of Criminal Procedure,1973-Sections 397/401-Section 156(3),200 & Indian Penal Code,1860-Section 376-challenge to-application u/s 156(3)-from the reading of application cognizable offence was made out-Court below instead of issuing direction to lodge FIR and investigate, illegally treated as a complaint-application was filed after two months-nothing could be traced by medical examination etc.-Concerned Court has not committed procedural irregularity in exercise of its discretionary jurisdiction under section 156(3)-Hence, dismissed. (Para 61 to 65)

B. In its discretionary power,it is open for the magistrate to direct the police to register a criminal case u/s 154 Cr.P.C. and conduct investigation. At the same time, it is open for the Magistrate, where the facts of the case and ends of justice so demand, to take cognizance of the matter by treating it as a complaint and proceed for the "inquiry" u/s 200 and 202 Cr.P.C.(Para 55 to 60)

Criminal Revision dismissed.(E-6)

List of Cases Cited:

1. Lalita Kumari Vs. Govt. Of U.P. & Ors., (2014) 2 SCC 1

2. Mohammad Yousuf Vs. Smt. Afaq Jahan & Anr.,(2006) 1 SCC 627

3. R.R. Chari Vs. St. Of U.P., (1951) SC 207

4. Narayandas Bhagwandas Madhavdas Vs. St. Of W.B.,(1959) SC 1118

5. Gopal Das Sindhi & Ors. Vs. St. Of Assam & Anr.,AIR (1961) SC 986

6. Superintendent and Remembrancer of Legal Affairs,W.B. Vs.Abani Kumar Banerjee,AIR (1950) Calcutta,437

7. Suresh Chand Jain Vs. St. Of M.P. & Anr., (2001)2 SCC 628

8. Tula Ram Vs. Kishore Singh, (1977) 4 SCC 459

9. Ram Babu Gupta Vs. St. Of U.P. & Ors.,(2001) 43 ACC 50

10. India Carat Pvt. Ltd. Vs. St. Of Karnataka (1989)2 SCC 132

11. Sakiri Vasu Vs. St. Of U.P. & Ors., (2008) 2 SCC 409

12. Vinubhai Haribhai & Malaviya & Ors. Vs. St. Of Guj.& Anr. (2019) SCC Online SC 1346

13. Devarapalli Laxminarayan Reddy & Ors. Vs. V. Narayana Reddy & Ors.,(1976) 3 SCC 252

14. Vinay Tyagi Vs. Irshad Ali @ Deepak & Ors.(2013) 5 SCC 762

15. Ramdev Food Products Pvt. Ltd. Vs. St. Of Guj., (2015) 6 SCC 439

16. Anil Kumar Vs. M.K. Aiyappa, (2013) 10 SCC 705

(Delivered by Hon'ble Mrs. Sunita Agarwal, J).)

1. The present criminal revision has been filed challenging the order dated 06.09.2019 passed in Criminal Misc. No. 203 of 2019 (Vishwanath vs. Santosh & others) by the Additional Sessions Judge, Court No.1, Kushinagar on an application under Section 156(3) Cr.P.C. filed by the revisionist.

2. The Court below while disposing of the application under Section 156(3) Cr.P.C. has treated the same as complaint and directed it to be registered as complaint case fixing date for recording statement of the complainant under Section 200 Cr.P.C.

3. Challenging this order, learned counsel for the revisionist vehemently submits that from the reading of the application under Section 156(3) Cr.P.C. itself, a cognizable offence was made out and as such it was required for the Court concerned to direct the police to investigate. The appropriate course of action for the Court was to issue direction to the police to lodge a first information report and submit the report under Section 173(2) Cr.P.C.

4. The allegations are of gang rape by the accused persons (opposite party nos. 2 to 5) falling under Section 376 I.P.C., the application seeking for lodging of the first information report could not have been treated as a complaint case.

5. Reliance is placed on the judgment and order dated 07.12.2019 of this Court passed in an application under Section 482 No. 44699 of 2019 *(Maneeta vs. State of U.P. & Ors.)* wherein following the law laid down in ***Lalita Kumari vs. Government of U.P. & ors***1, it was observed that once a cognizable offence is made out, an FIR should be registered and the summoning order under challenge was quashed as it did not provide any reason for not doing so. The matter had been relegated for fresh decision under Section 156(3) Cr.P.C.

6. Learned counsel for the revisionist vehemently submits that in ***Lalita Kumari***1, the Supreme Court has laid down guidelines holding that an obligation is cast on a police officer to register a first information report under Section 154 of the Code of Criminal Procedure upon receiving any information relating to commission of a cognizable offence. It is contended that the Supreme Court has categorically held that the registration of FIR is mandatory under Section 154 of the Code, if the information discloses commission of a cognizable offence and no preliminary inquiry is permissible in such a situation. Only in a case where the information received does not disclose a cognizable offence, the necessity for a preliminary inquiry may arise which may be conducted only to ascertain whether cognizable offence is disclosed or not. In that case also, once the preliminary inquiry discloses the commission of a cognizable offence, the FIR must be registered.

7. Submission is that the application under Section 156(3) Cr.P.C. was filed by the revisionist/applicant for the direction to lodge a first information report as police did not do so. The Court below instead of issuing necessary direction to the police to lodge the first information report and investigate, had illegally treated it as a complaint and proceeded to record the statement of the complainant.

8. Submission is that this act of the Court/Magistrate was beyond the powers conferred on it, as the principle laid down in ***Lalita Kumari***1 would be attracted even in the matter of filing of an application under Section 156(3) Cr.P.C. before the Magistrate. The result would be that once the application under Section 156(3) Cr.P.C. filed before the Magistrate or Court discloses commission of a cognizable offence, it had no option but to issue direction to the police to register a case and investigate the matter for submission of the police report under Section 173(2) Cr.P.C.

9. Learned AGA, on the other hand, submits that the power of a Magistrate under Section 156(3) Cr.P.C. can be equated to the power conferred on it under Section 190 Cr.P.C. as it flows from the said provision. Thus, on the presentation of an application under Section 156(3) Cr.P.C. before the Magistrate, it has two options either to direct the police to investigate by registration of a first information report or proceed to treat it as a complaint case to make an inquiry for recording statement of the complainant under Section 200 Cr.P.C. and his witnesses under Section 202 Cr.P.C.

10. The decision in ***Lalita Kumari***1 is on a reference regarding the power of a police officer to conduct a preliminary inquiry in order to test the veracity of the information received by him relating to commission of a cognizable offence, before registering the same under Section 154 Cr.P.C.

11. Submission is that the said decision has no reflection on the powers of the Magistrate or curtail his discretion to make a preliminary inquiry to ascertain truth or veracity of the information of commission of a criminal offence by treating it as a complaint instead of sending the matter to the police for investigation.

12. To deal with these submissions of the learned counsel for the parties, it would be appropriate to go through the provisions relating to registration of a criminal case and "investigation" thereof by the police under Chapter XII and as also the power and jurisdiction of the criminal courts/Magistrates in inquiries and trials as contained in Chapter XIII; and Chapter XIV of the Code pertaining to the requisite conditions for initiation of judicial proceedings.

13. The definition of "inquiry", "investigation" and "judicial proceedings" are also to be taken note of. "Inquiry" as defined under Section 2(g) means every inquiry other than a trial, conducted under the Code by a Magistrate or Court. Section 2(h) defines "investigation" to include all the proceedings under the Code for the collection of evidence conducted by a police officer or any person authorised by a Magistrate in this behalf, but other than a Magistrate. The "judicial proceedings" defined in Section 2(i) includes any proceeding in the course of which evidence is or may be legally taken on oath.

14. Thus, from the careful reading of the definitions as above, it is evident that the "inquiry", "investigation" and "judicial proceedings" are three different stages of a criminal matter reported to the police or the Magistrate/Court, and connotes different meaning under the Code. The "investigation" is done by the police officer or any other officer authorised by

the Magistrate (but not a Magistrate), whereas "inquiry" means a preliminary inquiry conducted by the Magistrate or a Court on receipt of information of commission of an offence which shall not include a trial where evidence is to be taken in a legal manner on oath being the "judicial proceedings". The "information" and "investigation" by the police is contained in Chapter XII and is distinguished from the jurisdiction of the Magistrate in taking cognizance of criminal offence under Chapter XIV of the Code.

15. In the case of ***Lalita Kumari***1, the question which arose for consideration on a reference was "whether a police officer is bound to register a first information report (FIR) upon receiving an information relating to commission of a cognizable offence under Section 154 of the Code of Criminal Procedure, 1973 (in short "Code") or the police officer has the power to conduct a preliminary inquiry in order to test the veracity of such information before registering the same in the context of the question before it"

16. The five judges Bench in ***Lalita Kumari***1 taking note of the provisions contained in Section 154, 156 & 157 in Chapter XII of the Code of Criminal Procedure has held in para '120' to '120.8' as under:-

"120. In viwe of the aforesaid discussion, we hold:

120.1 The registration of FIR is mandatory under Section 154 of the Code, if the information discloses commission of a cognizable offence and no preliminary inquiry is permissible in such a situation.

120.2 If the information received does not disclose commission of a cognizable offence but indicates that the necessity for an inquiry, a preliminary inquiry may be conducted only to ascertain whether cognizable offence is disclosed or not.

120.3 If the inquiry discloses the commission of a cognizable offence, the FIR must be registered. In cases where preliminary inquiry ends in closing the complaint, a copy of the entry of such closure must be supplied to the first informant forthwith (not later than one week) disclosing reasons in brief for closing the complaint and not proceeding further.

120.4 The police officer cannot avoid his duty of registering an offence if cognizable is disclosed. Action must be taken against an erring officer who do not register the FIR if information received by him discloses a cognizable offence.

120.5 The scope of preliminary inquiry is not to verify the veracity or otherwise by the information received but only to ascertain whether the information reveals any cognizable offence.

120.6 As to what type and in which cases the preliminary inquiry is to be conducted, will depend on the facts and circumstances of each case.The category of cases in which preliminary inquiry may be made are identified as under:-

(a) Matrimonial disputes/family disputes

(b) Commercial offences

(c) Medical negligence cases

(d) Corruption cases

(e) Cases where there is abnormal delay/laches in initiating criminal prosecution, for example, over 3 months' delay in reporting the matter without satisfactorily explaining the reasons for delay.

The aforesaid are only illustrations and not exhaustive of all

conditions which may warrant preliminary inquiry.

120.7 While ensuring and protecting the rights of the accused and the complainant, a preliminary inquiry should be made time-bound and in any case it should not exceed 7 days. The fact of such delay and the causes of it must be reflected in the General Diary entry.

120.8 Since the General Diary/Station Diary/Daily Diary is the record of all information received in a police station, we direct that all information relating to cognizable offences, whether resulting in registration of FIR or leading to an inquiry, must be mandatorily and meticulously reflected in the said diary and the decision to conduct a preliminary inquiry must also be reflected, as mentioned above."

17. Noticing the above directions issued by the Apex Court in the case of ***Lalita Kumari***1 in the context of the question referred before it, it is evident that all the directions issued therein apply in the matter of receipt of information of commission of a cognizable offence by the police and the stage of "investigation" as defined in Section 2(h) of the Code to be made by the police in exercise of power conferred upon it under Chapter XII of the Code.

18. From a careful reading of the observations and directions issued by the Apex Court in ***Lalita Kumari***1, it cannot be said that they relate in any manner or curtail the power of the Magistrate to make an "inquiry" as defined in Section 2(g) of the Code.

19. This view is further fortified from the observations of the Apex Court in paragraph '87' & '88' in ***Lalita Kumari***1 itself, which reads as under:-

"87. The term "inquiry" as per Section 2(g) of the Code reads as under:

"2.(g) "inquiry" means every inquiry, other than a trial, conducted under this Code by a Magistrate or Court."

Hence, it is clear that ***inquiry under the Code is relatable to a judicial act and not to the steps taken by the Police which are either investigation after the stage of Section 154 of the Code or termed as "preliminary inquiry" and which are prior to the registration of FIR,*** *even though, no entry in the General Diary/Station Diary/Daily Diary has been made.*

88. Though there is reference to the term "preliminary inquiry" and "inquiry" under Sections 159 and Sections 202 and 340 of the Code, that is a judicial exercise undertaken by the Court and not by the Police ***and is not relevant for the purpose of the present reference."***

20. Further, this Court may also deal with the relevant Section 156(3) contained in the same Chapter XII of the Code which empowers the Magistrate to order investigation on receipt of information of commission of criminal offence. Section 156(3) states that :-

"(3) Any Magistrate empowered under Section 190 may order such an investigation as above-mentioned."

21. The words "investigation as above mentioned", as contained in Section 156(3) contemplate investigation

by the officer in charge of a police station.

22. The question of power of Magistrate to order investigation under Section 156(3) Cr.P.C. came up for consideration before the Apex Court in ***Mohammad Yousuf Vs. Smt. Afaq Jahan & another***2. In the said matter, on an application filed by the appellant therein alleging commission of offences by the named accused persons, the Magistrate directed the police to register and investigate. The said order of the learned Magistrate was challenged by means of an application under Section 482 of the Code after the police had completed the investigation and submitted the charge sheet. The High Court proceeded to quash the charge sheet on the ground that the Magistrate had no power to order registration of the case.

23. It is observed therein that the "investigation" under the directions of the Magistrate under Section 156(3) Cr.P.C. falling within Chapter XII contemplates "investigation" by the police authorities. Whether the investigation is started by the police by the registration of FIR on the information received by it or under the order of the Magistrate under Section 156(3) Cr.P.C., it would be same kind of investigation which would end up only with the report contemplated under Section 173 of the Code. But when a Magistrate orders "investigation" under Chapter XII, he does so before he takes cognizance of the offence under Chapter XV of the Code.

24. It is observed that Chapter XV of the Code which confers power on the Magistrate to order "investigation" under Section 202 of the Code deals with the provisions relating to the steps which a Magistrate may adopt after taking cognizance of an offence on a complaint. Thus, the investigation under Section 202, which falls under Chapter XV, though refers to the power of a Magistrate " to direct an investigation by a police officer", but is different from the "investigation" contemplated in Section 156(3) falling within Chapter XII of the Code.

25. Further, it was observed in paragraph nos. '9' & '11' of the report ***{Mohd. Yousuf2}*** that it is not necessary for the Magistrate to order investigation under Chapter XII if he proposes to take cognizance of the offence, and once he takes cognizance he has to follow the procedure envisaged in Chapter XV of the Code. The position as clarified therein is that any judicial Magistrate, before taking cognizance of the offence, can order investigation under Section 156(3) of the Code. If he does so, he need not to examine the complainant on oath because he was not taking cognizance of any offence therein.

26. Relevant paragraphs '9', '10' & '11' of the report are to be quoted herein:-

"9. <u>But a Magistrate need not order any such investigation if he proposes to take cognizance of the offence. Once he takes cognizance of the offence he has to follow the procedure envisaged in Chapter XV of the Code.</u> A reading of Section 202(1) of the Code makes the position clear that the investigation referred to therein is of a limited nature. The Magistrate can direct such an investigation to be made either by a police officer or by any other person. Such investigation is only for helping the Magistrate to decide whether or not there

is sufficient ground for him to proceed further. This can be discerned from the culminating words in Section 202(1) i.e. "or direct an investigation to be made by a police officer or by such other person as he thinks fit, for the purpose of deciding whether or not there is sufficient ground for proceeding".

10. This is because he has already taken cognizance of the offence disclosed in the complaint, and the domain of the case would thereafter vest with him.

11. The clear position therefore is that any Judicial Magistrate, before taking cognizance of the offence, can order investigation under Section 156(3) of the Code. If he does so, he is not to examine the complainant on oath because he was not taking cognizance of any offence therein. For the purpose of enabling the police to start investigation it is open to the Magistrate to direct the police to register an FIR. There is nothing illegal in doing so. After all registration of an FIR involves only the process of entering the substance of the information relating to the commission of the cognizable offence in a book kept by the officer in charge of the police station as indicated in Section 154 of the Code. Even if a Magistrate does not say in so many words while directing investigation under Section 156(3) of the Code that an FIR should be registered, it is the duty of the officer in charge of the police station to register the FIR regarding the cognizable offence disclosed by the complaint because that police officer could take further steps contemplated in Chapter XII of the Code only thereafter."

27. Further the position of law as clarified by the Apex Court in ***R.R. Chari vs The State Of Uttar Pradesh3; Narayandas Bhagwandas Madhavdas vs State Of West Bengal4*** and ***Gopal Das Sindhi & others Vs. State of Assam & another5*** as also the decision of the Calcutta High Court in ***Superintendent and Remembrancer of Legal Affairs, West Bengal v. Abani Kumar Banerjee6,*** approved in ***R.R. Chari***3, has been cited with approval in paragraph Nos.'13', '14' of the report in ***Mohd. Yousuf***2 to fortify the above view.

28. In ***Suresh Chand Jain Vs. State of M.P. & another***7, the question before the Apex Court was whether the Magistrate was empowered to direct the police to register a case under Section 156(3) Cr.P.C. on a complaint of commission of offences under Section 3 of the Prized Chits and Money Circulation Scheme (Prohibition) Act and under Section 420 of the IPC.

29. The order of the Magistrate under Section 156(3) to register and investigate was upheld in the revision before the Sessions court and application under Section 482 Cr.P.C. before the High Court. The Apex Court while dismissing the appeal before it held in paragraphs Nos. '7', '8', '9' & '10' as under:-

"7. In our opinion, the aforesaid direction given by the learned Single Judge of the Punjab and Haryana High Court in Suresh Kumar vs. State of Haryana (supra) is contrary to law and cannot be approved. Chapter XII of the Code contains provisions relating to information to the police and their powers to investigate, whereas Chapter XV, which contains Section 202, deals with provisions relating to the steps which a magistrate has to adopt while and after taking cognizance of any offence on a complaint. Provisions of the above two

chapters deal with two different facets altogether though there could be a common factor i.e. complaint filed by a person. Section 156, falling within Chapter XII, deals with powers of the police officers to investigate cognizable offences. True, Section 202 which falls under Chapter XV, also refers to the power of a Magistrate to direct an investigation by a police officer. But the investigation envisaged in Section 202 is different from the investigation contemplated in Section 156 of the Code. Section 156 of the Code reads thus:

"156. Police officers power to investigate cognizable cases.- (1) Any officer in charge of a police station may, without the order of a Magistrate, investigate any cognizable case which a court having jurisdiction over the local area within the limits of such station would have power to inquire into or try under the provisions of Chapter XIII.

(2) No proceeding of a police officer in any such case shall at any stage be called in question on the ground that the case was one which such officer was not empowered under this section to investigate.

(3) Any Magistrate empowered under section 190 may order such an investigation as above-mentioned.

8. The investigation referred to therein is the same investigation the various steps to be adopted for it have been elaborated in Chapter XII of the Code. Such investigation would start with making the entry in a book to be kept by the officer-in-charge of a police station, of the substance of the information relating to the commission of a cognizable offence. The investigation started thereafter can end up only with the report filed by the police as indicated in Section 173 of the Code. The investigation contemplated in that Chapter can be commenced by the police even without the order of a magistrate. But that does not mean that when a magistrate orders an investigation under Section 156(3) it would be a different kind of investigation. Such investigation must also end up only with the report contemplated in Section 173 of the Code. But the significant point to be noticed is, when a magistrate orders investigation under Chapter XII he does so before he takes cognizance of the offence.

9.But a magistrate need not order any such investigation if he proposes to take cognizance of the offence. Once he takes cognizance of the offence he has to follow the procedure envisaged in Chapter XV of the Code. A reading of Section 202(1) of the Code would convince that the investigation referred to therein is of a limited nature. The magistrate can direct such an investigation to be made either by a police officer or by any other person. Such investigation is only for helping the magistrate to decide whether or not there is sufficient ground for him to proceed further. This can be discerned from the culminating words in Section 202(1) i.e.

"or direct an investigation to be made by a police officer or by such other persons as he thinks fit, for the purpose of deciding whether or not there is sufficient ground for proceeding."

This is because he has already taken cognizance of the offence disclosed in the complaint, and the domain of the case would thereafter vest with him.

10.The position is thus clear. Any judicial magistrate, before taking cognizance of the offence, can order investigation under Section 156(3) of the Code. If he does so, he is not to examine the complainant on oath because he was not taking cognizance of any offence therein. For the purpose of enabling the

police to start investigation it is open to the magistrate to direct the police to register an FIR. There is nothing illegal in doing so. After all registration of an FIR involves only the process of entering the substance of the information relating to the commission of the cognizable offence in a book kept by the officer-in- charge of the police station as indicated in Section 154 of the Code. Even if a magistrate does not say in so many words while directing investigation under Section 156(3) of the Code that an FIR should be registered, it is the duty of the officer-in-charge of the police station to register the FIR regarding the cognizable offence disclosed by the complaint because that police officer could take further steps contemplated in Chapter XII of the Code only thereafter."

30. The decision of the Apex Court in ***Tula Ram Vs. Kishore Singh***8 has also been cited with approval to state in ***Mohd. Yousuf***2 that the Apex Court had reiterated the same legal position after referring to its earlier decisions.

31. The abovenoted observations of the Apex Court in ***Suresh Chand Jain***7 were made after taking note of the observations of the Apex Court in its earlier decision in ***Gopal Das Sindhi***5. Relevant extract of para '7' in ***Gopal Das Sindhi***5 is quoted herein as under:-

7.....Section 156(3) states "Any Magistrate empowered under Section 190 may order such investigation as above-mentioned." Mr. Thomas was certainly a Magistrate empowered to take cognizance under Section 190 and he was empowered to take cognizance of an offence upon receiving a complaint He, however, decided not to take cognizance but to send the complaint to the police for investigation as Sections 147, 342 and 448 were cognizable offences. It was,. however, urged that once a complaint was filed the Magistrate was bound to take cognizance and proceed under Chapter XVI of the Code. It is clear, however, that Chapter XVI would come into play only if the Magistrate had taken cognizance of an offence on the complaint filed before him, because Section 200 states that a Magistrate taking cognizance of an offence on complaint shall at once examine the complainant and the witnesses present, if any, upon oath and the substance of the examination shall be reduced to writing and shall be signed by the complainant and the witnesses and also by the Magistrate. If the Magistrate had not taken cognizance of the offence on the com-plaint filed before him, he was not obliged 'to examine the complainant on oath and the witnesses present at the time of the filing of the complaint. We cannot read the provisions of Section 190 to mean that once a complaint is filed, a Magistrate is bound to take cognizance if the facts stated in the complaint disclose the commission of any offence. We are unable to construe the word 'may' in Section 190 to mean 'must.' The reason is obvious. A complaint disclosing cognizable offences may well justify a Magistrate in sending the complaint, under Section 156(3) to the police for investigation. There is no reason why the time of the Magistrate should be wasted when primarily the duty to investigate in cases involving cognizable offences is with the police. On the other hand, there may be occasions when the Magistrate may exercise his discretion and take cognizance of a cognizable offence. If he does so then he would have to proceed in the manner [provided by Chapter XVI of the Code.....…"

32. As to what would mean "by taking cognizance" has been clarified by the Apex Court in ***R.R. Chari***3. While approving the decision of the Calcutta High Court in **Superintendent and Remembrancer of Legal Affairs, West Bengal**6, paragraph Nos. '8' & '9' of the report in ***R.R. Chari***3 read as under:-

"8. In Gopal Marwari v. Emperor (1), it was observed that the word 'cognizance'is used in the Code to indicate the point when the Magistrate or a Judge first takes judicial notice of an offence. it is a different thing from the initiation of proceedings. It is the condition precedent to the initiation of proceedings by the Magistrate. The court noticed that the word 'cognizance'is a word of somewhat indefinite import and it is perhaps not always used in exactly the same sense.

"9. After referring to the observations in Emperor v. Sou- rindra Mohan Chuckerbutty (2), it was stated by Das Gupta J. in Superintendent and Remembrancer of Legal Affairs, West Bengal v. Abani Kumar Banerjee (3) as follows :--

" What is taking cognizance has not been defined in the Criminal Procedure Code and I have no desire to attempt to define it. ***It seems to me clear however that before it can be said that any magistrate has taken cognizance of any offence under section 190 (1) (a), Criminal Procedure Code, he must not only have applied his mind to the contents of the petition but he must have done so for the purpose of proceeding in a particular way as indicated in the subse- quent provisions of this Chapter-- proceeding under section 200 and thereafter sending it for inquiry and report under section 202. When the magistrate applies his mind not for the purpose of proceeding under the subsequent sections of this Chapter, but for taking action of some other kind, e.g., ordering investigation under section 156 (3), or issuing a search warrant for the purpose of the investiga- tion, he cannot be said to have taken cognizance of the offence."***

In our opinion that is the correct approach to the question before the court."

33. The above view had been noted with approval by the Apex Court in ***Narayandas Bhagwandas Madhavdas***4 by observing as under:-

".....It is, however, argued that in Chari's case this Court was dealing with a matter which came under the Prevention of Corruption Act. It seems to us, however, that makes no difference. ***It is the principle which was enunciated by Das Gupta, J., which was approved. As to when cognizance is taken of an offence will*** *depend upon the facts and circumstances of each case and it is impossible to attempt to define what is meant by taking cognizance. Issuing of a search warrant for the purpose of an investigation or of a warrant of arrest for that purpose cannot by themselves be regarded as acts by which cognizance was taken of an offence. Obviously, it is only when a Magistrate applies his mind for the purpose of proceeding under s. 200 and subsequent sections of Chapter XVI of the Code of Criminal Procedure or under s. 204 of Chapter XVII of the Code that it can be positively stated that he had applied his mind and therefore had taken cognizance."*

34. The above legal position laid down in ***Suresh Chand Jain***7 was

considered by the Full Bench of this Court in ***Ram Babu Gupta Vs. State of U.P. & others***9 to answer the question referred to it "as to whether on an application filed under Section 156(3) Cr.P.C., the Magistrate need not to apply his mind and simply direct the police to register and investigate." The Full Bench has held that it is not possible to hold that when an application is moved before the Court only for exercise of powers under Section 156(3) Cr.P.C., it will remain an application only and would not be in the nature of the complaint. It was held that in any case, the Magistrate has to apply his mind on the allegations in the complaint to use his powers under Section 156(3) Cr.P.C. It was, thus, held that:-

"on receiving a complaint the Magistrate has to apply his mind to the allegations in the complaint upon which he may not at once proceed to take cognizance and may order it to go to the police station for being registered and investigated.T he order of the Magistrate must indicate application of mind. If the Magistrate takes cognizance; he proceeds to follow the procedure provided in Chapter XV of Cr.P.C."

35. The questions referred to the Full Bench was answered, accordingly.

36. In ***India Carat Pvt. Ltd. vs. State of Karnataka***10, considering the provisions as contained in Chapter XIV, Chapter XV and Chapter XVI of the Code, it was observed in paragraph '13' as under:-

"13. From the provisions referred to above, it may be seen that on receipt of a complaint a Magistrate has several courses open to him..... .....Yet another course open to the Magistrate is that instead of taking cognizance of the offence and following the procedure laid down under Section 200 or Section 202, he may order an investigation to be made by the police under Section 156(3). When such an order is made, the police will have to investigate the matter and submit a report under Section 173(2). On receiving the police report the Magistrate may take congnizance of the offence under Section 190(1)(c) and issue process straightaway to the accused. The Magistrate may exercise his powers in this behalf irrespective of the view expressed by the police in their report whether an offence has been made out or not. This is because the police report under Section 173(2) will contain the facts discovered or unearthed by the police as well as the conclusion drawn by the police therefrom. If the Magistrate is satisfied that upon the facts discovered or unearthed by the police there is sufficient material for him to take cognizance of the offence and issue process, the Magistrate may do so without reference to the conclusion drawn by the Investigating Officer because the Magistrate is not bound by the opinion of the police officer as to whether an offence has been made out or not. Alternately the Magistrate, on receiving the police report, may without issuing process or dropping the proceeding proceed to act under Section 200 by taking cognizance of the offence on the basis of the complaint originally submitted to him and proceed to record the statement upon oath of the complaint and the witnesses present and thereafter decide whether the complaint should be

dismissed or process should be issued."

37. The question regarding the power of Magistrate to order investigation under Section 156(3) Cr.P.C. further came up for consideration before the Apex Court in ***Sakiri Vasu vs. State of U.P. & Ors.***11 wherein it is observed that Section 156(3) provides for a check by the Magistrate on the police performing its duties under Chapter XII of the Code. In case where the Magistrate finds that the police has not done its duties of investigating the case at all or has not done it satisfactorily, he can issue direction to the police to do the investigation properly and can also monitor the same.

38. It was held therein that although Section 156(3) is very briefly worded but there is an implied power with the Magistrate under Section 156(3) Cr.P.C. to order registration of a criminal case and/or to direct the officer in charge of the police station concerned to hold a proper investigation and take all such necessary steps that may be necessary for ensuring a proper investigation including monitoring the same.

39. The above view taken in ***Sakiri Vasu***11 is supported by the reasoning therein that even though these powers have not been expressly mentioned in Section 156(3) Cr.P.C., they are implied in the said provision as when a power is given to an authority to do something it includes such incidental or implied powers which would ensure the proper doing of that thing. Relevant paragraph Nos. '18', '19' & '20' are noted as under:-

"18. It is well-settled that when a power is given to an authority to do something it includes such incidental or implied powers which would ensure the proper doing of that thing. In other words, when any power is expressly granted by the statute, there is impliedly included in the grant, even without special mention, every power and every control the denial of which would render the grant itself ineffective. Thus where an Act confers jurisdiction it impliedly also grants the power of doing all such acts or employ such means as are essentially necessary to its execution.

19. The reason for the rule (doctrine of implied power) is quite apparent. Many matters of minor details are omitted from legislation. As Crawford observes in his Statutory Construction (3rd edn. Page 267):-

If these details could not be inserted by implication, the drafting of legislation would be an indeterminable process and the legislative intent would likely be defeated by a most insignificant omission.

20. In ascertaining a necessary implication, the Court simply determines the legislative will and makes it effective. What is necessarily implied is as much part of the statute as if it were specifically written therein."

40. The abovenoted views have been considered in a recent decision in ***Vinubhai Haribhai and Malaviya & Ors. vs. State of Gujarat & Anr.***12 while dealing with the power of the Magistrate to order further investigation under Section 173(8) of the Code after the charge sheet is filed and cognizance is taken. The argument there was that the Magistrate would have no power to order further investigation into an offence after he takes cognizance of the offence on submission of the charge-sheet on the

direction issued by it under Section 156(3) of the Code. Dealing with the said argument, it was observed that the power of a Magistrate under Section 156(3) of the Code is very wide, for it is this judicial authority that must be satisfied that a proper investigation by the police takes place.

41. Relevant paragraph '23' of the report is quoted as under:-

"23. It is thus clear that the Magistrates power under Section 156(3) of the CrPC is very wide, for it is this judicial authority that must be satisfied that a proper investigation by the police takes place. To ensure that a proper investigation takes place in the sense of a fair and just investigation by the police - which such Magistrate is to supervise - Article 21 of the Constitution of India mandates that all powers necessary, which may also be incidental or implied, are available to the Magistrate to ensure a proper investigation which, without doubt, would include the ordering of further investigation after a report is received by him under Section 173(2); and which power would Vinubhai Haribhai Malaviya vs The State Of Gujarat on 16 October, 2019 Indian Kanoon continue to enure in such Magistrate at all stages of the criminal proceedings until the trial itself commences. Indeed, even textually, the investigation referred to in Section 156(1) of the CrPC would, as per the definition of investigation under Section 2(h), include all proceedings for collection of evidence conducted by a police officer; which would undoubtedly include proceedings by way of further investigation under Section 173(8) of the CrPC."

42. The Apex Court in ***Vinubhai***12 in paragraph '24' has then considered an earlier three Judge Bench decision in ***Devarapalli Lakshminarayan Reddy & Ors. vs. V. Narayana Reddy & Ors.***13 wherein the question considered was that "in view of clause (a) of the first proviso to Section 202 (1) of the Code a Magistrate who receives a complaint, disclosing an offence exclusively triable the Court of Sessions, is debarred from sending the same to the police for investigation under Section 156(3) of the Code." In the facts of that case, in the complaint of commission of offences under Sections 307, 395, the Magistrate forwarded it to the police for investigation.

43. While dealing with the power of the Magistrate to order police investigation under Section 156(3) Cr.P.C and Section 202 (1) of the Code, it was held in ***Devapralli***13 that there is distinction between a police investigation ordered under Section 156(3) on the one and directed under Section 202(1) Cr.P.C., as two operate in distinct spheres at different stages. Further it was observed that the first is excersiable at the pre-cognizance stage, the second at the post-cognizance stage when the Magistrate is in seisin of the case. That means in the case of a complaint regarding commission of a cognizable offence, the power under Section 156(3) Cr.P.C. can be invoked by the Magistrate before he takes cognizance of the offence under Section 190(1)(a) Cr.P.C. But if he once takes such cognizance and embarks upon the procedure embodied in Chapter XV, he is not competent to switch back to the precognizance stage and avail of Section 156(3).

44. Paragraph '17' of ***Devapralli***13 has been noted in paragraph '24' of the report in ***Vinubhai***12 and is extracted as under:-

"24. However, Shri Basant relied strongly on a Three Judge Bench judgment in ***Devarapalli Lakshminarayana Reddy & Ors. v. V. Narayana Reddy & Ors. (1976) 3 SCC 252.*** *This judgment, while deciding whether the first proviso to Section 202 (1) of the CrPC was attracted on the facts of that case, held:*

"17.....It may be noted further that an order made under sub-section (3) of Section 156, is in the nature of a peremptory reminder or intimation to the police to exercise their plenary powers of investigation under Section 156(1). Such an investigation embraces the entire continuous process which begins with the collection of evidence under Section 156 and ends with a report or charge-sheet under Section 173. On the other hand, Section 202 comes in at a stage when some evidence has been collected by the Magistrate in proceedings under Chapter XV, but the same is deemed insufficient to take a decision as to the next step in the prescribed procedure. In such a situation, the Magistrate is empowered under Section 202 to direct, within the limits circumscribed by that section an investigation for the purpose of deciding whether or not there is sufficient ground for proceeding. Thus the object of an investigation under Section 202 is not to initiate a fresh case on police report but to assist the Magistrate in completing proceedings already instituted upon a complaint before him."

This judgment was then followed in ***Tula Ram & Ors. v. Kishore Singh (1977) 4 SCC 459*** *at paragraphs 11and 15."*

45. It may further be relevant to quote paragraph '25' & '26' of the report in **Vinubhai**12 which read as under:-

"25. Whereas it is true that Section 156(3) remains unchanged even after the 1973 Code has been brought into force, yet the 1973 Code has one very important addition, namely, Section 173(8), which did not exist under the 1898 Code. As we have noticed earlier in this judgment, Section 2(h) of the 1973 Criminal Procedure Code defines investigation in the same terms as the earlier definition contained in Section 2(l) of the 1898 Criminal Procedure Code with this difference that investigation after the 1973 Code has come into force will now include all the proceedings under the CrPC for collection of evidence conducted by a police officer. All would clearly include proceedings under Vinubhai Haribhai Malaviya vs The State Of Gujarat on 16 October, 2019 Indian Kanoon - http://indiankanoon.org/doc/131202146/
13 Section 173(8) as well. Thus, when Section 156(3) states that a Magistrate empowered under Section 190 may order such an investigation, such Magistrate may also order further investigation under Section 173(8), regard being had to the definition of investigation contained in Section 2(h).

26. Section 2(h) is not noticed by the aforesaid judgment at all, resulting in the erroneous finding ***in law that the power under Section 156(3) can only be exercised at the pre-cognizance stage. The investigation spoken of in Section 156(3) would embrace the entire process, which begins with the collection of evidence and continues until charges are framed by the Court, at which stage the trial*** *can be said to have begun. For these*

reasons, the statement of the law contained in paragraph 17 in ***Devarapalli Lakshminarayana Reddy*** *(supra) cannot be relied upon."* ***(emphasis added)***

46. Having carefully gone through the above observations in ***Vinubhai***12, it is evident that the power of a Magistrate to direct the police to conduct "investigation" under Section 156(3) flows in Chapter XII from the power conferred upon it under Section 190 Cr.P.C. under Chapter XIV of the Code to take cognizance of a criminal offence upon receiving an information of commission of offence(s), which is within his competence to inquire into. As noted in ***Vinubhai***12, the investigation ***"spoken of in Section 156(3) would embrace the entire process, which begins with the collection of evidence and continues until charges are framed by the Court, at which stage the trial can be said to have begun."*** The statement of law as contained in paragraph '17' in ***Devarapalli***13 noted above that "once the Magistrate takes cognizance of the offence under Section 190(1)(a) and embarks upon the procedure embodied in Chapter XV, he is not competent to switch back to the pre-cognizance stage and avail Section 156(3) to issue direction to the police to conduct investigation for collection of evidence" has been held to be erroneous finding in law, ignoring the language of Section 2(h) of the Code.

47. It was further observed in ***Vinubhai***12 that the provisions of Section 173(8) Cr.P.C. is an important addition in the 1973 Code which did not exist under the 1898 Code whereas Section 156(3) remains unchanged, to hold that "nothing in the provisions of Section 173(1) to 173(7) Cr.P.C. shall be deemed to preclude further investigation in respect to an offence, after a report under Sub-section (2) of Section 173 has been forwarded to the Magistrate." It was held therein that the Court of Magistrate enjoys the jurisdiction to direct further investigation under Section 173(8) into the offence even after taking cognizance on the charge-sheet/police report submitted under Section 173(2) Cr.P.C. Section 173(8) Cr.P.C. opens with Non-obstante clause and, therefore, the power therein cannot be said to have any inhibition.

48. In ***Vinay Tyagi vs. Irshad Ali @ Deepak & others***14 having analysed the provisions of the Code and various judgments of the Apex Court, it is said that:-

40. Having analysed the provisions of the Code and the various judgments as afore-indicated, we would state the following conclusions in regard to the powers of a magistrate in terms of Section 173(2) read with Section 173(8) and Section 156(3) of the Code:

40.1. The Magistrate has no power to direct reinvestigation or fresh investigation (de novo) in the case initiated on the basis of a police report.

40.2. A Magistrate has the power to direct further investigation after filing of a police report in terms of Section 173(6) of the Code.

40.3. The view expressed in (2) above is in conformity with the principle of law stated in Bhagwant Singhs case (supra) by a three Judge Bench and thus in conformity with the doctrine of precedence.

40.4. Neither the scheme of the Code nor any specific provision therein bars exercise of such jurisdiction by the Magistrate. The language of Section

173(2) cannot be construed so restrictively as to deprive the Magistrate of such powers particularly in face of the provisions of Section 156(3) and the language of Section 173(8) itself. In fact, such power would have to be read into the language of Section 173(8).

40.5. The Code is a procedural document, thus, it must receive a construction which would advance the cause of justice and legislative object sought to be achieved. ***(emphasis added)****..... It does not stand to reason that the legislature provided power of further investigation to the police even after filing a report, but intended to curtail the power of the Court to the extent that even where the facts of the case and the ends of justice demand, the Court can still not direct the investigating agency to conduct further investigation which it could do on its own.*

40.6. It has been a procedure of proprietary that the police has to seek permission of the Court to continue further investigation and file supplementary chargesheet. This approach has been approved by this Court in a number of judgments. This as such would support the view that we are taking in the present case."

49. In ***Ramdev Food Products Private Ltd. vs. State of Gujarat***15, the dispute was that on a complaint filed by the appellant therein against 14 accused for alleged commission of offences under Sections 409, 420, 406, 467, 468, 471 read with Sections 120-B and 114 of the Penal Code, 1860, the Magistrate passed an order directing the police to give a report to the Court under Section 202(1) of the Code instead of directing investigation under Section 156(3) of the Code, as sought by the appellant. The said order was not interfered by the High Court. Challenging the order of the Magistrate and the High Court, it was argued that the Magistrate has erred in declining to order investigation under Section 156(3) Cr.P.C. which was necessary in view of the allegation of forgery of documents and stamp paper by the accused to create backdated partnership deeds by forging signatures of a dead person. Such documents being in custody of the accused could not be otherwise produced except on arrest in the course of investigation and in accordance with Section 27 of the Evidence Act. Option of proceeding under Section 202, as against Section 156(3), has to be exercised only when evidence has already been collected and what remained to be decided was whether there was sufficient ground to proceed. Mere fact that the appellant first approached the police and the police did not register first information report could not be taken against it nor the dispute being of civil nature was a bar to criminal proceedings, if a case was made out. It was further argued that the direction under Section 156(3) for investigation was all the more necessary as under Section 202, the police officer had no power of arrest. In such a situation calling for report under Section 202 will not serve the purpose of finding out the truth. The arrest was integral part of the investigation.

50. In the light of above submissions, one of the questions framed for consideration is as under:-

"6.1 (I) Whether discretion of the Magistrate to call for a report under Section 202 instead of directing

investigation under Section 156(3) is controlled by any defined parameters?"

51. To answer the said question, in paragraph '13' of the report, the Court has proceeded to deal with the following question:-

"13. We may first deal with the question as to whether the Magistrate ought to have proceeded under Section 156(3) or was justified in proceeding under Section 202(1) and what are the parameters for exercise of power under the two provisions."

52. The Apex Court after considering the provisions in Chapter XII, Chapter XIV and Chapter XV has considered the law laid down by the Apex Court in ***Lalita Kumari***1 and held in paragraph 19 that:-

"19. Thus, this Court has laid down that while prompt registration of FIR is mandatory, checks and balances on power of police are equally important. Power of arrest or of investigation is not mechanical. It requires application of mind in the manner provided. Existence of power and its exercise are different. Delicate balance had to be maintained between the interest of society and liberty of an individual. Commercial offences have been put in the category of cases where FIR may not be warranted without enquiry."

53. It was further observed in paragraph '20' while relying upon the decision of the Apex Court in ***Anil Kumar vs. M.K. Aiyappa***16 that directions by the Magistrate for investigation under Section 156(3) cannot be given mechanically.

54. It was then held in paragraph '22' to '22.3' to hold as under:-

"22. Thus, we answer the first question by holding that:-

22.1 The direction under Section 156(3) is to be issued, only after application of mind by the Magistrate. When the Magistrate does not take cognizance and does not find it necessary to postpone instance of process and finds a case made out to proceed forthwith, direction under the said provision is issued. In other words, where on account of credibility of information available, or weighing the interest of justice it is considered appropriate to straightaway direct investigation, such a direction is issued.

22.2 The cases where Magistrate takes cognizance and postpones issuance of process are cases where the Magistrate has yet to determine "existence of sufficient ground to proceed". Category of cases falling under Para 120.6 in Lalita Kumari (supra) may fall under Section 202.

22.3 Subject to these broad guidelines available from the scheme of the Code, exercise of discretion by the Magistrate is guided by interest of justice from case to case."

55. Thus, in the whole scheme of the Code of Criminal Procedure as clarified in the pronouncements of the Apex Court ranging from 1951 to 2019, it is evident that if a person has a grievance that his FIR has not been registered by the police, his first remedy is to approach the Superintendent of Police under Section 154(3) Cr.P.C. or other police officer referred to in Section 36 Cr.P.C. If his

grievances still persist, then he can approach a Magistrate under Section 156(3) Cr.P.C. He has a further remedy of filing a criminal complaint under Section 200 Cr.P.C. On receipt of the complaint, however, several courses are open to the Magistrate:-

(i) He may take cognizance of the offence at once and proceed to record statements of the complaints and the witnesses present under Section 200, and proceed under Chapter XV and Chapter XVI, accordingly.

(ii) If, he thinks fit, he may postpone the issue of process and either inquire into the case himself or direct an investigation to be made by the police officer or such other process as he may thinks fit, for the purpose of deciding whether or nor there is sufficient ground for proceeding. He may then issue process if in his opinion there is sufficient ground of proceeding; or dismiss the complaint if there is no sufficient ground for proceeding.

(iii) Yet another course open to the Magistrate is that instead of taking cognizance of the offence and following the procedure laid down under Section 200 or Section 202, he may order investigation to be made by the police under Section 156(3).

(iv) On receiving the police report, the Magistrate may take cognizance of the offence under Section 190(1)(b) and issue process straightway to the accused. The Magistrate may exercise his power in this behalf irrespective of the view expressed by the police in their report whether an offence has been made out or not. This is because the Magistrate is not bound by the opinion of the police officer as to whether an offence has been made out or not.

56. Thus, the above discussion pertaining to the power of the Magistrate under Section 156(3) in Chapter XII read with Section 190 in Chapter XIV of the Code leaves no room for doubt that there is nothing in the Code of the Criminal Procedure, which curtails or puts any embargo on the power of the Magistrate to make an "inquiry" as defined under Section 2(g) of the Code or to order for "investigation" defined under Section 2(h) of the Code, in dealing with the application under Section 156(3) Cr.P.C. i.e. in exercise of the power conferred upon it under Chapter XII or Chapter XIV of the Code to satisfy itself about the veracity of the allegations of commission of a criminal offence made therein.

57. In its discretionary power, it is open for the Magistrate to direct the police to register a criminal case under Section 154 Cr.P.C. and conduct investigation. At the same time, it is open for the Magistrate, where the facts of the case and the ends of justice so demand, to take cognizance of the matter by treating it as a complaint and proceed for the "inquiry" under Section 200 and 202 Cr.P.C.

58. It cannot be said nor it could be demonstrated that in each case, without application of its independent mind, the Magistrate shall issue simply direction "to register and investigate" i.e. to lodge a first information report on an application filed under Section 156(3) Cr.P.C. The power to conduct a preliminary inquiry into the report of commission of criminal offence(s), conferred on the Magistrate within the scheme of the Code of Criminal Procedure has not been curtailed by any of the observations made by the Apex Court in the case of ***Lalita Kumari***1.

59. However, it is pertinent to note that while exercising its discretionary power under Section 156(3) Cr.P.C., the Magistrate like any other Court of discretionary jurisdiction is to act fairly and consciously and ensure that the discretion conferred upon it is exercised within the limits of judicial discretion. The entire emphasis is to act in an unbiased and just manner, strictly in accordance with law, to find out the truth of the case which shall come before it.

60. It is a Magistrate who is the competent authority to take cognizance of an offence and it is his duty to decide whether on the basis of the record and documents produced, an offence is made out or not and if made out, what course of law should be adopted. Emphasis is laid to the statement in ***Vinubhai***12, wherein it is stated that ***"it is the judicial conscience of the Magistrate which has to be satisfied with reference to the record and the documents placed before him by the investigating agency, in coming to an appropriate conclusion in consonance with the principles of law."*** It would not be out of place to note para '17' of the report in ***Vinubhai***12 at this stage:-

"17. It is clear that a fair trial must kick off only after an investigation is itself fair and just. The ultimate aim of all investigation and inquiry, whether by the police or by the Magistrate, is to ensure that those who have actually committed a crime are correctly booked, and those who have not are not arraigned to stand trial. That this is the minimal procedural requirement that is the fundamental requirement of Article 21 of the Constitution of India cannot be doubted. It is the hovering omnipresence of Article 21 over the CrPC that must needs inform the interpretation of all the provisions of the CrPC, so as to ensure that Article 21 is followed both in letter and in spirit." ***(emphasis added)***

61. Applying the above legal principles, in the facts of the present case, this Court finds that the application under Section 156(3) Cr.P.C. was filed after a period of two months of the alleged incident and it was noted by the Court concerned that nothing could be traced in favour of the prosecution by medical examination etc. In the circumstances before it, the Court deemed it fair, just and proper to search the evidence(s) which is/are well known to the applicant and in his possession so as to find out the truth of the allegations in the application.

62. Having perused the contents of the application and the order of the Court below, it cannot be said that the Court concerned has committed illegally in exercise of its discretionary jurisdiction under Section 156(3) Cr.P.C. or it has exceeded in its jurisdiction in any manner or has exercised jurisdiction not vested in it in law. It cannot be said also that any material injustice has been caused to the applicant on account of the decision of the Court below to treat the application under Section 156(3) Cr.P.C. as a complaint for the purpose of deciding whether or not there is sufficient ground for proceeding, rather than directing the police to register an FIR and investigate under Section 154 of the Code.

63. The judgment of this Court dated 07.12.2019 in the Application u/s 482 No. 44699 of 2019 (Maneeta vs. State of UP), relied upon by the learned counsel for the revisionist is based on the facts of that case

and is of no benefit to the revisionist herein.

64. No illegality much less procedural irregularity can be found in the order passed by the Additional Sessions Judge, Court No.1, Kushinagar, which would warrant interference by this Court in exercise of its revisional jurisdiction.

65. The revision is, thus, found devoid of merits and hence ***dismissed***.

(2020)02ILR A908

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 01.05.2019

BEFORE
THE HON'BLE MANOJ MISRA, J.
THE HON'BLE SURESH KUMAR GUPTA, J.

Crl. Misc. Writ Petition No. 9628 of 2019

M/s Puja Quench Distributors Pvt. Ltd. & Ors. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Bharat Kishore Srivastava, Sri Vimal Dharm Yadav

Counsel for the Respondents:
A.G.A., Sri Abhishek Srivastava

A. Criminal Law-Indian Penal Code,1860-Sections 420, 407,468,471,406,120-B-Quashing of FIR-settlement/compromise of non-compoundable offence-Petitioner Company obtained loan facility by setting up an impostor with fabricated papers to show execution of sale-deed with an intent to defraud the finance company-magistrate ordered for further investigation-petitioners as borrowers entered into settlement-defrauding a public limited finance company by setting up forged papers, is an act which has potential to affect the society at large-criminal cases cannot be quashed on the basis of settlement-Hence, dismissed.(Para 1 to 26)

The quashment neither helps to secure the ends of justice nor does it prevent the abuse of the process of law. These offences are serious and not private in nature.if the finance company is defrauded, it may shake the confidence of the shareholders, creditors and public at large.(Para 24)

Crl. Misc. writ petition dismissed. (E-6)

List of Cases Cited:-

1. Manoj Sharma Vs. State, (2008)16 SCC 1

2. CBI,ACB,Mumbai Vs. Narendra Lal Jain & Ors.,(2014) 5 SCC 364

3. Gian Singh Vs. St. Of Punjab & Anr, (2012) 10 SCC 303

4. St. Of Mah. Thru CBI Vs. Vikram Anantrai Doshi & Ors,(2014)15 SCC 29

5. Gopakumar B. Nair Vs. CBI & Anr. ,(2014) 5 SCC 800

6. CBI Vs. Jagjit Singh ,(2013)10 SCC 686

7. CBI Vs. Maninder Singh,(2016)1 SCC 389

(Delivered by Hon'ble Manoj Misra, J. & Hon'ble Suresh Kumar Gupta, J).)

1. We have heard the learned counsel for the petitioners; Sri Deepak Mishra, the learned A.G.A., for the respondents 1, 2 and 3; Sri Abhishek Srivastava for the respondent no.4; and have perused the record.

2. The instant petition seeks quashing of the first information report (in short FIR) dated 20.10.2015 which has been lodged at P.S. Kavi Nagar, District-

Ghaziabad as Case Crime No. 1343 of 2015, under Sections 420, 407, 468, 471, 406 and 120-B I.P.C.

3. The impugned first information report has been lodged by an authorized representative of Edelweiss Housing Finance Ltd. (respondent no.4) against the petitioners and one Smt. Geeta Devi (non-petitioner).

4. The allegations in the first information report are: that Edelweiss Housing Finance Ltd. (for short informant company) is a registered company doing business in financing, housing loans, etc.; that in the month of December 2012/January 2013, the accused-petitioners, some of whom are directors in M/s Pooja Quench Distributors India Pvt. Ltd (petitioner no.1), applied to the informant company for a housing loan to purchase a property i.e. House No. KF 41, Kavi Nagar, Ghaziabad by creation of mortgage thereon; that in connection therewith, property papers of the aforementioned property, which was stated to be owned by Geeta Devi (co-accused - non-petitioner), were shown to the informant company to indicate that the said property was allotted and leased to Devendra Kumar Jain (allottee) by Improvement Trust (currently Ghaziabad Development Authority), vide lease deed dated 02.02.1977, which was assigned to Smt. Geeta Devi, vide instrument dated 19.07.1978, following which, Geeta Devi obtained freehold rights from Ghaziabad Development Authority vide instrument dated 22.03.2005; that by disclosing that the said property has been purchased by the petitioners from Geeta Devi, vide sale-deed dated 08.03.2013, and by depositing papers thereof, loan of Rs. 3 crores, to finance the purchase, was obtained from the informant company, which was disbursed by the informant company by issuing bank draft of Rs. 3 crores in favour of Geeta Devi; that after paying few installments, in between April 2013 and October 2013, the accused-petitioners defaulted in payment of the installments; that, consequently, the informant company tried to contact the borrowers and when it failed in its efforts, an officer of the informant company was deputed for enquiry / inspection, whereupon, it was found that the property wore locks of IDBI Bank; that, when a detailed enquiry was made, it was found that the said property had been purchased by a person named Rajesh Singh, who had borrowed loan from IDBI Bank against mortgage of the property and, as he had defaulted in repayment of the loan, the IDBI Bank had taken possession thereof; that upon further enquiry, it was found that the purchaser company (M/s. Puja Quench Distributors Pvt. Ltd - petitioner no.1) through its Director (Sunder Singh-petitioner no.2) and other co-purchasers, namely, Smt. Kamlesh Singh (petitioner no.3) and Rajendra Kumar (petitioner no.4) for the purpose of obtaining loan facility had set up an impostor of Geeta Devi as also fabricated papers to show execution of sale-deed in their favour. Thus, in pith and substance, the allegations in the impugned first information report are that by setting up forged and fabricated documents, loan was obtained from a finance company with an intent to defraud the finance company.

5. The petitioners have not disputed that the sale-deed, which was deposited with the informant, was a forged and fabricated document and that it was executed by an impostor of Geeta Devi. Rather, the case of the petitioners is that they are innocent and they had no reason

to suspect that their vendor is an impostor of Geeta Devi. In that regard, it would be apposite to reproduce paragraphs 13, 14 and 15 of the writ petition, which are extracted below:-

"13. That petitioner was accosted by the accused, father-in-law Bhan Singh Nagar, brother-in-law Ved Prakash Nagar and Manoj Nagar all residents of KI 140 Kavi Nagar, Ghaziabad, who are all related as in-laws to his younger brother Rajkumar with the proposal for the sale of house and property located at KF 41 Kavi Nagar, Ghaziabad.

14. That the aforementioned accused presented one imposter a lady Smt. Geeta Devi as the owner of the property at KF 41 Kavi Nagar, Ghaziabad which she wanted to sell and further claimed that they had advanced some amount to this lady aforementioned.

15. That the petitioners had no reason to suspect all that was falsely projected before him as the accused were closely related to his younger brother."

6. However, the petition has not been pressed on that ground. This petition has been pressed by claiming that the police after registration of the first information report had investigated the matter and had submitted a final report on 09.11.2015; that to the final report, a protest petition was filed by the informant, upon which a direction was issued by the concerned Magistrate for further investigation; that pursuant to the order for further investigation, the matter was investigated and the police, yet again, submitted a final report on 30.11.2017; that on the said final report, again, by order dated 18.09.2018, the Court of A.C.J.M.-VIth, Ghaziabad, upon protest by the informant, rejected the final report and remanded the matter for further investigation; that, in between, on 16.11.2018, the petitioners, as borrowers, have entered into a settlement/compromise with the informant (creditor) and, by now, abiding the terms of the settlement, borrowers have paid off the dues therefore, as the informant company is not interested in pursuing the matter, the first information report should be quashed.

7. From the averments made in paragraph 9 of the petition, it appears that pursuant to the order of the concerned Magistrate, dated 18.09.2018, directing further investigation, the investigation is in progress. Interestingly, neither the order directing further investigation has been brought on record nor it has been challenged in this petition. It has also not been urged before us that the said order has been challenged in any proceeding and that it has been stayed or set aside.

8. On 18.04.2019, Sri Abhishek Srivastava, who had appeared for the respondent no.4, had stated before the Court that he would have no objection if the impugned first information report is quashed. But he, however, sought time to file an affidavit.

9. Pursuant to the order dated 18.04.2019, Sri Abhishek Srivastava, Advocate, has filed an affidavit of Sri Ragvendra Singh, Law Officer / Authorised representative of the informant company, stating that, as per the terms and conditions of settlement entered by the parties, Rs. 1.5 crores has been received, as per schedule, towards full satisfaction of the informant company. In paragraph 7 of that affidavit, it is stated that since the parties have not only arrived at a settlement but also complied with the

terms and conditions of the settlement dated 16.11.2018, the informant company does not want to prosecute the petitioners any further.

10. The learned counsel for the petitioners, by placing reliance on decisions of the Apex Court in ***Manoj Sharma v. State : 2008 (16) SCC 1; Central Bureau of Investigation, ACB, Mumbai v. Narendra Lal Jain and others : (2014) 5 SCC 364; and Gian Singh v. State of Punjab and another : (2012) 10 SCC 303***, has submitted that in view of compromise between the parties, the first information report for offences punishable under Sections 420, 468, 471, 34 and 120-B I.P.C. can and ought to be quashed even though the offences might be non-compoundable.

11. Learned A.G.A. has submitted that cases of economic offences or bank fraud or fraud relating to financial institutions stand on a different footing as they have an impact on the society at large and therefore neither the FIR nor the proceedings in pursuance thereof can be quashed on the basis of compromise between immediately affected parties. In such matters the proceeding would have to be brought to its logical conclusion as per law. He has further submitted that, in the instant case, the petitioners have not disputed the position that the sale-deed was obtained from an impostor of the owner and the same was used for creating a mortgage to obtain loan from a public limited company. It was urged that though it may be true that the informant company might have entered into a settlement with the borrower but who set up the impostor; who was behind the fraud; as to why funds were released without proper verification of the documents; whether original documents were at all there, if so, whether they were checked, are all issues which concern the society at large, inasmuch as the informant is a public limited company, where members of public must have subscribed to its capital, and there may be lenders lending there money to it. He submitted that such financial frauds have a cascading effect on the economy of the nation and destroys faith in the financial system. He has thus submitted that this is not a case where the first information report or the consequential investigation should be quashed on the basis of compromise between immediately affected parties. In support of his submission, the learned A.G.A. has placed reliance on decisions of the Apex Court in ***State of Maharastra through CBI v. Vikram Anantrai Doshi and others : (2014) 15 SCC 29;*** and in ***Gopakumar B. Nair v. Central Bureau of Investigation and another : (2014) 5 SCC 800***. He has thus prayed that the petition be dismissed and the investigation be allowed to come to its logical conclusion.

12. We have considered the rival submissions and have perused the record carefully.

13. A perusal of the record including the pleading of the writ petitioners would reflect that even the petitioners do not dispute that the sale-deed which was submitted for obtaining loan was a false document and was executed by an impostor. Though it has not been brought to our notice as to why, earlier, final report was submitted as also why further investigation was directed by the concerned Magistrate but, what is clear is that, the order of further investigation is operating. The only question therefore that remains for us to examine, is whether on

the basis of a private settlement between borrower and the creditor, the investigation on the first information report, which discloses commission of non-compoundable offences, relating to forgery and setting up of forged documents to obtain loan from a public limited finance company, can be quashed.

14. The issue as to when a non-compoundable offence can be quashed on the basis of a compromise had been an issue engaging attention of the courts time and again. A three Judge Bench of the Apex Court in ***Gian Singh's case (supra)*** had laid down law in that regard, as found in paragraph 61 of the report, which is extracted below:-

"61. The position that emerges from the above discussion can be summarised thus: the power of the High Court in quashing a criminal proceeding or FIR or complaint in exercise of its inherent jurisdiction is distinct and different from the power given to a criminal court for compounding the offences under Section 320 of the Code. Inherent power is of wide plenitude with no statutory limitation but it has to be exercised in accord with the guideline engrafted in such power viz; (i) to secure the ends of justice or (ii) to prevent abuse of the process of any Court. In what cases power to quash the criminal proceeding or complaint or F.I.R may be exercised where the offender and victim have settled their dispute would depend on the facts and circumstances of each case and no category can be prescribed. However, before exercise of such power, the High Court must have due regard to the nature and gravity of the crime. Heinous and serious offences of mental depravity or offences like murder, rape, dacoity, etc. cannot be fittingly quashed even though the victim or victim's family and the offender have settled the dispute. Such offences are not private in nature and have serious impact on society. Similarly, any compromise between the victim and offender in relation to the offences under special statutes like Prevention of Corruption Act or the offences committed by public servants while working in that capacity etc; cannot provide for any basis for quashing criminal proceedings involving such offences. But the criminal cases having overwhelmingly and predominatingly civil flavour stand on different footing for the purposes of quashing, particularly the offences arising from commercial, financial, mercantile, civil, partnership or such like transactions or the offences arising out of matrimony relating to dowry, etc. or the family disputes where the wrong is basically private or personal in nature and the parties have resolved their entire dispute. In this category of cases, High Court may quash criminal proceedings if in its view, because of the compromise between the offender and victim, the possibility of conviction is remote and bleak and continuation of criminal case would put accused to great oppression and prejudice and extreme injustice would be caused to him by not quashing the criminal case despite full and complete settlement and compromise with the victim. In other words, the High Court must consider whether it would be unfair or contrary to the interest of justice to continue with the criminal proceeding or continuation of the criminal proceeding would tantamount to abuse of process of law despite settlement and compromise between the victim and wrongdoer and whether to secure the ends of justice, it is appropriate that criminal case is put to an end and if the answer to

the above question(s) is in affirmative, the High Court shall be well within its jurisdiction to quash the criminal proceeding."

15. From above extract, it is clear that before exercising extraordinary power to quash the FIR or the proceeding, relating to a non-compoundable offence, on the basis of a compromise, the High Court must have due regard to the nature and gravity of the crime so as to ascertain whether it has serious impact on society.

16. In cases relating to financial fraud, particularly, where forged papers are set up for obtaining loan facility; and those relating to prevention of corruption matters, the apex court had been consistent in its view that such matters affect the society at large. In this regard, it would be worthwhile to notice the decision of the apex court in ***State of Maharastra through CBI v. Vikram Anantrai Doshi and others (supra)*** where it has been observed as follows:-

"26. We are in respectful agreement with the aforesaid view. Be it stated, that availing of money from a nationalized bank in the manner, as alleged by the investigating agency, vividly exposits fiscal impurity and, in a way, financial fraud. The modus operandi as narrated in the chargesheet cannot be put in the compartment of an individual or personal wrong. It is a social wrong and it has immense societal impact. It is an accepted principle of handling of finance that whenever there is manipulation and cleverly conceived contrivance to avail of these kind of benefits it cannot be regarded as a case having overwhelmingly and predominantingly of civil character. The ultimate victim is the collective. It creates a hazard in the financial interest of the society. The gravity of the offence creates a dent in the economic spine of the nation. The cleverness which has been skillfully contrived, if the allegations are true, has a serious consequence. A crime of this nature, in our view, would definitely fall in the category of offences which travel far ahead of personal or private wrong. It has the potentiality to usher in economic crisis. Its implications have its own seriousness, for it creates a concavity in the solemnity that is expected in financial transactions. It is not such a case where one can pay the amount and obtain a "no due certificate" and enjoy the benefit of quashing of the criminal proceeding on the hypostasis that nothing more remains to be done. The collective interest of which the Court is the guardian cannot be a silent or a mute spectator to allow the proceedings to be withdrawn, or for that matter yield to the ingenuous dexterity of the accused persons to invoke the jurisdiction under Article 226 of the Constitution or under Section 482 of the Code and quash the proceeding. It is not legally permissible. The Court is expected to be on guard to these kinds of adroit moves. The High Court, we humbly remind, should have dealt with the matter keeping in mind that in these kind of litigations the accused when perceives a tiny gleam of success, readily invokes the inherent jurisdiction for quashing of the criminal proceeding. The court's principal duty, at that juncture, should be to scan the entire facts to find out the thrust of allegations and the crux of the settlement. It is the experience of the Judge comes to his aid and the said experience should be used with care, caution, circumspection and courageous prudence. As we find in the case at hand the learned Single Judge has not taken pains to scrutinize the entire

conspectus of facts in proper perspective and quashed the criminal proceeding. The said quashment neither helps to secure the ends of justice nor does it prevent the abuse of the process of the Court nor can it be also said that as there is a settlement no evidence will come on record and there will be remote chance of conviction. Such a finding in our view would be difficult to record. Be that as it may, the fact remains that the social interest would be on peril and the prosecuting agency, in these circumstances, cannot be treated as an alien to the whole case. Ergo, we have no other option but to hold that the order of the High Court is wholly indefensible."

17. Likewise, in ***Gopakumar B. Nair's case (supra)***, by taking a similar view, a three Judges Bench of the Apex Court had refused to quash the proceedings against a borrower on account of alleged settlement with the Bank upon finding that the accused had also been charged for commission of substantive offence under Section 471 IPC. In that regard, it would be useful to reproduce paragraph 14 of the judgment, as reported, which is extracted below:-

"The aforesaid principle of law may now be applied to the facts of the present case. At the very outset a detailed narration of the charges against the accused-appellant has been made. The appellant has been charged with the offence of criminal conspiracy to commit the offence under Section 13(1)(d). He is also substantively charged under Section 420 (compoundable with the leave of the Court) and Section 471 (non-compoundable). A careful consideration of the facts of the case would indicate that unlike in Nikhil Merchant (supra) no conclusion can be reached that the substratum of the charges against the accused-appellant in the present case is one of cheating nor are the facts similar to those in Narendra Lal Jain (supra) where the accused was charged under Section 120-B read with Section 420 IPC only. The offences are certainly more serious; they are not private in nature. The charge of conspiracy is to commit offences under the Prevention of Corruption Act. The accused has also been charged for commission of the substantive offence under Section 471 IPC. Though the amounts due have been paid the same is under a private settlement between the parties unlike in Nikhil Merchant (supra) and Narendra Lal Jain (supra) where the compromise was a part of the decree of the Court. There is no acknowledgement on the part of the bank of the exoneration of the criminal liability of the accused-appellant unlike the terms of compromise decree in the aforesaid two cases. In the totality of the facts stated above, if the High Court has taken the view that the exclusion spelt out in Gian Singh (supra) (para 61) applies to the present case and on that basis had come to the conclusion that the power under Section 482 CrPC should not be exercised to quash the criminal case against the accused, we cannot find any justification to interfere with the said decision."

18. In ***Central Bureau of Investigation v. Jagjit Singh : (2013) 10 SCC 686***, a first information report was registered against Director of Company and Officers of Indian Overseas Bank on allegations that the accused obtained loan for his company against security on forged/ fabricated documents and Indian Overseas Bank including its officers and managers helped him in obtaining such loan. Later, the borrower settled the dispute with Indian Overseas Bank and

paid the amount, pursuant to the order passed by Debt Recovery Tribunal, Calcutta. By giving reference of the order of the Debt Recovery Tribunal, the accused moved an application under Section 482 Cr.P.C. before the High Court for quashing the criminal proceedings on the ground that in view of the alleged amicable settlement between the parties, the proceedings were liable to be quashed. The High Court quashed the proceedings against which the Central Bureau of Investigation filed an appeal before the Apex Court. Allowing the appeal and setting aside the order passed by the High Court, the Apex Court observed that the offences when committed in relation with Banking activities, including offences under Section 420/471 IPC, have harmful effect on the public and threaten the well being of the society. It was observed that one may say that the bank is the victim in such cases but, in fact, the society in general, including customers of the Bank is the sufferer.

19. Similarly, in ***Central Bureau of Investigation v. Maninder Singh : (2016) 1 SCC 389***, the Apex Court, in paragraph 16, had observed as follows:-

"16. The allegation against the respondent is "forgery' for the purpose of cheating and use of forged documents as genuine in order to embezzle the public money. After facing such serious charges of forgery, the respondent wants the proceedings to be quashed on account of settlement with the bank. The development in means of communication, science & technology etc. have led to an enormous increase in economic crimes viz. phishing, ATM frauds etc. which are being committed by intelligent but devious individuals involving huge sums of public or government money. These are actually public wrongs or crimes committed against society and the gravity and magnitude attached to these offences is concentrated at public at large."

20. At this stage, it may be noticed that in the decision of ***Central Bureau of Investigation, ACB, Mumbai v. Narendra Lal Jain (supra)***, on which reliance has been placed by the petitioner, the Apex Court had approved quashing of the proceeding by the High Court on the basis of settlement as there was no allegation of using a forged document for the purpose of obtaining loan. The decision in ***Narendra Lal Jain's case (supra)*** was considered and distinguished in ***Gopakumar B. Nair's case (supra)*** by observing that in ***Narendra Lal Jain's case (supra)***, the accused was charged for offences punishable under Section 120-B read with Section 420 I.P.C. only and there was no charge of an offence punishable under Section 471 I.P.C.

21. The question therefore that now arises for our consideration is whether the facts giving rise to the impugned FIR reflects a private dispute between borrower and the creditor or it has larger ramification that affects the society at large. If we hold that such transaction would have affect on the society then, on the basis of private settlement between borrower and creditor, the first information report can not be quashed.

22. To answer the above question, we would have to analyze the thrust of the allegations made in the impugned first information report. The thrust of the allegations is that the borrowers had set up a false document for the purpose of taking loan from a public limited housing finance

company and, after payment of few installments, they committed default and, when it was inquired, it was found that the property belonging to someone else was mortgaged by setting up a false document. The first information report was lodged in the year 2015 whereas the settlement between the parties came in the year 2018 much after the order of the Magistrate directing further investigation in the matter.

23. Whether the aforesaid transaction has potential to have an impact on the society at large would have to be examined with reference to the manner in which a finance company functions.

24. The business of a public limited finance company, as is the case here, is ordinarily run by borrowing funds from open market and by subscription of its shares by members of the public. In a public limited company, the shareholders and the creditors put their money to run its business. Finance companies may also generate finances by taking deposits from members of public. Therefore if a finance company is defrauded, the impact of its financial morass would be on the public at large and such impact may shake the confidence of the public in the financial system.

25. In view of the above, keeping in mind the law laid down by the Apex Court noticed above, we are of the considered view that an act of defrauding a public limited finance company by setting up forged papers, is an act which has potential to affect the society at large and, therefore, a criminal case based on such a transaction cannot be quashed on the basis of settlement or compromise.

26. A fortiorari, the prayer of the petitioners to quash the first information report and the consequential investigation, cannot be accepted. The petition is dismissed. It is made clear that we have not expressed any opinion on the merits of the allegations made in the impugned FIR.

(2020)02ILR A916

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 23.01.2020

BEFORE
THE HON'BLE ANIL KUMAR-IX, J.

Crl. Misc. Writ Petition No. 25689 of 2019

Parvindra ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Vinai Shanker Singh

Counsel for the Respondents:
A.G.A.

A. Criminal Law-Uttar Pradesh Control of Goondas Act, 1970-Section 3-challenge to-externment of the petitioner for a period of six months passed by ADM and Commissioner-for declaring a person as "Goonda" as defined u/s 2(b) of the Act, there must be repeated/ persistent overt acts not isolated and individual act-a single or two acts of accused will not be sufficient to hold that he is habitually involved in the commission of the offences referred in the Act-In the present case, show cause notice was issued on the basis of his involvement in only one case-thus, petitioner does not fall within the ambit of 'Goonda' as defined u/s 2(b) of the Act-Hence, allowed.(Para 7 to 20)

Crl. Misc. writ petition allowed. (E-6)

List of Cases Cited:-

1. Shankar Ji Shukla Vs. Ayukt Allahabad Mandal, Allahabad

2. Imran @ Abdul Quddus Khan Vs. St. Of U.P. & Ors,(2000) SCC 171 Alld.

3. Vijay Narain Singh Vs. St. Of Bih. & Ors, (1984) 3 SCC 14

(Delivered by Hon'ble Anil Kumar-IX, J)

1. Heard Sri Vinai Shankar Singh, learned counsel for the petitioner and Sri Virendra Singh Rajbhar, learned A.G.A. for the State.

2. This writ petition under Article 226 of the Constitution of India is directed against the order dated 30.10.2019 passed by Commissioner Meerut Division, Meerut (O.P. No.2) as well as order dated 25.09.2019 passed by Additional District Magistrate (Administration), Gautam Budh Nagar directing externment of the petitioner for a period of six months under Section 3 of U.P. Control of Goondas' Act, 1970 (hereinafter referred to as 'Act').

3. Briefly stated the relevant facts giving rise to the present writ petition are that the A.D.M. (Administration) Gautam Budh Nagar on 31.07.2019 issued notice to the petitioner under Section 3 of the Act with the allegation that on the basis of information received by him it appeared that Parvindra (Petitioner) s/o Baraf Singh resident of village Navada, Police Station-Bita-2, District- Gautam Budh Nagar commits offence under Chapter XVI, XVII or XXII of I.P.C., his general reputation is that he terrorizes the people and he is dangerous to the community, he operates his activity within the area of Gautam Budh Nagar. No person is ready to give evidence against him on account of his arduous activities. He is an accused in Case Crime No. 772 of 2018, under Section 384 I.P.C. P.S. Bita-2 which was registered on written report of the police Sub-Inspector. This notice also refers beat report no.43 dated 27.06.2019 received without any detail regarding subject matter of the beat information.

4. The petitioner by the said notice was called upon to furnish written explanation as to why an externment order be not passed against him under Section 3 (3) of the Act. The petitioner was served with the notice, he appeared before the learned Additional District Magistrate and submitted his detailed written explanation enclosing certain documents, copy of the said notice is annexed as Annexure no.3 to the affidavit. On the basis of materials available on record, learned Additional District Magistrate (O.P. No.3) declared him to be 'Goonda' and passed order for his externment for a period of six months by the impugned order dated 25.09.2019.

5. Against the aforesaid order dated 25.09.2019 passed by O.P. No.3, petitioner preferred an appeal before Commissioner Meerut Division, Meerut (O.P. No.2) on 03.10.2019 under Section 6 of Goondas Act that was dismissed by the impugned order dated 30.10.2019 passed by O.P. No.2.

6. Being aggrieved by the aforesaid both the impugned orders this writ petition has been moved by the petitioner.

7. It was submitted by the learned counsel for the petitioner that show cause notice issued against the petitioner suffer from the vice of totally application of mind. It was next submitted that neither the petitioner have criminal antecedents nor he has been involved in any anti social activity, except the solitary case shown in the notice. The show cause notice was issued against the petitioner only on the

ground of his involvement in a solitary case. Thus, the petitioner does not come within the meaning of 'Goonda' as defined under Section 2(b) of the Act. The petitioner filed his objection to the show cause notice but the respondent no.3 rejected the same and passed the impugned order. The respondent no.2 has also wrongly affirmed the order passed by the respondent no.3. Learned counsel for the petitioner further submitted that the Division Bench of this Court in the case of **Imran @ Abdul Quddus Khan Vs. State of U.P. and other reported in 2000 (suppl.) ACC 171 (HC)** has taken the view that for a person to be a 'Goonda' under Sub Section (1) (b) of the Act, it is to be a person who has to his credit repeated/persistent overt acts not isolated and individual act and in view of the above, the impugned orders are liable to be quashed. In support of his submission learned counsel for the petitioner has also placed reliance in **Shankar Ji Shukla Vs. Ayukt Allahabad Mandal and others reported in 2005 (52) ACC 633.**

8. Learned A.G.A. submitted that the petitioner failed to make out any case for quashing the orders. It was further submitted that a single act or omission is enough to treat the person concerned as an anti social element. There is no illegality or infirmity in the impugned orders warranting interference by this Court.

9. I have considered the submissions made by learned counsel for the parties and perused the impugned orders, further materials brought on record and case law cited by learned counsel for the petitioner in support of his submission.

10. The law of preventive detention is a hard law and, therefore, it should be strictly construed and care should taken that the liberty of a person is not jeopardized unless his case falls squarely within the four corners of the relevant law. The law of preventive detention should not be used merely to clip the wings of the accused who is involved in a criminal prosecution. It is not intended for purpose of keeping a man under detention when under ordinary criminal law it may not be possible to resist the issue of order of bail, unless the material available is such as would satisfy the requirements of the legal provisions authorising such detention. When a person is enlarged on bail by a competent criminal Court, great caution should be exercised in scrutinizing the validity of an order of preventive detention which is based on the very same charge which is to be tried by the criminal Court.

11. A Division Bench of this Court in the case of **Imran alias Abdul Quddus Khan** (supra) while examining the question whether a person can be labelled as 'Goonda' and notice under Section 3(3) of the U.P. Control of Goondas Act can be clamped upon him only on the basis of a solitary incident has, in paragraph nos. 11, 12, 13 and 14 of its aforesaid judgment, observed as under :-

"11. Ex facie, a person is termed as a 'goonda' if he is a habitual criminal. The provisions of section 2 (b) of the Act are almost akin to the expression 'anti social element' occurring in section 2 (d) of Bihar Prevention of Crimes Act, 1981. In the context of the expression 'anti social element' the connotation 'habitually commits' came to be interpreted by the apex court in the case of Vijay Narain Singh V. State of Bihar and others (1984) 3 SCC-14. The meaning put to the aforesaid expression by the apex court

would squarely apply to the expression used in the Act, in question. The majority view was that the word 'habitually' means 'repeatedly' or 'persistently'. It implies a thread of continuity stringing together similar repetitive acts. Repeated, persistent and similar but not isolated, individual and dissimilar acts are necessary to justify an inference of habit. It connotes frequent commission of acts or omissions of the same kind referred to in each of the said sub-clauses or an aggregate of similar acts or omissions. Even the minority view which was taken in Vijay Narain's case (supra) was that the word 'habitually' means 'by force of habit'. It is the force of habit inherent or latent in an individual with a criminal instinct with a criminal disposition of mind, that makes a person accustomed to lead a life of crime posing danger to the society in general. If a person with criminal tendencies consistently or persistently or repeatedly commits or attempts to commit or abets the commission of offences punishable under the specified chapters of the Code, he should be considered to be an 'anti social element'. There are thus two views with regard to the expression 'habitually' flowing from the decision of Vijay Narain's case (supra). The majority was inclined to give a restricted meaning to the word 'habitually' as denoting 'repetitive' and that on the basis of a single act cannot be said to be forming the habit of the person. That is to say, the act complained of must be repeated more than once and be inherent in his nature. The minority view is that a person in habitual criminal who by force of habit or inward disposition inherent or latent in him has grown accustomed to lead a life of crime. In simple language, the minority view was expressed that the word 'habitually; means 'by force of habit'. The minority view is based on the meaning given in stroud's Judicial Dictionary, Fourth Ed. Vol. II? 1204-habitually requires a continuance and permanence of some tendency, something that has developed into a propensity, that is, present from day to day. Thus, the word- 'habitual' connotes some degree of frequency and continuity.

12. The word 'habit' has a clear well understood meaning being nearly the same as 'accustomed' and cannot be applied to single act. When we speak of habit of a person, we prefer to his customary conduct to pursue, which he has acquired a tendency from frequent repetitions. In B.N. Singh V. State of U.P.AI.R. 1960-Allahabad ?754 it was observed that it would be incorrect to say that a person has a habit of anything from a single act. In the Law Lexicon ? Encyclopedic Law Dictionary, 1997 Ed. by P. Ramanatha Aiyer, the expression 'habitual' has been defined to mean as constant, customary and addicted to a specified habit; formed or acquired by or resulting from habit; frequent use or custom formed by repeated impressions. The term 'habitual criminal', it is stated may be applied to any one, who has been previously more than twice convicted of crime, sentenced and committed to prison. The word 'habit' means persistence in doing an act, a fact, which is capable of proof by adducing evidence of the commission of a number of similar acts. 'Habitually' must be taken to mean repeatedly or persistently. It does not refer to frequency INDIAN LAW REPORTS 6 ALLAHABAD SERIES [2000 of the occasions but rather to the invariability of the practice.

13. The expression 'habitual criminal' is the same thing as the 'habitual offender' within the meaning of section 110 of the

Code of Criminal Procedure, 1973. This preventive Section deals for requiring security for good behavior from 'habitual offenders'. The expression 'habitually' in the aforesaid section has been used in the sense of depravity of character as evidenced by frequent repetition or commission of offence. It means repetition or persistency in doing an act and not an inclination by nature, that is, commission of same acts in the past and readiness to commit them again where there is an opportunity.

14. Expressions like 'by habit' 'habitual' 'desperate' 'dangerous' and 'hazardous' cannot be flung in the face of a man with laxity or semantics. The court must insist on specificity of facts and a consistent course of conduct convincingly enough to draw the rigorous inference that by confirmed habit, the petitioner is sure to commit the offence if not externed or say directed to take himself out of the district. It is not a case where the petitioner has ever involved himself in committing the crime or has adopted crime as his profession. There is not even faint or feeble material against the petitioner that he is a person of a criminal propensity. The case of the petitioner does not come in either of the clauses of Section 2 (b) of the Act, which defines the expression 'Goonda'. Therefore, to outright label bona fide student as 'goonda' was not only arbitrary capricious and unjustified but also counter productive. A bona fide student who is pursing his studies in the Post Graduate course and has never seen the world of the criminals is now being forced to enter the arena. The intention of the Act is to afford protection to the public against hardened or habitual criminals or bullies or dangerous or desperate class who menace the security of a person or of property. The order of externment under the Act is required to be passed against persons who cannot readily be brought under the ordinary penal law and who for personal reasons cannot be convicted for the offences said to have been committed by them. The legislation is preventive and not punitive. Its sole purpose is to protect the citizens from the habitual criminals and to secure future good behavior and not to punish the innocent students. The Act is a powerful tool for the control and suppression of the 'Goondas'; it should be used very sparingly in very clear cases of 'public disorder' or for the maintenance of 'public order'. If the provisions of the Act are recklessly used without adopting caution and desecretion, it may easily become an engine of operession. Its provisions are not intended to secure indirectly a conviction in case where a prosecution for a substantial offence is likely to fail. Similarly the Act should not obviously be used against mere innocent people or to march over the opponents who are taking recourse to democratic process to get their certain demands fulfilled or to wreck the private vengeance."

15. In the case of **Shankar Ji Shukla Vs. Ayukt Allahabad Mandal, Allahabad (supra)** the word "habitually" came for consideration before this Court. The Court relying on its previous judgement in the case of **Imran @ Abdul Quddus Khan Vs. State of U.P. and others reported in 2000 SCC 171 Alld.,** as well as the case of **Vijay Narain Singh Vs. State of Bihar and others 1984 (3) SCC 14** decided by the Hon'ble Apex Court held that a single or two acts of the accused will not be sufficient to hold that he is habitually involved in commission of the offences referred in the Act.

16. Thus, what follows from the above is that a person can be termed as 'Goonda' and clamped with a show cause notice under Section 3(3) of the Act when there is material indicating that he either by himself or as a member or leader or a gang, habitually commits or attempts to commit, or abet the commission of the offences punishable under Sections 153, 153(b) or Section 294 I.P.C. or Chapter XV, or Chapter XVI, Chapter XVII or Chapter XXII of the I.P.C. or has been convicted for an offence punishable under the Suppression of Immoral Traffic in Women and Girls Act, 1956 or under the U.P. Excise Act, 1910 or the Public Gambling Act, 1867 or Section 25, Section 27 or Section 29 of the Arms Act, 1959 is generally reputed to be a person who is desperate and dangerous to the community or has been habitually passing indecent remarks or teasing women or girls as tout.

17. In the present case, the show cause notice was issued by the O.P. No.3 against the petitioner on the basis of his involvement in only one case, namely Case Crime No. 772 of 2018, Section 384 I.P.C., P.S. Bita-2, District Gautam Budh Nagar. The show cause notice also refers to a beat information report no.43 dated 27.06.2019 recorded without any detail with regard to the subject matter of the beat information.

18. From the above facts and discussion, it appears that the respondent no.3 without applying his judicial mind and observing the provision of law has issued the show cause notice under the Act in routine, casual and mechanical manner and passed the impugned order dated 25.09.2019. The Appellate authority i.e. Commissioner Meerut Division, Meerut (O.P. No.2) also did not consider these facts and dismissed the appeals filed by the petitioner affirming the order passed by O.P. No.3.

19. There is nothing in show cause notice which may indicate that the petitioner fall within the ambit of 'Goonda' as defined under Section 2(b) of the Act. Thus, the impugned orders dated 25.09.2019 and 30.10.2019 passed by the Courts below/Authorities concerned suffer from inherent infirmity and illegality and cannot be sustained.

20. The writ petition succeeds and is **allowed**. The impugned orders dated 25.09.2019 and 30.10.2019 are hereby quashed.

21. No order as to costs.

(2020)02ILR A921

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 06.08.2019

BEFORE

THE HON'BLE PRADEEP KUMAR SINGH BAGHEL, J.
THE HON'BLE ROHIT RANJAN AGARWAL, J.

First Appeal No. 60 of 2016
with
First Appeal No. 61 of 2016

Smt. Monika Gupta ...Appellant
Versus
Jitendra Gandhi ...Respondent

Counsel for the Appellant:
Sri Rajesh Khare, Sri Jitendra Kumar Chakraborty

Counsel for the Respondent:
Sri Gulab Chandra

A. Civil Law-Hindu Marriage Act (25 of 1955) - S. 9 - Restitution of Conjugal Rights - Case filed by respondent-husband for restitution of conjugal rights

- husband made wild allegations against wife of having illicit relationship - *Held* - As there are allegations and counter allegations from both the sides, no decree under Section 9 could have been passed (Para 39)

B. Civil Law-Hindu Marriage Act (25 of 1955) - S.13(1)(ia) - Divorce - Mental Cruelty - demand of dowry, husband forcing appellant-wife to share bed with his friends & colleagues and making allegation against wife of having illicit relationship with her brother-in law - *Held* - coercing wife to do such act which cannot be justified and expected from any husband - amounts to mental cruelty (Para 45)

C. Civil Law- Hindu Marriage Act (25 of 1955) - S.13(1)(ia) - Divorce - Cruelty - *Irretrievable breakdown of marriage* - divorce on ground of irretrievable breakdown of marriage can be granted - where both parties level such grave allegations against each other - that the marriage appears to be practically dead & completely broken down - and no chance of survival of marriage remains

Serious charges against each other regarding character - parties living separately for last nine years - married life existed for brief period - despite efforts of the Trial Court as well as High Court - reconciliation failed - *Held* - Appellant - wife subjected to mental cruelty by the husband - marriage completely broken down & no chance of survival remains - wife entitled for a decree of divorce - Order of Family Court, set aside - Divorce granted (Para 46)

D. Civil Law-Hindu Marriage Act (25 of 1955) - S. 25 - Permanent alimony – Neither any application for permanent alimony filed by the appellant- wife nor any oral prayer made during the course of argument, or at the time of reconciliation - Permanent alimony not granted
(Para 50)

E. Civil Law-Hindu Marriage Act (25 of 1955) - S.13(1)(ia) - Divorce - Limitation - petition for divorce on the ground of mental cruelty may be presented even *within two years* of marriage (Para 48)

F. Civil Law-Hindu Marriage Act (25 of 1955) - Matrimonial proceedings - Practice & Procedure - Matrimonial proceedings cannot be simply decided on the basis of mere evidence on record - Court has to decide on the circumstances which led to the filing of the case - grave allegation made by wife that her husband forced her to share bed with his friends & colleagues - cannot be proved by the wife by any evidence except her testimony (Para 37, 38, 41)

First Appeal allowed. (E-5)

List of cases cited :

1. Vishnu Dutt Sharma Vs Manju Sharma 2009(6) SCC 379

2. Darshan Gupta Vs Radhika Gupta, 2013 (9) SCC 1

3. Samar Ghosh Vs Jaya Ghosh 2007 (4) SCC 511

4. Sirajmohmedkhan Janmohamadkhan Vs Hafizunnisa Yasinkhan and another (1981) 4 SCC 250

5. V. Bhagat Vs D. Bhagat (1994) 1 SCC 337

6. Dr. N.G. Dastane Vs Mrs. S. Dastane (1975) 2 SCC 326

7. Savitri Pandey Vs Prem Chandra Pandey (2002) 2 SCC 73

8. A. Jayachandra Vs Aneel Kaur (2005) 2 SCC 22

9. Naveen Kohli Vs Neelu Kohli 2006 (4) SCC 558

10. Ms. Jorden Diengdeh Vs S.S. Chopra AIR 1985 SC 935

11. Geeta Mullick Vs Brojo Gopal Mullick, IR 2003 Calcutta 331

12. Tapan Kumar Chakraborty Vs Jyotsna Chakraborty, AIR 1997 Calcutta 134

(Delivered by Hon'ble Rohit Ranjan Agarwal, J.)

1. Both the appeals arise out of common order of Principal Judge, Family Court, Jhansi dated 18.1.2016 passed in Case No.205 of 2011 filed by the appellant (Smt. Monika Gupta Vs. Jitendra Gandhi), under Section 13 of the Hindu Marriage Act and Case No.94 of 2011 (Jitendra Gandhi Vs. Smt. Monika Gupta), under Section 9 of the Hindu Marrigate Act.

2. Case No.205 of 2011 was filed by appellant, Smt. Monika Gupta against the defendant/respondent under Section 13 of the Hindu Marriage Act for annulling marriage on 15.4.2011 before the Principal Judge, Family Court, Jhansi. Case No.94 of 2011 was filed by respondent, Jitendra Gandhi under Section 9 of the Hindu Marriage Act for restitution of conjugal rights before the Court of Additional Senior Civil Judge at Gandhi Dham (Gujarat). The said case was transferred to the Court of Principal Judge, Family Court at Jhansi by orders of the Supreme Court of India dated, 23.4.2012 passed on Transfer Petition (C) No.166 of 2012. Both the cases were tried together by the Court below and was decided by common order.

3. Plaintiff/appellant filed Case No.205 of 2011 under Section 13 of the Hindu Marriage Act for annulling the marriage on the ground that she was married to the defendant/respondent on 12.12.2009 according to Hindu rites and custom at Dabra, District Gwalior (Madhya Pradesh). It was contended that when she was 7 years old, both her parents died, and she was brought up along with her two brothers by her maternal uncle and aunt (Mausa and mausi). It is they who had performed the ceremony of 'Kanyadan' and gave dowry as per their status. It was contended that after marriage, there was constant demand for dowry by the in-laws and appellant was not treated well. For three weeks, she stayed at her in-laws house and, thereafter came to her maternal home along with her brother and after living for 15 days, she again went back to her in-laws house from where her husband took her to Gandhi Dham, Gujarat.

4. In paragraph no.5 of the plaint, it has been specifically stated that at Gandhi Dham (Gujarat), the respondent started pressurising the appellant for sharing bed and having physical relation with his friends, on refusing to do so, she was beaten by her husband. In paragraph 6 of the plaint it is stated that appellant had intimated this to her in laws, but they were not helpful and scolded her saying wife has to obey her husband. It is further stated in paragraph no.8 that she lived at Gandhi Dham till 7.11.2010 and, thereafter, she returned with her brother to her maternal home at Jhansi.

5. The said case was contested by the defendant/respondent by filing his written statement and in the additional pleas, it was stated that the appellant did not want to live at Gandhi Dham and was forcing the respondent to live at Jhansi. It was further averred that appellant and her two brothers are not in control of her maternal uncle and aunt. It is further stated that appellant would quarrel and fight for petty things and she was not interested in doing domestic work and she did not want to live along with family members of the respondent and was always pressurizing

him to live separately. It has also been contended that she had been pressurizing the respondent for claiming his share in the family property, consequence of which the parents of the respondent after, giving his share had snapped ties with the respondent and the appellant. It was further stated that the appellant was having extra marital relation with her brother-in-law (Jija).

6. The defendant/respondent filed Case No.94 of 2011 under Section 9 of the Hindu Marriage Act, for restitution of conjugal rights before the Additional Senior Civil Judge at Gandhi Dham. In the said case, he made the same allegation that appellant displayed strange behaviour after returning from her parental house. The said case, after being transferred from Gandhi Dham to the Court of Principal Judge, Family Court at Jhansi was contested by the appellant who filed her written statement denying the said facts and reiterated the case set up by her in her case under Section 13 of the Hindu Marriage Act in the additional pleas.

7. As in both the cases, the parties were same, as such the Principal Judge, Family Court proceeded to decide the same together and following issues were framed :-

"1– क्या याची श्रीमती मोनिका गुप्ता को विपक्षी जितेन्द्र गंधी से अलग रहने का युक्ति युक्त एवं औचित्यपूर्ण आधार है?

2– क्या याची श्रीमती मोनिका गुप्ता अपनी याचिका में वर्णित तथ्यों के आधार पर विपक्षी जितेन्द्र गंधी से विवाह विच्छेद की आज्ञप्ति प्राप्त की अधिकारिणी है?"

8. The Court below, thereafter considering the oral and documentary evidence proceeded to hold that appellant has failed to prove her case for cruelty, nor she could prove her case beyond doubt as far as the allegation of sharing bed and making physical relation with other men, the Court below dismissed the case of the appellant under Section 13 of the Hindu Marriage Act and allowed the application of the defendant/respondent under Section 9 for the restitution of conjugal rights. Against the order dated 18.1.2016 passed by the Principal Judge, Family Court, Jhansi two appeals, First Appeal No.60 2016 filed by the appellant against the order under Section 9 of the Hindu Marriage Act and First Appeal No.61 of 2016 has been preferred against the dismissal of the case under Section 13 of the Hindu Marriage Act.

9. Both the appeals are being heard and decided together as the same arises out of common order of the Court below. This Court before hearing the case on merits had made an effort for reconciliation between the parties on 25.4.2019, but the effort for reconciliation failed.

10. From the pleadings of the parties and from the perusal of the records of the Court below, the question which emerges for consideration is,

(i) whether the appellant is entitled to a decree of divorce on the ground of cruelty.

(ii)Whether there is an irretrievable break down of marriage between the parties.

11. It is contended by the appellant that court below while dealing with the issue failed to record just, cogent and reasonable finding disbelieving the fact of allegation made by the appellant as far as that she was pressurized by

defendant/respondent to share bed with friends and colleagues. The Court below should have visualized that lady like appellant whose parents had passed away in her childhood and was brought up by her maternal uncle and aunt and she having no source of livelihood would not make such allegations against her husband which could land her in a dangerous zone unless and until the circumstances compelled her to do so and the Principal Judge, Family Court should not have taken her allegations made in the plaint so lightly and disbelieve for want of any specific evidence. Further the allegations made by the respondent in the additional pleas of the written statement filed in proceedings under Section 13, as well as in petition under Section 9 of the Hindu Marriage Act that appellant was having an illicit relationship with her brother in law also amounted to mental as well as legal cruelty.

12. It has also been argued that the Court below had not recorded any finding in respect of specific pleadings as well as testimony put forward and the court below while coming to the conclusion that no mental cruelty has been established by the appellant, as such was not entitled to a decree of divorce.

13. Sri Gulab Chand, counsel appearing for the husband submitted that the appellant failed to prove cruelty, as alleged by her and the trial court was correct in dismissing her case for divorce. It was submitted that appellant was a highly qualified lady and she had ample opportunity to make complaint directly or through electronic process/message, but she did not availed the same and there was no evidence on record to establish the charge of cruelty. It was further contended that defendant (husband) had got examined the landlord before the court below who adduced that the appellant was never subjected to any cruelty at hands of the respondent-husband.

14. Sri Gulab Chand, counsel for the respondent vehemently argued that this Court has got no jurisdiction to grant a decree of divorce on the ground of irretrievable break down of marriage, as Section 13(1)of the Hindu Marriage Act does not mandate, as a ground for annulling the marriage. He relied upon two judgments of the Apex Court in the case of **Vishnu Dutt Sharma vs. Manju Sharma, 2009(6) SCC 379** and **Darshan Gupta vs. Radhika Gupta, 2013 (9) SCC 1** wherein the Apex Court has held that irretrievable break down of marriage is not a ground for divorce under the Hindu Marriage Act.

15. Further reliance was placed upon the provisions of sub-Section (1) (i-b) of Section 13 of the Hindu Marriage Act 1955 whereby petition for divorce could not be presented unless two years have passed since either of the parties has deserted.

16. We have heard Sri Jitendra Kumar Chakraborty and Sri Rajesh Khare, learned Counsel for the appellant and Sri Gulab Chandra, learned Counsel for respondents and have perused the records of the case.

17. In the present case, appellant had filed case under Section 13 of the Hindu Marriage Act for annulling the marriage on the ground of cruelty. The Apex Court in depth had examined the word "cruelty" in the case of ***Samar Ghosh Vs. Jaya Ghosh, 2007 (4) SCC 511*** in Paragraph

nos.38, 39, 40, 41, 42 and 43 which are as under:-

"38. Before we critically examine both the judgments in the light of settled law, it has become imperative to understand and comprehend the concept of cruelty.

39. The Shorter Oxford Dictionary defines 'cruelty' as 'the quality of being cruel; disposition of inflicting suffering; delight in or indifference to another's pain; mercilessness; hard-heartedness'.

40. The term "mental cruelty" has been defined in the Black's Law Dictionary [8th Edition, 2004] as under:

"Mental Cruelty - As a ground for divorce, one spouse's course of conduct (not involving actual violence) that creates such anguish that it endangers the life, physical health, or mental health of the other spouse."

41. The concept of cruelty has been summarized in Halsbury's Laws of England [Vol.13, 4th Edition Para 1269] as under:

"The general rule in all cases of cruelty is that the entire matrimonial relationship must be considered, and that rule is of special value when the cruelty consists not of violent acts but of injurious reproaches, complaints, accusations or taunts. In cases where no violence is averred, it is undesirable to consider judicial pronouncements with a view to creating certain categories of acts or conduct as having or lacking the nature or quality which renders them capable or incapable in all circumstances of amounting to cruelty; for it is the effect of the conduct rather than its nature which is of paramount importance in assessing a complaint of cruelty. Whether one spouse has been guilty of cruelty to the other is essentially a question of fact and previously decided cases have little, if any, value. The court should bear in mind the physical and mental condition of the parties as well as their social status, and should consider the impact of the personality and conduct of one spouse on the mind of the other, weighing all incidents and quarrels between the spouses from that point of view; further, the conduct alleged must be examined in the light of the complainant's capacity for endurance and the extent to which that capacity is known to the other spouse. Malevolent intention is not essential to cruelty but it is an important element where it exits."

42. In 24 American Jurisprudence 2d, the term "mental cruelty" has been defined as under:

"Mental Cruelty as a course of unprovoked conduct toward one's spouse which causes embarrassment, humiliation, and anguish so as to render the spouse's life miserable and unendurable. The plaintiff must show a course of conduct on the part of the defendant which so endangers the physical or mental health of the plaintiff as to render continued cohabitation unsafe or improper, although the plaintiff need not establish actual instances of physical abuse."

43. In the instant case, our main endeavour would be to define broad parameters of the concept of 'mental cruelty'. Thereafter, we would strive to determine whether the instances of mental cruelty enumerated in this case by the appellant would cumulatively be adequate to grant a decree of divorce on the ground of mental cruelty according to the settled legal position as crystallized by a

number of cases of this Court and other Courts."

18. The concept of legal cruelity has been dealt with by the Supreme Court in case of ***Sirajmohmedkhan Janmohamadkhan Vs. Hafizunnisa Yasinkhan and another, (1981) 4 SCC 250***, which is as under :-

"29. In Sm. Pancho v. Ram Prasad, Roy, J. while dealing with the Hindu Married Women's Right to Separate Residence and Maintenance Act (19 of 1946) expounded the concept of 'legal cruelty' and observed thus:

"In advancement of a remedial statute, everything is to be done that can be done consistently with a proper construction of it even though it may be necessary to extend enacting words beyond their natural import and effect.

Conception of legal cruelty undergoes changes according to the changes and advance of social concept and standards of living. With the advancement our social conceptions, this feature has obtained legislative recognition that a second marriage is a sufficient ground for separate residence and separate maintenance. Moreover, to establish legal cruelty, it is not necessary that physical violence should be used. Continuous ill-treatment, cessation of marital intercourse, studied neglect, indifference on the part of the husband, and an assertion on the part of the husband that the wife is unchaste are all factors which may undermine the health of a wife."

19. Supreme Court in case of **V. Bhagat Vs. D. Bhagat, (1994) 1 SCC 337** in Para 16, while dealing with mental cruelty held as under :-

"16. Mental cruelty in Section 13(1)(i-a) can broadly be defined as that conduct which inflicts upon the other party such mental pain and suffering as would make it not possible for that party to live with the other. In other words, mental cruelty must be of such a nature that the parties cannot reasonably be expected to live together. The situation must be such that the wronged party cannot reasonably be asked to put up with such conduct and continue to live with the other party. It is not necessary to prove that the mental cruelty is such as to cause injury to the health of the petitioner. While arriving at such conclusion, regard must be had to the social status, educational level of the parties, the society they move in, the possibility or otherwise of the parties ever living together in case they are already living apart and all other relevant facts and circumstances which it is neither possible nor desirable to set out exhaustively. What is cruelty in one case may not amount to cruelty in another case. It is a matter to be Determined in each case having regard to the facts and circumstances of that case. If it is a case of accusations and allegations, regard must also be had to the context in which they were made. "

20. Further the Apex Court in case of **Dr. N.G. Dastane Vs. Mrs. S. Dastane, (1975) 2 SCC 326** Para 30 has observed as under :-

"30. An awareness of foreign decisions could be a useful asset in interpreting our own laws. But it has to be remembered that we have to interpret in this case a specific provision of a specific enactment, namely, section 10(1) (b) of the Act. What constitutes cruelty must depend upon the terms of this statute which provides :

"10(1) Either party to a marriage, whether solemnized before or

after the commencement of this Act, may present a petition to the district court praying for a decree for judicial separation on the ground that the other party-

(b) has treated the petitioner with such cruelty as to cause areasonable apprehension in the mind of the petitioner that it will be harmful or injurious for the petitioner to live with the other party;"

The inquiry therefore has to be whether the conduct charged a,.- cruelty is of such a character as to cause in the mind of the petitioner a reasonable apprehension that it will be harmful or injurious for him to live with the respondent. It is not necessary, as under the English law, that the cruelty must be of such a character as to cause "danger" to life, limb or health or as to give rise to a reasonable apprehension of such a danger. Clearly, danger to life, limb or health or a reasonable apprehension of it is a higher requirement than a reasonable apprehension that it is harmful or injurious for one spouse to live with the other."

21. In **Savitri Pandey Vs. Prem Chandra Pandey, (2002) 2 SCC 73**, the Apex Court while dealing with cruelty in Para 6 held as under :-

"6. Treating the petitioner with cruelty is a ground for divorce under Section 13(1)(ia) of the Act. Cruelty has not been defined under the Act but in relation to matrimonial matters it is contemplated as a conduct of such type which endangers the living of the petitioner with the respondent. Cruelty consists of acts which are dangerous to life, limb or health. Cruelty for the purpose of the Act means where one spouse has so treated the other and manifested such feelings towards her or him as to have inflicted bodily injury, or to have caused reasonable apprehension of bodily injury, suffering or to have injured health. Cruelty may be physical or mental. Mental cruelty is the conduct of other spouse which causes mental suffering or fear to the matrimonial life of the other. "Cruelty", therefore, postulates a treatment of the petitioner with such cruelty as to cause a reasonable apprehension in his or her mind that it would be harmful or injurious for the petitioner to live with the other party. Cruelty, however, has to be distinguished from the ordinary wear and tear of family life. It cannot be decided on the basis of the sensitivity of the petitioner and has to be adjudged on the basis of the course of conduct which would, in general, be dangerous for a spouse to live with the other. In the instant case both the trial court as well as the High Court have found on facts that the wife had failed to prove the allegations of cruelty attributed to the respondent. Concurrent findings of fact arrived at by the courts cannot be disturbed by this Court in exercise of powers under Article 136 of the Constitution of India. Otherwise also the averments made in the petition and the evidence led in support thereof clearly shows that the allegations, even if held to have been proved, would only show the sensitivity of the appellant with respect to the conduct of the respondent which cannot be termed more than ordinary wear and tear of the family life."

22. In **A. Jayachandra Vs. Aneel Kaur, (2005) 2 SCC 22** in Paragraph nos.10, 12 and 13, the Apex Court held as under :-

"10. The expression "cruelty" has not been defined in the Act. Cruelty can be physical or mental. Cruelty which is a ground for dissolution of marriage may be defined as willful and unjustifiable conduct of such character as to cause danger to life, limb or health, bodily or

mental, or as to give rise to a reasonable apprehension of such a danger. The question of mental cruelty has to be considered in the light of the norms of marital ties of the particular society to which the parties belong, their social values, status, environment in which they live. Cruelty, as noted above, includes mental cruelty, which falls within the purview of a matrimonial wrong. Cruelty need not be physical. If from the conduct of his spouse same is established and/or an inference can be legitimately drawn that the treatment of the spouse is such that it causes an apprehension in the mind of the other spouse, about his or her mental welfare then this conduct amounts to cruelty. In delicate human relationship like matrimony, one has to see the probabilities of the case. The concept, a proof beyond the shadow of doubt, is to be applied to criminal trials and not to civil matters and certainly not to matters of such delicate personal relationship as those of husband and wife. Therefore, one has to see what are the probabilities in a case and legal cruelty has to be found out, not merely as a matter of fact, but as the effect on the mind of the complainant spouse because of the acts or omissions of the other. Cruelty may be physical or corporeal or may be mental. In physical cruelty, there can be tangible and direct evidence, but in the case of mental cruelty there may not at the same time be direct evidence. In cases where there is no direct evidence, Courts are required to probe into the mental process and mental effect of incidents that are brought out in evidence. It is in this view that one has to consider the evidence in matrimonial disputes.

12. To constitute cruelty, the conduct complained of should be "grave and weighty" so as to come to the conclusion that the petitioner spouse cannot be reasonably expected to live with the other spouse. It must be something more serious than "ordinary wear and tear of married life". The conduct, taking into consideration the circumstances and background has to be examined to reach the conclusion whether the conduct complained of amounts to cruelty in the matrimonial law. Conduct has to be considered, as noted above, in the background of several factors such as social status of parties, their education, physical and mental conditions, customs and traditions. It is difficult to lay down a precise definition or to give exhaustive description of the circumstances, which would constitute cruelty. It must be of the type as to satisfy the conscience of the Court that the relationship between the parties had deteriorated to such an extent due to the conduct of the other spouse that it would be impossible for them to live together without mental agony, torture or distress, to entitle the complaining spouse to secure divorce. Physical violence is not absolutely essential to constitute cruelty and a consistent course of conduct inflicting immeasurable mental agony and torture may well constitute cruelty within the meaning of Section 10 of the Act. Mental cruelty may consist of verbal abuses and insults by using filthy and abusive language leading to constant disturbance of mental peace of the other party.

13. The Court dealing with the petition for divorce on the ground of cruelty has to bear in mind that the problems before it are those of human beings and the psychological changes in a spouse's conduct have to be borne in mind before disposing of the petition for divorce. However insignificant or trifling, such conduct may cause pain in the mind

of another. But before the conduct can be called cruelty, it must touch a certain pitch of severity. It is for the Court to weigh the gravity. It has to be seen whether the conduct was such that no reasonable person would tolerate it. It has to be considered whether the complainant should be called upon to endure as a part of normal human life. Every matrimonial conduct, which may cause annoyance to the other, may not amount to cruelty. Mere trivial irritations, quarrels between spouses, which happen in day-to-day married life, may also not amount to cruelty. Cruelty in matrimonial life may be of unfounded variety, which can be subtle or brutal. It may be words, gestures or by mere silence, violent or non-violent."

23. Further the Apex Court in case of **Samar Ghosh (supra)** laid down the guidelines to enumerate some instances of human behaviour which may be relevant in dealing with the case of 'mental cruelty', paragraph no.101 of the judgment is extracted herein as under :-

"101. No uniform standard can ever be laid down for guidance, yet we deem it appropriate to enumerate some instances of human behaviour which may be relevant in dealing with the cases of 'mental cruelty'. The instances indicated in the succeeding paragraphs are only illustrative and not exhaustive.

(i) On consideration of complete matrimonial life of the parties, acute mental pain, agony and suffering as would not make possible for the parties to live with each other could come within the broad parameters of mental cruelty.

(ii) On comprehensive appraisal of the entire matrimonial life of the parties, it becomes abundantly clear that situation is such that the wronged party cannot reasonably be asked to put up with such conduct and continue to live with other party.

(iii) Mere coldness or lack of affection cannot amount to cruelty, frequent rudeness of language, petulance of manner, indifference and neglect may reach such a degree that it makes the married life for the other spouse absolutely intolerable.

(iv) Mental cruelty is a state of mind. The feeling of deep anguish, disappointment, frustration in one spouse caused by the conduct of other for a long time may lead to mental cruelty.

(v) A sustained course of abusive and humiliating treatment calculated to torture, discommode or render miserable life of the spouse.

(vi) Sustained unjustifiable conduct and behaviour of one spouse actually affecting physical and mental health of the other spouse. The treatment complained of and the resultant danger or apprehension must be very grave, substantial and weighty.

(vii) Sustained reprehensible conduct, studied neglect, indifference or total departure from the normal standard of conjugal kindness causing injury to mental health or deriving sadistic pleasure can also amount to mental cruelty.

(viii) The conduct must be much more than jealousy, selfishness, possessiveness, which causes unhappiness and dissatisfaction and emotional upset may not be a ground for grant of divorce on the ground of mental cruelty.

(ix) Mere trivial irritations, quarrels, normal wear and tear of the married life which happens in day to day life would not be adequate for grant of divorce on the ground of mental cruelty.

(x) The married life should be reviewed as a whole and a few isolated

instances over a period of years will not amount to cruelty. The ill-conduct must be persistent for a fairly lengthy period, where the relationship has deteriorated to an extent that because of the acts and behaviour of a spouse, the wronged party finds it extremely difficult to live with the other party any longer, may amount to mental cruelty.

(xi) If a husband submits himself for an operation of sterilization without medical reasons and without the consent or knowledge of his wife and similarly if the wife undergoes vasectomy or abortion without medical reason or without the consent or knowledge of her husband, such an act of the spouse may lead to mental cruelty.

(xii) Unilateral decision of refusal to have intercourse for considerable period without there (xiii) Unilateral decision of either husband or wife after marriage not to have child from the marriage may amount to cruelty.

(xiii) Unilateral decision of either husband or wife after marriage not to have child from the marriage may amount to cruelty.

(xiv) Where there has been a long period of continuous separation, it may fairly be concluded that the matrimonial bond is beyond repair. The marriage becomes a fiction though supported by a legal tie. By refusing to sever that tie, the law in such cases, does not serve the sanctity of marriage; on the contrary, it shows scant regard for the feelings and emotions of the parties. In such like situations, it may lead to mental cruelty." decision of either husband or wife after marriage not to have child from the marriage may amount to cruelty.

24. Section 13 of the Hindu Marriage Act, 1955 provides for grounds on which petition can be presented for divorce. Cruelty is one of the ground on which, a petition for divorce can be filed, but where there is irretrievable breakdown of marriage, no petition can be filed. The Law Commission of India in its 71st report titled ***"The Hindu Marriage Act, 1955 - Irretrievable Break Down Of Marriage as a Ground of Divorce"*** recommended amendments in the Hindu Marriage Act as a new ground for granting divorce among the Hindus. But the recommendation of the Law Commission of India was not accepted.

25. The Supreme Court in case of **Naveen Kohli Vs. Neelu Kohli, 2006 (4) SCC 558**, while considering the concept of irretrievable breakdown of marriage held as under:-

"80. Since there is no acceptable way in which a spouse can be compelled to resume life with the consort, nothing is gained by trying to keep the parties tied for ever to a marriage that in fact has ceased to exist.

81. Some jurists have also expressed their apprehension for introduction of irretrievable breakdown of marriage as a ground for grant of the decree of divorce. In their opinion, such an amendment in the Act would put human ingenuity at a premium and throw wide open the doors to litigation, and will create more problems then are sought to be solved.

82. The other majority view, which is shared by most jurists, according to the Law Commission Report, is that human life has a short span and situations causing misery cannot be allowed to continue indefinitely. A halt has to be called at some stage. Law cannot turn a blind eye to such situations, nor can it

decline to give adequate response to the necessities arising therefrom.

88. Even at this stage, the respondent does not want divorce by mutual consent. From the analysis and evaluation of the entire evidence, it is clear that the respondent has resolved to live in agony only to make life a miserable hell for the appellant as well. This type of adamant and callous attitude, in the context of the facts of this case, leaves no manner of doubt in our mind that the respondent is bent upon treating the appellant with mental cruelty. It is abundantly clear that the marriage between the parties had broken down irretrievably and there is no chance of their coming together, or living together again.

89. The High Court ought to have appreciated that there is no acceptable way in which the parties can be compelled to resume life with the consort, nothing is gained by trying to keep the parties tied forever to a marriage that in fact has ceased to exist.

90. Undoubtedly, it is the obligation of the Court and all concerned that the marriage status should, as far as possible, as long as possible and whenever possible, be maintained, but when the marriage is totally dead, in that event, nothing is gained by trying to keep the parties tied forever to a marriage which in fact has ceased to exist. In the instant case, there has been total disappearance of emotional substratum in the marriage. The course which has been adopted by the High Court would encourage continuous bickering, perpetual bitterness and may lead to immorality. "

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26. Earlier in case of **Samar Ghosh (supra)**, the Supreme Court referred to 71st report of the Law Commission of India on "Irretrievable breakdown of marriage" with approval as follows:-

"90. We have examined and referred to the cases from the various countries. We find strong basic similarity in adjudication of cases relating to mental cruelty in matrimonial matters. Now, we deem it appropriate to deal with the 71st report of the Law Commission of India on "Irretrievable Breakdown of Marriage".

91. The 71st Report of the Law Commission of India briefly dealt with the concept of irretrievable breakdown of marriage. This Report was submitted to the Government on 7th April, 1978. In this Report, it is mentioned that during last 20 years or so, and now it would be around 50 years, a very important question has engaged the attention of lawyers, social scientists and men of affairs, should the grant of divorce be based on the fault of the party, or should it be based on the breakdown of the marriage? The former is known as the matrimonial offence theory or fault theory. The latter has come to be known as the breakdown theory. It would be relevant to recapitulate recommendation of the said Report.

92. In the Report, it is mentioned that the germ of the breakdown theory, so far as Commonwealth countries are concerned, may be found in the legislative and judicial developments during a much earlier period. The (New Zealand) Divorce and Matrimonial Causes Amendment Act, 1920, included for the first time the provision that a separation agreement for three years or more was a ground for making a petition to the court for divorce and the court was given a discretion (without guidelines) whether to grant the divorce or not. The discretion conferred by this statute was exercised in a case Lodder v. Lodder Salmond, J., in a passage which

has now become classic, enunciated the breakdown principle in these words:

"The Legislature must, I think, be taken to have intended that separation for three years is to be accepted by this court, as prima facie a good ground for divorce. When the matrimonial relation has for that period ceased to exist de facto, it should, unless there are special reasons to the contrary, cease to exist de jure also. In general, it is not in the interests of the parties or in the interest of the public that a man and woman should remain bound together as husband and wife in law when for a lengthy period they have ceased to be such in fact. In the case of such a separation the essential purposes of marriage have been frustrated, and its further continuance is in general not merely useless but mischievous."

93. In the said Report, it is mentioned that restricting the ground of divorce to a particular offence or matrimonial disability, causes injustice in those cases where the situation is such that although none of the parties is at fault, or the fault is of such a nature that the parties to the marriage do not want to divulge it, yet such a situation has arisen in which the marriage cannot survive. The marriage has all the external appearances of marriage, but none in reality. As is often put pithily, the marriage is merely a shell out of which the substance is gone. In such circumstances, it is stated, there is hardly any utility in maintaining the marriage as a fagade, when the emotional and other bonds which are of the essence of marriage have disappeared.

94. It is also mentioned in the Report that in case the marriage has ceased to exist in substance and in reality, there is no reason for denying divorce, then the parties alone can decide whether their mutual relationship provides the fulfilment which they seek. Divorce should be seen as a solution and an escape route out of a difficult situation. Such divorce is unconcerned with the wrongs of the past, but is concerned with bringing the parties and the children to terms with the new situation and developments by working out the most satisfactory basis upon which they may regulate their relationship in the changed circumstances.

95. Once the parties have separated and the separation has continued for a sufficient length of time and one of them has presented a petition for divorce, it can well be presumed that the marriage has broken down. The court, no doubt, should seriously make an endeavour to reconcile the parties; yet, if it is found that the breakdown is irreparable, then divorce should not be withheld. The consequences of preservation in law of the unworkable marriage which has long ceased to be effective are bound to be a source of greater misery for the parties."

27. The Supreme Court in case of **Ms. Jorden Diengdeh Vs. S.S. Chopra, AIR 1985 SC 935** held as under :-

"It appears to be necessary to introduce irretrievable breakdown of marriage and mutual consent as grounds of divorce in all cases..... We suggest that the time has come for the intervention of the legislature in those matters to provide for a uniform code of marriage and divorce and to provide by law for a way out of the unhappy situation in which couples like the present have found themselves."

28. Further the Apex Court in case of **V. Bhagat (supra)** held as under :-

"Irretrievable breakdown of the marriage is not a ground for divorce by itself. But while scrutinizing the evidence on record to determine whether the ground(s) alleged is made out and in determining the relief to be granted, the said circumstance can certainly be borne in mind."

29. However, in case of **Geeta Mullick v. Brojo Gopal Mullick, IR 2003 Calcutta 331**, the High Court held as under :-

"In our considered opinion, the marriage between the parties can not be dissolved by the trial Court or even by the High Court only on the ground of marriage having been irretrievably broken down, in the absence of one or more grounds as contemplated under section 13(1) of the Hindu Marriage Act,1955."

30. Similarly, in case of **Tapan Kumar Chakraborty V.s Jyotsna Chakraborty, AIR 1997 Calcutta 134**, the Calcutta High Court held that in a petition for divorce on a ground as mentioned in the Hindu Marriage Act or the Special Marriage Act, Court cannot grant divorce on the mere ground of irretrievable breakdown of marriage.

31. However, the Apex Court in case of Savitri Pandey (supra) held as under :-

"that marriage between the parties cannot be dissolved only on the averments made by one of the parties that as the marriage between them has broken down, no useful purpose would be served to keep it alive. The legislature, in its wisdom, despite observation of the Supreme Court has not thought it proper to provide for dissolution of the marriage on such averments. There may be cases where it is found that as the marriage has become dead on account of contributory acts of commission and omission of the parties, no useful purpose would be served by keeping such marriage alive. The sanctity of marriage cannot be left at the whims of one of the annoying spouses."

32. After the judgment of Supreme Court in **Naveen Kohli (supra)**, the Law Commission of India in its Report No.217 submitted to the Government in March, 2009 regarding irretrievable breakdown of marriage-another ground for divorce, was of the view that:-

"The foundation of a sound marriage is tolerance, adjustment and respecting one another. Tolerance to each other's fault to a certain bearable extent has to be inherent in every marriage. Petty quibbles, trifling differences should not be exaggerated and magnified to destroy what is said to have been made in heaven. All quarrels must be weighed from that point of view in determining what constitutes cruelty in each particular case and always keeping in view the physical and mental conditions of the parties, their character and social status. A too technical and hypersensitive approach would be counter-productive to the institution of marriage. The Courts do not have to deal with ideal husbands and ideal wives. It has to deal with particular man and woman before it.

33. The Law Commission was of the view that :-

"2.1 A law of divorce based mainly on fault is inadequate to deal with a broken marriage. Under the fault theory, guilt has to be proved; divorce Courts are

presented with concrete instances of human behaviour as bring the institution of marriage into disrepute. Once the marriage has broken down beyond repair, it would be unrealistic for the law not to take notice of that fact, and it would be harmful to society and injurious to the interest of the parties. Where there has been a long period of continuous separation, it may fairly be surmised that the matrimonial bond is beyond repair. The marriage becomes a fiction, though supported by a legal tie, by refusing to sever that tie, the law in such cases does not serve the sanctity of marriage; on the contrary, it shows scant regard for the feelings and emotions of the parties. Public interest demands not only that the married status should, as long as possible, and whenever possible, be maintained, but where a marriage has been wrecked beyond the hope of salvage, public interest lies in the recognition of that fact. Since there is no acceptable way in which a spouse can be compelled to resume life with the consort, nothing is gained by trying to keep the parties tied for ever to a marriage that in fact has ceased to exist. Human life has a short span and situations causing misery cannot be allowed to continue indefinitely. A halt has to be called at some stage. Law cannot turn a blind eye to such situations, nor can it decline to give adequate response to the necessities arising therefrom."

34. However, the Supreme Court in case of Darshan Gupta (supra), while considering the case of Vishnu Datt Sharma (supra) as to whether relief on the ground of irretrievable break down of marriage is available to the appellant, held as under:

"50. At the present juncture, it is questionable as to whether the relief sought by the learned counsel for the appellant, on the ground of irretrievable breakdown of marriage is available to him. The reason for us to say so, is based on a judgment rendered by this Court in Vishnu Dutt Sharma vs. Manju Sharma, (2009) 6 SCC 379, wherein this Court has held as under:-

"10. On a bare reading of Section 13 of the Act, reproduced above, it is

crystal clear that no such ground of irretrievable breakdown of the marriage is provided by the legislature for granting a decree of divorce. This Court cannot add such a ground to Section 13 of the Act as that would be amending the Act, which is a function of the legislature.

11. Learned Counsel for the appellant has stated that this Court in some cases has dissolved a marriage on the ground of irretrievable breakdown. In our opinion, those cases have not taken into consideration the legal position which we have mentioned above, and hence they are not precedents. A mere direction of the Court without considering the legal position is not a precedent.

12. If we grant divorce on the ground of irretrievable breakdown, then we shall by judicial verdict be adding a clause to Section 13 of the Act to the effect that irretrievable breakdown of the marriage is also a ground for divorce. In our opinion, this can only be done by the legislature and not by the Court. It is for the Parliament to enact or amend the law and not for the Courts. Hence, we do not find force in the submission of the learned Counsel for the appellant.

13. Had both parties been willing we could, of course, have granted a divorce by mutual consent as contemplated by Section 13-B of the Act,

but in this case the respondent is not willing to agree to a divorce."

35. Thus, the Apex Court had constantly directed for the amendment in the Hindu Marriage Act, for introducing irretrievable break down of marriage, as one of the grounds for divorce. However, the Law Commission has twice in its 71st report and, thereafter, in report No.217 has recommended for the inclusion of irretrievable break down of marriage, as one of the grounds for divorce. The Apex Court, however, in those cases where it found that mental cruelty existed on the part of one of the spouses, it granted divorce taking into consideration that the marriage cannot continue as it has irretrievably broken down, while it refused to grant divorce in those cases, which were simply based on the ground of irretrievable break down of marriage.

36. In the present case, divorce has been sought on the ground of cruelty by appellant, making serious allegations against the respondent-husband for demand of dowry and sharing bed with his friends and colleagues. In the additional pleas of written statement, defendant-respondent had made counter allegations as regards the character of appellant, having illicit relationship with her brother-in-law (Jija). These allegations, so made, qualifies under the term mental as well as legal cruelty.

37. The appellant in her cross-examination before the court below had clearly stated that the respondent-husband was forcing her to share bed with his friends and colleagues. Her statement was also supported by PW-2, Ram Kumar Gupta, who also in his cross-examination had stated that the appellant had told her that the respondent was forcing her to share bed with other persons. The Court below wrongly repelled and discarded the oral testimony of the appellant and held that she failed to produce material to substantiate her claim.

38. The allegation made by the appellant against her husband are so grave in nature which cannot be proved by evidence nor it can be expected from a lady to make such allegation against her husband after such a short span of marriage, being fully aware of the fact that she has been brought up by her maternal uncle and aunt after her parents passed away at an early age, and she being not employed and earning any money.

39. The Court below completely lost sight of the fact that the respondent-husband had made wild allegations not only in the written statement filed by him in proceedings under Section 13, but also in proceedings under Section 9 of the Act. As there are allegations and counter allegations from both the sides, no decree under Section 9 could have been passed.

40. The Court below also lost sight of the fact that the appellant who was for the first time taken by her husband to Gandhi Dham, Gujarat was living in rented accommodation on the first floor, and it cannot be expected from the appellant who was not familiar with the new place to have reported the matter to landlord or neighbours or to have made complaint to police, except to have told her misery to her maternal uncle, aunt and her brothers, which she did.

41. Another aspect which required consideration was, as to why a newly wedded lady immediately after few

months of her marriage will leave her husband's house and make such serious allegations and refuse to go back. Further effort made for reconciliation, also failed. Before passing the judgment impugned a thought should have been given to the misery of the lady who refused to return to her husband's home. Matrimonial proceedings cannot be simply decided on the basis of mere evidence on record, sometimes the Court while examining and scrutinizing the case has to decide on the circumstances which led to the filing of the case, as in the present case, the allegation made in matrimonial case cannot be proved by the wife by any evidence except her testimony.

42. It is true that in Section 13 of the Act, irretrievable breakdown of marriage is not a ground for dissolution of marriage, but the Apex Court has held the decree of divorce on the ground that the marriage has irretrievably broken down can be granted in those cases where both the parties have levelled such allegations against each other that the marriage appears to be practically dead and the parties cannot live together.

43. In the present case, the divorce claimed by the appellant is on the ground of cruelty, it is both mental and physical, the appellant has been subjected to mental cruelty by the respondent-husband pressurising and coercing her to do such act which cannot be justified and expected from any husband. Further the appellant and respondent are living separately since 7.11.2010 i.e. for about 9 years, while the married life existed for a brief period.

44. The Court below in most cryptic and arbitrary manner decided the divorce petition without recording any finding holding that appellant has failed to prove her case, as no evidence was adduced by her in support of the allegations made in the divorce petition, while by the same judgment petition under Section 9 of the husband was allowed. No finding has been recorded as to mental cruelty, suffered by the appellant, as the averment of the petition and testimony had been discarded.

45. In Samar Ghosh (supra), the Apex Court had laid guidelines to enumerate some instances of human behaviour, which may be relevant in dealing with the case of mental cruelty. As from reading of the claims and counter claims of the parties in their petition and written statement, one thing clearly emerges that both the parties have made serious charges against each other, especially in regard to the character. Considering the averments so made by the parties, it can safely be said that the action of the respondent-husband specially in forcing the appellant to share bed with his friends and colleagues, and also making allegation by husband against the appellant, having illicit relationship with her brother-in-law amounts to mental cruelty as enumerated in some of the instances in the guidelines.

46. It is not in dispute that both the parties are living separately for the last nine years and despite the efforts of the Trial Court as well as this Court reconciliation failed. Thus, as the appellant has been subjected to mental cruelty, which is one of the ground for divorce under Section 13 as well as keeping in mind the fact that the marriage between the parties has broken down. No useful purpose would be served to keep it alive, as observed by the Apex Court in case of Savitri Pandey (supra) "the sanctity of

marriage cannot be lived at the whims one of the annoying spouses".

47. Argument of the counsel for respondent-husband, that this Court does not have any jurisdiction to grant decree of divorce on the ground of irretrievable break down of marriage under Section 13 has no force, as the appellant had filed petition for divorce on the ground of cruelty and the Apex Court while dealing in case of Vishnu Datt Sharma (supra) and Darshan Gupta (supra) had held that irretrievable break down of marriage is not a ground under Section 13, but the Apex Court in case of Samar Ghosh (supra) and Naveen Kohli (supra) while dealing with the similar situation in which divorce was sought on the ground of mental cruelty. The Court went further and held that where one of the parties, who was subjected to mental cruelty and the marriage cannot be sustained any more having been broken down, came up with the concept of irretrievable break down of marriage. In the present case also the appellant, who has been subjected to mental cruelty by the respondent-husband is also entitled for a decree of divorce as her marriage has completely broken down and no chance of survival remains.

48. As far as the second objection of the counsel for the respondent-husband, that sub-Section (1) (i-b) of Section 13 of the Act debars the parties from presenting petition within two years in case of desertion, but in the present case, the appellant had moved the petition seeking annulment of marriage on the ground of mental cruelty. The argument made has no force and the said provision is not applicable in the present case.

49. Thus there is no use of keeping the appellant and the respondent tied by matrimonial relationship when they cannot live peacefully, since parties are living separately after marriage, appellant has lived for a few months in her matrimonial house, she having made allegation of cruelty and desertion against husband and husband having made counter allegations against her the marriage has irretrievably broken down.

50. As, no application for permanent alimony has been filed by the appellant, nor any oral prayer was made during the course of argument, or at the time of reconciliation held in Chamber, the appellant is not granted any permanent alimony from the respondent.

51. In the interest of justice, the judgment dated 18.1.2016 and decree dated 30.1.2016 are set aside and Case No.205 of 2011 filed by appellant, under Section 13 of the Hindu Marriage Act is decreed and the marriage between the parties stand annulled, and Case No.94 of 2011 filed by the respondent under Section 9 of the Hindu Marriage Act for restitution of conjugal rights is dismissed.

52. Both the appeals stand **allowed**.

(2020)02ILR A938

APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 03.02.2020

BEFORE
THE HON'BLE RAJNISH KUMAR, J.

Second Appeal No. 162 of 2011

Badri & Ors. ...Appellants
Versus
Jata Shankar & Anr. ...Respondents

Counsel for the Appellants:
R.R. Upadhyay, Amit Srivastava, Indra P. Singh

Counsel for the Respondents:
S.K. Mehrotra, Aditya Mishra, Aditya Nath, I.D. Shukla, Shobh Nath Pandey, Vipin Kumar Mishra

A. Civil Law-U.P. Zamindari Abolition and Land Reforms Act (1 of 1951) - S. 172 - Suit for permanent injunction – Plaintiff failed to establish his possession - Injunction cannot be granted in favour of plaintiff

One Jagesar entrusted his property to plaintiffs with condition that they had no right to sell the property & that they will serve his wife Smt. Raji who was issueless - Suit for permanent injunction filed by appellant/plaintiffs with the allegation that Smt. Raji performed customary marriage with defendant after the death of Jagesar, therefore, they had become the owner of her property in view of Section 172 of the U.P.Z.A.& L.R. Act - *Held* - Plaintiff-appellants failed to prove the re-marriage of Smt. Raji and possession over the property as no Khasra was filed showing the possession of the plaintiffs. - Injunction granted in favour of plaintiff, not proper suit dismissed (Para 42)

B. Hindu Law - Customary marriage - Proof - Custom not pleaded - In absence of 'Saptpadi' merely living together as husband and wife - cannot serve as proof of a valid marriage

Held - No plea that marriage was solemnized in accordance with the customary rites and usage, which do not include 'Saptpadi' - In absence of 'Saptpadi' and without plea of customary marriage and without proof of existence of any such custom, merely on the basis of statement of witnesses of plaintiffs cannot be treated as re-marriage (Para 26)

C. Civil Procedure Code (5 of 1908) - O.41 R.31 - Contents of judgment - Points for determination - judgment of appellate court shall state the points for determination - if points of determination not specifically stated - judgment may not vitiate - if there is substantial compliance with Order 41 Rule 31 CPC & the higher appellate court is able to ascertain the *findings of the lower appellate court*

Lower appellate court not formulated points of determination - *Held* - Judgment passed after considering the submissions of the parties, evidence & specifically considering the pleadings and evidence in regard to issues on which the arguments were advanced - there is substantial compliance of Order 41 Rule 31 CPC and the judgment does not vitiate (Para 40, 41)

D. Procedure - Pleadings & Proof - statement of witnesses in absence of pleading is nothing but stray statement which is not binding (Para 24)

Second Appeal dismissed. (E-5)

List of cases cited :-

1. Ambika Prasad & Anr Vs Sri Harihar Prasad 1985 (3) LCD 266

2. Santi Deb Berma Vs Kanchan Prava Devi 1991 Supp (2) SCC 616

3. Dina Nath Verma & Ors Vs Gokaran & Ors 2003(94) RD 323

4. Hori Lal Vs Babu Ram & Ors 2005 All.C.J.2158

5. Shri Ram & Ors Vs Deputy Director of Consolidation Alld & Ors 2011 (29) LCD 764

6. Prabhu Dayal Vs Gaon Samaj Tandarpore 1965 ALJ 426

7. Kanchan Kumar Chaudhary Vs District Judge, Mau & Ors; 1998 (89) RD 610

8. Ratti Pal Vs Additional District Judge, Court No.6, Pratapgarh & Ors ;2014(124 RD 195

9. Anathula Sudhakar Vs P.Buchi Reddy (dead) by LRs. and others (2008) 4 SCC 594

10. Jagdish Vs Rajendr AIR 1975 Allahabad 395

11. Meenakshiammal (dead) through LRs & Ors Vs Chandrasekaran & ors 2006 (24) LCD 1316

12. K. Laxmanan Vs Thekkayil Padmini & Ors 2009 (27) LCD 1344

13. Kanailal & Vs Ram Chandra Sing & Ors (2018) 13 SCC 715

14. Raj Kumar & Ors Vs Ashok Kumar Chaurasia and 3 other 2015 SS Online All 9373

15. G.Amalorpavam &Ors Vs R.C.Diocese of Madurai & Ors (2006) 3 SCC 224

(Delivered by Hon'ble Rajnish Kumar, J.)

1. Heard, Shri Amit Srivastava, learned counsel for the appellants and Shri Shobh Nath Pandey, learned counsel for the respondents.

2. The instant Second Appeal under Section 100 of the Civil Procedure Code is by the appellants/plaintiffs against the judgment and order dated 05.03.2011 passed by the Additional District Judge, Court No.8, Faizabad in Civil Appeal No.87 of 2008;Jata Shankar and another Versus Badri and others, which was preferred by the defendants/respondents for setting aside the judgment and order dated 29.07.2008, passed by the 3rd Civil Judge (JD), Faizabad in Regular Suit No.248 of 1989;Bhagwan Das and others Versus Smt.Raji and another.

3. The brief facts of the case for adjudication of the present Second Appeal are that both the appellants/plaintiffs and the respondents/defendants are the residents of the same village and they were the members of Hindu joint family. Jorai was the owner of the whole property in dispute. After death of Jorai it came in the name of Mahangi, the eldest son of Jorai. After the death of Mahangi it was mutated in the name of Jagesar. Mahangi, Dubar, Lahuri and Rohni took over their possession according to their shares. Lahuri died issueless, therefore, his share was divided among all the brothers. Smt. Raji had equal share in whole property. Jagesar had entrusted his whole property in his life time to Ram Sumer, Chhedo, Bhagwan Dass and Ram Lal, but they had no right to sell the property. It was ordered by Jagesar that they will serve Smt. Raji. She was also issueless. As such they were the heirs of her property, but they had not got their names recorded in the revenue records. Smt.Raji was remarried and after her marriage they had become the owner of her property. Any how she wanted to grab the property of deceased Jagesar and transfer the house and agricultural land to others. After death of Smt.Raji her servant Bhagauti claimed himself to be heir through her Will. While she had never executed any Will and Bhagauti had no possession and right over the land in dispute.

4. The defendants had filed their written statement alleging that Smt. Raji was the owner of the disputed property. She had written Will dated 21/23.01.1980 of her whole property in the name of the defendants. After her death they became owner and bhumidhar of the disputed land. Plaintiffs had never served Smt. Raji while the defendants had served her. There was no relation of wife and husband between the defendants. Plaintiffs are not the heirs of Smt.Raji and the suit had been filed only to grab her property. The suit is not within time and it has been filed only to harass the defendants. Bhgauti had filed additional written statement alleging therein that Smt. Raji was not remarried. Smt. Raji is the nearest relative of the defendants. The defendants are in possession over the land in dispute from the life time of Smt. Raji and they became owner on the basis of Will dated 21/23.01.1980.

5. On the basis of the pleadings of the parties the following issues were framed:-

1. Whether the plaintiff is owner and in possession over the disputed land?

2. Whether the suit is not maintainable in absence of possession?

3. Whether the suit is time barred?

4.Whether the suit is undervalued and the court fee paid is insufficient?

5. Whether the defendants are entitled to get special cost from plaintiffs under section 35 C.P.C.?

6. Whether the plaintiff is entitled to get any relief?

7. Whether Smt. Raji was remarried with Bhagauti?

6. The plaintiff in addition to documentary evidence had examined P.W.1 Bahaoo and P.W.2 Chingo. The defendants had examined D.W.1 Jata Shankar, D.W.2 Ram Lala and D.W. 3 Prabhu Dei and also filed affidavit of Ram Achal.

7. Learned Trial Court had partly allowed the suit of the plaintiffs after considering the arguments of both the parties and the entire evidence on record by means of the judgment and order dated 29.07.2008. Aggrieved with the same the defendants had filed civil appeal no.87 of 2008(Jata Shankar and another Versus Badri and others), which has been allowed by means of judgment and order dated 05.03.2011 and the judgment and order dated 29.07.2008 has been set aside and the suit of the appellants/plaintiffs has been dismissed. Being aggrieved with the same the appellants/plaintiffs have filed the present Second Appeal.

8. The present Second Appeal was admitted by means of the order dated 29.04.2011 on substantial question of law framed at Sl.No.1. Subsequently on an application moved by the appellants another substantial question of law was formulated by means of order dated 11.12.2017. Accordingly two substantial questions of law are involved for adjudication, which are reproduced as under:-

1. Whether the trial court having recorded a finding that the property in dispute is ancestral and the plaintiffs/appellants are in possession over their share, has the lower appellate court erred in law in setting aside the findings of the trial court without any evidence on record?

2. Whether the lower appellate court has failed to make compliance of Order 41 Rule 31 CPC and has not formulated points of determination while deciding the appeal and whether it would result to non-sustainability of impugned judgment in the eyes of law?

9. Learned counsel for the appellants submitted that the suit for permanent injunction was filed by the appellants/plaintiffs against Smt.Raji on 25.05.1989 and Smt. Raji had died on 13.06.1989. Smt. Raji was wife of Jagesar. Smt. Raji had died issueless. Bhagauti Kewat had filed an impleadment application on the basis of a photocopy of registered Will dated 21/23.01.1980 in his favour executed by Smt. Raji, but the original Will was not filed before the trial court. The suit was decreed exparte in the year 1990. The exparte decree was recalled and set aside in the year 1998. Smt. Raji had remarried to Bhagauti Kewat, which is apparent from the family register of house no.23 and also the electoral roll, in which he has been shown as her husband, but the same has wrongly not been accepted on the ground that it is not proved that there was 'saptpadi' in the marriage and mere entry in family register and electoral roll is not sufficient to prove the relationship or remarriage while the 'Dharaua' marriage being customary was

proved. The original Will was neither filed nor proved before the trial court. Bhagauti Kewat had transferred the land in dispute to Bhagwati Prasad and Jata Shankar through registered Will dated 16.07.2003. Accordingly they were impleaded in the suit. Since the original Will dated 21/23.01.1980 was not filed, therefore, the chain of transfer was not complete. Therefore the suit was decreed in regard to the land under U.P.Z.A. & L.R.Act. In the appellate court the certified copy of the Will was filed but the same was not proved in accordance with the Evidence Act therefore the same could not have been relied.

10. It has further been contended that the learned trial court has recorded a categorical finding that the name of Bhagauti was recorded in the revenue records by fraud, but without rebutting the said finding the Will has been accepted without being proof in accordance with the Evidence Act, which could not have been done by the learned appellate court.

11. He further submitted that an application for amendment in the written statement was moved by the respondents/defendants in the appellate court to take the plea of suit being barred by Section 49 of the U.P. Consolidation of Holdings Act, 1953. The said application was rejected by means of the order dated 08.05.2009, but the learned appellate court has allowed the appeal on the ground of bar of Section 49 of the U.P.C.H.Act without framing any point of determination on it. In case if the learned appellate court was of the view that it is the legal plea which could have been raised at any stage the matter should have been remitted back to the learned trial court to decide it after affording opportunity to the appellants/plaintiffs.

12. On the basis of above learned counsel for the appellants submitted that the lower appellate court has erred in law in deciding the appeal without formulating the point of determination therefore it is in violation of Order 41 Rule 31 of CPC and also setting aside the findings of the trial court on the basis of the Will filed at the appellate stage, which was not proved and no opportunity has been afforded to the appellants to rebut the same. Therefore the judgment and order passed by the learned appellate court is liable to be set aside.

13. In support of his submissions learned counsel for the appellants has relied on *Jagdish Versus Rajendr;AIR 1975 Allahabad 395, K.Laxmanan Versus Thekkayil Padmini and others;2009 (27) LCD 1344, Kanchan Kumar Chaudhary Versus District Judge, Mau and others;RD 1998 (89) 610, Ratti Pal Versus Additional District Judge, Court No.6, Pratapgarh and others;2014 (124) RD 195, Hori Lal Versus Babu Ram and others;2005 All.C.J. 2158, Shri Ram and others Versus Deputy Director of Consolidation, Allahabad and others;2011 (29) LCD 764, Kanailal and others Versus Ram Chandra Singh and others;(2018) 13 SCC 715, Meenakshiammal (dead) Through LRs and others versus Chandrasekaran and Another; 2006 (24) LCD 1316 and Anathula Sudhakar Versus P.Buchi Reddy (dead) by LRs. and others;(2008) 4 SCC 594.*

14. Per contra, learned counsel for the respondents submitted that the appellants/plaintiffs had filed the injunction suit but they have failed to prove their title and possession over the land in dispute. The learned Trial Court had decreed the suit partly only in regard to the land covered under the U.P.Z.A.& L.R. Act, but no relief was granted in regard to the land of abadi and no appeal

was filed by the appellants-plaintiffs against the said part of the judgment and the same was accepted. The name of late Smt. Raji was recorded in the first consolidation of 1962 and thereafter again in the 2nd consolidation which took place in 1980. Both consolidations took place in the life time of Smt. Raji, but no objection was raised or claim was made by the plaintiffs-appellants during her life time and it was only just before her death the suit for permanent injunction was filed.

15. The land in dispute was transferred in the name of respondents-defendants on the basis of a registered Will executed by Smt.Raji in favour of Bhagauti Kewat and thereafter the registered Will executed by Bhagauti Kewat in favour of the respondents-defendants. The Wills were never challenged by the appellants-plaintiffs and the names of respondent/defendants was mutated in accordance with law on the basis of Will. Therefore, they are not entitled for any relief. Learned counsel for the respondents further submitted that the suit filed by the appellants-plaintiffs was not maintainable and the first appellate court has rightly held that the suit is barred by Section 331 of the U.P.Z.A. & L.R. Act and Section 49 of the U.P. Consolidation of Holdings Act.

16. Lastly he submitted that the appellants-plaintiffs and the respondents-defendants were already separated and had separate 'Pariwar' Register, which were filed before the learned trial court. Therefore, the appellants cannot claim the land devolved on late Smt.Raji, which has come in the name of the respondents-defendants on the basis of registered Will.

17. On the basis of above learned counsel for the respondents submitted that the learned trial court had wrongly and illegally partly allowed the suit filed by the appellants-plaintiffs which has rightly been set aside and the suit for permanent injunction of the appellants-plaintiffs has rightly been dismissed. The present appeal has been filed on misconceived and baseless grounds which is liable to be dismissed with costs.

18. In support of his submissions learned counsel for the respondents has relied on *Dina Nath Verma and others Versus Gokaran and others;2003 (94) RD 323 and Prabhu Dayal Versus Gaon Samaj, Tandarpore;1965 ALJ 426.*

19. I have considered the submissions of learned counsels of the parties and perused the record.

20. The facts which are not in dispute are that Jorai was the owner of the whole property in dispute. After his death it came in the name of Mahangi, Dubar, Lahuri and Rohini. They took over their possession according to their share. Lahuri died issueless, therefore his share was divided among all the brothers. Thereafter the property in dispute came in the name of Jagesar. Smt. Raji being wife of Jagesar had equal share in whole property after his death. Jagesar had entrusted his property to Ram Sumer, Chhedi, Bhagwan Dass and Ram Lal, but they had no right to sell the property as it was provided by Jagesar that they will look after Smt. Raji as she was issueless.

21. The appellant/plaintiffs had filed Suit for permanent injunction alleging therein that Smt. Raji had re-married after the death of Jagesar. Therefore they had become the owner of her property in view of Section 172 of the U.P.Z.A.& L.R.Act. The Suit was filed during life time of Smt. Raji on 25.05.1989 and Smt. Raji died on

13.06.1989 without filing written statement. Bhagauti had got himself impleaded on the basis of a registered Will deed in his favour executed by Smt.Raji on 21/23.01.1980. The plea of the appellants/plaintiffs is that Smt. Raji had re-married with Bhagauti, therefore, the property was reverted to the family of Jagesar and the appellants had become owner and in possession of the property in dispute.

22. Learned Trial court on the basis of evidence and findings recorded in regard to issues no.1 and 7 came to the conclusion that the appellants have not produced any Khasra by which the possession of the plaintiffs could be proved, but since Smt. Raji had re-married and the plaintiffs are owner and in possession under the U.P.Z.A.& L.R.Act, therefore, the said issues are decided in favour of the plaintiffs and against the defendants.

23. Learned Appellate court while considering the findings recorded in regard to the issues no.1 and 7 and the evidence found that P.W.1 has stated that Smt.Raji had done 'Dharauwa' marriage with Bhagauti and at the time of marriage he was 25 years of age. P.W.2 Ram Achal has also stated that Smt.Raji had done 'Dharauwa' marriage with Bhagauti and he was 10 to 20 years old. They live like husband and wife. The marriage of Bhagauti and Smt. Raji took place according to 'Hindu' customs. About 50 members were gathered. Pandit Ji had not come. The marriage was done by 'Biradari'. D.W.1-Jata Shanker, D.W.2-Rampal and D.W.3-Prabhu Dei have denied any 'Dharauwa' marriage between Smt. Raji and Bhagauti or any relation of husband and wife between them. Though it was stated by D.W.2 that Bhagauti was living in the house of Smt.Raji. As per the pleadings and evidence Smt. Raji re-married with Bhagauti prior to 36 years ago and due to re-marriage she lost her title as stated in the plaint. While Jagesar had died in 1959. Therefore, on the basis of versions of the witnesses, the learned appellate court found that Smt. Raji should have married in 1953, which is self contradictory because it is not the case of the plaintiffs that Smt.Raji married in the life time of Jagesar. While in view of above Smt. Raji should have married during life time of Jagesar.

24. In paragraph 8 of the plaint it has been mentioned that after the death of Smt. Raji the said servant Bhagauti showed himself as the legal heir of Smt.Raji on the basis of Will executed by her. Smt. Raji had not executed any Will deed. Therefore, there is an admission by the appellant/plaintiffs that Bhaguati was the servant of Smt. Raji. 'Dharauwa' marriage deposed by the P.W.1 and P.W.2 has not been pleaded in the plaint. It is not proved by the evidence on record that there was 'Saptpadi' in the marriage of Smt. Raji and Bhagauti. 'Dharauwa' marriage has been deposed as a custom in the family but the plaintiffs have even not proved that there was any such custom in the family. The statement of witnesses in absence of pleading is nothing but stray statement which is not binding as held by this court in **Ambika Prasad and another Versus Sri Harihar Prasad;1985 (3) LCD 266.**

25. In the Will deed dated 21/23.01.1980 filed as Paper No.152 C/2 to 5, Smt. Raji widow of Jagesar and Bhagauti as 'Mausiyat Dewar' has been mentioned. It is also mentioned that he was living with her for the last 18-20 years

and serving her and managing her farming etc. It is also apparent from Paper No.152C/19, the order passed on mutation case, that the name of Bhagauti was recorded on the basis of Will, after proving in accordance with law.

26. In absence of 'Saptpadi' and without plea of customary marriage as 'Dharauwa' and without proof of existence of any such custom, merely on the basis of statement of witnesses of plaintiffs and living of Bhagauti with Smt. Raji to serve her and manage her farming cannot be treated as re-marriage in absence of any cogent evidence and the rights of Smt. Raji, a widow, would not be extinguished under Section 172 of U.P.Z.A.& L.R. Act. The findings recorded by the learned trial court that Smt. Raji had re-married with Bhgauti is without any cogent evidence and the learned appellate court has rightly recorded that it is not proved by the cogent, reliable and corroborative evidence and the finding of the trial court is not based on the evidence on record.

27. The Hon'ble Apex Court in the case of **Santi Deb Berma Versus Kanchan Prava Devi; 1991 Supp (2) SCC 616** held that living together as husband and wife cannot in any way serve as proof of a valid marriage as per the Act, especially when there is no plea that the marriage was solemnized in accordance with the customary rites and usage, which do not include 'Saptpadi'.

28. This Court in the case of **Dina Nath Verma and others Versus Gokaran and others;2003(94) RD 323** does not find "Ghar Baitha" as legal marriage and held that since no objection was raised in consolidation proceedings therefore the allegations are only an after thought and the allegation of re-marriage can not be accepted. The relevant paragraphs 11 to 13 are extracted below:-

"11. Now coming to the other questions firstly, I consider whether Smt. Lakhraji re-married to Phagoo. Oral evidence has been produced regarding re-marriage. However, the same does not appear to convincting. There is absolutely no evidence to show that the marriage took place. On the other hand, only to is alleged that it was "Ghar Baitha"; that sagai took place and thereafter Smt. Lakhraji and Phagoo started living as husband and wife. It does not show that it was a legal marriage. It is not alleged in the plaint that "sapta-pati" took place and therefore, this marriage cannot be recognised and Smt. Lakhraji cannot be divested from the property.

12. In the present case, it is admitted position that the name of Smt. Lakhraji was recorded over the land on which dispute houses exist in CH Form No. 23. Smt. Lakhraji was declared as exclusive owner of the land and chack was carved out in her name. Smt. Yashoda Devi and respondent Nos. 2 and 3 did not raised any objection in the consolidation proceedings. They have not stated that Smt. Lakhraji has been divested from the land because she had re-married with Phagoo. Therefore, the allegations made in the suit is only a after thought and the allegation that Smt. Lakhraji has re-married cannot be accepted.

13. The Apex Court in the case of Surjit Kaur v. Garja Singh [A.I.R. 1994 SCC 135.] , has held that where customary marriage is pleaded but the custom is not pleaded and there is no evidence of the nature of the ceremonies performed in marriage in such a case from the evidence that the parties were living together as

husband and wife does not itself show that it would confer status of husband and wife."

29. The judgment passed in the case of **Hori Lal Versus Babu Ram and others;2005 All.C.J.2158, Shri Ram and others versus Deputy Director of Consolidation, Allahabad and others;2011 (29) LCD 764** are of no assistance to the case of the appellants.

30. This Court in the case of **Prabhu Dayal Versus Gaon Samaj Tandarpore ;1965 ALJ 426** has held that in a Suit for injunction the plaintiff's right to an injunction is based upon some title which he must establish to the satisfaction of the Court. But the appellant/plaintiffs have failed to establish.

31. This Court in the case of **Kanchan Kumar Chaudhary Versus District Judge, Mau and others;1998 (89) RD 610** has held that in a suit for permanent injunction the question of title arises only incidentally. Similar view has been taken by this court in the case of **Ratti Pal Versus Additional District Judge, Court No.6, Pratapgarh and others;2014(124) RD 195.**

32. The Hon'ble Apex Court in the case of **Anathula Sudhakar Versus P.Buchi Reddy (dead) by LRs. and others;(2008) 4 SCC 594** has referred the general principles as to when a mere suit for permanent injunction will lie, and when it is necessary to file a suit for declaration and/or possession with injunction as a consequential relief. The relevant paragraph 13 is extracted below:-

"13. The general principles as to when a mere suit for permanent injunction will lie, and when it is necessary to file a suit for declaration and/or possession with injunction as a consequential relief, are well settled. We may refer to them briefly.

13.1. Where a plaintiff is in lawful or peaceful possession of a property and such possession is interfered or threatened by the defendant, a suit for an injunction simpliciter will lie. A person has a right to protect his possession against any person who does not prove a better title by seeking a prohibitory injunction. But a person in wrongful possession is not entitled to an injunction against the rightful owner.

13.2. Where the title of the plaintiff is not disputed, but he is not in possession, his remedy is to file a suit for possession and seek in addition, if necessary, an injunction. A person out of possession, cannot seek the relief of injunction simpliciter, without claiming the relief of possession.

13.3. Where the plaintiff is in possession, but his title to the property is in dispute, or under a cloud, or where the defendant asserts title thereto and there is also a threat of dispossession from the defendant, the plaintiff will have to sue for declaration of title and the consequential relief of injunction. Where the title of the plaintiff is under a cloud or in dispute and he is not in possession or not able to establish possession, necessarily the plaintiff will have to file a suit for declaration, possession and injunction."

33. So far as the proof of Will deed executed by Smt. Raji is concerned the same was acted upon after proving before the Tehsildar. It is also apparent from report of Police Station 172c and Paper No.162c/7 Khasra, 162c/8 Khatauni etc. that the disputed land was in possession of Jagesar-Smt.Raji-Bhagauti-Jata Shanker-

Bhagwati. The disputed house is locked. Therefore the judgments cited by the learned counsel for the appellants in the case of **Jagdish Versus Rajendr;AIR 1975 Allahabad 395, Meenakshiammal (dead) through LRs and others Versus Chandrasekaran and another; 2006 (24) LCD 1316 and K. Laxmanan Versus Thekkayil Padmini and others; 2009 (27) LCD 1344** are not applicable on the facts and circumstances of the present case and of no assistance to the case of the appellants.

34. In view of above this court is of the considered opinion that the findings recorded by the learned Trial court in regard to reversion of the land in dispute and possession of the appellants on account of alleged re-marriage of Smt. Raji was perverse and not tenable because no Khasra was also filed showing the possession of the plaintiffs. Therefore, the learned appellate court has rightly set aside the findings of the trial court in regard to possession. This court does not find any illegality or error in it.

35. Learned Appellate court after examining the evidence found that house No.23, Gata No.190-A area 0-0-17, 190-B area 1-2-2, 309 area 3-6-12 and 161 Ka area 0-8-5 given in the bottom of the plaint were recorded in the name of Smt. Raji in the first consolidation and continued in the second consolidation and respondents had not made any objection before the consolidation authorities. However, the matter regarding adjudication of title is pending before the consolidation authorities and thus the suit of plaintiffs was also barred by Section 49 of Consolidation of Holdings Act. Even otherwise the plaintiff/appellants have failed to prove their case as discussed above. In view of no objection raised by the appellant/plaintiffs in both the consolidations during the life time of Smt.Raji, their allegations are only after thought and could not be proved by cogent and reliable evidence, therefore not acceptable in view of judgment in the case of **Dina Nath Verma and others Versus Gokaran and others (Supra)** also.

36. Adverting to the second question of law Order 41 Rule 31 of the CPC provides that the judgment of the appellate court shall be in writing and shall state the points for determination, the decision thereon, the reasons for the decision and where the decree appealed from is reversed or varied, the relief to which the appellant is entitled.

37. The Hon'ble Apex Court in the case of **Kanailal and others Versus Ram Chandra Singh and others; (2018) 13 SCC 715** has observed in paragraph 12 that it is clear from mere reading of Rules 31(a) to (d) that it makes legally obligatory upon the appellate court (both first and second appellate court) as to what should the judgment of the appellate court contain.

38. This court in the case of **Raj Kumar and others Versus Ashok Kumar Chaurasia and 3 other;2015 SS Online All.9373** has held that where parties have led the evidence and said evidence has been considered for recording finding and if controversy is discernible from the judgment, then non-framing of points for determination does not vitiate the judgment and same will be treated to be substantial compliance of Order 41 Rule 31 CPC.

39. The Hon'ble Apex Court in the case of **G.Amalorpavam and others Versus R.C.Diocese of Madurai and others; (2006) 3 SCC 224** has held that non-compliance with the provisions may not vitiate the judgment and make it wholly void, and may be ignored if there has been substantial compliance with it and the second appellate court is in a position to ascertain the findings of the lower appellate court.

40. In view of above merely because the points of determination have not specifically been stated, the judgment may not vitiate because it can be ignored if there has been substantial compliance with the provisions i.e. Order 41 Rule 31 CPC and the higher appellate court is able to ascertain the findings of the lower appellate court.

41. Learned counsel for the appellant had also failed to disclose as to which issue has not been framed and evidence has not been considered and only submitted that the points of determination have not been framed while the judgment has been passed after considering the submissions of the parties and the evidence and also the case laws specifically considering the pleadings and evidence in regard to issues on which the arguments were advanced. Therefore, this court is of the view that there is substantial compliance of Order 41 Rule 31 CPC and the judgment does not vitiate on this ground.

42. In the present case the suit for permanent injunction was filed by the appellant/plaintiffs with the allegation that Smt. Raji had re-married after the death of jagesar, therefore, they had become the owner of her property in view of Section 172 of the U.P.Z.A.& L.R.Act. As discussed above the plaintiff-appellants have failed to prove the re-marriage of Smt. Raji and possesson over the property, therefore, the decree passed by the learned trial court has rightly been set aside and suit has been dismissed in accordance with law.

43. In view of above this court is of the considered opinion that there is no illegality or error in the judgment and order dated 05.03.2011 passed by the First Appellate Court. The substantial questions of law framed by this court are accordingly decided against the appellants.

44. This second appeal is hereby **dismissed**. No order as to costs.

45. The lower Court record shall be remitted to the concerned court forthwith.

(2020)02ILR A948

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 20.09.2019

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.
THE HON'BLE RAJEEV MISRA, J.

First Appeal No. 448 of 2015

Girish Chandra Srivastava ...Appellant
Versus
Smt. Reeta Srivastava ...Respondent

Counsel for the Appellant:
Sri Sriprakash Dwivedi

Counsel for the Respondent:
Sri Ratnesh Khare

A. Civil Law-Hindu Marriage Act (25 of 1955) - S.12(2)(a)(i) - Marriage - Fraud - Consent obtained by fraud - Annulment of marriage - no petition for annulling a marriage on the ground of fraud shall be entertained if the petition is presented

more than one year after the fraud had been discovered.

Allegation of husband that wife is elder to him but said fact was concealed at time of marriage - Husband not detailed in his marriage petition as to when factum that age of wife is more than him was discovered - In absence of pleading in that regard in plaint itself, suit filed by husband barred under S. 12(2)(a)(i) (Para 10)

B. Civil Law-Hindu Marriage Act (25 of 1955) - S.13(1)(ia) - Divorce - Cruelty - Merely on the allegation of cruelty without giving specific instances in support of such allegation, same cannot be considered by Court - Necessary to plead specific instances of cruelty

Held - Plaintiff-husband pleaded commission of cruelty upon his parents by wife – However husband failed to plead any specific instance of 'cruelty' - Further, parents of plaintiff-husband were the best persons to prove commission of 'cruelty' upon them by defendant-wife - However, Plaintiff did not adduce his own parents to prove commission of cruelty by defendant-wife - Husband failed to prove cruelty.(Para 13)

C. Civil Law-Hindu Marriage Act (25 of 1955) - S.13 - Divorce - Irretrievable breakdown of marriage - Husband conduct forced the wife to live separately - Wife filed suit for restitution of conjugal rights - *Held* - it is established that the wife has not herself abandoned the husband - it cannot be said that marriage between parties has broken down irretrievably (Para 27)

D. Civil Law-Hindu Marriage and Divorce Rules, 1956 - Rule 6 - Necessary Parties - Mandatory to implead alleged adulterer or adulteress a co-respondent to the divorce petition - Rule 6 mandatory in nature – Fact - Plaintiff - Husband pleaded that wife is in illegitimate relationship with her 'Jija' - Held - Plaintiff- was obliged to implead 'Jija' of Defendant-wife as a party to the marriage petition - Plaintiff-husband committed procedural error by not impleading 'Jija' of Defendant as a party to the Divorce Petition (Para 25)

E. Matrimonial dispute - Hindu Marriage Act (25 of 1955) - S.13 - Infidelity of wife - legitimacy of child - DNA test - Held - once infidelity of wife was challenged alleging that a son was born out of cohabitation with her 'Jija', it was incumbent upon Plaintiff-husband to apply for D.N.A. - DNA testing is the most legitimate and scientifically perfect means, which the husband could use, to establish his assertion of infidelity infidelity (Para 24)

Appeal Dismissed. (E-5)

List of cases cited:-

1. Smt. Sarita Devi Vs Sri Ashok Kumar Singh 2018 (3) AWC 2328

2. Dipanwita Roy Vs Ronobroto Roy 2015 (1) SCC 365

3. Sukhendu Das Vs Rita Mukherjee 2007 (9) SCC 632

(Delivered by Hon'ble Rajeev Misra, J).)

1. This is plaintiff's appeal under section 19 of Family Court's Act 1984 (hereinafter referred to as "Act, 1984") arising out of judgement dated 16.7.2015 and decree dated 23.7.2015, passed by Principal Judge, Family Court, Varanasi in Marriage Petition No. 536 of 2013 (Girish Chandra Srivastava Vs. Smt. Reeta Srivastava) under section 13 of Hindu Marriage Act , 1955 (hereinafter referred to as "Act, 1955") whereby, Court below has dismissed marriage petition filed by plaintiff-appellant for divorce on the grounds of cruelty, adultery and desertion.

2. According to plaint allegations, marriage of plaintiff-appellant was

solemnized with Reeta Srivastava on 30.11.2001 in a very simple manner. It is the case of plaintiff-appellant that defendant-respondent, without taking consent of plaintiff-appellant, left her marital home in January, 2002 and is residing at her parental home since then. When all attempts by plaintiff-appellant for conciliation between parties failed and defendant-respondent did not return to her matrimonial home to live along plaintiff-appellant, Marriage Petition No. 536 of 2013 (Girish Chandra Srivastava Vs. Smt. Reeta Srivastava) under section 13 of Act, 1955 was filed by plaintiff-appellant for decree of divorce on grounds of cruelty, adultery and desertion. Apart from factual pleas in respect of aforesaid grounds, it was also pleaded in plaint that marriage between parties has been got solemnized by playing fraud. At the time of marriage, age of plaintiff was 43 years, whereas defendant-respondent was aged about 47 years. However, aforesaid fact was concealed and age of defendant-respondent was disclosed as 32 years. It was also alleged that at time of marriage defendant-respondent is younger to her brother Pankaj Khare, whereas true and correct fact is even at the time of marriage, defendant-respondent was elder to plaintiff-appellant. In elaboration of aforesaid ground, it was also pleaded that mensuration cycle of defendant-respondent has come to an end on account of her age. As such, defendant-respondent is incapable of reproducing a child. It was then pleaded that defendant-respondent committed cruelty both physical and mental upon plaintiff-appellant and his family members. Defendant-respondent was alleged to possess M.A. Degree, whereas, plaintiff-appellant is just High School. On account of such disparity, defendant-respondent used to make objectionable comments against plaintiff-appellant. It was also stated that defendant-respondent has failed to discharge her spousal obligations as well as her marriage obligations causing physical and mental cruelty to plaintiff-appellant. Defendant-respondent has refused to perform household jobs and has further entered into a scuffle with parents of plaintiff-appellant. False allegation regarding plaintiff-appellant being drunkard were also leveled by defendant-respondent causing mental agony to plaintiff-appellant. On the question of adulteress character of defendant-respondent, it was pleaded by plaintiff-appellant that defendant-respondent is in illegitimate relationship with Mahesh Khare her 'Jija' (husband of sister) and out of aforesaid illegal relationship, son has been born aged about 12 years. With respect to desertion by defendant-respondent, it was alleged by plaintiff-appellant that defendant-respondent has left house of plaintiff-appellant in January, 2002 without consent of plaintiff-appellant and inspite of best efforts for conciliation and request made by plaintiff-appellant requesting defendant-respondent to return to her marital home and co-habitate with plaintiff-appellant having failed, plaintiff-appellant filed matrimonial petition for grant of divorce.

3. Summons were issued to defendant-respondent but in spite of that, defendant-respondent did not appear. Consequently, service upon defendant-respondent was affected through substituted serviced by way of publication in daily news paper 'Aaj'. Inspite of aforesaid, defendant-respondent did not appear to contest marriage petition filed by plaintiff-appellant. Accordingly, Court below held service upon defendant-

respondent to be sufficient. Consequently, marriage petition filed by plaintiff-appellant proceeded ex-parte against defendant-respondent.

4. Plaintiff-appellant, in order to prove his case, adduced only himself as P.W.1. He also filed six documentary evidence i.e. paper Nos. 8-Ga (I) to 8-Ga (VI) vide list of documents (Paper No. 7 Ga), in proof of his case.

5. To adjudicate marriage petition filed by plaintiff-appellant, Court below did not frame specific issues but independently considered grounds pleaded in plaint for grant of a decree of divorce.

6. Court below considered allegations made in plaint, oral testimony of plaintiff-appellant and documentary evidence adduced by plaintiff-appellant, while evaluating grounds for divorce pleaded in plaint. Upon consideration and evaluation of same, Court below concluded that none of the grounds raised by plaintiff-appellant are cogent enough to allow marriage petition filed by plaintiff-appellant and consequently, declined to grant a decree of divorce as prayed for.

7. It was pleaded by plaintiff-appellant that marriage of parties has been solemnized by playing fraud inasmuch as age of defendant-respondent was more than plaintiff-appellant at time of marriage but the said fact was deliberately concealed.

8. Court below took the view that on the aforesaid ground, marriage petition ought to have been filed within a period of one year from date of marriage or from date of knowledge of aforesaid fact. Admittedly, marriage of plaintiff-appellant with defendant-respondent was solemnized on 30.11.2001, whereas Marriage Petition has been filed in the year 2013 vide plaint dated 30.5.2013, without disclosing date on which plaintiff-appellant discovered aforesaid fact. As such, marriage petition filed by plaintiff-appellant on aforesaid ground is barred by limitation.

9. We have considered the finding recorded by Court below in respect of ground urged by plaintiff-appellant that fraud has been played inasmuch as defendant-respondent is elder to plaintiff-appellant but said fact was concealed at time of marriage between parties. As such, same has been got solemnized by playing fraud. Section 12 of Act 1955 relates to voidable marriages. For ready reference Section 12 of Act 1955 is reproduced herein below:

"12 ***Voidable marriages*** *. (1) Any marriage solemnised, whether before or after the commencement of this Act,* ***shall be voidable and may be annulled by a decree of nullity*** *on* ***any of the following grounds,*** *namely:-*

(a) that the marriage has ***not been consummated owing to the impotence of the respondent****; or]*

(b) that the marriage is in ***contravention of the condition specified in clause (ii) of section 5****; or*

(c) that the ***consent of the petitioner****, or where the consent of the guardian in marriage of the petitioner 13 [was required under section 5 as it stood immediately before the commencement of the Child Marriage Restraint (Amendment) Act, 1978 (2 of 1978)], the consent of such guardian was* ***obtained by force or by fraud as to the nature of the ceremony*** *or* ***as to any material fact or***

circumstance concerning the respondent; *or*

(d) that the respondent was ***at the time of the marriage pregnant by some person other*** *than the petitioner.*

(2) ***Notwithstanding anything contained in sub-section (1), no petition for annulling a marriage:-***

(a) on the ground specified in ***clause (c) of sub-section (1) shall be entertained*** *if-*

(i) the petition is presented ***more than one year after the force had ceased to operate or****, as the* ***case may be, the fraud had been discovered****; or*

(ii) the ***petitioner has, with his or her full consent, lived with the other party*** *to the marriage as husband or wife after the force had ceased to operate or, as the case may be,* ***the fraud had been discovered;***

(b) on the ground specified in clause (d) of sub-section (1) shall be entertained unless the court is satisfied

(i) that the petitioner was at the time of the marriage ignorant of the facts alleged;

(ii) that proceedings have been instituted in the case of a marriage solemnised before the commencement of this Act within one year of such commencement and in the case of marriages solemnised after such commencement within one year from the date of the marriage; and

(iii) that marital intercourse with the consent of the petitioner has not taken place since the discovery by the petitioner of the existence of the said ground."

(Emphasis added)

10. When finding recorded by Court below on the question that marriage of parties was got solemnized by playing fraud is examined in the light of provisions contained in Section 12 of Act, 1955, it is explicitly clear that finding recorded by Court below on the aforesaid question is perfectly just and legal. Plaintiff-appellant has himself not detailed in his marriage petition as to when the factum that age of Defendant-respondent is more than Plaintiff-appellant was discovered by him. In the absence of pleading in that regard in plaint itself, suit filed by Plaintiff-appellant stood clearly barred under Section 12(2) (a) (i) of the Act, 1955.

11. Plaintiff-appellant also pleaded commission of cruelty upon his parents by Defendant-respondent. Divorce can be granted on the ground of cruelty as per section 13 (1) (i-a). For ready reference, same is reproduced herein below:

"(1) Any marriage solemnized, whether before or after the commencement of this Act, may, on a petition presented by either the husband or the wife, be dissolved by a decree of divorce on the ground that the other party--

(i-a) has, after the solemnization of the marriage, treated the petitioner with cruelty; or "

12. Said issue was considered by Court below but refused to be accepted. Court below concluded that in order to prove 'cruelty', Plaintiff-appellant has not produced any supporting documentary evidence nor has adduced any independent witness to prove the same.

13. Admittedly, Plaintiff-appellant only made allegations of cruelty being committed by Defendant-respondent in the plaint. However, Plaintiff-appellant failed to plead any specific instance of 'cruelty'. Once it was alleged by Plaintiff-appellant

that 'cruelty' was committed by Defendant-respondent upon his parents, then plaintiff-appellant ought to have detailed specific instances of 'cruelty' alleged to have been committed by defendant-respondent. Apart from above, parents of plaintiff-appellant were the best persons to prove commission of 'cruelty' upon them by defendant-respondent. However, for reasons best known to Plaintiff-appellant he did not adduce his own parents to prove commission of cruelty by defendant-respondent as alleged by him. We therefore find no illegality in the finding recorded by Court below on aforesaid issue. Consequently, we affirm the same.

14. It was then pleaded by plaintiff-appellant that defendant-respondent does not perform household jobs which is unbecoming of a wife. On this factual premise plaintiff-appellant pleaded for grant of a decree of divorce. However, Court below has considered the aforesaid plea raised by plaintiff-appellant but concluded that same by itself is not sufficient to grant decree of divorce as prayed for by plaintiff-appellant.

15. Section 13 of Act, 1955 provides for grounds of divorce. For ready reference Section 13 of Act, 1955 is reproduced herein-under

" 13 Divorce. --(1) Any marriage solemnized, whether before or after the commencement of this Act, may, on a petition presented by either the husband or the wife, be dissolved by a decree of divorce on the ground that the other party--

[(i) has, after the solemnization of the marriage, had voluntary sexual intercourse with any person other than his or her spouse; or

(i-a) has, after the solemnization of the marriage, treated the petitioner with cruelty; or

(i-b) has deserted the petitioner for a continuous period of not less than two years immediately preceding the presentation of the petition; or]

(ii) has ceased to be a Hindu by conversion to another religion; or

[(iii) has been incurably of unsound mind, or has been suffering continuously or intermittently from mental disorder of such a kind and to such an extent that the petitioner cannot reasonably be expected to live with the respondent.

Explanation.--In this clause,--

(a) the expression "mental disorder" means mental illness, arrested or incomplete development of mind, psychopathic disorder or any other disorder or disability of mind and includes schizophrenia;

(b) the expression "psychopathic disorder" means a persistent disorder or disability of mind (whether or not including sub-normality of intelligence) which results in abnormally aggressive or seriously irresponsible conduct on the part of the other party, and whether or not it requires or is susceptible to medical treatment; or]

(iv) has, [***] been suffering from a virulent and incurable form of leprosy; or

(v) has, [***] been suffering from venereal disease in a communicable form; or

(vi) has renounced the world by entering any religious order; or

(vi) has not been heard of as being alive for a period of seven years or more by those persons who would naturally have heard of it, had that party been alive; [***]

[Explanation. —In this sub-section, the expression "desertion" means the desertion of the petitioner by the other party to the marriage without reasonable cause and without the consent or against the wish of such party, and includes the wilful neglect of the petitioner by the other party to the marriage, and its grammatical variations and cognate expressions shall be construed accordingly.]

(viii) [***]

(ix) [***]

[(1-A) Either party to a marriage, whether solemnised before or after the commencement of this Act, may also present a petition for the dissolution of the marriage by a decree of divorce on the ground--

(i) that there has been no resumption of cohabitation as between the parties to the marriage for a period of 22 [one year] or upwards after the passing of a decree for judicial separation in a proceeding to which they were parties; or

(ii) that there has been no restitution of conjugal rights as between the parties to the marriage for a period of 22 [one year] or upwards after the passing of a decree for restitution of conjugal rights in a proceeding to which they were parties.]

(2) A wife may also present a petition for the dissolution of her marriage by a decree of divorce on the ground,---

(i) in the case of any marriage solemnised before the commencement of this Act, that the husband had married again before such commencement or that any other wife of the husband married before such commencement was alive at the time of the solemnisation of the marriage of the petitioner: Provided that in either case the other wife is alive at the time of the presentation of the petition; or

(ii) that the husband has, since the solemnisation of the marriage, been guilty of rape, sodomy or [bestiality; or]

[(iii) that in a suit under section 18 of the Hindu Adoptions and Maintenance Act, 1956 (78 of 1956), or in a proceeding under section 125 of the Code of Criminal Procedure, 1973 (2 of 1974) [or under the corresponding section 488 of the Code of Criminal Procedure, 1898 (5 of 1898)], a decree or order, as the case may be, has been passed against the husband awarding maintenance to the wife notwithstanding that she was living apart and that since the passing of such decree or order, cohabitation between the parties has not been resumed for one year or upwards; or

[(iv) that her marriage (whether consummated or not) was solemnised before she attained the age of fifteen years and she has repudiated the marriage after attaining that age but before attaining the age of eighteen years.]

Explanation. --This clause applies whether the marriage was solemnised before or after the commencement of the Marriage Laws (Amendment) Act, 1976 (68 of 1976).]

STATE AMENDMENT

Uttar Pradesh.-- In its application to Hindus domiciled in Uttar Pradesh and also when either party to the marriage was not at the time of marriage a Hindu domiciled in Uttar Pradesh, in section 13--

(i) in sub-section (1), after clause (i) insert (and shall be deemed always to have been inserted) the following

"(1-a) has persistently or repeatedly treated the petitioner with such cruelty as to cause a reasonable

apprehension in the mind of the petitioner that it will be harmful or injurious for the petitioner to live with the other party; or", and

(ii) for clause (viii) (since repealed) substituted and deem always to have been so substituted for following.

" (viii) has not resumed cohabitation after the passing of a decree for judicial separation against that party and--

(a) a period of two years has elapsed since the passing of such decree, or

(b) the case is one of exceptional hardship to the petitioner or of exceptional depravity on the part of other party; or"."

16. Section 13 (I) (i-a) of Act, 1955 provides for grant of decree of divorce on the ground of cruelty. The term 'cruelty' has not been defined in Act, 1955. Consequently, same has been subject-matter of debate for long.

17. Recently a Division Bench of this Court in **Smt. Sarita Devi Vs. Sri Ashok Kumar Singh reported in 2018 (3) AWC 2328** has considered the question of cruelty in detail in paragraphs 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 27 and 29 which reads as under:-

"16. In Samar Ghosh vs. Jaya Ghosh (2007) 4 SCC 511 Court considered the concept of cruelty and referring to Oxford Dictionary defines 'cruelty' as 'the quality of being cruel; disposition of inflicting suffering; delight in or indifference to another's pain; mercilessness; hard-heartedness'.

17. In Black's Law Dictionary, 8th Edition, 2004, term "mental cruelty" has been defined as, "a ground for divorce, one spouse's course of conduct (not involving actual violence) that creates such anguish that it endangers the life, physical health, or mental health of the other spouse."

18. The concept of cruelty has been summarized in Halsbury's Laws of England, Vol.13, 4th Edition Para 1269, as under:

"The general rule in all cases of cruelty is that the entire matrimonial relationship must be considered, and that rule is of special value when the cruelty consists not of violent acts but of injurious reproaches, complaints, accusations or taunts. In cases where no violence is averred, it is undesirable to consider judicial pronouncements with a view to creating certain categories of acts or conduct as having or lacking the nature or quality which renders them capable or incapable in all circumstances of amounting to cruelty; for it is the effect of the conduct rather than its nature which is of paramount importance in assessing a complaint of cruelty. Whether one spouse has been guilty of cruelty to the other is essentially a question of fact and previously decided cases have little, if any, value. The court should bear in mind the physical and mental condition of the parties as well as their social status, and should consider the impact of the personality and conduct of one spouse on the mind of the other, weighing all incidents and quarrels between the spouses from that point of view; further, the conduct alleged must be examined in the light of the complainant's capacity for endurance and the extent to which that capacity is known to the other spouse. Malevolent intention is not essential to cruelty but it is an important element where it exits."

19. In 24 American Jurisprudence 2d, the term "mental cruelty" has been defined as under:

"Mental Cruelty as a course of unprovoked conduct toward one's spouse which causes embarrassment, humiliation, and anguish so as to render the spouse's life miserable and unendurable. The plaintiff must show a course of conduct on the part of the defendant which so endangers the physical or mental health of

the plaintiff as to render continued cohabitation unsafe or improper, although the plaintiff need not establish actual instances of physical abuse. "

20. One of the earliest decision considering "mental cruelty" we find is, N.G. Dastane v. S. Dastane (1975) 2 SCC 326, wherein Court has said:

"The enquiry therefore has to be whether the conduct charges as cruelty is of such a character as to cause in the mind of the petitioner a reasonable apprehension that it will be harmful or injurious for him to live with the respondent. "

21. In Sirajmohmedkhan Janmohamadkhan v. Haizunnisa Yasinkhan and Anr. (1981) 4 SCC 250 Court said that a concept of legal cruelty changes according to the changes and advancement of social concept and standards of living. With the advancement of our social conceptions, this feature has obtained legislative recognition, that a second marriage is a sufficient ground for separate residence and maintenance. Moreover, to establish legal cruelty, it is not necessary that physical violence should be used. Continuous ill-treatment, cessation of marital intercourse, studied neglect, indifference on the part of the husband, and an assertion on the part of the husband that the wife is unchaste are all factors which lead to mental or legal cruelty.

22. In Shobha Rani v. Madhukar Reddi, (1988) 1 SCC 105, Court observed that word 'cruelty' has not been defined in Act, 1955 but legislature, making it a ground for divorce under Section 13(1)(i)(a) of Act, 1955, has made it clear that conduct of party in treatment of other if amounts to cruelty actual, physical or mental or legal is a just reason for grant of divorce. Cruelty may be mental or physical, intentional or unintentional. If it is physical, it is a question of fact about degree. If it is mental, the enquiry must begin as to the nature of cruel treatment and then as to the impact of such treatment on the mind of the spouse. Whether it caused reasonable apprehension that it would be harmful or injurious to live with the other, ultimately, is a matter of inference to be drawn by taking into account the nature of conduct and its effect on the complaining spouse. There may, however, be cases where conduct complained of itself is bad enough and per se unlawful or illegal. Then the impact or injurious effect on the other spouse need not be enquired into or considered. In such cases, cruelty will be established if conduct itself is proved or admitted. The absence of intention should not make any difference in the case, if by ordinary sense in human affairs, the act complained of could otherwise be regarded as cruelty.

23. In V. Bhagat v. D. Bhagat (Mrs.), (1994) 1 SCC 337 considering the concept of "mental cruelty" in the context of Section 13(1)(i)(a) of Act, 1984, Court said that it can be defined as conduct which inflicts upon the other party such mental pain and suffering as would make it not possible for that party to live with other. In other words, mental cruelty must be of such a nature that the parties cannot reasonably be expected to live together. The situation must be such that the wronged party cannot reasonably be asked to put up with such conduct and continue to live with other party. It is not necessary to prove that mental cruelty is such as to cause injury to the health of other party. While arriving at such conclusion, regard must be had to the social status, educational level of parties, the society they move in, the possibility or otherwise of the parties ever living together in case

they are already living apart and all other relevant facts and circumstances which it is neither possible nor desirable to set out exhaustively. What is cruelty in one case may not amount to cruelty in another case. It is thus has to be determined in each case having regard to the facts and circumstances of each case.

24. In Chetan Dass v. Kamla Devi, (2001) 4 SCC 250, Court observed that matrimonial matters relates to delicate human and emotional relationship. It demands mutual trust, regard, respect, love and affection with sufficient play for reasonable adjustments with spouse. The relationship has to conform to the social norms as well. There is no scope of applying the concept of "irretrievably broken marriage" as a straitjacket formula for grant of relief of divorce but it has to be considered in the backdrop of facts and circumstances of the case concerned.

25. In Savitri Pandey v. Prem Chandra Panadey, (2002) 2 SCC 73, Court held that mental cruelty is the conduct of other spouse which causes mental suffering or fear to matrimonial life of other. Cruelty postulates a treatment of party to marriage with such conduct as to cause a reasonable apprehension in his or her mind that it would be harmful or injurious to live with other party. Cruelty has to be distinguished from ordinary wear and tear of family life.

27. In Vinita Saxena v. Pankaj Pandit, (2006) 3 SCC 778 Court held that complaints and reproaches, sometimes of ordinary nature, may not be termed as 'cruelty' but their continuance or persistence over a period of time may do so which would depends on the facts of each case and have to be considered carefully by the Court concerned.

29. In Samar Ghosh vs. Jaya Ghosh (supra) Court said that though no uniform standard can be laid down but there are some instances which may constitute mental cruelty and the same are illustrated as under:

"(i) On consideration of complete matrimonial life of the parties, acute mental pain, agony and suffering as would not make possible for the parties to live with each other could come within the broad parameters of mental cruelty.

(ii) On comprehensive appraisal of the entire matrimonial life of the parties, it becomes abundantly clear that situation is such that the wronged party cannot reasonably be asked to put up with such conduct and continue to live with other party.

(iii) Mere coldness or lack of affection cannot amount to cruelty, frequent rudeness of language, petulance of manner, indifference and neglect may reach such a degree that it makes the married life for the other spouse absolutely intolerable.

(iv) Mental cruelty is a state of mind. The feeling of deep anguish, disappointment, frustration in one spouse caused by the conduct of other for a long time may lead to mental cruelty.

(v) A sustained course of abusive and humiliating treatment calculated to torture, discommode or render miserable life of the spouse.

(vi) Sustained unjustifiable conduct and behavior of one spouse actually affecting physical and mental health of the other spouse. The treatment complained of and the resultant danger or apprehension must be very grave, substantial and weighty.

(vii) Sustained reprehensible conduct, studied neglect, indifference or total departure from the normal standard

of conjugal kindness causing injury to mental health or deriving sadistic pleasure can also amount to mental cruelty.

(viii) The conduct must be much more than jealousy, selfishness, possessiveness, which causes unhappiness and dissatisfaction and emotional upset may not be a ground for grant of divorce on the ground of mental cruelty.

(ix) Mere trivial irritations, quarrels, normal wear and tear of the married life which happens in day to day life would not be adequate for grant of divorce on the ground of mental cruelty.

(x) The married life should be reviewed as a whole and a few isolated instances over a period of years will not amount to cruelty. The ill-conduct must be persistent for a fairly lengthy period, where the relationship has deteriorated to an extent that because of the acts and behavior of a spouse, the wronged party finds it extremely difficult to live with the other party any longer, may amount to mental cruelty.

(xi) If a husband submits himself for an operation of sterilization without medical reasons and without the consent or knowledge of his wife and similarly if the wife undergoes vasectomy or abortion without medical reason or without the consent or knowledge of her husband, such an act of the spouse may lead to mental cruelty.

(xii) Unilateral decision of refusal to have intercourse for considerable period without there being any physical incapacity or valid reason may amount to mental cruelty.

(xiii) Unilateral decision of either husband or wife after marriage not to have child from the marriage may amount to cruelty.

(xiv) Where there has been a long period of continuous separation, it may fairly be concluded that the matrimonial bond is beyond repair. The marriage becomes a fiction though supported by a legal tie. By refusing to sever that tie, the law in such cases, does not serve the sanctity of marriage; on the contrary, it shows scant regard for the feelings and emotions of the parties. In such like situations, it may lead to mental cruelty."

18. The aforesaid Division Bench judgement clearly explains different shades of 'cruelty' which by itself are sufficient enough to dissolve the marriage on the ground of cruelty. The aforesaid judgement also prescribes the mode as to how 'cruelty' has to be proved and in what decree it has to be proved so as to grant of decree of divorce on the ground of 'cruelty'.

19. With the aid of the aforesaid material, Court has now to examine, whether plaintiff-appellant was able to successfully establish cruelty on the part of defendant- respondent and therefore, entitled to the decree of divorce on the aforesaid ground.

20. From perusal of plaint, we find that allegation of cruelty made by plaintiff-appellant is only allegation but does not give any specific instance or instances of cruelty having been committed by Defendant-respondent. Merely on the allegation of cruelty having been committed without giving specific instances in support of such allegation, same cannot be considered by Court. In the present case, Plaintiff-appellant has failed to plead specific instances of cruelty. Plea raised by plaintiff-appellant is not covered under judgement of Apex Court in Samar Ghosh (Supra) wherein

Apex Court has given various instances of mental cruelty. Plea raised by plaintiff-appellant neither singularly nor when considered cumulatively along with other grounds pleaded in plaint, is sufficient enough to grant decree of divorce. Consequently, we do not find any error much less an error on face of record in conclusion drawn by Court below that decree of divorce cannot be granted on ground that wife has refused to perform household job.

21. Plaintiff-appellant in support of his divorce suit further pleaded that defendant-respondent was in illegal relationship with her 'Jija' i.e. husband of sister namely Mahesh Khare. From aforesaid illegal relationship, a son aged about 12 years was born. Court below refused to entertain this ground as Rule 6 of The Hindu Marriage and Divorce Rules, 1956 (hereinafter referred to as "Rules, 1956") were not complied with inasmuch as Mahesh Khare was not impleaded as a party to the proceedings. Apart from above bare pleading no cogent evidence has been adduced by Plaintiff-appellant to substantiate aforesaid plea. Once infidelity of wife of Defendantn-respondent i.e. wife was challenged, it was incombent upon Plaintiff-appellant to apply for D.N.A. Test of the child as well as Mahesh Khare. However, no such step was taken by Plaintiff-appellant. Consequently, Court below rejected the aforesaid ground for grant of divorce prayed for by Plaintiff-appellant. He has also not impleaded the person allegedly involved in adultery with defendant-respondent.

22. We have examined the finding recorded by Court below with regard to adulterous character of Defendant-respondent as alleged by Plaintiff-appellant. For ready reference Rule 6 of Rules, 1956 is reproduced herein-under:-

*"6. **Necessary Parties**- (a) In every petition for divorce or judicial separation on the ground that the respondent is living in adultery or has committed adultery with any person, the petitioner shall make the alleged adulterer or adulteress a co-respondent to the petition unless he or she is excused by the Court from doing so on any of the following grounds:*

(i) that the name of such person is unknown to the petitioner although he has made due efforts for discovery,

(ii) that such person is dead;

(iii) that the respondent if a woman is leading the life of a prostitute and that the petitioner knows of no person with whom adultery has been committed; or

(iv) Any other reason that the Court considers sufficient.

(b) In every petition under Sec.13 (1) and (2) of the Act, the petitioner shall make 'the other wife' mentioned in that section a co-respondent.

(c) In every petition under Sec. 11 of the Act on the ground that the condition in Sec. 5 (1) is contravened the petitioner shall make the spouse alleged to be living at the time of the marriage a co-respondent.

(d) If a petitioner does not make the alleged adulterer or adulteress a co-respondent he shall at the time of presenting the petition file a separate application supported by an affidavit giving the reasons."

23. Admittedly, Rule 6 of Rules, 1956 is mandatory in nature and therefore, Plaintiff-appellant was obliged to implead Mahesh Khare i.e. 'Jija' of Defendant-

respondent as a party to the marriage petition.

24. That apart, we find that once ifidelity of wife was challenged stating that a son was born out of cohabitation with Mahesh Khare i.e. 'Jija' of Defendant-respondent, it was incumbent upon Plaintiff-appellant to apply for D.N.A. Test of alleged illegitimate son and Mahesh Khare. However, for reasons best known to Plaintiff-appellant no such steps were taken. Reference in this regard be made to judgement of Apex Court in **Dipanwita Roy Vs. Ronobroto Roy, 2015 (1) SCC 365 in which** Court considered the question of presumption arising out under section 112 and the necessity of holding D.N.A. test. Court referred to provisions of Section 112 and thereafter observed as follows in paragraphs 9, 10, 11, 13, 14, 15, 17, 18:

"9. Learned counsel for the appellant-wife, in the first instance, invited our attention to Section 112 of the Indian Evidence Act. The same is being extracted hereunder:

"112. Birth during marriage, conclusive proof of legitimacy- The fact that any person was born during the continuance of a valid marriage between his mother and any man, or within two hundred and eighty days after its dissolution, the mother remaining unmarried, shall be conclusive proof that he is the legitimate son of that man, unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten."

Based on the aforesaid provision, learned counsel for the appellant-wife drew our attention to decision rendered by the Privy Council in Karapaya Servai v. Mayandi, AIR 1934 PC 49, wherein it was held, that the word 'access' used in Section 112 of the Evidence Act, connoted only the existence of an opportunity for marital intercourse, and in case such an opportunity was shown to have existed during the subsistence of a valid marriage, the provision by a fiction of law, accepted the same as conclusive proof of the fact that the child born during the subsistence of the valid marriage, was a legitimate child. It was the submission of the learned counsel for the appellant-wife, that the determination of the Privy Council in Karapaya Servai's case(supra) was approved by this Court in Chilukuri Venkateshwarly vs. Chilukuri Venkatanarayana, 1954 SCR 424.

10. Learned counsel for the appellant-wife also invited our attention to a decision rendered by this Court in Goutam Kundu vs. State of West Bengal and another, (1993) 3 SCC 418, wherein this Court, inter alia, held as under:

"(1) That Courts in India cannot order blood test as a matter of course.

(2) Wherever applications are made for such prayers in order to have roving inquiry, the prayer for blood test cannot be entertained.

(3) There must be a strong prima facie case in that the husband must establish non-access in order to dispel the presumption arising under Section 112 of the Evidence Act.

(4) The Court must carefully examine as to what would be the consequence of ordering the blood test; whether it will have the effect of branding a child as a bastard and the mother as an unchaste woman.

(5) No one can be compelled to give samle of blood for analysis." Reliance was also placed on the decision rendered

by this Court in Kamti Devi and another v. Poshi Ram, AIR 2001 SC 2226, wherefrom, the following observations made by this Court, were sought to be highlighted:

"9. But Section 112 itself provides an outlet to the party who wants to escape from the rigour of that conclusiveness. The said outlet is, if it can be shown that the parties had no access to each other at the time when the child could have been begotten the presumption could be rebutted. In other words, the party who wants to dislodge the conclusiveness has the burden to show a negative, not merely that he did not have the opportunity to approach his wife but that she too did not have the opportunity of approaching him during the relevant time. Normally, the rule of evidence in other instances is that the burden is on the party who asserts the positive, but in this instance the burden is cast on the party who pleads the negative. The raison d'etre is the legislative concern against illegitimatizing a child. It is a sublime public policy that children should not suffer social disability on account of the laches or lapses of parents.

10. We may remember that Section 112 of the Evidence Act was enacted at a time when the modern scientific advancements with Dioxy Nucleric Acid (DNA) as well as Ribonucleic Acid (RNA) tests were not even in contemplation of the legislature. The result of a genuine DNA test is said to be scientifically accurate. But even that is not enough to escape from the conclusiveness of Section 112 of the Act, e.g., if a husband and wife were living together during the time of conception but the DNA test revealed that the child was not born to the husband, the conclusiveness in law would remain unrebuttable. This may look hard from thepoint of view of the husband who would be compelled to bear the fatherhood of a child of which he may be innocent. But even in such a case the law leans in favour of the innocent child from being bastardized if his mother and her spouse were living together during the time of conception. Hence the question regarding the degree of proof of non-access for rebutting the conclusiveness must be answered in the light of what is meant by access or non-access as delineated above.

11.....Its corollary is that the burden of the plaintiff-husband should be higher than the standard of preponderance of probabilities. The standard of proof in such cases must at least be of a degree in between the two as to ensure that there was no possibility of the child being conceived through the plaintiff-husband. " (emphasis is ours)

11. Lastly, learned counsel for the appellant-wife, placed reliance on the decision rendered by this Court in Sham Lal @ Kuldeep vs. Sanjeev Kumar and others, (2009) 12 SCC 454, wherein it was inter alia, held as under:

"Once the validity of marriage is proved then there is strong presumption about the legitimacy of children born from that wedlock. The presumption can only be rebutted by a strong, clear, satisfying and conclusive evidence. The presumption cannot be displaced by mere balance of probabilities or any circumstance creating doubt. Even the evidence of adultery by wife which though amounts to very strong evidence, it, by itself, is not quite sufficient to repel this presumption and will not justify finding of illegitimacy if husband has had access. In the instant case, admittedly the plaintiff and Defendant 4 were born to D during the continuance of her valid marriage with B. Their marriage was in fact never dissolved. There is no

evidence on record that B at any point of time did not have access to D." (emphasis is ours).

13. All the judgments relied upon by the learned counsel for the appellant were on the pointed subject of the legitimacy of the child born during the subsistence of a valid marriage. The question that arises for consideration in the present appeal, pertains to the alleged infidelity of the appellant-wife. It is not the husband's desire to prove the legitimacy or illegitimacy of the child born to the appellant. The purpose of the respondent is, to establish the ingredients of Section 13(1)(ii) of the Hindu Marriage Act, 1955, namely, that after the solemnisation of the marriage of the appellant with the respondent, the appellant had voluntarily engaged in sexual intercourse, with a person other than the respondent. There can be no doubt, that the prayer made by the respondent for conducting a DNA test of the appellant's son as also of himself, was aimed at the alleged adulterous behaviour of the appellant. In the determination of the issue in hand, undoubtedly, the issue of legitimacy will also be incidentally involved. Therefore, insofar as the present controversy is concerned, Section 112 of the Indian Evidence Act would not strictly come into play.

14. A similar issue came to be adjudicated upon by this Court in Bhabani Prasad Jena vs. Convenor Secretary, Orissa State Commission for Women and another, (2010) 8 SCC 633, wherein this Court held as under:

"21. In a matter where paternity of a child is in issue before the court, the use of DNA test is an extremely delicate and sensitive aspect. One view is that when modern science gives the means of ascertaining the paternity of a child, there should not be any hesitation to use those means whenever the occasion requires. The other view is that the court must be reluctant in the use of such scientific advances and tools which result in invasion of right to privacy of an individual and may not only be prejudicial to the rights of the parties but may have devastating effect on the child. Sometimes the result of such scientific test may bastardise an innocent child even though his mother and her spouse were living together during the time of conception.

22. In our view, when there is apparent conflict between the right to privacy of a person not to submit himself forcibly to medical examination and duty of the court to reach the truth, the court must exercise its discretion only after balancing the interests of the parties and on due consideration whether for a just decision in the matter, DNA test is eminently needed. DNA test in a matter relating to paternity of a child should not be directed by the court as a matter of course or in a routine manner, whenever such a request is made. The court has to consider diverse aspects including presumption under Section 112 of the Evidence Act; pros and cons of such order and the test of "eminent need" whether it is not possible for the court to reach the truth without use of such test.

23. There is no conflict in the two decisions of this ourt, namely, Goutam Kundu vs. State of West Bengal (1993) 3 SCC 418 and Sharda vs. Dharmpal (2003) 4 SCC 493. In Goutam Kundu, it has been laid down that courts in India cannot order blood test as a matter of course and such prayers cannot be granted to have roving inquiry; there must be strong prima facie case and the court must carefully examine as to what would be the consequence of ordering the blood test. In

Sharda, while concluding that a matrimonial court has power to order a person to undergo a medical test, it was reiterated that the court should exercise such a power if the applicant has a strong prime facie case and there is sufficient material before the court. Obviously, therefore, any order for DNA test can be given by the court only if a strong prima facie case is made out for such a course.

24. Insofar as the present case is concerned, we have already held that the State Commission has no authority, competence or power to order DNA test. Looking to the nature of proceedings with which the High Court was concerned, it has to be held that the High Court exceeded its jurisdiction in passing the impugned order. Strangely, the High Court overlooked a very material aspect that the matrimonial dispute between the parties is already pending in the court of competent jurisdiction and all aspects concerning matrimonial dispute raised by the parties in that case shall be adjudicated and determined by that court. Should an issue arise before the matrimonial court concerning the paternity of the child, obviously that court will be competent to pass an appropriate order at the relevant time in accordance with law. In any view of the matter, it is not possible to sustain the order passed by the High Court. " (emphasis is ours)

It is therefore apparent, that despite the consequences of a DNA test, this Court has concluded, that it was permissible for a Court to permit the holding of a DNA test, if it was eminently needed, after balancing the interests of the parties.

15. Recently, the issue was again considered by this Court in Nandlal Wasudeo Badwaik vs. Lata Nandlal Badwaik and another, (2014) 2 SCC 576, wherein this Court held as under:

"15. Here, in the present case, the wife had pleaded that the husband had access to her and, in fact, the child was born in the said wedlock, but the husband had specifically pleaded that after his wife left the matrimonial home, she did not return and thereafter, he had no access to her. The wife has admitted that she had left the matrimonial home but again joined her husband. Unfortunately, none of the courts below have given any finding with regard to this plea of the husband that he had not any access to his wife at the time when the child could have been begotten.

16. As stated earlier, the DNA test is an accurate test and on that basis it is clear that the appellant is not the biological father of the girl child. However, at the same time, the condition precedent for invocation of Section 112 of the Evidence Act has been established and no finding with regard to the plea of the husband that he had no access to his wife at the time when the child could have been begotten has been recorded. Admittedly, the child has been born during the continuance of a valid marriage. Therefore, the provisions of Section 112 of the Evidence Act conclusively prove that Respondent 2 is the daughter of the appellant. At the same time, the DNA test reports, based on scientific analysis, in no uncertain terms suggest that the appellant is not the biological father. In such circumstances, which would give way to the other is a complex question posed before us.

17. We may remember that Section 112 of the Evidence Act was enacted at a time when the modern scientific advancement and DNA test were not even in contemplation of the legislature. The result of DNA test is said to be scientifically accurate. Although Section 112 raises a presumption of conclusive proof on satisfaction of the conditions enumerated therein but the same is rebuttable. The presumption may

afford legitimate means of arriving at an affirmative legal conclusion. While the truth or fact is known, in our opinion, there is no need or room for any presumption. Where there is evidence to the contrary, the presumption is rebuttable and must yield to proof. The interest of justice is best served by ascertaining the truth and the court should be furnished with the best available science and may not be left to bank upon presumptions, unless science has no answer to the facts in issue. In our opinion, when there is a conflict between a conclusive proof envisaged under law and a proof based on scientific advancement accepted by the world community to be correct, the latter must prevail over the former.

18. We must understand the distinction between a legal fiction and the presumption of a fact. Legal fiction assumes existence of a fact which may not really exist. However, a presumption of a fact depends on satisfaction of certain circumstances. Those circumstances logically would lead to the fact sought to be presumed. Section 112 of the Evidence Act does not create a legal fiction but provides for presumption.

19. The husband's plea that he had no access to the wife when the child was begotten stands proved by the DNA test report and in the face of it, we cannot compel the appellant to bear the fatherhood of a child, when the scientific reports prove to the contrary. We are conscious that an innocent child may not be bastardised as the marriage between her mother and father was subsisting at the time of her birth, but in view of the DNA test reports and what we have observed above, we cannot forestall the consequence. It is denying the truth. "Truth must triumph" is the hallmark of justice." (emphasis is ours) This Court has therefore clearly opined, that proof based on a DNA test would be sufficient to dislodge, a presumption under Section 112 of the Indian Evidence Act.

16. It is borne from the decisions rendered by this Court in Bhabani Prasad Jena (supra), and Nandlal Wasudeo Badwaik (supra), that depending on the facts and circumstances of the case, it would be permissible for a Court to direct the holding of a DNA examination, to determine the veracity of the allegation(s), which constitute one of the grounds, on which the concerned party would either succeed or lose. There can be no dispute, that if the direction to hold such a test can be avoided, it should be so avoided. The reason, as already recorded in various judgments by this Court, is that the legitimacy of a child should not be put to peril.

17. The question that has to be answered in this case, is in respect of the alleged infidelity of the appellant-wife. The respondent-husband has made clear and categorical assertions in the petition filed by him under Section 13 of the Hindu Marriage Act, alleging infidelity. He has gone to the extent of naming the person, who was the father of the male child born to the appellant-wife. It is in the process of substantiating his allegation of infidelity, that the respondent-husband had made an application before the Family Court for conducting a DNA test, which would establish whether or not, he had fathered the male child born to the appellant-wife. The respondent feels that it is only possible for him to substantiate the allegations levelled by him (of the appellant-wife's infidelity) through a DNA test. We agree with him. In our view, but for the DNA test, it would be impossible for the respondent-husband to establish and confirm the assertions made in the

pleadings. We are therefore satisfied, that the direction issued by the High Court, as has been extracted hereinabove, was fully justified. DNA testing is the most legitimate and scientifically perfect means, which the husband could use, to establish his assertion of infidelity. This should simultaneously be taken as the most authentic, rightful and correct means also with the wife, for her to rebut the assertions made by the respondent-husband, and to establish that she had not been unfaithful, adulterous or disloyal. If the appellant-wife is right, she shall be proved to be so.

18. We would, however, while upholding the order passed by the High Court, consider it just and appropriate to record a caveat, giving the appellant-wife liberty to comply with or disregard the order passed by the High Court, requiring the holding of the DNA test. In case, she accepts the direction issued by the High Court, the DNA test will determine conclusively the veracity of accusation levelled by the respondent-husband, against her. In case, she declines to comply with the direction issued by the High Court, the allegation would be determined by the concerned Court, by drawing a presumption of the nature contemplated in Section 114 of the Indian Evidence Act, especially, in terms of illustration (h) thereof. Section 114 as also illustration (h), referred to above, are being extracted hereunder:

"114. Court may presume existence of certain facts - The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.

Illustration (h) - That if a man refuses to answer a question which he is not compelled to answer by law, the answer, if given, would be unfavourable to him."

This course has been adopted to preserve the right of individual privacy to the extent possible. Of course, without sacrificing the cause of justice. By adopting the above course, the issue of infidelity alone would be determined, without expressly disturbing the presumption contemplated under Section 112 of the Indian Evidence Act. Even though, as already stated above, undoubtedly the issue of legitimacy would also be incidentally involved."

25. Thus having considered the legal provisions and case law regarding proof of fact as to whether illegitimate son was born out of cohabitation with another person, we find that Plaintiff-appellant has committed a procedural error in plaint by not impleading Mahesh Khare 'Jija' of Defendant-respondent as a party to the Divorce Potion even when the same was mandatorily required under Rule 6, of Rules 1956. Further no application was filed by Plaintiff-appellant before Court below to ascertain the D.N.A. Character of illegitimate child and Mahesh Khare 'Jija' of Defendant-respondent. In the absence of aforesaid, Court below was totally handicapped to consider the aforesaid issue pressed by Plaintiff-appellant for annulment of marriage. Court below thus did not commit any illegality in refusing to grant a decree of divorce to Plaintiff-appellant on this ground.

26. Lastly, it was pleaded by Plaintiff-appellant before Court below that parties have been living separately since January, 2002, as such, marriage of parties has broken down irretrievably. It was the case of Plaintiff-appellant that defendant-respondent without taking consent of plaintiff-appellant and out of her own free will left her matrimonial home in January, 2002 and is residing with her parents since

then. In spite of repeated request made by Plaintiff-appellant defendant-respondent has refused to live with Plaintiff-appellant in her marital home. Reliance is placed upon judgements in **Sukhendu Das VS. Rita Mukherjee, 2007 (9) SCC 632**. Reliance is placed upon paragraphs 6 and 7 to buttress the submission that in present case also, wife defendant-respondent is living separately since January, 2002 and inspite of knowledge of divorce suit has refused to participate in the same, consequently marriage of parties has broken down irretrievably and forcing appellant to stay in a dead marriage would itself constitute mental cruelty. Para 6 and 7 of the judgement in **Sukhendu Das (Supra)** read as under:

"6. Mr. Raja Chatterjee, learned counsel appearing for the Appellant submitted that the Respondent deserted the Appellant about 17 years back and she refused to come back and live with him. Apart from the allegation of desertion, the learned counsel also alleged mental cruelty on the part of the Respondent who threatened the Appellant in the year 2005 that she would get a criminal case filed against him if he did not stop attempts to get the divorce. The learned counsel further submitted that the Appellant and the Respondent have been living apart due to matrimonial discord since 17 years and for all practical purposes the marriage has broken down.

7. The Respondent, who did not appear before the trial court after filing of written statement, did not respond to the request made by the High Court for personal appearance. In spite of service of Notice, the Respondent did not show any interest to appear in this Court also. This conduct of the Respondent by itself would indicate that she is not interested in living with the Appellant. Refusal to participate in proceeding for divorce and forcing the appellant to stay in a dead marriage would itself constitute mental cruelty ***[Samar Ghosh v. Jaya Ghosh, 2007 (2) R.C.R (Civil 595; 2007 (2) R.C.R. (Criminal) 515 : 2007 (2) Recent Apex Judgements (R.A.J) 177: (2007) 4 SCC 511 (para 101) (xiv) .*** *The High Court observed that no attempt was made by either of the parties to be posted at the same place. Without entering into the disputed facts of the case, we are of the opinion that there is no likelihood of the Appellant and the Respondent living together and for all practical purposes there is an irretrievable breakdown of the marriage. "*

27. Court below also considered above mentioned ground. Court below upon evaluation of evidence on record, concluded that Plaintiff-appellant had previously filed Marriage Petition No. 258 of 2003 for grant of divorce. Defendant-respondent appeared in aforesaid marriage petition. She appears to have subsequently filed an application under Section 24 of Act, 1955 for grant of interim maintenance. Same was allowed. However, on account of failure of Plaintiff-appellant to pay interim maintenance to defendant-respondent, earlier Marriage Petition NO. 258 of 2003 filed by Plaintiff-appellant came to be dismissed. Restoration application filed by plaintiff-appellant was also rejected. That apart, Defendant-respondent had herself filed Case No. 448 of 2003 in the Family Court, Gorakhpur for restitution of conjugal rights as contemplated under Section 9 of Act, 1955. As such, it is established that Defendant-respondent has not herself abounded Plaintiff-appellant. To the contrary on account of conduct of

Plaintiff-appellant, Defendant-respondent has been forced to live separately. On the facts as noted above, it cannot be said that marriage between parties has broken down irretrievably. Consequently, we have no hesitation to hold that finding recorded by Court below that marriage between parties has not broken down irretrievably, does not suffer from any illegality, perversity or being erroneous. Defendant-respondent is legally wedded wife of plaintiff-appellant. As such, plaintiff-appellant is legally and morally bound to maintain his wife. Record shows that plaintiff-appellant has miserably failed in discharging his moral and legal obligation.

28. In view of discussion made herein-above, appeal fails and is liable to be dismissed. It is accordingly dismissed. Cost made easy.

(2020)02ILR A967

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.12.2019

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.
THE HON'BLE RAJEEV MISRA, J.

First Appeal No. 451 of 2016

Krishna Murarri ...Appellant
Versus
Sangeeta ...Respondent

Counsel for the Appellant:
Sri Uday Bhan Singh, Sri Uday Bhan Singh

Counsel for the Respondent:
Sri Atul Kumar Tiwari

A. Civil Law-Hindu Marriage Act (25 of 1955) - S.13(1)(i) - Divorce - 'Adultery' - difficult to prove same by direct evidence - 'adultery' can be inferred from circumstances - burden is upon person, who alleges adultery (Para 8)

B. Civil Law-Hindu Marriage Act (25 of 1955) - S.13(1)(i) - Divorce - Ground of adultery - Allegations that wife has extra marital physical relationship with her brother-in-law - *Held* - Witness silent with regard to day, date and timing of alleged act of 'adultery' on part of wife - Husband failed to prove adultery on the part of wife - Husband not entitled to decree of divorce (Para 8)

C. Civil Law-Hindu Marriage Act (25 of 1955) S.13 - Divorce - Irretrievable breakdown of marriage - Cannot be granted - when such a plea is raised by one party alone (Para 18)

D. Civil Law-Hindu Marriage Act (25 of 1955) - S.13 - Divorce - Irretrievable breakdown of marriage - Husband not prayed divorce on the ground of irretrievable breakdown of marriage before Family court - For the first time before High Court prayed to grant decree of divorce on ground of irretrievable break down of marriage - *Held* - Conduct of the Husband forced the wife to live separately - wife pleaded that she wants to live with husband but he refused to keep her - Husband failed to lay factual foundation that there has been an irretrievable break down of marriage (Para 18)

First Appeal dismissed. (E-5)

List of cases cited :

1. Smt. Kavita Sharma Vs Neeraj Sharma First Appeal No. 525 of 2006 dt. 7.2.2018

2. Ashwani Kumar Kohli Vs Smt. Anita First Appeal No. 792 of 2008 dt. 17.11.2016

(Delivered by Hon'ble Rajeev Misra, J).)

1. The present first appeal under section 19 of Family Courts Act, 1984 (hereinafter referred to as 'Act 1984') has

been filed by Krishna Murari Plaintiff-appellant (hereinafter referred to as 'Plaintiff') challenging judgement dated 17.11.2015 and decree dated 27.11.2015, passed by Principal Judge, Family Court, Kanpur Dehat in Suit No. 11 of 2009 (Krishna Murari Vs. Sangeeta) under section 13 of Hindu Marriage Act, 1955 (hereinafter referred to as 'Act 1955') whereby suit filed by Plaintiff for grant of decree of divorce on the ground of adultery, which is recognized as a ground of divorce under section 13 (1) (i) of Act 1955 has been dismissed.

2. We have heard Mr. Udhay Bhan Singh, learned counsel for Plaintiff and Mr. Atul Kumar Tiwari, learned counsel representing Defendant-respondent (hereinafter referred to as 'Defendant')

3. According to plaint allegations marriage of Plaintiff was solemnized with Defendant on 17.6.2005 at Hindupur in accordance with Hindu Rites and Customs. After marriage, Defendant came to her matrimonial home at village Nasirapur. It is alleged by Plaintiff that after some time, Defendant insisted that they should live in Bilhour. However Plaintiff resisted the desire of Defendant on the ground that he is the only son of his parents and father of Plaintiff has died long ago. As such, Mother of Plaintiff will be left alone at Naserpur. Therefore, it is not advisable to live in Bilhour. However, it is alleged by Plaintiff that after some time again pressure was exerted by Defendant to live at Bilhour. Ultimately, Plaintiff acceded to the insistence of defendant and started residing at Bilhour. It is further alleged by Plaintiff that on 28.9.2005, when he returned after closing his shop found of his residence locked. On inquiry, it was gathered that Defendant has gone to house of her Jija, namely, Mahesh Chand, who is also living in Bilhour. According to Plaintiff, he reached house of Mahesh Chand at arround 6:00 pm and found Defendant in compromising position with Mahesh. Plaintiff is alleged to have words with Defendant but she refused to pay any heed. After the aforesaid incident, Plaintiff is alleged to have pursuaded Defendant to abstain from visiting her Jija's place but she refused. On complaint being made to father and brother of Defendant Sangeeta, they also did not pay any heed, but to the contrary supported her. They are also alleged to have threatened Plaintiff of his life. Relationship between parties became strained. On 20.4.2006, father of Defendant came to Bilhour, and stating that there is some function in village and Sangeeta shall return after one week. Accordingly, Sangeeta wife of Plaintiff went with her father on 20.4.2006 to her parental home. After one week, Plaintiff went to Hindupur to bring back Sangeeta but father and brother of Defendant refused to send her along with Plaintiff. It is also alleged that on 5.6.2006, when Plaintiff was at his shop, his friend Girish Chand informed that his wife has arrived at her Jija's house, since yesterday. Plaintiff closed his shop and retuned to his home waiting for Defendant. However, as Defendant did not return up to 8:00 pm, Plaintiff went to the house of Jija of Defendant and there he saw his wife Sangeeta in compromising position with Mahesh Chand, her Jija. Inspite of aforesaid, wife of Mahesh i.e. Ranu and Mahesh abused Plaintiff, as such, Plaintiff returned to his home. Defendant lodged an F.I.R. against Plaintiff in which Plaintiff surrendered before Court on 20.7.2006 and enlarged on bail on 20.7.2006. It is also alleged that on 4.8.2006, Pappu, brother-in-law of Plaintiff and Mahesh Chand,

Sadhu of Plaintiff are alleged to have assaulted Plaintiff and also took away Rs. 10,000/- from the person of Mahesh. Inspite of all attempts made by relatives of Plaintiff, to have a compromise, Defendant did not accede to the same. To the contrary, she initiated criminal proceedings against Plaintiff. As such, except for divorce there is no other way to resolve the deadlock.

4. Suit filed by Plaintiff was contested by Defendant. She accordingly filed a written statement whereby, not only plaint allegations were denied but also additional pleas were raised. Defendant pleaded that her mother-in-law and sister-in-law have harassed her for demand of dowry. Consequently, criminal case regarding demand of dowry was initiated by Defendant, which is pending consideration. In respect of incident which was alleged to have occurred on 4.8.2006, in which Plaintiff was alleged to have been assaulted by Pappu, brother-in-law and Mahesh Chand (Sadhu) it was stated that Police upon investigation has submitted a final report, as the incident was found to be false. It is the Plaintiff-husband, mother-in-law and sister-in-law of Defendant, who have caused physical and mental cruelty upon defendant and have also harassed defendant for money. No attempt was made by Plaintiff to apologize for his previous mistakes or give an undertaking for good behaviour in future. Defendant categorically pleaded that in case Plaintiff is ready to remove the cause of agony and gives an undertaking that he will keep Defendant properly then Defendant is ready to live with Plaintiff and to discharge her marital obligations as wife of Plaintiff. Allegations made against Mahesh Chand, Jija of Defendant, were categorically denied.

5. After exchange of pleading, parties went to trial. Court below upon consideration of pleadings of parties, framed following issues:

(a) Whether plaintiff is entitled to decree of divorce on grounds mentioned in the plaint.

(b) Whether plaintiff is entitled to any other relief.

6. Plaintiff in support of his case, adduced himself as P.W.-1 and One Surjit as P.W.-2. No documentary evidence was filed by Plaintiff in support of his case. Defendant, in support of her defence adduced herself as D.W.1 and one Rani as D.W.-2. Defendant also filed documentary evidence, in proof of her defence. She accordingly filed copy of formal order passed in Misc. Case No. 20/74/10 Smt. Sangeeta Vs. Krishna Murari.

7. Court below examined pleadings and evidence of parties. It accordingly concluded that Plaintiff has instituted suit for divorce on the ground of adultery but Plaintiff could not prove the same. In support of aforesaid finding, Trial Court observed that in order to prove adultery, following three questions must be answered in affirmative:

(a) Whether after marriage, Defendant had extra marital intercourse with any other person.

(b) Whether Defendant had extra marital intercourse with any other person on account of fraud, force or under influence of some psychotherapeutic substance, as such, she could not understand what is being committed upon her and therefore, no offence can be said to be committed by her. It is only when such crime is committed with a guilty

mind that decree of divorce can be granted.

(c) With which person other than husband or wife has defendant entered into extra marital physical relationship.

8. Court below before proceeding to answer aforesaid three questions guarded itself with the parameters by which jurisdiction of Courts while deciding issue of 'adultery' is circumferenced. Court below rightly observed that question of 'adultery' cannot be decided like other grounds for dissolution of marriage. 'Adultery' is normally committed in secrecy and therefore, it is difficult to prove same by direct evidence. Consequently, 'adultery' can be inferred from circumstances. However, burden is upon person, who alleges adultery.

9. Court below examined above mentioned three questions in the backdrop of limitation as stated above and concluded that Plaintiff has failed to prove 'adultery' on the part of Defendant. In view of finding recorded on Issue-1, Court below further held that Plaintiff is not entitled to any other relief. Consequently, Court below dismissed suit of Plaintiff for grant of decree of divorce on ground of 'adultery' vide judgement dated 17.11.2015 and decree dated 27.11.2015. Feeling aggrieved, Plaintiff has now approached this Court by means of present first appeal.

10. Mr. Uday Bahan Singh, learned counsel for Plaintiff in challenge to impugned judgement and decree passed by Court below has submitted that impugned judgement and decree passed by Court below are manifestly illegal and in excess of jurisdiction, hence same are liable to be set aside by this Court. He next submits that from the statement of P.W.-1 and P.W.-2, it is proved beyond doubt that Defendant is guilty of committing 'adultery'. He lastly submits that irrespective of findings recorded by Court below crux of matter is that parties have been living separately since 20.04.2006. As such, for all practical purposes, marriage of parties has broken down irretrievably. Therefore, this Court in exercise of powers under section 19 of Act 1984, can still reverse the decree passed by Court below and decree suit of plaintiff-respondent by granting decree of divorce on ground of irretrievable break down of marriage.

11. Before proceeding to consider the correctness of judgement and decree passed by Court below, it would be appropriate to understand meaning of term 'Adultery' as same has not been defined in Act, 1955.

(i) In Philips Divorce Practice 4th Edition "Adultery" has been defined as voluntary sexual connection between two person of opposite sex who are not married to each other but of whom one alreat is married to third person"

(ii) In Halsbury's Laws of England, Adultery for the purpose of relief in matrimonial jurisdiction has been defined to mean "consensual sexual intercourse during the subsistence of the marriage between one spouse and a person of the opposite sex not the other spouse."

(iii) In Divorce 14th Edition 1952, adultery in relation to matrimonial matters has been held to mean "willing sexual intercourse between a husband or wife and on the opposite sex while the marriage subsists"

(iv) In RAYDON on divorce, 10th Edition, adultery has been held to be a matrimonial offence. It has been defined

as "Consensual sexual intercourse between a married person and a person of opposite sex not the spouse, during the subsistence of the marriage."

(v) In Webster's New English Dictionary, 1888, adultery has been defined to mean "Violation of marriage bed; voluntary sexual intercourse of a marrried person with one of the opposite sex, whether unmarried or married to another; (the former case being technically designated single, the latter double adultery)."

(vi) In Fowler's Concise Oxford Dictionary, adultery has been defined as "Voluntary sexual intercourse of married person with one of opposite sex married (double adultery) or not (single adultery)."

(vii) Adultery has been defined in Section 497 I.P.C. as follows:-

" whoever has a sexual intercourse with a person who is and whom he knows or has a reason to believe to be the wife of the another man, without the consent or connivance of that man, such sexual intercourse not amounting to the offence of rape, is guilty of the offence of the adultery, and shall be punished with imprisonment of either description for a term which may extend to five years, or with fine or with both."

(viii) The term 'adultery' has not been defined in Act, 1955. What has been stated in Section 13 (1) (i) of Act, 1955 only provides as to what would constitute adultery i.e. "has after the solemnisation of the marriage, had voluntary sexual intercourse with any person other than his or her spouse."

12. Having noted the definition of 'adultery' as defined in various texts, the Court now proceeds to examine, whether Plaintiff has been able to prove 'adultery' on the part of Defendant so as to entitle him to a decree of divorce as prayed for.

13. From perusal of judgement, passed by Court below, it is apparent that Court below upon appreciation of oral and documentary evidence and pleadings of parties, concluded that Plaintiff has failed to establish 'adultery' on party of defendant-appellant. Court below concluded that there is clear contradiction in the statement of P.W.-1 and P.W.-2. It further observed that Plaintiff has alleged that Defendant was in adulterous relationship with husband of Poonam D.W.-2. sister of Defendant. Rani D.W.-2 wife of Mahesh has deposed before Court below and in her statement in chief has clearly supported Defendant. P.W.-2 Surjit Singh in his statement in chief has alleged that he saw Defendant in the company of Mahesh husband of D.W-2 Rani in compromising position. Court below disbelieved the testimony of P.W.-2. Statement in chief of P.W.-2 is completely silent with regard to day, date and timing of alleged act of 'adultery' on part of Defendant in the company of Mahesh, husband of D.W.-2. Thus, having considered the impugned judgement and decree in the light of material on record, we find that Court below did not commit any illegality or irregularity in disbelieving case set up by Plaintiff. Consequently, the conclusion drawn by Court below refusing to grant decree of divorce to Plaintiff, on ground of 'adultery' which is ground for divorce, recognized under section 13 (1)(i) of Act 1955, cannot be said to be illegal or erroneous.

14. On the issue of irretrievable breakdown of marriage, learned counsel for Plaintiff submitted that marriage of parties was solemnized on 17.6.2005 in accordance with Hindu Rites and Customs. However, Defendant, has deserted Plaintiff on 20.04.2006 without any valid reason.

As such, since 20.04.2006 Plaintiff has been denied the happiness and pleasure of marital relationship with wife, causing physical and mental pain and agony to Plaintiff. It is also submitted that inspite of efforts made by Plaintiff to bring back Defendant to her matrimonial home, no heed was paid by Defendant. So much so, that on 15.11.2008, relatives of Plaintiff made an attempt to resolve the dead lock and bring back Defendant to her matrimonial home, but same also failed. On the aforesaid factual premise, learned counsel for Plaintiff submits that admittedly parties have been living separately since 20.04.2006 without any attempt by either side after 15.11.2008 to re-establish marital relationship between the two. This deadlock/stalemate, between the parties, clearly proves that parties have given up each other and there are no chances of reunion between them. As such marriage of parties has broken down irretrievably. Counsel for Plaintiff further submitted that Plaintiff has categorically pleaded in plaint that in spite of repeated efforts made by him, Defendant has chosen not to reside with Plaintiff. In such state of affairs asking the parties to live together will itself amount to injustice rather than doing justice to them. Therefore, in the light of aforesaid facts, it is vehemently urged that decree of divorce be granted to do complete justice between parties.

15. From perusal of plaint, we find that decree of divorce was not prayed for on the ground of irretrievable breakdown of marriage. Therefore, the question that arises for our consideration is:

"Whether a decree of reversal can be passed on a ground which was not the subject matter of adjudication before Court below."

16. The issue relating to irretrievable break down of marriage has been considered by a Division Bench of this Court in First Appeal No. 525 of 2006 (Smt. Kavita Sharma Vs. Neeraj Sharma) decided on 7.2.2018, wherein it has been observed as follows in paragraph 28:-

"28. The above findings recorded by Court below could not be shown perverse or contrary to record. Having considered the fact that parties are living separately from decades, we are also of the view that marriage between two is irretrievable and has broken down completely. Irretrievable breakdown of marriage is not a ground for divorce under Act, 1955. But, where marriage is beyond repair on account of bitterness created by the acts of the husband or the wife or of both, Courts have always taken irretrievable breakdown of marriage as a very weighty circumstance amongst others necessitating severance of marital tie. A marriage which is dead for all purposes cannot be revived by the Court's verdict, if the parties are not willing. This is because marriage involves human sentiments and emotions and if they are dried-up there is hardly any chance of their springing back to life on account of artificial reunion created by the Court's decree. On the ground of irretrievable marriage, Courts have allowed decree of divorce and reference may be made to Naveen Kohli v. Neelu Kohli (2006) 4 SCC 558 and Rishikesh Sharma Vs. Saroj Sharma, 2006(12) SCALE 282. It is also noteworthy that in Naveen Kohli v. Neelu Kohli (supra) Court made recommendation to Union of India that

Act, 1955 be amended to incorporate irretrievable breakdown of marriage as a ground for grant of divorce."

17. Similarly this Court in First Appeal No. 792 of 2008 (Ashwani Kumar Kohli Vs. Smt. Anita) decided on 17.11.2016 has also considered the question posed by us and observed as follows in paragraphs 7, 8, 10, 11, 12 and 13:-

"7. Therefore, point for adjudication in this appeal is "whether a decree of reversal can be passed by granting divorce to the appellant on the ground which was not subject matter of adjudication before the Court below and is being raised for the first time in appeal".

8. Under the provisions of Act, 1955 there is no ground like any "irretrievable breakdown of marriage", justifying divorce. It is a doctrine laid down by judicial precedents, in particular, Supreme Court in exercise of powers under Article 142 of the Constitution has granted decree of divorce on the ground of irretrievable breakdown of marriage.

10. This aspect has been considered by this Court in Ram Babu Babeley Vs. Smt. Sandhya AIR 2006 (All) 12 = 2006 AWC 183 and it has laid down certain inferences from various authorities of Supreme Court, which read as under:-

"(i) The irretrievable break down of marriage is not a ground for divorce by itself. But while scrutinizing the evidence on record to determine whether the grounds on which divorce is sought are made out, this circumstance can be taken into consideration as laid down by Hon'ble Apex Court in the case of Savitri Pandey v. prem Chand Pandey, (2002) 2 SCC 73 and V. Bhagat versus D. Bhagat, AIR 1994 SC 710.

(ii) No divorce can be granted on the ground of irretrievable break down of marriage if the party seeking divorce on this ground is himself or herself at fault for the above break down as laid down in the case of Chetan Dass Versus Kamla Devi, AIR 2001 SC 1709, Savitri Pandey v. prem Chand Pandey, (2002) 2 SCC 73 and Shyam Sunder Kohli v. Sushma Kohli, (2004) 7 SCC 747.

(iii) The decree of divorce on the ground that the marriage had been irretrievably broken down can be granted in those cases where both the parties have levelled such allegations against each other that the marriage appears to be practically dead and the parties can not live together as laid down in Chandra Kala Trivedi versus Dr. SP Trivedi, (1993) 4 SCC 232.

(iv)The decree of divorce on the ground that the marriage had been irretrievably broken down can be granted in those cases also where the conduct or averments of one party have been so much painful for the other party (who is not at fault) that he cannot be expected to live with the offending party as laid down in the cases of V. Bhagat versus D. Bhagat, (supra), Ramesh Chander versus Savitri, (1995) 2 SCC 7, Ashok Hurra versus Rupa Bipin Zaveri, 1997(3) AWC 1843 (SC), 1997(3) A.W.C. 1843(SC) and A. Jayachandra versus Aneel Kaur, (2005) 2 SCC 22.

(v) The power to grant divorce on the ground of irretrievable break down of marriage should be exercised with much care and caution in exceptional circumstances only in the interest of both

the parties, as observed by Hon'ble Apex Court at paragraph No. 21 of the judgment in the case of V. Bhagat and Mrs. D. Bhagat, AIR (supra) and at para 12 in the case of Shyam Sunder Kohli versus Sushma Kohli, (supra)."

11. The above authorities have been followed by this Court in "Pradeep Kumar Vs. Smt. Vijay Lakshmi' in 2015 (4) ALJ 667 wherein one of us (Hon'ble Sudhir Agarwal,J.) was a member of the Bench.

12. In Vishnu Dutt Sharma Vs. Manju Sharma, (2009) 6 SCC 379, it was held that under Section 13 of Act 1955 there is no ground of irretrievable breakdown of marriage for granting decree of divorce. Court said that it cannot add such a ground to Section 13, as that would amount to amendment of Act, which is the function of legislature. It also referred to some judgments of Supreme Court in which dissolution of marriage was allowed on the ground of irretrievable breakdown but held that those judgments do not lay down any precedent. Supreme Court very categorically observed as under:-

"If we grant divorce on the ground of irretrievable breakdown, then we shall by judicial verdict be adding a clause to Section 13 of the Act to the effect that irretrievable breakdown of marriage is also a ground for divorce. In our opinion, this can only be done by the legislature and not by the Court. It is for the Parliament to enact or amend the law and not for the Court. Hence, we do not find force in the submission of learned counsel for the appellant."

13. The above view has been followed in Darshan Gupta Vs. Radhika Gupta (2013) 9 SCC 1. Similar view was expressed in "Gurubux Singh Vs. Harminder Kaur' (2010) 14 SCC 301. This Court also has followed the above view in Shailesh Kumari Vs. Amod Kumar Sachan 2016 (115) ALR 689."

18. In the case in hand, we find that parties have not been living separately on account of their own free will. Defendant has been forced to live separately on account of conduct of Plaintiff and other in-laws. Record further shows that it is Plaintiff, who has refused to keep Defendant with him as he failed to initiate any proceedings for restitution of conjugal relationship. Defendant has continuously and consistently pleaded that she wants to live with Plaintiff. In this view of the matter, argument raised by learned counsel for Plaintiff that there has been an irretrievable break down of marriage has no factual foundation. That apart this Court in **Ashwani Kumar Kohli (supra)** has clearly held that divorce cannot be granted on aforesaid ground, particularly when such a plea is raised by one party alone. In addition to aforesaid, decree of divorce was not prayed for, on ground of irretrievable break down of marriage also as parties are alleged to have been living separately since 20.04.2006. Plaint was presented in the year 2009, whereas divorce petition was finally decided vide judgement dated 17.11.2015 and decree dated 27.11.2015 passed by Principal Judge (Family Court), Kanpur Dehat in Suit No. 11 of 2009 (Krishna Murari Vs. Sangeeta). For a period of six long years, Plaintiff kept quiet and now for the first time, this issue is being raised. In our opinion, it is half hearted attempt on the part of learned counsel for Plaintiff to raise this plea without there being any factual foundation for the same.

19. In view of discussion made above, present appeal fails and is,

therefore, liable to be dismissed. It is accordingly, dismissed. Cost made easy.

(2020)02ILR A975

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 23.01.2020

BEFORE

THE HON'BLE J.J. MUNIR, J.

Second Appeal No. 590 of 1993

Sri Naresh Kumar & Ors. ...Appellants
Versus
Smt. Chawli & Ors. ...Respondents

Counsel for the Appellants:
Sri Amit Krishna, Sri B. Dayal, Sri Chetan Chatterjee, Sri N.K. Srivastava, Sri Neeraj Agarwal

Counsel for the Respondents:
Sri N.K. Srivastava, Sri Amit Krishna, Sri Ravi Kant, Sri Syed Wajid Ali

A. Civil Law-Civil Procedure Code (5 of 1908) - S.100 - Second appeal - Substantial question of law - Interpretation of any document including its contents or its admissibility in evidence or its effect on the rights of the parties to the Lis constitutes a substantial question(s) of law within the meaning of Section 100 of the Code.

Substantial question of law involved in the second appeal was about the correct interpretation of the sale deeds relied upon by the defendants, to establish that the suit property is not part of Khasra no.113, but a part and parcel of Khasra no.111. (Para 20)

B. Deed-Construction-Conveyance of land - though boundaries given in the deeds of title are the most reliable evidence about the identity of adjoining properties, but the rule have no application to a situation where physical features about the property suffer change in course of time

Plaintiff suit for possession of land, part of Khasra no.113 - Suit property came into existence owing to the construction of a brick-worked road (kharanja) across plaintiff Khasra no.113 in the year 1956 - Defendant relied upon description of boundaries in sale deeds of the year 1896 to establish that the property is not part of Khasra no.113 but a part of Khasra no.111- Trial dismissed the suit - Lower Appellate court reversed the decree *Held* - Appellate Court rightly held the suit property to be a subdivision that came into existence on account of the laying of a brick-worked road, across Khasra no.113 after looking into evidence that brought about certain changes to the boundaries of Khasra nos.111 and 113, much later in point of time than execution of the defendants' sale deeds, dated 03.06.1896, 04.06.1896 and 26.03.1920 - description of boundaries in the two sale deeds of the year 1896 would not have a decisive impact upon the rights of parties to the suit property (Para 41)

Second Appeal dismissed. (E-5)

List of cases cited: -

1. Uma Pandey & Ors Vs Munna Pandey & Ors AIR 2018 SC 9 1930

2. Rajendra Lalitkumar Agrawal Vs Smt. Ratna Ashok Muranjan (2019) 3 SCC 378

3. Gurnam Singh (D) by LRs. Vs Lehna Singh (D) by LRs. AIR 2019 SC 1441

(Delivered by Hon'ble J.J. Munir, J.)

1. This is a defendants' Second Appeal from a decree of possession passed by the Lower Appellate Court, reversing the Trial Court.

2. Nanu Singh brought Original Suit no.101 of 1971 against Bhupeshwar Prasad, Rajeshwar Prasad, Ishwar Prasad,

Rameshwar Prasad, all sons of late Hari Kishan Das and Smt. Shashi Prabha, daughter of late Hari Kishan Das for possession of land, part of *Khasra* no.113, situate at *Mauza* Khan Alampur, Saharanpur, as detailed and bounded at the foot of the plaint. The Suit was instituted on 27.01.1971. Pending Suit, the Appeal from the Original Decree and the present Appeal, the plaintiffs have grown to a figure of nine on account of exiting this mortal world. The defendants, likewise, who were five before the Trial Court, have grown to a figure of eighteen, with legal representatives being substituted for the deceased defendants, *pendente lite*.

3. Sri Shamsher Bahadur Singh, the then Munsif City, Saharanpur, who tried the Suit, dismissed it with costs by his judgment and decree dated 11.07.1989. The plaintiffs appealed to the District Judge, Saharanpur, where the Appeal was registered on the file of the learned District Judge as Civil Appeal no.70 of 1989. The Appeal on assignment came up for determination before Sri Naresh Kumar Bahal, the then IVth Additional Civil Judge, Saharanpur on 26.03.1993. The learned Additional Civil Judge by his judgment and decree of the date last mentioned, allowed the Appeal with costs, set aside and reversed the decree of the learned Munsif, ordering the Suit to be decreed with costs. It is ordered by the Appellate Decree that the defendants shall hand over the plaintiffs possession of the suit property within a month of the judgment.

4. Aggrieved, the defendants have brought this Second Appeal.

5. To clarify reference to parties in this judgment, the plaintiff-respondents, who are now nine in number, all heirs and legal representatives of the original and sole plaintiff, Nanu Singh, shall be hereinafter referred to as the 'plaintiff'. The defendant-appellants, multiple in number, as they are from the institution of the Suit, shall be hereinafter referred to as the 'defendants'.

6. The Suit was brought on facts that the suit property is part of *Khasra* no.113, formally numbered as *Khasra* no.126, part of *Mahaal* Asha Ram, situate at Village Khan Alampura, Saharanpur, of which the plaintiff is owner in possession. The defendants have no right, title or interest in the suit property. The suit property, that is part of *Khasra* no.113, has been detailed at the foot of the plaint. Towards the East of *Khasra* no.113, there is a house *(kothi)* and quarters located in *Khasra* no.111, that are the defendants' ownership. Also, a Mosque and *Madarsa* annexed to the Mosque Shahjahani, besides a Temple *(Mandir)* etc., are also located in *Khasra* no.111. The suit property lies within the local limits of Municipal Board, Saharanpur, which is in possession of the plaintiff since 20 years past. The plaintiff has planted and nurtured two trees over the suit property, a *Bel* and another *Barna*, the fruits and shade whereof the plaintiff utilises to his benefit. The plaintiff also utilises the suit property for the purposes of processing his dung based fuel *(Uple)*, stacking firewood and manure, besides using it to bask in the Sun and tether cattle. The plaintiff also exploits the suit property for agriculture, which is a part of the plaintiff's *Khasra* no.113.

7. The defendants since a long time have been harassing and troubling the plaintiff. To the West of the defendants' *Kothi* and quarters, there is no land in the

title and possession of the defendants, or do they have any drain, window, ventilator or door opening into the suit property. The defendants never had or have any connection or possession of the suit property since 12 years past.

8. It is then pleaded by the plaintiff that in *Khasra* no.112, there was formerly a way *(rasta)*, which terminated at the western end of *Khasra* no.115 and the eastern and southern ends of *Khasra* no.113. This terminus of the way, that was an avenue for natives of the village to proceed to the river, Dhamola, located towards the north of *Khasra* no.113, caused inconvenience to the local populace in accessing the river themselves and with their cattle. It is pleaded that some respectable natives of the village requested the plaintiff to give passage across *Khasra* no.113, that was his ownership in order to enable the existing passage terminating there to be extended to the river, to the North. For the purpose, the plaintiff's permission was requested to lay a brick-worked road *(kharanja)* across his property. The plaintiff permitted construction of a brick-worked road across *Khasra* no.113, licensing the Municipal Board to lay out that road as a straight stretch across his land. Since the road that was laid out was a straight stretch, the brick-worked road divided the plaintiff's *Khasra* no.113 in the manner that some part of it towards the North and East was cut-off from the main part of 113. It is this land lying to the East and North of the road permitted by the plaintiff to be laid across Khasra no.113, that is the suit property. This suit property has been pleaded to be in the plaintiff's use and occupation for the purposes hereinbefore detailed.

9. It is, in particular, pleaded on behalf of the plaintiff that through an order dated 13.01.1971 passed by the City Magistrate, Saharanpur in Case no.26 of 1969, under Section 145 Cr.P.C., possession of the suit property was delivered to defendant no.1, which the plaintiff says is in derogation of his title.

10. Defendant nos.1, 3, 4 and 5 filed a single written statement traversing the plaintiff's case. The crux of the defendants' case is that the suit property is located to the East of the Road that divides *Khasra* no.111 and *Khasra* no.113. *Khasra* no.111 is the defendants' property, lawfully acquired through a consistent chain of title passed on from the previous recorded owners. It is asserted that the suit property located to the East of the Road is part of *Khasra* no.111, and, therefore, in the defendants' title, of which they have been lawfully entrusted possession by the Magistrate, upon a sham dispute being raised by the plaintiff about it.

11. It is the defendants' case that their property located in *Khasra* no.111 comprises a house *(kothi)* together with its appurtenant land and outhouses, including servant quarters. The aforesaid property was purchased by one Jyoti Prasad from a certain Lala Ganga Ram through sale deeds dated 03.08.1896 and 04.06.1896, paper nos. 78ग and 79ग, respectively. The said property, together with the House and its appurtenant land, was purchased by Hari Kishan Das, father of defendant nos.1

to 5 through a sale deed dated 26.03.1920, paper no.262ग. The crux of the defendants' case is that all property to the East of the Road, hereinabove referred, is theirs and part of *Khasra* no.111 and that the Road is located in *Khasra* no.112, that divides *Khasra* no.111 from *Khasra* no.113, that is the plaintiff's property. The plaintiff purchased *Khasra* no.113 through two sale deeds. First of these is from one Chameli, dated 07.08.1946, paper no.28ग and the other was executed in his favour by Abdul Aziz, dated 07.01.1949.

12. The Trial Court framed the following issues, on which the parties went to trial:

"1. Whether khasara abadi No.113 is the disputed property?

2. Whether the plaintiff is owner of the disputed property?

3. Whether the suit is undervalued and Court fees paid is insufficient?

4. Whether the suit is barred by Sec. 41 of Specific Relief Act?

5. Whether the defendant no.2 Sri Rajeshwar Prasad is an unnecessary party?

6. To what relief if any is the plaintiff entitled?"

13. The varying events in the Trial Court and the Appellate Court have already been detailed hereinbefore. It must be mentioned here, however, that issue no.1 that was dealt with in Appeal was corrected to read, on basis of reasons recorded by the Lower Appellate Court, *Khasra* no.113 for *Khasra* no.111 there. The first issue considered by the Appellate Court, rendered in Hindi from the original in English, reads as follows:

"1- क्या खसरा आबादी सं0 113 विवादित है?"

14. The Appellate Court has examined the matter in great detail to opine that in fact the Trial Court, while framing issues, mentioned *Khasra* no.113 as the suit property in issue no.1, and not 111, as appears from the judgment of the Trial Court. He has recorded his reasons to conclude about the correct contents of issue no.1, with reference to the *Khasra* number of the suit property mentioned there, in the following words:

"अपीलार्थी के विद्वान अधिवक्ता का कहना है कि विद्वान अवर न्यायालय ने विवादित सम्पत्ति को ख0न0111 का हिस्सा मानकर गलत निर्णय दिया है जबकि प्रत्युरदातागण के विद्वान अधिवक्ता का यह कहना है कि विद्वान अवर न्यायालय ने वाद बिन्दु संख्या 1 ख0न0 113 से सम्बंधित बनाया था। इस सम्बंध में मेरे द्वारा मूल आदेशपत्र का अवलोकन किया गया। विद्वान अवर न्यायालय द्वारा दिनांक 11.1.71 को वाद बिन्दु आदेशपत्र पर अग्रेंजी भाषा में बनाए गए थे परन्तु यह आदेशपत्र लगभग 20 वर्ष से अधिक पुराना होने के कारण निचले व दाहिने हाशिये की ओर से कुछ गला एवं फटा हुआ है। जिस स्थान पर वाद बिन्दु संख्या 1 में खसरा नम्बर का जिक्र आया है उस स्थान से आदेशपत्र फटा हुआ है। विद्वान अवर न्यायालय द्वारा मूलवाद में जो निर्णय लिखा गया हैए उसमें आदेशपत्र से जो वाद बिन्दु संख्या 1 उतारा गया है उसमे पहले ख0न0 113 लिखा हुआ है और उसके उपर

ओवरराइटिंग करके ख0न0 111 बनाया गया हैए परन्तु इस ओवररातिंग पर तत्कालीन पीठासीन अधिकारी के हस्ताक्षर नहीं है। मेरे द्वारा पक्षगण के अभिवचनो को ध्यानपूर्वक अवलोकन किया गया। वादी पक्ष ने विवादित आराजी को ख0न0 113 का भाग बताया है जबकि प्रतिवादी.गण ने विवादित सम्पत्ति को ख0न0 111 का भाग बतलाया है। कानून की स्थिति बहुत ही स्पष्ट है कि वादी जिस खसरा नं0 में विवादित आराजी स्थित होना कहता हैए उसको साबित करने का भार वादी पर ही है और वाद बिन्दु भी वादी के अभिवचनो के अनुसार ख0न0 113 से सम्बधिंत बनाया जाना चिहिए था। चूकिं विवादित सम्पत्ति को वादी ने ख0न0 113 में स्थित होना बतलाया है और इस बात को साबित करने का भार भी वादी पर ही है। मेरे द्वारा विद्वान अवर न्यायालय द्वारा वाद बिन्दु सं0 1 व 2 पर दिए गए निर्णय का ध्यानपूर्वक अवलोकन किया गया। विद्वान अवर न्यायालय द्वारा इन दोनो वाद बिन्दुओं पर जो विवेचना की गयी हैए उसे पढ़ने से यह स्पष्ट है कि अवर न्यायालय ने विवादित सम्पत्ति को खसरा नं0 113 में स्थित होने का वाद बिन्दु अपने मस्तिष्क में रखकर विवेचना की परन्तु अन्त में वाद बिन्दु संख्या 1 सकारात्मक रुप से तय होना लिख दिया। विद्वान अवर न्यायालय का यह भी निष्कर्ष है कि विवादित सम्पत्ति वादी के खसरा नं0 113 का भाग नहीं है बल्कि वह प्रतिवादीगण की आराजी ख0नं0 111 का भाग है। इस प्रकाश में विद्वान अवर न्यायालय को वाद बिन्दु संख्या 1 नकारात्मक रूप से तय करना चाहिए थाए और यदि विद्वान अवर न्यायालय के द्वारा वाद बिन्दु संख्या 1 ख0न0 111 से सम्बन्धित बना होना मानकर विवेचना की जाती तो उसका अर्थ यह होता कि विद्वान अवर न्यायालय ने विवादित आराजी को ख0न0 111 में स्थित होना यदि माना है तो विद्वान अवर न्यायालय ने इस वाद बिन्दु को साबित करने का भार प्रतिवादीगण पर रखकर निर्णय दिया है जबकि अभिवचनो के अनुसार वाद बिन्दु संख्या 1 को साबित करने का भार वादी पर पर ही है और वादी पक्ष पर ही होना चाहिए। विद्वान अवर न्यायालय द्वारा जो निर्णय लिखा गया है वह निर्णय हिन्दी में टाईपशुदा है परन्तु इस निर्णय में जो छः वाद बिन्दु लिखे गए है उनको तत्कालीन पीठासीन अधिकारी द्वारा अपने लेख में अग्रेंजी में ही लिखा गया है। ऐसा सम्भवतः उन्होने इसलिए किया है कि मूल आदेशपत्र पर वाद बिन्दु अग्रेजी भाषा में बनाए गए है। वाद बिन्दु संख्या 1 को अपने निर्णय में उतारते समय विद्वान पीठासीन अधिकारी ने उसमें ख0न0 113 लिखा है और उस पर ख0न0 113 के अंतिम अंक 3 पर ओवरराइटिंग करके उसे 1 बनाया गया है। मेरी राय मे यदि पीठासीन अधिकारी ने वाद बिन्दु सं0 1 पर विवादित सम्पत्ति को ख0न0 111 में स्थित होना मानकर विवेचना लिखनी होती तो वह अवश्य ही इस ओवररातिंग पर अपने हस्ताक्षर करतेए परन्तु इस ओवरराइटिंग पर विद्वान पीठासीन अधिकारी के हस्ताक्षर अथवा लघु हस्ताक्षर उपलब्ध नहीं हैए जबकि इस निर्णय में अन्य जगहों पर जहां कटिंग अथवा ओवरराइटिंग हुई है

उस पर विद्वान पीठासीन अधिकारी ने अपने लघु हस्ताक्षर किए हैं परन्तु वाद बिन्दु संख्या 1 में जहां पर ख0न0 113 पर ओवरराइटिंग करके ख0न0 111 लिखा है उस पर पीठासीन अधिकारी के लघु हस्ताक्षर नहीं है। पूरे निर्णय को पढ़ने से भी ऐसा प्रतीत होता है कि विद्वान अवर न्यायालय द्वारा वाद बिन्दु संख्या 1 को यह मानकर निर्णय लिखा गया है कि ष्क्या खसरा आबादी संख्या 113 में विवादित सम्पत्ति स्थित हैद्ध अतः मैं अपीलार्थीगण के इस तर्क से सहमत नहीं हूँ कि विद्वान अवर न्यायालय ने वाद बिन्दु सं0 111 से सम्बंधित बनाकर उसे निर्णीत किया है। दोनो पक्षों की बहस को सुनने के पश्चात और पत्रावली पर उपलब्ध अभिवचनों एवं विद्वान अवर न्यायालय द्वारा लिखे गए निर्णय का अवलोकन करने के पश्चात मैं इस निष्कर्ष पर पहुँचा हूँ कि विद्वान अवर न्यायालय द्वारा वाद बिन्दु संख्या 1 इस आशय का बनाया था कि ष्क्या विवादित सम्पत्ति खसरा आबादी संख्या 113 में स्थित है और विद्वान अवर न्यायालय द्वारा इस वाद बिन्दु को ख0न0 113 से सम्बंधित बना हुआ मानकर ही अपना निर्णय लिखा गयाए हालांकि विद्वान अवर न्यायालय का निष्कर्ष यह है कि विवादित सम्पत्ति वादी के ख0न0 113 में स्थित न होकर प्रतिवादीगण के खसरा नं0 111 में स्थित है। यदि विद्वान अवर न्यायालय द्वारा लिखे गए वाद बिन्दु पर लिखी गयी विवेचना को सही मान लिया जाए तो वाद बिन्दु सं0 1 नकारात्मक रूप से तय होना चाहिए थाए जबकि विद्वान अवर न्यायालय द्वारा वाद बिन्दु सं0 1 को सकारात्मक रूप से तय किया गया है। पक्षगण के मध्य वाद बिन्दु सं0 1 से सम्बंधित उत्पन्न संशय को दूर करने के लिए यह बात पुनः लिखना मैं न्यायसंगत समझता हूँ कि विद्वान अवर न्यायालय ने वाद बिन्दु संख्या 1 यह बनाया था कि क्या विवादित सम्पत्ति खसरा आबादी संख्या 113 में स्थित है और इसी वाद बिन्दु पर उन्होने अपनी विवेचना एवं निर्णय भी लिखा है। इस अपील का निस्तारण भी यही मानकर किया जा रहा है कि वाद बिन्दु सं0 1 खसरा नं0 113 से सम्बंधित बनाया गया था और वादी के अभिवचनों के अनुसार वादी पर ही यह भार है कि वह यह साबित करे कि विवादित सम्पत्ति ख0नं0 113 का भाग है।"

15. It must be remarked here that the lower Appellate Court has done a very meticulous exercise, to set the record straight about the plot number of the suit property, mentioned in issue no.1. This Court must record straight away that the reasoning of the lower Appellate Court about the contents of issue no.1, particularly, the *Khasra* number of the suit property is based on flawless reasoning, that is self-evident. This Court approves the same and proceeds on the basis that it was *Khasra* no.113, which is the subject matter of issue no.1, as it is that *Khasra* number, a part of which is claimed to be the suit property by the plaintiff.

16. Both parties led evidence before the Trial Court, that includes a good number of documents, cited on both sides, that find detail in the judgments of the Courts below. Three witnesses were examined on behalf of the plaintiff and two on behalf of the defendants. These include the plaintiff, Nanu Singh, who

deposed as PW-1 and defendant no.1, Bhupeshwar Prasad, who testified as DW-2. This evidence has been considered by both the Courts below, to reach discordant conclusions, already mentioned.

17. This appeal was admitted to hearing, vide order dated 16.04.1993, on the following substantial questions of law:

"1. WHETHER the lower appellate court misinterpreted the sale deeds produced by the appellants?

2. WHETHER the lower appellate court illegally and wrongly discorded (sic discarded) a number of important documentary evidence by the appellants.

3. WHETHER plaintiffs having failed to locate the disputed land by survey report, even though several opportunities were provided by the court, the suit out to have been dismissed.

4. WHETHER the lower appellate (sic court) has omitted to consider that there was a (sic an) old road in Khasra no.113 in the same place when (sic where) the new Kharanja road of the Nagarpalika exists?

5. WHETHER the lower appellate court has illegally reversed the judgment and decree passed by the learned Munsif."

18. At the hearing of this appeal, learned Counsel for the defendants confined his submissions to substantial question nos.1 and 4.

19. Heard Sri B. Dayal, learned Counsel for the defendant-appellants and Sri Syed Wajid Ali, learned Counsel for the plaintiff-respondents.

20. The first substantial question of law is about the correct interpretation of the sale deeds relied upon by the defendants, to establish that the suit property is not part of *Khasra* no.113, but a part and parcel of *Khasra* no.111. Learned Counsel for the defendants, Sri B. Dayal has urged that interpretation of the sale deeds produced by him and their impact on the rights of the parties, is a substantial question of law that merits adjudication in this second appeal. This submission has been advanced in answer to the contentions advanced by Sri S. Wajid Ali, learned Counsel for the plaintiff that this appeal is concluded by findings of fact, recorded by the lower Appellate Court. For one, it is not readily open to this Court to say that the substantial questions of law that this Court has approved to admit this appeal are not substantial questions of law, as envisaged under Section 100 CPC. But, that is one part of it and not much. Mr. B. Dayal is right in his submission that interpretation of a document and its impact on the rights of parties is indeed a substantial question of law, which has to be decided under Section 100(5) CPC, at the hearing of the Appeal. In this connection Sri Dayal has referred to the decision of the Supreme Court in **Uma Pandey and others vs. Munna Pandey and others, AIR 2018 SC 1930**, where it has been held:

"14. It is not in dispute that the defendants (respondents) filed one document (EX-A)-(Annexure-P-1 of SLP). This document was relied on and appreciated by the two Courts below for deciding the rights of the parties. The Trial Court decreed the suit and the First Appellate Court reversed it on appreciating the evidence including EX-A.

15. It is a settled principle of law that interpretation of any document including its contents or its admissibility in evidence or its effect on the rights of the parties to the Lis constitutes a substantial question(s) of law within the meaning of Section 100 of the Code.

16. Whenever such question arises in the second appeal at the instance of the

appellant, it deserves admission on framing appropriate substantial question(s) on such questions to enable the High Court to decide the appeal on merits bi-party."

21. Learned Counsel for the defendants has placed further reliance on a decision of their Lordships in **Rajendra Lalitkumar Agrawal vs. Smt. Ratna Ashok Muranjan, (2019) 3 SCC 378**, where it has been held thus:

"10. It cannot be disputed that the interpretation of any terms and conditions of a document (such as the agreement dated 08.08.1984 in this case) constitutes a substantial question of law within the meaning of Section 100 of the Code. It is more so when both the parties admit the document."

22. The interpretation of a document and its impact on the valuable rights of parties has been always regarded as a substantial question of law, that merits consideration in an appeal from an appellate decree, under Section 100 CPC. The very recent decision of their Lordships in **Uma Pandey and others** *(supra)* and **Rajendra Lalitkumar Agrawal** *(supra)* reinforces that principle beyond cavil.

23. This Court is, therefore, not in agreement with the contention of the learned Counsel for the plaintiff that this appeal is concluded by findings of fact, in the sense that may prohibit this Court, within the confines of its jurisdiction in a second appeal, to pronounce upon the correctness or otherwise of the conclusions drawn by the Lower Appellate Court regarding rights of parties, based on interpretation of the title deeds, that the defendants have relied upon.

24. In order to persuade this Court that on a true construction of the title deeds relied upon by the defendants, the suit property would fall in *Khasra* No. 111 and not 113, as urged by the plaintiff, learned counsel for the defendant has drawn the attention of the Court to the boundaries of the suit property, as detailed at the foot of the plaint. These boundaries are extracted below:

East : Quarters and *Kothi* of Defendant & Masjid Shah Jahani.
West: *Kharanja* and *Arazi* of Plaintiff of Khasra no. 113
North : *Patri* Dhamola *Nadi*
South : *Arazi* talab and *Rasta*

25. Learned Counsel for the defendants has pointed out that the western boundary of the suit property shown in the plaint is of particular significance, as that is part of the plaintiff's pleadings. It is indicated in the details of boundaries that to the west of the suit property lies a *Kharanja* and *Arazi* of plaintiff of *Khasra* No. 113. It is contended by learned counsel for the appellant that if to the west lies the *Kharanja* and *Arazi* of the plaintiff that is part of *Khasra* No. 113, the suit property would be located to the east of the *Kharanja*.

26. The case of the plaintiff specifically pleaded in paragraph 5 of the plaint by contrast is that upon the plaintiff permitting the construction of a brick worked road across *Khasra* No. 113, in order to provide access to natives of the village to river Dhamola, the straight stretch of the brick worked road divided the petitioner's *Khasra* No. 113 in a manner that some part of it towards the East and North was cut off from the main part of *Khasra* No. 113. It is pointed out in this paragraph that it is this part of *Khasra* No. 113, which has been described to be the suit property. According to learned Counsel for the defendants, if this be the case of the plaintiff, the Western boundary

of the suit property ought to have shown land of *Khasra* No. 111 and the Eastern boundary, the brick worked road *(kharanja)*.

27. It is argued that this apparent contradiction in the plaintiff's pleadings *ex facie* shows that his case is not consistent in his pleadings about the precise location of the suit property. It is pointed out that by contrast, in the two sale deeds of 1896, through which the predecessor-in-interest of the defendant acquired title to *Khasra* No. 111, that is to say, the two sale deeds executed by Gangaram in favour of Jyoti Prasad, Paper Nos. 78 Ga and 79 Ga, there is a clear mention of the western boundary of the Kothi that was purchased as *Rasta Deh*. *Rasta Deh* translates to "village road". It is urged that it is the same Kothi and land transferred through sale deeds of 1896 to Jyoti Prasad that was purchased by Harikisan Das, the father of original defendants Nos. 1 to 5, through a registered sale deed of 26th March, 1920.

28. It is pointed out that it is common ground between parties that the Kothi stands on *Khasra* No. 111, the old number of which was 124. It is urged also that the plaintiff claims that he came into possession of the suit property some 20 years prior to institution of this suit. The suit was instituted in the year 1971, and, therefore, the plaintiff's possession would date back to the year 1951. It is asserted that the plaintiff has not specifically disclosed when he was actually dispossessed from the suit property. It is emphasized by Sri Dayal, learned Counsel for the defendants, that the plaintiff claims purchase of the land comprising *Khasra* No. 113, of which the suit property is a part, through two sale deeds: one from Chameli dated 07.08.1946; and the other from Abdul Aziz, dated 07.01.1949.

29. Learned Counsel for the defendants endeavored to point out that these dates of acquisition of title on a comparison with the date when the plaintiff came into possession of *Khasra* No. 113, as reckoned hereinbefore, would show that he entered upon *Khasra* No. 113 after a few years of its purchase from Chameli and Abdul Aziz.

30. It is also emphasized that both Courts below have found for a fact that there was a village road between plot No. 111, whereon the defendants' Kothi stands and plot No. 113, the land purchased by the plaintiff, of which the suit property is a part. It is pointed out that defendant No. 1, who was old enough to have witnessed the transactions leading to the cause of action has said in his dock evidence, that in place of the old village road between *Khasra* No. 111 and no. 113 (Kothi of defendant and land of the plaintiff) a brick worked road *(kharanja)* has been laid by the Municipal Board. It is also urged that the Trial Court relied upon the description of boundaries in the sale deed of 3rd June, 1896 and survey sheet of the Municipal Board 1914-1915, filed as paper No. 125-A and exhibited without any objection as exhibit 84A-1, to come to the conclusion that all land up to the site of the village road, over which the brick worked road *(kharanja)* has now been laid by the Municipal Board, is part of the defendants' Kothi and not the plaintiff's land. Learned counsel submits that on these findings, the Trial Court rightly dismissed the suit. It is also argued by learned Counsel for the defendants that the plaintiff's case of possession has not been vindicated in the proceedings under Section 145 Cr.P.C., a position which remained undisturbed in those proceedings up to this Court.

31. Sri Dayal, learned Counsel for the defendants urged that the Lower Appellate Court has done a misconstruction about the description of boundaries in the sale deeds of 1896, to conclude that there was land of the plaintiff between the Kothi of the defendants and its appurtenant land, and the old village road *(Rasta Deh)*. It is also argued by Sri Dayal that the Lower Appellate Court has committed a substantial error of law in reversing findings of the Trial Court on the ground alone that neither the area or the *Khasra* number is mentioned in the two sale deeds of 1896, in favour of Jyoti Prasad executed by Lala Gangaram. His conclusions, drawn from the absence of dimensions and boundaries of land sold way back in the year 1896, to the effect that it is not proved that the Kothi and land of the defendant's exists over *khasra* No. 111, although admitted to be so to the parties, is manifestly illegal.

32. Sri S. Wajid Ali, learned Counsel for the plaintiff on the other hand has played down the involvement of any substantial question of law as to interpretation of recitals in the two title deeds of 1896, or the subsequent deeds, relied upon by the defendants. He has pointed out that the plaintiff's case is based on a division of his land, comprised of *Khasra* no.113, with one part of it towards the eastern side being separated from the rest of it, on account of the construction of a brick worked road, that the plaintiff himself lincenced the Municipal Board to construct across his land bearing no. 113, for convenience of natives of the village to access the River Dhamola. The part of *Khasra* no.113 that went to the other side of the road, on account of the extension of the old village road with a brick worked *Kharanja* across *Khasra* no.113, is the suit property, of which the defendants took possession through summary proceedings under Section 145 Cr.P.C., that is not in accordance with rights of parties.

33. Learned Counsel for the plaintiff has relied upon a decision of the Supreme Court in **Gurnam Singh (D) by LRs. v. Lehna Singh (D) by LRs., AIR 2019 SC 1441**. He has drawn the attention of this Court to paragraphs 14, 15 and 15.1 of the report in **Gurunam Singh** *(supra)*, where it is held:

"14. When a substantial question of law can be said to have arisen, has been dealt with and considered by this Court in the case of Ishwar Dass Jain (AIR 2000 SC 426) (Supra). In the aforesaid decision, this Court has specifically observed and held : "Under Section 100 CPC, after the 1976 amendment, it is essential for the High Court to formulate a substantial question of law and it is not permissible to reverse the judgment of the first appellate court without doing so. There are two situations in which interference with findings of fact is permissible. The first one is when material or relevant evidence is not considered which, if considered, would have led to an opposite conclusion. The second situation in which interference with findings of fact is permissible is where a finding has been arrived at by the appellate court by placing reliance on inadmissible evidence which if it was omitted, an opposite conclusion was possible. In either of the above situations, a substantial question of law can arise."

15. Applying the law laid down by this Court in the aforesaid decisions to the facts of the case on hand, we are of the opinion that the High Court has erred in reappreciating the evidence on record in

the second appeal under Section 100 of the CPC. The High Court has materially erred in interfering with the findings recorded by the First Appellate Court, which were on reappreciation of evidence, which was permissible by the First Appellate Court in exercise of powers under Section 96 of the CPC. Cogent reasons, on appreciation of the evidence, were given by the First Appellate Court. First Appellate Court dealt with, in detail, the socalled suspicious circumstance which weighed with the learned Trial Court and thereafter it came to the conclusion that the Will, which as such was a registered Will, was genuine and do not suffer from any suspicious circumstances. The findings recorded by the First Appellate Court are reproduced hereinabove. Therefore, while passing the impugned judgment and order, the High Court has exceeded in its jurisdiction while deciding the second appeal under Section 100 CPC.

15.1. As observed hereinabove and as held by this Court in a catena of decisions and even as per Section 100 CPC, the jurisdiction of the High Court to entertain the second appeal under Section 100 CPC is confined only to such appeals which involve a substantial question of law. On going through the substantial questions of law framed by the High Court, we are of the opinion that the question of law framed by the High Court while deciding the second appeal, cannot be said to be substantial questions of law at all. The substantial questions of law framed by the High Court are as under :

"(i) Whether the Appellate Court can reverse the findings recorded by the learned trial court without adverting to the specific finding of the trial Court?

(ii) Whether the judgment passed by the learned lower Appellate Court is perverse and outcome of misreading of evidence?"

The aforesaid cannot be said to be substantial questions of law at all. In the circumstances, the impugned judgment and order passed by the High Court cannot be sustained and the same deserves to be quashed and set aside. At this stage, decision of this Court in the case of Madamanchi Ramappa v. Muthaluru Bojappa, AIR 1963 SC 1633, is required to be referred to.

In the aforesaid decision, this Court has observed and held as under:

"Whenever this Court is satisfied that in dealing with a second appeal, the High Court has, either unwittingly and in a casual manner, or deliberately as in this case, contravened the limits prescribed by S.100, it becomes the duty of this Court to intervene and give effect to the said provisions. It may be that in some cases, the High Court dealing with the second appeal is inclined to take the view that what it regards to be justice or equity of the case has not been served by the findings of fact recorded by Courts of fact; but on such occasions it is necessary to remember that what is administered in Courts is justice according to law and considerations of fair play and equity however important they may be, must yield to clear and express provisions of the law. If in reaching its decisions in second appeals, the High Court contravenes the express provisions of S.100, it would inevitably introduce in such decisions an element of disconcerting unpredictability which is usually associated with gambling; and that is a reproach which judicial

process must constantly and scrupulously endeavour to avoid."

34. This Court has keenly considered the submissions advanced on both sides.

35. A perusal of the findings recorded by the lower Appellate Court in reversal of the Trial Court do show that the lower Appellate Court has gone about the task of evaluating evidence in meticulous detail. But, that is not what the concern of this Court is while answering the substantial questions of law, under Section 100(5) CPC. The question in hand is about the interpretation of the sale deeds, relied upon by the defendants, to establish that the property is not part of *Khasra* no.113 but a part and parcel of *Khasra* no.111.

36. The lower Appellate Court in holding the suit property to be a subdivision that has come into existence on account of the laying of a brick-worked road, across *Khasra* no.113, with permission of the defendants, has looked into evidence that brought about certain changes to the boundaries of *Khasra* nos.111 and 113, much later in point of time than execution of the defendants' sale deeds, dated 03.06.1896, 04.06.1896 and 26.03.1920.

37. It has been held for a fact by the lower Appellate Court on appreciation of evidence that the old village road located in *Khasra* no.112, mentioned in the sale deeds conferring title on the defendants, terminated at *Khasra* no.113. The plaintiff permitted laying of a brick-worked road *(kharanja)* extending the old village road across Khasra no.113, in order to provide access to natives of the village to the River Dhamola. This event has been recorded for a fact by the lower Appellate Court to have happened in the year 1956 when on permission by the plaintiff, the Nagar Palika laid a 10 feet wide brick-worked road, extending the old village road through *Khasra* no.113 to the River Dhamola. Now, in the face of this change in physical features that earlier demarcated *Khasra* no.113 from 111, the description of boundaries in the sale deeds of the defendants, dated 03.06.1896, 04.06.1896 and 26.03.1920, would not be very relevant.

38. The mention in those boundaries of a village road *(rasta deh)* to the west of the *kothi* (*Khasra* no.111), that is the defendants' property, would bear reference to a geographical subdivision of these two adjoining *Khasra* numbers on the premise that the village road ended at *Khasra* no.112, at the time when the deeds under reference relied upon by the defendants were executed. There was no existence of the brick-worked road *(kharanja)*, permitted by the plaintiff, lateron to be constructed across *Khasra* no.113. The description of boundaries, therefore, in these deeds would not have a decisive impact upon the rights of parties to the suit property, the suit property having come into existence subsequent in point of time, owing to the construction of a brick-worked road *(kharanja)* in the year 1956.

39. The lower Appellate Court has, therefore, rightly looked into and done a comparison of the revenue records over a course of time, comparing the *Khasra* for the *Fasli* Years 1296 and 1324, and appreciated these together with the oral evidence of parties. The lower Appellate Court on the basis of a further comparison done with the *Khasra Mauza* Khan Alampura, *Pargana*, *Tehsil* and District Saharanpur for the year 1324F, concluded

that the old number of *Khasra* no.111 in 1297F was 124, the old *Khasra* number of the village road that now bears *Khasra* no.112 was 125 and that of the plaintiff's which is no.113, used to be no.126. He has recorded on the basis of these revenue records, a detailed measurement and dimensions of these adjoining *Khasra* numbers.

40. The lower Appellate Court has then concluded that when the old village road in *Khasra* no.112 (old no.125) was extended into 113 and laid as a brick-worked road *(kharanja)*, across no.113 by the *Nagar Palika*, it was a 10 feet wide passage. It was extended backwards across *Khasra* no.112 to join a much wider road, accessing the Dehradun road, also part of *Khasra* no.112, that is 33 feet wide. However, the extension in *Khasra* no.113 was just 10 feet wide, that resulted in subdivision of no.113, leaving some part of it on the eastern side of the brick-worked road, adjoining *Khasra* no.111, owned by the defendants.

41. The findings of the lower Appellate Court, based on appreciation of documentary and oral evidence to conclude the precise manner in which *Khasra* no.113 has been subdivided to leave a residue on the eastern side of the brick-worked road, laid with permission of the plaintiff, is a flawless finding of fact. It is not for this Court to interfere with that part of the finding. This Court, however, has, within the limited scope of its scrutiny clearly indicated that on a true interpretation of the title deeds, dated 03.06.1896, 04.06.1896 and 26.03.1920, there is no interpretation to be done about identity of the suit property, where conclusions have been drawn by the lower Appellate Court from evidence based on subsequent changes to physical features, that are not contemporaneous to the sale deeds. It is held for a principle that though boundaries given in the deeds of title are the most reliable evidence about the identity of adjoining properties, but the rule may have slender or no application to a situation where physical features about the property suffer change in course of time. In this case that change happened in 1956.

42. Substantial question of law no.1 is, therefore, stand answered in the negative.

43. The second substantial question of law that has been pressed is to the effect whether the lower Appellate Court has omitted to consider that there was an old road in *Khasra* no.113 in the same place, where the new *kharanja* road laid by the *Nagar Palika* exists.

44. This Court while answering the first question had occasion to look into the very detailed evaluation of documentary and oral evidence done by the lower Appellate Court, with regard to the old village road existing in *Khasra* no.112 (old no.125) and the brick-worked road *(kharanja)* laid after permission of the plaintiff, in the year 1956 by the *Nagar Palika*. The issue which the question postulates, on a thorough consideration of the matter, is found to be concluded by well considered findings of facts recorded by the lower Appellate Court.

45. This Court does not think that on the evidence on record and its appreciation done by the lower Appellate Court, this question is really arises in this appeal.

46. In the result, this Appeal fails and is **dismissed** with costs.

47. Let a decree be drawn up, accordingly.

(2020)02ILR A988

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 23.09.2019

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.
THE HON'BLE RAJEEV MISRA, J.

First Appeal No. 625 of 2015

Gulshan & Anr. ...Appellants
Versus
Shahjahan ...Respondent

Counsel for the Appellants:
Sri Abhishek Kumar

Counsel for the Respondent:
Sri Manoj Yadav

A. Civil Law-Guardian and Wards Act (8 of 1890) - S. 8 - Appointment of guardian - Custody of minor girl after mother death - Given to father u/s 8 - Challenge by *mausi* on the ground that natural father plaintiff has remarried and therefore not practical to give guardianship of minor to natural father - Held - father is natural guardian of minor - After death of mother, it is father who is entitled to guardianship of minor children - this rule is subject to certain exceptions - Such exceptions should be strong enough to deprive the father of guardianship of minor children - No interference warranted in custody order. (Para 15)

Firtst Appeal dismissed. (E-5)

(Delivered by Hon'ble Rajeev Misra, J).)

1. This is an appeal under section 19 of Family Courts Act, 1955 (hereinafter referred to as 'Act 1955') filed by defendants appellants, challenging judgement dated 7.11.2015, passed by Principal Judge (Family Court), Ballia, in Misc. Case No. 18 of 2004 (Shahjahan Vs. Jehangir) whereby, plaintiff-respondent Shahjahan has been appointed as guardian of minor Anjuman under section 8 of Guardians and Wards Act, 1890 (hereinafter referred to as 'Act 1890').

2. We have heard Mr. Abhishek Kumar, learned counsel for defendant-appellants and Mr. Manoj Yadav, representing plaintiff-respondent.

3. It transpires from record that marriage of plaintiff-respondent Shahjahan was solemnized with Rabiya Khatoon on 26.11.2001, in accordance with Muslim Rites and Customs. From aforesaid wedlock, a daughter namely, Anjuman was born on 25.11.2002. Rabiya Khatoon, wife of plaintiff-respondent was subsequently, diagnosed of having cancer. Her treatment started. On account of ailment suffered by Rabiya Khatoon, she came to her parental home at Bansdih Ballia along with her minor daughter Anjuman. Ultimately, Rabiya Khatoon wife of plaintiff-respondent died at her parental home on 12.12.2003. Father of Rabiya Khatoon/Materna Grand Father (nana) of minor Anjuman retained minor Anjuman. Ultimately, minor Anjuman was given in the custody of Gulshan, sister of Rabiya Khatoon, mother of minor Anjuman. It may be noted that Gulshan is sister-in-law of Shahjahan, whereas Jahangir is father-in-law of Shahjahan.

4. Plaintiff-respondent, Shahjahan filed misc. case no. 18 of 2004 (Shahjahan Vs. Jahagir and another) regarding guardianship of minor Anjuman vide plaint dated 13.7.2004. According to plaint allegations, it was alleged by plaintiff-respondent that he was married to Rabiya Khatoon on 26.12.2001 in accordance with Muslim Rites and Customs. From

aforesaid wedlock, a daughter namely, Anjuman was born on 25.11.2002. Ultimately, it was discovered that Rabiya Khatoon is suffering from cancer. The plaintiff-respondent accordingly took his wife Rabiya Khatoon to different Doctors for medical treatment. On accunt of ailment suffered by Rabiya Khatoon, she came to her parental home along with minor daughter so that she could meet all of her relatives and friends in the last days of her life. Ultimately, Rabiya Khatoon, wife of plaintiff-respondent died on 12.12.2003 at her parental home. Thereafter, Jahangir, father-in-law of plaintiff-respondent retained custody of minor Anjuman. Subsequently, custody of Anjuman was given to Gulshan, another daughter of Jahangir and sister-in-law of plaintiff-respondent. Thus, plaintiff-respondent filed Misc. Case No. 18/04 (Shahjahan Vs. Jehangir and Another) under Section 8 of Act 1890 for appointment of himself as guardian of minor Anjuman.

5. It was the case of plaintiff-respondent that minor Anjuman is not being properly looked after by defendant-appellants. The minor Anjuman has been deprived of love and affection of father and grand parents. Plaintiff-respondent has solemnized his second marriage with Yasmeen Khatoon on 14.4.2005. Plaintiff-respondent is capable of maintaining his minor dauther and further provide her with education.

6. Suit filed by plaintiff-respondent was contested by defendant-appellants. They accordingly filed a written statement whereby, not only allegations made in plaint were denied but also additional pleas were raised. According to defendant-appellants minor Anjuman is residing with defendant-appellant no.2 Gulshan who is her Mausi (sister of mother of minor Anjuman). The minor is being maintained from the income of husband of defendant-appellant no.2. Plaintiff-respondent did not undertake medical treatment of his wife Rabiya Khatoon. Entire expences in treatment of Rabia Khatoon were borne by husband of defendant-appellant no.2 Gulshan. Rabiya Khatoon, mother of minor Anjuman, during her life time, had executed a will dated 10.11.2003, providing that minor Anjuman shall be brought up by defendant-appellant no.2 Gulshan. The minor is being looked after by defendant-appellant no.2 like her own child. Plaintiff-respondent wants to do away with minor Anjuman. Lastly, it was submitted that in maintaining minor Anjuman, defendant-appellant no.2 incurs an expense of Rs. 5000/- per month. As such, in case the court comes to conclusion that custody of minor be given to plaintiff-respondent than defendant-appellant no.2 be compensated by awarding payment at the rate of Rs. 5000/- per month from 25.11.2002.

7. After exchange of pleadings, parties went to trial. Plaintiff-respondent, in support of his case, adduced himself as A.P.W-1, Sarvdeo Upadhyay as A.P.W.-2 and Yasmeen Khatoon as A.P.W.-3. Plaintiff-respondent filed photocopy of F.D.R. in the name of Anjuman valued at Rs. 1,00,000/-. Plaintiff-respondent also filed documents relating to the education of minor Anjuman and also pay slip of Mustaque Ahmad, husband of defendant-appellant no.1 Gulshan. Defendant-appellant no.1, Gulshan in support of her defence adduced herself as O.P.W.1, defendant-appellant No.2 Jahangir adduced himself as O.P.W.-2 and minor Muskan was adduced as O.P.W.-3. Vide

list of documents (paper no. 22 Ga), defendant-appellant No.1 filed nine documents. Apart from above, vide paper No. 28 Ga, the birth certificate of Anjuman and death certificate of Rabiya Khatoon were also filed.

8. Court below examined the case of parties in light of pleadings and evidence both oral and documentary on record. Court below concluded that plaintiff-respondent is the father of minor Anjuman and therefore, he is natural guardian of minor. The theory of will set up by defendant-appellants was disbelieved by court below as original will deed alleged to have been executed by Rabiya Khatoon, was never produced in Court. The defence taken by defendant-appellants that it is they who had borne the entire expenses, pertaining to medical treatment of Rabiya Khatoon was also disbelieved by court below, in view of medical receipts pertaining to Rabiya Khatoon being produced by plaintiff-respondent. Defendant-appellant No.2 Gulshan is having two sons as is proved from evidence of parties, therefore, contention raised by defendant-appellant no.2 that she has only one son was found false. On the aforesaid factual premise, court below concluded that under aforesaid circumstances, it is natural for minor Anjuman to feel neglected. Court below also recorded a finding that plaintiff-respondent has a tailoring shop from which he has sufficient income. On account of minor being detained by defendant-appellant no.1 Gulshan, she has been deprived of natural love and affection of her father and grand parents. On the aforesaid findings Court below opined that plaintiff-respondent is liable to be appointed as guardian of minor Anjuman. Accordingly, Misc. Case No. 18 of 2004 (Shahjahan Vs. Jehangir and Another) was allowed vide judgement dated 7.11.2015, passed by Principal Judge, Family Court, Ballia. Consequently, plaintiff-respondent Shahjahan was appointed as Guardian of minor Anjuman.

9. Thus, feeling aggrieved by aforesaid judgement, defendant-appellants have now come to this Court by means of present first appeal, challenging judgement and order dated 7.11.2015, passed by Court below.

10. Mr. Abhishek Kumar, learned counsel for defendant-appellants has challenged judgement and order 7.11.2015, passed by Court below primarily submitting that daughter of plaintiff-respondent, namely, Anjuman, is minor as her date of birth is 25.11.2002. Secondly he submits that there was no such evidence on record to show that interest of minor was not well protected in guardianship of defendant-appellant No.1 Gulshan. Lastly, he submits that irrespective of the fact that plaintiff-respondent is father of minor and therefore, natural guardian of minor, the guardianship of minor in favour of natural father can be denied in exceptional circumstances. Minor Anjuman was being looked after by defendant-appellant no. 1 Gulshan from 2002 without any complaint made by any person. The natural father i.e. plaintiff-respondent Shahjahan has remarried and therefore, it is not practical to give guardianship of minor Anjuman to natural father i.e. plaintiff-respondent Shahjahan.

11. On the other hand Mr. Manoj Yadav, learned counsel for plaintiff-respondent has supported impugned judgement and order on the strength of

findings recorded therein. He further submits that since plaintiff-respondent is the natural guardian of minor Anjuman, guardianship of minor cannot be denied to him.

12. In view of rival submissions, only one point for determination has arisen which requires adjudication in this appeal, i.e;

"Whether Court below was justified in appointing plaintiff-respondent father of minor girl Km. Anjuman as guardian instead of defendant-appellant and judgement under appeal warrants interference or not?"

13. Before proceeding to consider respective submissions made by counsel for the parties, it would be appropriate to refer to section 8 of Act 1890, which reads as under:

"8. ***Persons entitled to apply for order.****--An order shall not be made under the last foregoing section except on the application of--*

(a) the person desirous of being, or claiming to be, the guardian of the minor; or

(b) any relative or friend of the minor; or

(c) the Collector of the district or other local area within which the minor ordinarily resides or in which he has property; or

(d) the Collector having authority with respect to the class to which the minor belongs."

14. Section 8 of Act 1890 provides as to who may apply for an order regarding appointment of guardian. Section 7 of Act 1890 empowers the Court to make order as to guardianship. However, neither in section 7 or in section 8, there are any indicators which shall be followed by Court before making an order regarding appointment of a guardian. Similarly, Act, 1890 does not contain any provision, which provides the facts/circumstances which are required to be looked into before making an order appointing a guardian nor there is any such provision indicating facts and circumstances, which are required to be ignored by Court while passing an order regarding appointment of a guardian.

15. It is well established that father is natural guardian of minor. After death of mother, it is father who is entitled to guardianship of minor children. Therefore, in all probability, it is father who has to be appointed as guardian of minor. However, this rule is subject to certain exceptions. Such exceptions should be strong enough to deprive the father of guardianship of minor children.

16. Learned counsel for defendant-appellant could not point out any such special facts, existing in this case, on the basis whereof plaintiff-respondent Shahjahan could be denied guardianship of minor Anjuman. Similarly, no illegality or perversity could be established by learned counsel for defendant-appellants in respect of findings recorded by Court below. The findings of fact recorded by Court below remain intact. Logical conclusion is that if findings could not be dislodged, conclusion also cannot be dislodged. The point for demarcation framed above, therefore, is answered against appellants.

17. In view of above discussion, this appeal is clearly devoid of merits and therefore, liable to be dismissed. It is accordingly dismissed.

18. Cost made easy.

(2020)02ILR A992

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 25.11.2019

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.
THE HON'BLE RAJEEV MISRA, J.

First Appeal No. 626 of 2015

Gulabpati ...Appellant
Versus
Smt. Pushpa Rani Pandey & Ors. ...Respondents

Counsel for the Appellant:
Sri Ganesh Datt Misra

Counsel for the Respondents:
Sri Manoj Kumar Singh

A. Civil Law-Civil Procedure Code (5 of 1908) - Order 13, Order 8 - General Rules (Civil) Chapter 3 Part C Rules 40 to 69 - Exhibit vis-à-vis Marking of paper - Suit for declaration that plaintiff entitled to family pension - none of the documents produced by parties were either put for admission or denial - No endorsement made personally by Presiding Judge of Court below on the documents so filed, admitting them in evidence - No document filed by either of parties was marked as exhibit - *Held* - until and unless a document is admitted in evidence, it cannot be marked as exhibit and unless the aforesaid exercise is undertaken, there is no legally admissible evidence on record - Marking of mere paper number and decision of a case on that basis is not correct - Procedure adopted by court below in total ignorance of Order 13, Order 8 C.P.C. as well as Rules 40 to 69 of Chapter 3 Part C of General Rules (Civil) - Trial of Original Suit held to be erroneous - Matter remitted back for fresh consideration (Para 22)

First Appeal allowed. (E-5)

List of cases cited :

1. New Okhla Industrial Development Authority Vs. Kendriya Karamchari Sahkari Grih Nirman Samiti Ltd., (2017) 4 UPLBEC 3077,

(Delivered by Hon'ble Rajeev Misra, J.)

1. Present First Appeal under Section 19 of Family Court Act, 1984 (hereinafter referred to as 'Act 1984') has been filed by plaintiff-appellant challenging Judgment dated 28.10.2015 and decree dated 30.10.2015 passed by Principal Judge, Family Court, Basti dismissing O.S. No. 15 of 2010 (Gulabpati Vs. Smt. Pushpa Rani Pandey and others).

2. We have heard Mr. Ganesh Datt Mishra, learned counsel for plaintiff-appellant and Mr. Manoj Kumar Singh, learned counsel representing defendant-respondents 2 and 3. In spite of revision of cause list, no one has appeared on behalf of defendant-respondent 1, Smt. Pushpa Pandey.

3. Plaintiff-appellant Gulabpati (hereinafter referred to as 'appellant') filed O.S. No. 15 of 2010 (Gulabpati Vs. Smt. Pushpa Rani Pandey and others) for a decree of declaration declaring that plaintiff alone is legally wedded wife of Murli Prasad @ Murlidhar resident of Village Dubaul, Tappa, Hardi, Pargana Basti Pashchim, Tehsil Harraiya, District Basti, who worked in Air Force, as such, plaintiff alone is entitled to receive family pension.

4. According to plaint allegations, it was alleged that plaintiff is legally wedded wife of Murlidhar Pandey @Murli Prasad Pandey son of Chandra Prakash Pandey resident of Village Dubaul, Tappa, Hardi, Pargana Basti Pashchim, Tehsil Harraiya, District Basti. Marriage of plaintiff with Murlidhar Pandey @ Murli Prasad Pandey was solemnized on 6.6.1965. From

aforesaid wedlock and co-habitation of plaintiff and Murlidhar Pandey @ Murli Prasad Pandey, a daughter was born. Subsequently, Murlidhar Pandey @ Murli Prasad Pandey joined Air Force under the Ministry of Defence. Plaintiff being a simple and illiterate lady was ill-treated by Murlidhar Pandey @ Murli Prasad Pandey and his family members. After Murlidhar Pandey @ Murli Prasad Pandey joined Air Force, status of plaintiff was reduced to that of a domestic servant. Plaintiff is alleged to have complained about aforesaid conduct to Murlidhar Pandey @ Murli Prasad Pandey but no heed was paid. As plaintiff and her minor daughter were neglected by Murlidhar Pandey @ Murli Prasad Pandey, she accordingly initiated proceedings under Section 125 Cr.P.C. which was registered as Case No. 14 of 1981 and allowed, vide Judgment and order dated 9.1.1985. Murlidhar Pandey @ Murli Prasad Pandey was directed to make payment at the rate of Rs.250/- for plaintiff and Rs.150/- for minor daughter, per month. Against order dated 9.1.1985, Murlidhar Pandey @ Murli Prasad Pandey filed Criminal Revision No. 255 of 1985, which was allowed, vide order dated 11.4.1986. Against order dated 11.4.1986 passed by Revisional Court, i.e., Vth Additional District & Sessions Judge, Basti, plaintiff filed Criminal Revision No. 31 of 1981 (Smt. Gulabpati Vs. State of U.P.) before High Court, Allahabad, which was allowed, vide order dated 23.3.2005. Effect of same was that order dated 11.4.1986 came to be set aside resulting in restoration of earlier order dated 9.1.1985 passed by trial Court. Subsequent to Judgment of High Court, plaintiff filed an execution case and, accordingly, Murlidhar Pandey @ Murli Prasad Pandey started paying the arrears of maintenance due in instalments. On account of rise in cost of living, plaintiff filed application for enhancement of maintenance, which was allowed and accordingly, amount of maintenance was respectively enhanced to Rs.400/- and Rs.200/- per month. Daughter of plaintiff, Shashibala got married with the help of family members of plaintiff's parental side as well as relatives. Subsequently, plaintiff again filed an application for enhancement which was allowed, vide order dated 15.11.2007, and maintenance payable to plaintiff was enhanced to Rs.2,000/- per month. In spite of fact that from wedlock of plaintiff and Murlidhar Pandey @ Murli Prasad Pandey, a daughter was born, yet Murlidhar Pandey @ Murli Prasad Pandey indulged in extra-marital affair by keeping Smt. Pushpa Devi as his kept. Plaintiff, therefore, filed Criminal Case No. 92 of 1984 (Smt. Gulabpati Vs. Murlidhar) in the court of IVth Additional Judicial Magistrate, Basti wherein Murlidhar Pandey @ Murli Prasad Pandey and other accused were summoned, vide summoning order dated 14.6.1984. Aggrieved by summoning order dated 14.6.1984, parents of Murlidhar Pandey @ Murli Prasad Pandey filed Criminal Revision No. 283 of 1984 (Chandra Prakash Vs. Gunjapati) which was allowed, vide order dated 26.2.1985. On aforesaid facts, it was alleged that plaintiff is legally wedded wife of Murlidhar Pandey @ Murli Prasad Pandey. During the life-time of plaintiff, defendant Smt. Pushpa Devi cannot be legally wedded wife of Murlidhar Pandey @ Murli Prasad Pandey and, therefore, she is kept of Murlidhar Pandey @ Murli Prasad Pandey. During pendency of execution proceedings regarding payment of maintenance amount, counsel for Murlidhar Pandey @ Murli Prasad Pandey informed Court, i.e., IIIrd Additional Chief

Judicial Magistrate, on 18.7.2013 that Murlidhar Pandey @ Murli Prasad Pandeyhas died on 1.7.2009 and in proof of same also filed the condolence card. Upon death of Murlidhar Pandey @ Murli Prasad Pandey, plaintiff went to her marital home. Along with her mother-in-law Smt. Prem Rani, she performed all the rituals upon death of her husband. However, father-in-law of plaintiff refused to give share of late husband to plaintiff. Plaintiff had also filed O.S. No. 119 of 2004 for maintenance. On account of information, given by counsel for Murlidhar Pandey @ Murli Prasad Pandey that he has died, substitution application was filed, which has been allowed. In spite of service of notice, defendants have not yet appeared on account of which suit has proceeded ex-parte against them. Even though, upon death of Murlidhar Pandey @ Murli Prasad Pandey, all rituals were performed by plaintiff as his widow with the consent of her father/mother-in-law but father/mother-in-law of plaintiff refused to maintain her. Subsequently, name of plaintiff was scored off from family register and name of Pushpa Rani was got incorporated even though she is not legally wedded wife of Murlidhar Pandey @ Murli Prasad Pandey. No marriage of Murlidhar Pandey @ Murli Prasad Pandey could take place with Pushpa Rani during life time of plaintiff. Husband of plaintiff was initially employed as Airman and upon superannuation, he started working at some other place, therefore, for grant of family pension, plaintiff submitted an application through District Basic Board, Basti, which was replied, vide letter No. R.O./2853/6{2182}/1807 stating therein that Murlidhar Pandey @ Murli Prasad Pandey has nominated Smt. Pushpa Pandey as his wife in records. It was also alleged that entry so made in official records is not binding upon plaintiff as Pushpa Devi could not be legally wedded wife of plaintiff. It was further alleged that on complaints made by plaintiff, martial proceedings were initiated again plaintiff but on account of order dated 11.4.1986 passed by Vth Additional District and Sessions Judge, aforesaid proceedings were stayed. Aforesaid order dated 11.4.1986 was set aside by High Court. Just on account of an illegal nomination in service records that defendant Pushpa Rani is wife of Murlidhar Pandey @ Murli Prasad Pandey, rights of plaintiff to receive family pension cannot be curtailed.

5. Defendant 1 Smt. Pushpa Pandey contested the suit of plaintiff. She, accordingly, filed a written statement whereby she not only denied plaint allegations but also raised additional pleas. Defendant 1 admitted the place of residence of Murlidhar Pandey @ Murli Prasad Pandey as stated in plaint but she denied status of plaintiff as legally wedded wife of Murlidhar Pandey @ Murli Prasad Pandey. The factum regarding birth of Shashikala from wedlock and co-habitation of plaintiff and Murlidhar Pandey @ Murli Prasad Pandey was denied. Appointment of Murlidhar Pandey @ Murli Prasad Pandey in Defence Department was, however, admitted. Defendant 1 also denied the allegations made by plaintiff that she is a simple lady and only after Murlidhar Pandey @ Murli Prasad Pandey got employed, husband of plaintiff as well as his parents started neglecting plaintiff and reduced her status to that of a domestic servant. She also denied the alleged conduct of parents of Murlidhar Pandey @ Murli Prasad Pandey and also the fact that plaintiff was ousted from her marital home. It was also denied that plaintiff is incapable of maintaining

herself. Judgment/order passed in proceedings under Section 125 Cr.P.C. are not binding as they have been rendered in summary proceedings. Factum regarding filing of criminal revision and it being allowed as stated in para 5 of plaint was admitted but rest of the averments were denied. Allegations made in plaint that defendant 1 is kept of Murlidhar Pandey @ Murli Prasad Pandey was completely denied and objection to the use of word 'kept' was seriously raised. It was also alleged that plaintiff was initially working in Montesary School and thereafter in a Nursing Home as maid. Factum regarding death of Murlidhar Pandey @ Murli Prasad Pandey was also denied. Allegation regarding performance of religious ceremony by plaintiff at her marital home upon death of Murlidhar Pandey @ Murli Prasad Pandey was also denied. It was further pleaded that name of defendant 1 is recorded in service records and, therefore, she is the legally wedded wife of Murlidhar Pandey @ Murli Prasad Pandey. Reference was also made to various documents in which name of defendant 1 is shown as wife of Murlidhar Pandey @ Murli Prasad Pandey. Plea regarding maintainability of suit was also raised. On the aforesaid defence, it was prayed that suit filed by plaintiff be dismissed.

6. Suit filed by plaintiff was also contested by defendants 2 and 3. Defence of defendants 2 and 3 was primarily based upon entry in service records of Murlidhar Pandey @ Murli Prasad Pandey. After retirement, vide, Pension Payment Order no. 008/14/B/87892/91, pension was sanctioned in favour of Murlidhar Pandey @ Murli Prasad Pandey. Upon death of Murlidhar Pandey @ Murli Prasad Pandey on 31.8.1991, family pension was sanctioned in favour of Smt. Pushpa Rani Pandey as Smt. Pushpa Rani Pandey was nominated as wife of Murlidhar Pandey @ Murli Prasad Pandey, In the service records of Murlidhar Pandey @ Murli Prasad Pandey, it is mentioned that Murlidhar Pandey @ Murli Prasad Pandey married Pushpa Rani Pandey on 5.2.1980 and from aforesaid wedlock two children, namely, Master Sachin and daughter Sangeeta were born. However, in paragraph 24 of written statement, it was pleaded that though name of Pushpa Rani Pandey is mentioned in the records of Air Force as legally wedded wife of Murlidhar Pandey @ Murli Prasad Pandey, yet plaintiff has been informed that she can approach appropriate Court for redressal of her grievance. On aforesaid defence, it was pleaded by defendants 2 and 3 that suit for declaration filed by plaintiff is liable to be dismissed.

7. On these pleadings raised by parties, Court below framed following issues for adjudication:-

1. Whether plaintiff alone is legally wedded wife of Murlidhar Pandey @ Murli Prasad Pandey having service no.612182 C.P.L. Pandey, M.P. and, therefore, entitled to family pension?

2. Whether suit has been undervalued and court fees paid is deficient?

3. Whether suit is barred by Order 39 Rule 2 C.P.C.?

4. Whether plaintiff has the right to institute present suit?

5. Whether the plaint is not duly signed and verified?

6. Whether Court has jurisdiction to try the suit?

7. Whether plaintiff is entitled to any other relief?

8. Plaintiff in order to prove her case, adduced herself as P.W.1, Shashibala as P.W.2 and Umapati Mishra as P.W. 3. As per impugned judgement, Plaintiff also filed following documents in evidence:-

(i) Paper No. 41 (Ga) -certified copy of order dated 7.4.2010.

(ii) Paper No. 83 (Ga)-copy of order passed by High Court in Criminal Revision No. 31 of 1991.

(iii) Vide list of documents (Paper No. 9 (Ga)) eight documents, i.e., paper no. 10 (Ga) to 19(Ga) were filed. These are Paper Nos. 10(Ga) Reply dated 9.11.2002, sent by Wing Commander, OIC, P & W.W. (F.P), 11(Ga) Judgement dated 26.2.1985, passed in Criminal Revision No. 263 of 1984 (Chandra Prakash Pandey and Others Vs. Gulabpati), 12(Ga) Phot copy of judgement dated 23.3.1995, passed in Criminal Revision No. 31 of 1981, 13 (Ga) Certified copy of entry in Voter list, 14 (Ga) Reply dated 8.8.1980, issued by Sqn.Ldr Officer 1/c- P-10, 15 (Ga) Photo copy of letter 16.10.2019, 16 (Ga) Document not discernible, 17(Ga) Original post card/postal receipts, 18 (Ga) Photo copy of question-answer form, 19(Ga) Photo copy of application dated 18.7.2009 submitted by counsel for opposite party in proceedings under Section 128 Cr.P.C.

(iv) Vide list of documents (Paper No. 56 (Ga)) plaintiff filed following documents:- (a) Paper No. 57 (Ga)-certificate of Pradhan, Paper No. (66Ga to 83Ga)-copy of order sheet of Criminal Revision No. 124 /11/97 (Gulabpati Vs. Murlidhar), Paper No. 102(Ga)-photo copy of letter, Paper No.97Ga-extract of family register, Paper No. 98Ga-voter ID card, Paper No. 121(Ga)-report of Tehsildar

9. Defendant 1 filed paper no. 39 (Ga). Objections dated 4.3.2011, Paper No. 44 (Ga)-extract of family register, Paper No. 45 (Ga)-copy of application for marriage, Paper No. 46 (Ga)- Identity Card as well as joint photograph, photo copy of Voter I.D. Card of Pushpa Rani and Voter I.D. Card of Sachin Kumar. After filing of written statement and upon submission of documents to be taken as documentary evidence on behalf of defendant 1, she abandoned proceedings of suit, consequently, suit proceeded ex-parte against defendant 1.

10. Defendants 2 and 3 filed attested copy of service book of Murlidhar Pandey @ Murli Prasad Pandey. No other document was adduced by defendants to be taken as documentary evidence nor defendants 2 and 3 adduced any witness on their behalf.

11. Upon consideration of pleadings of parties, Court below dismissed suit of appellant, vide Judgment dated 28.10.2015 and decree dated 30.10.2015.

12. Perusal of Judgment of Court below shows that upon evaluation of oral evidence, court below concluded that plaintiff and her witnesses failed to prove the place and time of marriage. Upon evaluation of documentary evidence in the light of Section 5 of Hindu Marriage Act, 1955, Court below arrived at the conclusion that plaintiff has failed to prove herself as legally wedded wife of Murali Prasad Pandey.

13. In respect of Issues 2 and 6, Court below held that aforesaid issues have already been decided, vide order dated 23.11.2011 and, therefore, order dated 23.11.2011 will be part of Judgment.

14. Issue No. 3 was decided in negative, but in favour of plaintiff as such it was held by Court below that suit of

plaintiff is not barred by Order 39 Rule 2 C.P.C.

15. Regarding Issue No. 4, Court below held that defendants have failed to prove as to how plaintiff has no right to institute suit, as such, aforesaid issue was decided in negative and against defendants.

16. Court below upon evaluation of plaint held that plaint is duly signed and verified, as such, Issue No. 5 was decided in favour of plaintiff.

17. In respect of relief to which plaintiff was entitled, Court below held that since plaintiff has failed to prove herself to be legally wedded wife of Murlidhar Pandey @ Murli Prasad Pandey, she is not entitled to any relief. Accordingly, issue no. 7 was decided against plaintiff.

18. Mr. G.D. Mishra, learned counsel for appellant in challenge to impugned Judgment and decree passed by Court below has placed before us impugned Judgment passed by Court below. He submits that court below while deciding Issue No.1 has referred to various documents. However, perusal of original record shows that documents referred to by Court below have not been marked 'Exhibits'. According to counsel for appellant until and unless a document is admitted in evidence, it cannot be marked as exhibit and unless the aforesaid exercise is undertaken, there is no legally admissible evidence on record. Therefore, submission urged is that court below has conducted an erroneous trial and, therefore, Judgment and decree passed by court below is liable to be set aside.

19. Mr. Manoj Kumar Singh, learned counsel representing respondents 2 and 3, on the other hand, has supported impugned Judgment and decree by placing reliance upon findings recorded by Court below as well as observations made in impugned Judgment. According to Mr. Manoj Kumar Singh, findings recorded by Court below cannot be said to be illegal, perverse or erroneous, as such, same are not liable to be interfered with. Once findings recorded by Court below are maintained by this Court, then conclusion cannot be challenged. It is, thus, vehemently urged that present First Appeal does not involve any point of determination in law or fact. Hence, same is liable to be dismissed.

20. The issues involved in the present First Appeal can better be appreciated in the light of provisions contained in Order 13, Order 8 C.P.C and Chapter 3 Part C, Rules 40 to 69, General Rules (Civil).

21. When record of court below is scrutinized in the light of provisions noted hereinabove, we find that none of the documents produced by parties were either put for admission or denial. Consequently, none of the documents were either admitted in evidence or proved in evidence. As such, no document filed by either of the parties was marked as an exhibit. What will be the consequence when such a procedure is adopted has been adequately dealt with in **New Okhla Industrial Development Authority Vs. Kendriya Karamchari Sahkari Grih Nirman Samiti Ltd., (2017) 4 UPLBEC 3077**, wherein following has been observed in paragraphs 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79:-

"19. While advancing arguments, it was also submitted that a very strange procedure in this case was followed by Court below inasmuch as parties submitted documents which included original, photostate copies and true copies. All these documents were marked paper numbers. No exercise of admission or denial of documents admitting documents in evidence, marking of exhibits etc. was undertaken and only on the basis of paper numbers, Court below has proceeded to decide the matter. Infact there is not a single evidence admitted by Court in accordance with procedure prescribed in Order 13 CPC read with General Rules (Civil), 1957 (hereinafter referred to as, 'GR(C), 1957') applicable to Court below and therefore, judgement is based on no valid evidence at all, hence on this ground alone it is liable to be set aside.

20. The entire original record of Court below is before us. We have examined entire record and found that there is not a single document which Court has admitted in evidence and marked exhibit number. No document contains any endorsement of admission or denial. A list of documents alongwith documents is there which have been given paper numbers. Whenever documents were filed before Court, the office has given paper number and those documents have been treated as evidence by Court below in deciding suit.

21. When questioned, learned counsel appearing for plaintiff-respondent whether any document was admitted as evidence and exhibit numbers were marked, he fairly stated that no such procedure has been followed by Court below and this is also evident from impugned judgement of Court below.

22. In these circumstances, we have examined for deciding these appeals only one question for determination i.e. "whether without admitting documents filed by parties as evidence and exhibiting the same in accordance with procedure prescribed under Order 13 read with Rules 4 CPC, was permissible for Court below to decide suit relying on documents, which are not admitted in evidence at all and can be said to be a judgment based on valid evidence."

23. A perusal of impugned judgement shows that a large number of documents were filed, which included original documents, photostate copies and true copies. No document has been referred by Court below with exhibit number. All the documents are referred with paper number. After examination of original record, we find that no document has been marked as exhibit. There is no endorsement by Presiding Officer of Court below admitting any document in evidence and infact even there is no endorsement by parties regarding admission or denial of document(s) filed by other party.

24. It is now a well established principle that a document, not admissible in evidence is to be excluded and cannot be considered a valid evidence for deciding suit.

25. In Roman Catholic Mission Vs. State of Madras, 1966 SCR (3) 283 Court held that a document not admissible in evidence, though brought on record, has to be excluded from consideration.

26. Procedure for taking documentary evidence on record is provided in Order 13 CPC read with General Rule (Civil). It is no doubt true that it is a procedural law, but this procedure is consistent with the principles of natural justice so that no party may suffer in the assessment of evidence to prove a fact, if any documentary evidence is relied, which is either in admissible in evidence or has not been otherwise proved.

27. Section 3 of Indian Evidence Act, 1872 (hereinafter referred to as, 'Act, 1872') says that, "fact is said to be proved when, after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists."

28. It is evaluation of result drawn by applicability of rule. The evaluation obviously is based on the pleadings between parties and evidence, oral and/or documentary, led by respective parties. In several cases on preponderance of probability of evidence it can be held that a fact is proved and and therefore to decide suit by holding that fact has been proved, legal evidence is of utmost importance.

29. Here is not a case, where Court has admitted documents and marked exhibits without any objection by either of parties but unfortunately here is a case where documents filed are different manner, i.e. original documents, photostate copies and true copies have been filed. At the time of filing the same were given paper numbers but thereafter no process whatsoever of admitting documents as evidence in accordance with procedure prescribed in statute has undergone. Suit has been decided on these documents as such without admitting even a single document as evidence.

30. At this stage, it would be appropriate to have a bird's eye view of relevant provisions laying down procedure for admitting documents as evidence and marking of same as exhibits.

31. Order XIII deals with production, impounding and return of documents. Rule 1 thereof as it stands today, substituted by CPC Amendment Act, 1999 (hereinafter referred to as "Amendment Act, 1999") w.e.f. 01.07.2002. Earlier Rule 1 reads as under:-

"**(1) Documentary evidence to be produced at or before the settlement of issues.**--(1) The parties or their pleaders shall produce, at or before the settlement of issues all the documentary evidence of every description in their possession or power, on which they intend to rely, and which has not already been filed in Court, and all documents which the Court has ordered to be produced.

(2) The Court shall receive the documents so produced: Provided that they are accompanied by an accurate list thereof prepared in such form as the High Court directs."

32. The substituted Rule 1 which is effective from 01.07.2002, reads as under:

"**1. Original documents to be produced at or before the settlement of issues.-**(1) The parties or their pleader shall produce on or before the settlement of issues, all the documentary evidence in original where the copies thereof have been filed along with the plaint or written statement.

(2) The court shall receive the documents so produced:

Provided that they are accompanied by an accurate list thereof prepared in such form as the High Court directs.

(3) Nothing in sub-rule (1) shall apply to documents--

(a) produced for the cross-examination of the witnesses of the other party; or

(b) handed over to a witness merely to refresh his memory."

33. This is consistent with Order VII Rule 14 in respect of the documents of plaintiff and Order VIII Rule 1A in respect of the documents of defendants. Both

these rules have also undergone amendment by substitution and Order VII Rule 14 and Order VIII Rule 1A as inserted by Amendment Act, 1999, read as under:-

Rule 14 before Amendment

"Rule 14. Production of document on which plaintiff sues--(1) Where a plaintiff sues upon a document in his possession or power, he shall produce it in Court when the plaint is presented, and shall at the same time deliver the document or a copy thereof to be filed with the plaint.

List of other documents.--(2) Where he relies on any other documents (whether in his possession or power or not) as evidence in support of his claim, he shall enter such documents in a list to be added or annexed to the plaint."

Rule 14 after Amendment

"14. Production of document on which plaintiff sues or relies-(1) Where a plaintiff sues upon a document or relies upon document in his possession or power in support of his claim, he shall enter such documents in a list, and shall produce it in court when the plaint is presented by him and shall, at the same time deliver the document and a copy thereof, to be filed with the plaint.

(2) Where any such documents not in the possession or power of the plaintiff, he shall, wherever possible, state in whose possession or power it is.

(3) A document which ought to be produced in Court by the plaintiff when the plaint is presented, or to be entered in the list to be added or annexed to the plaint but is not produced or entered accordingly, shall not, without the leave of the Court, be received in evidence on his behalf at the hearing of the suit.

(4) Nothing in this rule shall apply to document produced for the cross examination of the plaintiff's witnesses, or, handed over to a witness merely to refresh his memory."

Order VIII Rule 1A (inserted by Amendment Act, 1999)

"1A. Duty of defendant to produce documents upon which relief is claimed or relied upon by him- (1) Where the defendant bases his defence upon a document or relies upon any document in his possession or power, in support of his defence or claim for set off or counter claim, he shall enter such document in a list, and shall produce it in court when the written statement is presented by him and shall, at the same time, deliver the document and a copy thereof, to be filed with the written statement.

(2) Where any such document is not in the possession or power of the defendant, he shall, wherever possible, state in whose possession or power it is.

(3) A document which ought to be produced in Court by the defendant under this rule, but, is not so produced shall not, without the leave of the Court, be received in evidence on his behalf at the hearing of the suit.

(4) Nothing in this rule shall apply to documents--

(a) produced for the cross-examination of the plaintiff's witnesses, or

(b) handed over to a witness merely to refresh his memory."

34. Order XIII Rule 1 now creates an obligation upon parties or their pleader to produce original documents on or before settlement of Issues. Order XIII Rule 2 earlier provided effect of non-production of documents but now by Amendment Act, 1999 it has been omitted. If primary evidence i.e. original document is not available and party intends to lead secondary evidence, then all conditions

provided in Evidence Act have to be satisfied. Rule 3 permits a Court to reject a document at any stage of the suit which it considers irrelevant or otherwise inadmissible after recording grounds of such rejection. Rule 4 contemplates endorsement on the documents admitted in evidence and it has to be done by Court since such endorsement has to be signed or initialled by Presiding Officer of the Court. It reads as under:-

"4. Endorsements on documents admitted in evidence- (1) Subject to the provisions of the next following sub-rule, there shall be endorsed on every document which has been admitted in evidence in the Suit the following particulars, namely:--

(a) the number and title of the suit,

(b) the name of the person producing the document,

(c) the date on which it was produced, and

(d) a statement of its having been so admitted; and the **endorsement shall be signed or Initialed by the judge.**

(2) Where a document so admitted is an entry in a book, account or record, and a copy thereof has been substituted for the original under the next following rule, the particulars aforesaid shall be endorsed on the copy and the endorsement thereon shall be signed or initialed by the Judge."

35. Order XIII Rule 5 provides for endorsement on copies of admitted entries in books, accounts and records. Rule 6 talks of endorsement of documents rejected as inadmissible. The Rules read as under:-

"5. Endorsements on copies of admitted entries in books, accounts and records.- (1) Save in so far as otherwise provided by the Bankers' Books Evidence Act, 1891 (XVIII of 1891), where a document admitted in evidence in the suit is an entry in a letter book or a shop book or other account in current use, the party on whose behalf the book or account is produced may furnish a copy of the entry.

(2) Where such a document is an entry in a public record produced from a public office or by a public officer, or an entry in a book or account belonging to a person other than a party on whose behalf the book or account is produced, the court may require a copy of the entry to be furnished--

(a) where the record, book or account is produced on behalf of a party, then by that party, or

(b) Where the record, book or account is produced in obedience to an Order of the court acting of its own motion, then by either or any party.

(3) Where a copy of an entry is furnished under the foregoing provisions of this rule, the court shall, after causing the copy to be examined, compared and certified in manner mentioned in rule 17 of Order VII, mark the entry and cause the book, account or record in which its occurs to be returned to the person producing it.

6. Endorsements on documents rejected as inadmissible in evidence.- Where a document relied on as evidence by either party is considered by the court to be inadmissible in evidence, there shall be endorsed there or the particulars mentioned in clauses (a), (b) and (c) of Rule 4, sub-rule (1), together with a statement of its having been rejected, and the endorsement shall be signed or initialled by the Judge.

36. Order XIII Rule 7 CPC provides that documents which are admitted in evidence shall form part of record of suit. The documents not admitted in evidence shall not form part of record

and shall be returned to the persons respectively producing them.

37. Order XIII Rule 8 CPC empowers Court to impound a document and keep in the custody of officer of Court, if it sees sufficient cause, for such period and subject to such conditions, as Court thinks fit.

38. Rule 9 provides for return of admitted documents after suit is disposed of, and, either time for filing appeal has expired or appeal has been disposed of. Proviso covers a situation where a document may be returned at any time earlier than the period provided hereinabove in certain conditions. Rule 10 states that Court may, of its own motion, and its discretion, upon application of any of the parties to suit, send for, either from its own record or from any other Court, record of any other suit or proceeding, and inspect the same. Conditions applicable when such order is passed on the application, are contained in sub-rule 2 of Rule 10. Sub-rule 3 declares that Rule 10 shall not enable Court to use in evidence, any document which under the law of evidence would be inadmissible in suit. Rule 11 extends provisions relating to documents to all other material objects producible as evidence.

39. In exercise of supervisory powers under Article 227 of Constitution of India read with Section 122 CPC, GR (C), 1957 have been notified in supersession of all existing Rules on the subject. These Rules have 28 Chapters dealing with different aspects of procedure to be followed, not only in trial of civil suits etc., but also tell subordinate Courts, manner of maintenance of record of various proceedings and other administrative aspects.

40. Part (A) deals with parties to the proceedings; (B) with applications and pleadings; (C) with Documents; (D) Commissions; (E) Affidavits; (F) Adjournments; (G) Hearing of suit; (H) Transfer or withdrawal of cases; and, (I) Judgment and decree.

41. For purpose of present matter we confine ourselves to Chapter III Part C which deals with documents and contains Rules 40 to 69.

42. Rule 40 of GR (C), 1957 specify the persons who may produce documents in the Court and says that it may be by parties, by persons, other than parties and on requisition issued by Court. Rule 41 imposes an obligation where the documents produced by party or his witness is in a language other than Hindi, Urdu or English and says that it shall be accompanied by a correct translation of the document in Hindi, written in Devnagri script. Such translation shall bear a certificate of party's lawyer to the effect that the translation is correct. If parties are not represented by a lawyer, Court shall have the translation certificate of any person appointed by it in this behalf at the cost of the party concerned.

43. Rule 42 of GR (C), 1957 contemplates that parties desiring to produce any document in Court, shall, before producing it in any Court, obtain admission or denial, recorded on back of the document by the opposite party's lawyer. If opposite party is not represented by lawyer, Court shall get admission or denial by the party in its presence and may, for the purpose, examine the party.

44. Rule 43 lays procedure of list of documents contemplated in Order VII Rule 14 and Order XIII Rule 1 CPC and says that such list of documents shall be in form (part IV-71). It further says that no document whensoever produced, shall be received unless accompanied by the said form duly filled up. In case a document is

produced by a witness or person summoned to produce documents, form shall be supplied by the parties at whose instance the document is produced. It also requires that list as well as the documents shall be immediately entered in the general index.

45. If there is any erasures or additions in the documents, other than a registered documents or certified copy, Rule 44 of GR (C), 1957 states that such document shall be accompanied by a statement clearly describing such erasure, addition or interlineation and signed by such party. Reference to such statement shall be made in the list form (part IV-71) with which paper is filed.

46. Rule 45 is basically a provision for safety and convenience of perusal of documents when it is a small piece of paper or of historic value or written on both sides. It reads as under:-

"45. Small documents and documents of historic value.--Small documents when filed in Court shall be filed pasted on a paper equal to the size of the record, and the margin of the paper should be stitched to the file so that no part of the document is concealed by the stitching. If a document contains writing both on the front and the back, it should be kept in a separate cover, which should be stitched to the file at the proper place leaving the main document untouched."

47. When a party require production of a public record, Rule 46 says that application shall be submitted by such party accompanied by an affidavit showing how such party requiring record has satisfied itself that it is material to the suit and why a certified copy of document cannot be produced or will not serve the purpose.

48. When a public record is ordered to be produced but its production require sanction of Head of Department, Rule 47 deals with such a situation and says as under:-

"47. Documents for production of which sanction of head of department is necessary.--When a Court decides that in the interests of justice it is necessary that it should have before it a document which cannot be produced without the sanction of the head of the department concerned, it shall in its order asking for such document set out as clearly as possible (a) the facts, for the proof of which the production of the document is sought; (b) the exact portion or portions of the document required as evidence of the facts sought to be proved. The Court summoning the document shall fix a date for its production, which should not be less than three weeks from the date of issue of summons."

49. Rule 48 deals with public record of different offices like Sub Registrar, Police, Municipal and District Board and Post Office and says as under:-

"48. Registers from Sub-Registrar's office.--(1) A summons for the production of any register or book belonging to the office of a Sub- Registrar shall be addressed to the District Registrar and not direct to the Sub-Registrar.

(2) Production of documents in police custody.-A summons for the production of documents in the custody of the police should be addressed to the Superintendent of Police concerned, and not to the Inspector General.

(3) Production of Municipal and District Board Records.-When duly authenticated and certified copies of documents in the possession of Municipal and District Boards15 are admissible in evidence, the Court shall not send for original records unless, after perusal of copies filed, the Court is satisfied that the

production of the original is absolutely necessary.

(4) Post Office records not to be unnecessarily disclosed.-When any journal or other record of a post office is produced in Court, the Court shall not permit any portion of such journal or record to be disclosed, other than the portion or portions which seem to the Court necessary for the determination of the case then before it."

50. For summoning of settlement record, procedure is prescribed in Rule 49 and reads as under:-

"49. Settlement Records.-- When a Court requires the production of any Settlement Record in which the Settlement Officer acted in a judicial capacity, it shall be summoned in the manner provided by Order XIII, Rule10. In other cases the procedure prescribed in Order XVI, Rule 6 shall be followed. The summons to produce such documents shall be issued to the Collector/Deputy Commissioner, who may send the document by messenger or registered post."

51. Rule 50 deals with payment of postage fee, travelling charges and other expenses for transmission or requisition of record etc. Rule 51 says that documents received by registered post, then the registered cover shall not be destroyed but shall be attached to the file of proceedings in the case to which the document is referred.

52. Then comes Rule 52 which says that all document received must be received by the Court and must be dealt with in one or the other of three means i.e. (a) returned; (b) placed on record; and (c) impounded.

53. Thereafter Rule 53 imposes a duty upon Court to inspect documents as soon as they are produced before Court. It says that documents which are proved or admitted by party against whom they are produced in evidence, shall be marked as exhibit in the manner prescribed in Rule 57 and this fact shall be noted in the record. The document which are not proved or not admitted by parties against whom they are produced in Court, shall be kept in record pending proof and shall be rejected at the close of evidence, if not proved or admitted. Documents that are found to be irrelevant or otherwise inadmissible in evidence shall be rejected forthwith. There is a note under Rule 53 stating that no document unless admitted in evidence shall be marked as an exhibit.

54. Rule 54 of GR (C), 1957 clarifies that admission of genuineness is not to be confused with admission of truth of contents and reads as under:

"54. Admission of genuineness not to be confused with admission of truth of contents.-(1)When a certified copy of any private document is produced in Court, inquiry shall be made from the opposite party whether he admits that it is a true and correct copy of the document which he also admits, or whether it is a true and correct copy of the document which he denies, or whether it is a true and correct copy of the document the genuineness of which he admits without admitting the truth of its contents, or whether he denies the correctness of the copy as well as of the document itself. Admission of the genuineness of a document is not to be confused with the admission of the truth of its contents or with the admission that such document is relevant or sufficient to prove any alleged fact.

(2) A Sessions Clerk who fails to furnish security as required by the preceding sub-rule shall not be allowed to hold that most and also other posts of equivalent status.

Explanation.--Posts of Suits Clerk, Execution Clerk, Appeals Clerk and

Readers of the courts of Judge, Small Causes, Civil Judges and Munsif shall, for purposes of this rule, be deemed to be in status equivalent to that of a Sessions Clerk."

55. The expression which are to be used by parties while admitting or not admitting documents, is provided in Rule 55 and reads as under:

"55. Proper expression about admissions of documents.-Admission of a document by a party shall be indicated by the endorsement "Admitted by the plaintiff" or "Admitted by the defendant". Admission of a document in evidence by the Court shall be indicated by the endorsement "Admitted in evidence". If any question is raised as to the correctness of a copy and the correctness of its is admitted, the endorsement shall be "correctness of copy admitted". The use of the expression "Admitted as a copy" in endorsement on document is prohibited."

56. Rule 56 talks of documents filed in suits which are compromised or dismissed in default and says:

"**56. Endorsement on documents in suits compromised or dismissed for default.**-Documents filed in suits, which are dismissed for default or compromised, shall, before being dealt with in the manner provided in Rules 59 and 60 be endorsed with the particulars mentioned in Order XIII, Rule 4(i)and the result of the suit."

57. Rule 57 provides the manner in which marking is to be made in documents and reads as under :

"57. Marking of documents.-(1) Documents produced by a plaintiff and duly admitted in evidence shall be marked with a number, and documents produced by a defendant shall be marked with a number and the letter A, or, where there are more than one set of defendants by the letter A for the first set of defendants, by the letter B for the second, and so on. Where a document is produced by order of the Court and is not produced by any party, the serial number shall be prefaced by the words "Court Exhibit" or an abbreviation of the same.

(2) Where a document is produced by a witness at the instance of a party, the number of the witness shall be endorsed thereon, e.g., Ex.P.W.1 if it is produced by the plaintiff's first witness, and Ex.-A/D.W.1 if it is produced by the defendant's first witness.

(3) The party at whose instance a document is produced by a witness shall deposit the cost of the preparation of a certified copy of that document before it is placed on the record. The office shall then prepare a certified copy and keep it with the original document. If the witness wants to take back his document it shall be returned to him unless there are special reasons for keeping the original on the record.

Provided that a certified copy shall not be necessary where the document is written in a language other than Hindi or English, and a translation has been filed as prescribed by Rule 41.

(4) Every exhibit-mark shall be initialed and dated by the Judge."

58. If a number of documents of same nature are admitted than the manner in which such documents are marked, is provided in Rule 58 as under:

"58. Marking of documents.-Where a number of documents of the same nature are admitted, as for example, a series of receipt for rent, the whole series should bear one figure or capital letter or letters, a small figure or letter in brackets being added to distinguish each paper of the series."

59. Rule 59 states that documents which are rejected as irrelevant or otherwise inadmissible under Order 13 Rule 3 CPC or not proved, unless impounded under Order 13 Rule 8 or rendered wholly void or useless by force of decree, be returned to the person producing it or to the pleader and such person or pleader shall give a receipt for same in column 4 of list (Form Part IV-71).

60. Rules 60 and 61 of GR (C), 1957 deal with retention of impounded and certain other documents and care of impounded documents. Rule 63 talks with the manner in which documents are to be returned. Rule 64 specifically concerned with books of business and read as under:

"**64. Books of business.-**If a document be an entry in a letter book, a shop book, or other account in current use or an entry in a public record, produced from a public office or by a public officer, a copy of the entry, certified in the manner required by law, shall be substituted on the record before the book, account or record is returned, and the necessary endorsement should be made thereon, as required by Order XIII, Rule 5."

61. It is true that these are the provisions relating to procedure and have been designed to facilitate procedure for imparting justice. The procedural law is not to be dealt as a penal enactment and too technical construction thereof is not needed. This is what has been said by Hon'ble Vivian Bose, J in Sangram Singh vs. Election Tribunal, Kotah and another, 1955(2) SCR 1 and we quote relevant observation as under:

"Now a code of procedure must be regarded as such. It is procedure, something designed to facilitate justice and further its ends : not a Penal enactment for punishment and penalties; not a thing designed to trip people up. Too technical construction of sections that leaves no room for reasonable elasticity of interpretation should therefore be guarded against (provided always that justice is done to both sides) lest the very means designed for the furtherance of justice be used to frustrate it."

62. Evidence is the foundation of every case since in our system of justice disputes are decided, whether Civil or Criminal, on the basis of evidence which may be oral or documentary or both. Therefore, rules dealing with procedure as to how a document will become an evidence is of great importance and such procedure must be adhered. Normal requirement under Rules is that provisions relating to endorsement of document admitted in evidence should be strictly followed.

63. In the past, Courts, on different occasions and in particular, in the light of facts of those cases, deviation in process of marking of evidence or admitting of documents has allowed to stay. Such deviation and has not vitiated proceedings but a close scrutiny of such matters will reveal that such occasions existed due to peculiar facts of those matters. In order to avoid injustice to one or the other party, Courts have not held a document inadmissible at a later stage but in general, law is that in order to make a document, 'exhibit' the procedure prescribed under rules should be adhered to. However, such authorities are mostly in relation to civil matters instituted and proceeded in Courts below prior to amendment of order 13 Rule 1 by C.P.C. Amendment Act, 1999, which came into force on 1.7.2004

64. Legislature has intervened by amending Order 13 Rule 1 and now parties have to file documentary evidence in

original. This is clearly with the intention to avoid scope of fictitious, manufactured or otherwise documents, particularly when scientific development has made things much easier to create any kind of manipulation in a document very conveniently. Courts are under a duty that before it treat a document, evidence, it should follow the procedure strictly and unless document is admitted as evidence and marked as exhibit, same obviously cannot be relied to decide a dispute. Marking of mere paper number and decision of a case on that basis is not correct. It may amount to render decision on the basis of documents inadmissible in evidence.

65. In Sadik Husain Khan vs Hashim Ali Khan and others, 1916 ILR (38) All 627, Judicial Committee said:

"Their Lordships, with a view of insisting on the observance of the wholesome provisions of these Statutes, will, in order to prevent injustice, be obliged in future on the hearing of Indian appeals to refuse to read or permit to be used any document not endorsed in the manner required."

66. In Secretary of State vs. (Shrimati) Sarla Devi Chaudhrani, AIR 1924 Lahore 548 followed in Hari Singh vs. Firm Karam Chand-Kanshi Ram, AIR 1927 Lahore 115 and Imam-ud-Din and Anr. vs. Sri Ram Perbhu Dial, AIR 1928 Lahore 142, it was said that documents admitted on record without making endorsement prescribed by Rules cannot be regarded as having been brought on record legally, before Court.

67. In Feroze Din and Ors. vs. Nawab Khan and others, AIR 1928 Lahore 432, Court said that documents should not be endorsed until they are proved. Sometimes the Court may mark a document as an exhibit without having it proved.

68. In Sait Tarajee Khimchand and others vs. Yelamarti Satyam alias Satteyya and others, AIR 1971 SC 1865, Court said that merely marking of an exhibit does not dispense with the proof of documents. It was followed in Sitaram vs. Ram Charan and Ors. AIR 1995 MP 134.

69. In the present case, documents have been filed as original documents, photocopies and true copies. Photocopies and true copies are in nature of secondary evidence and therefore would be admissible in evidence under Section 65 of Act, 1872 in case conditions therein are satisfied.

70. In J. Yashoda Vs. K. Shobha Rani (2007) 5 SCC 730, Court held :-

"The rule which is the most universal, namely that the best evidence the nature of the case will admit shall be produced, decides this objection that rule only means that, so long as the higher or superior evidence is within your possession or may be reached by you, you shall give no inferior proof in relation to it."

71. Section 63 of Act, 1872 talks about what secondary evidence is and reads as under :-

"**63. Secondary evidence.**- Secondary evidence means and includes--

(1) certified copies given under the provisions hereinafter contained;

(2) copies made from the original by mechanical processes which in themselves insure the accuracy of the copy, and copies compared with such copies;

(3) copies made from or compared with the original;

(4) counterparts of documents as against the parties who did not execute them;

(5) oral accounts of the contents of a document given by some person who has himself seen it."

72. Section 65 of Act, 1872 deals with cases in which secondary evidence may be given. It reads as under :-

"65. Cases in which secondary evidence relating to documents may be given.--Secondary evidence may be given of the existence, condition, or contents of a document in the following cases:--

(a) When the original is shown or appears to be in the possession or power--

of the person against whom the document is sought to be proved, or of any person out of reach of, or not subject to, the process of the Court, or

of any person legally bound to produce it, and when, after the notice mentioned in section 66, such person does not produce it;

(b) when the existence, condition or contents of the original have been proved to be admitted in writing by the person against whom it is proved or by his representative in interest;

(c) when the original has been destroyed or lost, or when the party offering evidence of its contents cannot, for any other reason not arising from his own default or neglect, produce it in reasonable time;

(d) when the original is of such a nature as not to be easily movable;

(e) when the original is a public document within the meaning of section 74;

(f) when the original is a document of which a certified copy is permitted by this Act, or by any other law in force in India to be given in evidence;

(g) when the originals consists of numerous accounts or other documents which cannot conveniently be examined in Court, and the fact to be proved is the general result of the whole collection.

In cases (a), (c) and (d), any secondary evidence of the contents of the document is admissible.

In case (b), the written admission is admissible.

In case (e) or (f), a certified copy of the document, but no other kind of secondary evidence, is admissible.

In case (g), evidence may be given as to the general result of the documents by any person who has examined them, and who is skilled in the examination of such documents."

73. In J. Yashoda (Supra), Court said :-

"Section 65 deals with the proof of the contents of the documents tendered in evidence. In order to enable a party to produce secondary evidence it is necessary for the party to prove existence and execution of the original document. Under Section 64, documents are to be provided by primary evidence. Section 65, however permits secondary evidence to be given of the existence, condition or contents of documents under the circumstances mentioned. The conditions laid down in the said Section must be fulfilled before secondary evidence can be admitted. Secondary evidence of the contents of a document cannot be admitted without non-production of the original being first accounted for in such a manner as to bring it within one or other of the cases provided for in the Section."

74. In Ashok Dulichand Vs. Madahavlal Dube (1975) 4 SCC 664 Court said :-

"According to clause (a) of section 65 of the Indian Evidence Act, secondary evidence may be given of the existence, condition or contents of a

document when the original is shown or appears to be in the possession or power of the person against whom the document is sought to be proved, or of any person out of reach of, or not subject to, the process of the Court, or of any person legally bound to produce it, and when, after the notice mentioned in section 66, such person does not produce it. Clauses (b) to (g) of section 65 specify some other contingencies wherein secondary evidence relating to a document may be given, but we are not concerned with those clauses as it is the common case of the parties that the present case is not covered by those clauses. In order to bring his case within the purview of clause (a) of section 65, the appellant filed applications on July 4, 1973, before respondent No. 1 was examined as a witness, praying that the said respondent be ordered to produce the original manuscript of which, according to the appellant, he had filed photostat copy. Prayer was also made by the appellant that in case respondent No. 1 denied that the said manuscript had been written by him, the photostat copy might be got examined from a handwriting expert. The appellant also filed affidavit in support of his applications. It was, however, nowhere stated in the affidavit that the original document of which the photostat copy had been filed by the appellant was in the possession of respondent No. 1. There was also no other material on the record to indicate that the original document was in the possession of respondent No. 1. The appellant further failed to explain as to what were the circumstances under which the photostat copy was prepared and who was in possession of the original document at the time its photograph was taken. Respondent No. 1 in his affidavit denied being in possession of or having anything to do with such a document. The photostat copy appeared to the High Court to be not above suspicion. In view of all the circumstances, the High Court came to the conclusion that no foundation had been laid by the appellant for leading secondary evidence in the shape of the photostat copy. We find no infirmity in the above order of the High Court as might justify interference by this Court."

75. A Division Bench of Madhya Pradesh High Court (Indore) in Food Corporation of India Vs. Dena Bank AIR 2004 MP 158 said:-

"It is evident from the above discussion that there is no legal evidence to arrive at the conclusion at which learned Lower Court has arrived. No evidence of any kind has been adduced even the written statement was not filed while the defendant was directed to file written statement. Any document has not been proved. The finding of the learned Lower Court seems to be based on the photostat copies of the award and the order of the Delhi High Court, which have not been even exhibited. Thus, the order passed by the learned Lower Court is not based on any legal evidence and is liable to be set aside."

76. The above observation that photocopy of a document is not a evidence to pass a decree has been affirmed by Supreme Court in Neebha Kapoor Vs. Jayantilal Khandwala (2008) 3 SCC 770 wherein Court referring to judgement of Madhya Pradesh High Court in Food Corporation of India (Supra) said :-

"A decree could not have been granted on the basis of even photostat copies of the documents. Presumption in regard to a negotiable instrument or a bill of exchange in terms of Section 118 of the Act is also an evidence. It is true that a presumption can be raised that a bill of exchange was correctly stamped as

provided for under Clause (f) of Sub-section (2) of Section 128 of the Code but a decree is to be passed by a court of law upon application of mind."

77. In R.V.E. Venkatachala Gounder Vs. Arulmigu Viswesaraswami & V.P Temple and Another (2003) 8 SCC 752 referring to Order 13 Rule 4 CPC, Court said :-

"every document admitted in evidence in suit being endorsed by or on behalf of the Court, which endorsement signed or initialled by the Judge amounts to admission of document in evidence. Having said so, Court said, "an objection to the admissibility of the document should be raised before such endorsement is made and the Court is obliged to form its opinion on the question of admissibility and express the same on which opinion would depend the document being endorsed as admitted or not admitted in evidence. In the latter case, the document may be returned by the Court to the person from whose custody it was produced." Further Court said that, "ordinarily an objection to the admissibility of evidence should be taken when it is tendered and not subsequently. The objections as to admissibility of documents in evidence may be classified into two classes:- (i) an objection that the document which is sought to be proved is itself inadmissible in evidence; and (ii) where the objection does not dispute the admissibility of the document in evidence but is directed towards the mode of proof alleging the same to be irregular or insufficient. In the first case, merely because a document has been marked as 'an exhibit', an objection as to its admissibility is not excluded and is available to be raised even at a later stage or even in appeal or revision. In the latter case, the objection should be taken before the evidence is tendered. Once the document has been admitted in evidence and marked as an exhibit, the objection that it should not have been admitted in evidence or that the mode adopted for proving the document is irregular cannot be allowed to be raised at any stage subsequent to the marking of the document as an exhibit." Court said that, "later proposition is a rule of fair play."

78. In H. Siddiqui Vs. A. Ramalingam, (2011) 4 SCC 240 considering the admissibility of secondary evidence Court said :-

"secondary evidence relating to contents of a document is inadmissible, until non-production of original is accounted for, so as to bring it within one or other of the cases provided for in the Section. Secondary evidence must be authenticated by foundational evidence that alleged copy is in fact true copy of the original. Mere admission of a document in evidence does not amount to its proof, therefore, documentary evidence is required to be proved in accordance with law. Court has an obligation to decide question of admissibility of a document in secondary evidence before making endorsement thereon."

79. Photostate copies and true copies which have not even been marked as exhibit and there is no endorsement by Presiding Judge of Court on document admitting the same as evidence in the case in hand, brings a very difficult situation before us to consider as to which evidence was admitted and which was not and what document was proved and whether judgement is founded only on admissible evidence or inadmissible evidence or unproved document, hence unreliable. The question of any objection by party, it appears, has lost its significance since procedure of admitting of document and marking of evidence has been given a

complete go bye by Court below and in absence of ascertaining as to which document is admissible, we find no option but to remand the matter by setting aside the judgement dated 10.9.2008 and decree dated 24.9.2008, directing Court below to first observe the procedure of admission of documents in evidence and thereafter decide the matter afresh, in accordance with law. The point for determination formulated above is answered by holding that the judgement and decree passed by Court below is not founded on valid evidence and Court below has erred in law in not following the procedure prescribed for admitting documents in evidence."

22. In the present case also, documents filed by parties have not been marked, 'exhibits'. There is no endorsement made personally by Presiding Judge of Court below on the documents so filed, admitting them in evidence. Thus, what was the evidence which was relied upon by Court below is shrouded in obscurity. Therefore, Judgment passed by Court below is upon basis of such documents which did not form part of documentary evidence adduced by parties. In fact, there was no such document which was legally admitted in evidence. Procedure adopted by court below is in total ignorance of Order 13, Order 8 C.P.C. as well as Rules 40 to 69 of Chapter 3 Part C of General Rules (Civil). In the result, trial of Original Suit No. 15 of 2010 (Gulabpati Vs. Smt. Pushpa Rani Pandey is held to be erroneous.

23. Consequently, present First Appeal succeeds and is allowed. Judgment dated 28.10.2005 and decree dated 30.10.2005 passed by Principal Judge, Family Court, Basti in O.S. No. 626 of 2015 (Gulabpati Vs. Smt. Pushpa Rani Pandey and others) are hereby set aside. Matter is remanded to Court below for decision afresh keeping in mind the observations made hereinabove.

24. In the facts and circumstances of the case, we make the cost easy.

(2020)02ILR A1011

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 20.12.2019

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.
THE HON'BLE RAJEEV MISRA, J.

First Appeal No. 780 of 2017

Shri Vishnu Shankar Pandey ...Appellant
Versus
Smt. Maya Pandey ...Respondent

Counsel for the Appellant:
Sri Harish K. Yadav, Sri Harish Kr. Yadav

Counsel for the Respondent:
Sri Brijesh Shukla, Sri Arvind Kumar Tiwari

A. Hindu Marriage Act (25 of 1955) - S.13(1)(ia), S.13(1)(ib) - Divorce - Fulfilment of any one of the grounds mentioned in Section 13 by itself is sufficient to grant divorce - cruelty and desertion are independent grounds of divorce & are not inter-dependant and have to be proved independently by direct evidence (Para 12)

B. Hindu Marriage Act (25 of 1955) - S.13(1)(ia) - Divorce - Cruelty - Plaintiff must plead specific instances of 'cruelty' or make such allegations of 'cruelty' which if considered cumulatively, lead to a reasonable apprehension in the mind of other that it would be harmful or injurious to reside with other spouse

Allegations in plaint do not spell out any specific instances of 'cruelty' but only allegations of 'cruelty' – No such allegations of cruelty which lead to reasonable apprehension that it would be harmful or injurious to reside with wife (Para 24)

C. Hindu Marriage Act (25 of 1955) - S.13(1)(ib) – Divorce - Desertion - Pre-requisite for grant of divorce on ground of desertion - Plaintiff required to plead that defendant deserted plaintiff for a continuous period of not less than two years immediately preceding the presentation of the petition - Period subsequent to institution of suit cannot be taken into consideration for determining desertion on the part of respondent in a suit for divorce

Husband alleged that wife deserted him on 10.11.2008 - Divorce suit instituted on 21.03.2009 - *Held* - Husband was required to plead that wife deserted him for a continuous period of not less than two years immediately preceding the presentation of the petition - husband failed to establish desertion on part of wife for continuous period of two years prior to institution of suit - Husband not entitled to divorce (Para 12, 26, 27)

First Appeal dismissed. (E-5)

List of cases cited :

1. Smt. Sarita Devi Vs Sri Ashok Kumar Singh 2018 (3) AWC 2328

2. Ravi Kumar Vs Julmi Devi 2010 (4) SCC 476

3. Srinivas Rao Vs D. A. Deepa 2013 (5) SCC 226

4. N.G. Dastane Vs S. Dastane (1975) 2 SCC 326

5. A. Jaya Chandra Vs Aneel Kaur 2005 (2) SCC 22

6. K. Srinivas Rao Vs D.A. Deepa (2013) 5 SCC 226

7. Neelam Kumar Vs Dayarani 2010 (13) SCC 298

(Delivered by Hon'ble Rajeev Misra, J).)

1. Challenge in this appeal under Section 19 of Family Courts Act, 1984 (hereinafter referred to as 'Act, 1984') is to the judgement dated 25.8.2014 and decree dated 17.9.2014, passed by Additional Principal Judge, Family Court/Additional District and Sessions Judge (Court No. 3), Allahabad, dismissing Matrimonial Petition No. 239 of 2009 (Sri Vishnu Shanker Pandey Vs. Smt. Maya Pandey) under section 13 of Hindu Marriage Act, 1955 (hereinafter referred to as 'Act, 1955') filed by plaintiff-appellant for dissolution of marriage of the parties.

2. Plaintiff-appellant Sri Vishnu Shanker Pandey (hereinafter referred to as 'appellant') filed Matrimonial Petition No. 239 of 2009 (Sri Vishnu Shanker Pandey Vs. Smt. Maya Pandey) for divorce on the grounds of cruelty and desertion. According to plaint allegations, marriage of parties was solemnized 28-29 years prior to institution of above mentioned matrimonial petition. From wedlock of parties, three children namely, Sarita Pandey- Date of Birth 9.12.1984, Surya Prakash Pandey- Date of Birth 2.11.1987 and Ved Prakash Pandey- Date of Birth 5.11.1989, were born. Appellant retired from post of Honorary Lieutenant from Indian Army and started residing at 6/5 Madhuwan Vihar Colony, Umarpur Niva, P.S. Dhoomanganj, District Allahabad. All three children have become major and are residing with appellant. Eldest daughter of appellant Km. Sarita Pandey is working in a private institute at Civil Lines Allahabad. Plaintiff alleged that defendant respondent Maya Pandey, wife of appellant (hereinafter referred to as 'respondent'), is also residing with him. However, since last three years, conduct of respondent has gone bad and she indulges in garrulous talking, which has disturbed peace of house. Aforesaid conduct of respondent amounts to commission of mental cruelty upon appellant. Contrary to her spousal

obligations, respondent by her conduct and behaviour has totally dissolved peace and tranquillity of house. Whenever appellant tried to persuade respondent to give up her such conduct, she always behaved rudely and with arrogance and thereby, committing mental cruelty upon appellant. Consequently, it is impossible for appellant to live with respondent. For the last three years, respondent has miserably failed to discharge her spousal obligations even though plaintiff has all along been faithful, nor ever committed such act which may cause pain and agony to respondent. Inspite of aforesaid, respondent has continuously by her false and frivolous allegations degraded prestige of appellant by alleging that appellant is not maintaining respondent and further commits physical atrocities upon her. Appellant alleged that on 10.11.2008, he again persuaded respondent to mend her ways but in vain. To the contrary, on the basis of false, fabricated and incorrect allegations, respondent started residing separately from plaintiff. In furtherance of aforesaid respondent filed an application under section 125 Cr.P.C. claiming maintenance. Thoug parties are living together in same house but they are not in conjugal relationship or in co-habitation. As such, in the same house parties are living separately. Cause of action was pleaded to be continuous since 10.11.2008. On the aforesaid factual foundation, appellant filed Matrimonial Petition No. 239 of 2009 (Sri Vishnu Shanker Pandey Vs. Smt. Maya Pandey) under section 13 of Act, 1955 for dissolution of marriage.

3. Suit filed by appellant was contested by respondent. She filed written statement dated 14.9.2009, whereby not only plaint allegations were denied but additional pleas were also raised. Except for paragraphs 1 and 2 of plaint, remaining paragraphs were denied. In additional pleas respondent admitted that from wedlock of parties, three children namely, Km. Sarita Pandey, Surya Prakash Pandey and Ved Prakash Pandey were born. Appellant retired from Indian Army from the post of Honorary Lieutenant. All three children are still studying and preparing for their examinations. However, appellant does not bear their expenses, as such all expenses are borne by father of respondent. Eldest daughter Km. Sarita Pandey has still not completed her studies and she is continuing the same. However, she is working in a private institute at Civil Lines, Allahabad. Respondent never behaved with appellant in a manner which is unbecoming of a pious and faithful wife nor she ever displayed such conduct on basis of which, it could be alleged that respondent has caused physical/mental cruelty to appellant. To the Contrary, it is appellant who has committed cruelty upon her by continuously assaulting her physically. On account of aforesaid conduct, respondent disclosed the same to her father upon which he repeatedly requested appellant to give up his rude and immoral behaviour which is unbecoming of a caring husband and ideal father. However, irrespective of above, inhuman conduct of appellant continued unabated and on 20.12.2008, appellant in a drunken position, assaulted respondent, ousted her from house, forcing respondent to reside in a room outside her matrimonial home. No maintenance was paid by appellant on account of which it was impossible for respondent to reside with plaintiff. Respondent was always performing her spousal obligations but inspite of above, appellant committed cruelty upon her by his deed and conduct and further failed to maintain her. She never insulted appellant.

It was on account of aforesaid action of appellant that respondent faced despair and destitution forcing her to initiate proceedings under section 125 Cr.P.C. for grant of maintenance. From 20.12.2008, parties are living separately in the same house. Three children are residing with respondent and expenses for maintaining the respondent and her three children are being borne by father of respondent. It is on account of aforesaid that respondent is unable to discharge her spousal obligations. On the aforesaid defence, respondent prayed for dismissal of suit for divorce.

4. Appellant filed a rejoinder affidavit (Paper No. 16 Ga) to the written statement filed by respondent whereby, Appellant reiterated and reaffirmed allegations made in plaint.

5. On the above pleading of parties, Court below framed following issues for determination:

(I) Whether appellant was married to respondent in the year 1980.

(ii) Whether respondent is not having marital co-habitation with appellant since January, 2006.

(iii) Whether respondent is not discharging her marital obligations since February, 2006.

(iv) Whether respondent is committing physical and mental cruelty upon appellant since February, 2006 and without any reason is maintaining distance from appellant since February, 2006.

(v) Whether on 10.11.2008 inspite of pursuation made by appellant requesting respondent not to cause cruelty, respondent threatened appellant that she will not reside with him but live separately.

(vi) Whether appellant always committed physical cruelty upon respondent in a drunkard position and further committed mental cruelty upon her. On 20.12.2008, appellant physically assaulted respondent as such, respondent along with her three children is residing separately. No amount of maintenance is being paid by appellant to respondent as such, entire expenses are being borne by father of respondent, yet appellant repeatedly, extends threat to respondent of killing her.

6. After aforesaid issues were framed, parties went to trial. Appellant in support of his case adduced himself as P.W.1. Further appellant also filed documentary evidence which is detailed in paragraph 6 of impugned judgement. Respondent adduced herself as D.W. 1 to establish her defence. Respondent also adduced documentary evidence as detailed in paragraph 6 of impugned judgement.

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7. Court below on the basis of pleadings of parties, oral and documentary evidence adduced, as well as submissions urged on behalf of parties, examined the issues so framed. Court below accordingly re-framed the issues which arose for determination i.e:

(I) Whether respondent has deserted appellant without any valid reason.

(ii) Whether respondent has displayed cruel behaviour against appellant.

(iii) Whether appellant is entitled to any relief.

8. In respect of issue no.1, Court below concluded that since factum of marriage between parties is admitted, date

of marriage, therefore, is irrelevant. Issue nos. 1, 2 and 3 as originally framed were considered together. Court below opined that three issues reframed subsequently are included in Original Issue No.3. Upon evaluation of pleadings on record, Court below held that plaintiff has instituted the suit on 23.3.2009. Cause of action for desertion pleaded in plaint is 10.11.2008, which was said to be continuous. As per mandate of Section 13 (i-b), a period of two years must have lapsed from date of desertion up to the date of filing of suit for pleading divorce on the ground of desertion. Aforesaid pre-condition is not satisfied in present case. It was thus held by Court below that appellant has failed to establish desertion on part of respondent. Court below further concluded that respondent is residing separately along with her three children. Conduct of appellant towards respondent is unbecoming of a good husband, as he repeatedly commits physical assault upon respondent in a drunken position and therefore, respondent started residing separately from 20.12.2008. Appellant himself has forced respondent to live separately, as such, there is a valid reason for respondent in residing separately. Consequently, it cannot be said that respondent has deserted appellant. Issue Nos. 4, 5 and 6 were decided together by Court below. Upon evaluation of evidence of parties, as well as pleadings on record, Court below concluded that appellant has failed to establish commission of physical and mental cruelty by respondent upon appellant. Court below further concluded that since plaintiff has failed to prove the grounds of desertion and cruelty upon which plaintiff claimed decree of divorce, no relief prayed for by plaintiff can be granted. On the aforesaid findings, Court below dismissed suit of plaintiff vide judgement dated 25.8.2014 and decree dated 17.9.2014. Thus feeling aggrieved by aforesaid judgement and decree passed by Court below, plaintiff has now come to this Court by means of present first appeal.

9. We have heard Mr. Harish K. Yadav, learned counsel for appellant. Though cause list was revised, none appeared for respondent even though names of Brijesh Shukla and Arvind Kumar Tiwari, Advocates, were duly printed in the cause list as counsel for respondent. As such we proceeded with hearing of present first appeal by hearing learned counsel for appellant.

10. Mr. Harish K. Yadav, learned counsel for appellant, in challenge to impugned judgement and decree passed by Court below has submitted that the same are manifestly illegal and liable to be quashed by this Court. He further submits that findings recorded by court below on twin issues namely, cruelty and desertion are wholly illegal, perverse and erroneous. On the basis of material on record, commission of cruelty by respondent upon appellant and further her act of deserting appellant are duly proved. Consequently, judgement and decree passed by Court below are liable to be set aside and suit filed by appellant for divorce on grounds of cruelty and desertion is liable to be decreed by this Court.

11. Before proceeding to examine the submissions urged by learned counel for appellant, it would be appropriate to reproduce Section 13 of Act 1955, which provides for grounds of divorce:

"" 13 Divorce. --(1) Any marriage solemnized, whether before or after the commencement of this Act, may,

on a petition presented by either the husband or the wife, be dissolved by a decree of divorce on the ground that the other party--

[(i) has, after the solemnization of the marriage, had voluntary sexual intercourse with any person other than his or her spouse; or

(i-a) ***has, after the solemnization of the marriage, treated the petitioner with cruelty; or***

(i-b) ***has deserted the petitioner for a continuous period of not less than two years immediately preceding the presentation of the petition; or]***

(ii) has ceased to be a Hindu by conversion to another religion; or

[(iii) has been incurably of unsound mind, or has been suffering continuously or intermittently from mental disorder of such a kind and to such an extent that the petitioner cannot reasonably be expected to live with the respondent.

Explanation.--In this clause,--

(a) the expression "mental disorder" means mental illness, arrested or incomplete development of mind, psychopathic disorder or any other disorder or disability of mind and includes schizophrenia;

(b) the expression "psychopathic disorder" means a persistent disorder or disability of mind (whether or not including sub-normality of intelligence) which results in abnormally aggressive or seriously irresponsible conduct on the part of the other party, and whether or not it requires or is susceptible to medical treatment; or]

(iv) has, been suffering from a virulent and incurable form of leprosy; or

(v) has, been suffering from venereal disease in a communicable form; or

(vi) has renounced the world by entering any religious order; or

(vi) has not been heard of as being alive for a period of seven years or more by those persons who would naturally have heard of it, had that party been alive;

[Explanation. —In this sub-section, the expression "desertion" means the desertion of the petitioner by the other party to the marriage without reasonable cause and without the consent or against the wish of such party, and includes the wilful neglect of the petitioner by the other party to the marriage, and its grammatical variations and cognate expressions shall be construed accordingly.]

(viii) deleted

(ix) deleted

[(1-A) Either party to a marriage, whether solemnised before or after the commencement of this Act, may also present a petition for the dissolution of the marriage by a decree of divorce on the ground--

(i) that there has been no resumption of cohabitation as between the parties to the marriage for a period of 22 [one year] or upwards after the passing of a decree for judicial separation in a proceeding to which they were parties; or

(ii) that there has been no restitution of conjugal rights as between the parties to the marriage for a period of 22 [one year] or upwards after the passing of a decree for restitution of conjugal rights in a proceeding to which they were parties.]

(2) A wife may also present a petition for the dissolution of her marriage by a decree of divorce on the ground,---

(i) in the case of any marriage solemnised before the commencement of this Act, that the husband had married again before such commencement or that any other wife of the husband married before such commencement was alive at the time of the solemnisation of the marriage of the petitioner: Provided that in either case the other wife is alive at the time of the presentation of the petition; or

(ii) that the husband has, since the solemnisation of the marriage, been guilty of rape, sodomy or bestiality; or

(iii) that in a suit under section 18 of the Hindu Adoptions and Maintenance Act, 1956 (78 of 1956), or in a proceeding under section 125 of the Code of Criminal Procedure, 1973 (2 of 1974) [or under the corresponding section 488 of the Code of Criminal Procedure, 1898 (5 of 1898)], a decree or order, as the case may be, has been passed against the husband awarding maintenance to the wife notwithstanding that she was living apart and that since the passing of such decree or order, cohabitation between the parties has not been resumed for one year or upwards; or

(iv) that her marriage (whether consummated or not) was solemnised before she attained the age of fifteen years and she has repudiated the marriage after attaining that age but before attaining the age of eighteen years.

Explanation. --This clause applies whether the marriage was solemnised before or after the commencement of the Marriage Laws (Amendment) Act, 1976 (68 of 1976).

STATE AMENDMENT

Uttar Pradesh.-- In its application to Hindus domiciled in Uttar Pradesh and also when either party to the marriage was not at the time of marriage a Hindu domiciled in Uttar Pradesh, in section 13--

(i) in sub-section (1), after clause (i) insert (and shall be deemed always to have been inserted) the following

"(1-a) has persistently or repeatedly treated the petitioner with such cruelty as to cause a reasonable apprehension in the mind of the petitioner that it will be harmful or injurious for the petitioner to live with the other party; or", and

(ii) for clause (viii) (since repealed) substituted and deem always to have been so substituted for following.

"(viii) has not resumed cohabitation after the passing of a decree for judicial separation against that party and--

(a) a period of two years has elapsed since the passing of such decree, or

(b) the case is one of exceptional hardship to the petitioner or of exceptional depravity on the part of other party; or"."

12. From perusal of above quoted Section 13 of Act,1955, it is explicit that cruelty and desertion are grounds recognised in law for granting a decree of divorce. While cruelty as a ground of divorce is duly provided for in Section 13 (1) (i-a) of Act, 1955, desertion as a ground of divorce is duly provided for in Section 13 (1) (i-b) of Act, 1955. Under scheme of Act, 1955, grounds of divorce mentioned in Section 13 are independent grounds. Fulfilment of one of the grounds mentioned in Section 13 of Act, 1955 by itself is sufficient to grant divorce. It may also be noted that cruelty and desertion are independent grounds of divorce and have to be proved independently by direct evidence. They are not inter-dependant. However, one important factor distinguishing the aforesaid grounds of divorce is that while there is no pre-requisite for pleading cruelty but in case a plea of desertion is pleaded then a period of two years from date of desertion must have elapsed prior to the date of institution of suit by plaintiff. Period subsequent to institution of suit cannot be taken into consideration for determining desertion on the part of respondent in a suit for divorce.

13. The term 'cruelty' has not been defined in the Act of 1956 and therefore, same has been subject matter of debate for long. Different Courts in India have tried to explain meaning of term 'cruelty' and also crystalize the actions which can constitute cruelty. In doing so varied aspects of human nature in the changing vicissitudes of time have been taken into consideration.

14. A Division Bench of this Court in ***Smt. Sarita Devi Vs. Sri Ashok Kumar Singh reported in 2018 (3) AWC 2328*** has considered the concept of 'cruelty' in detail by referring to the meaning assigned to the term in different dictionaries and text. Following has been observed in paragraphs 16, 17, 18 and 19:-

"16. In Samar Ghosh vs. Jaya Ghosh (2007) 4 SCC 511 Court considered the concept of cruelty and referring to Oxford Dictionary defines 'cruelty' as 'the quality of being cruel; disposition of inflicting suffering; delight in or indifference to another's pain; mercilessness; hard-heartedness'.

17. In Black's Law Dictionary, 8th Edition, 2004, term "mental cruelty" has been defined as, "a ground for divorce, one spouse's course of conduct (not involving actual violence) that creates such anguish that it endangers the life, physical health, or mental health of the other spouse."

18. The concept of cruelty has been summarized in Halsbury's Laws of England, Vol.13, 4th Edition Para 1269, as under:

"The general rule in all cases of cruelty is that the entire matrimonial relationship must be considered, and that rule is of special value when the cruelty consists not of violent acts but of injurious reproaches, complaints, accusations or taunts. In cases where no violence is averred, it is undesirable to consider judicial pronouncements with a view to creating certain categories of acts or conduct as having or lacking the nature or quality which renders them capable or incapable in all circumstances of amounting to cruelty; for it is the effect of the conduct rather than its nature which is of paramount importance in assessing a complaint of cruelty. Whether one spouse has been guilty of cruelty to the other is essentially a question of fact and previously decided cases have little, if any, value. The court should bear in mind the physical and mental condition of the parties as well as their social status, and should consider the impact of the personality and conduct of one spouse on the mind of the other, weighing all incidents and quarrels between the spouses from that point of view; further, the conduct alleged must be examined in the light of the complainant's capacity for endurance and the extent to which that capacity is known to the other spouse. Malevolent intention is not essential to cruelty but it is an important element where it exits."

19. In 24 American Jurisprudence 2d, the term "mental cruelty" has been defined as under:

"Mental Cruelty as a course of unprovoked conduct toward one's spouse which causes embarrassment, humiliation, and anguish so as to render the spouse's life miserable and unendurable. Plaintiff must show a course of conduct on the part of Defendant which so endangers the physical or mental health of Plaintiff as to render continued cohabitation unsafe or improper, although Plaintiff need not establish actual instances of physical abuse. "

15. In ***Vishwanath Sitram Agarwal Vs. San. Sarle Vishwanath Agarwal, 2012 (7) SCC 288***, Supreme Court considered various earlier decisions with regard to meaning of term 'cruelty'. Their Lordships observed as follows in paragraphs 22 to 32:-

22.The expression "cruelty" has an inseparable nexus with human conduct or human behaviour. It is always dependent upon the social strata or the milieu to which the parties belong, their ways of life, relationship, temperaments and emotions that have been conditioned by their social status.

23. In Sirajmohmedkhan Janmohamadkhan v. Hafizunnisa Yasinkhan [(1981) 4 SCC 250 : 1981 SCC (Cri) 829] , a two-Judge Bench approved the concept of legal cruelty as expounded inPancho v. Ram Prasad [AIR 1956 All 41] wherein it was stated thus: (Pancho case [AIR 1956 All 41] , AIR p. 43, para 3)

"3. ... Conception of legal cruelty undergoes changes according to the changes and advancement of social concept and standards of living. With the advancement of our social conceptions, this feature has obtained legislative recognition that a second marriage is a sufficient ground for separate residence and separate maintenance. Moreover, to establish legal cruelty, it is not necessary that physical violence should be used.

Continuous ill-treatment, cessation of marital intercourse, studied neglect, indifference on the part of the husband, and an assertion on the part of the husband that the wife is unchaste are all factors which may undermine the health of a wife."

It is apt to note here that the said observations were made while dealing with the Hindu Married Women's Right to Separate Residence and Maintenance Act (19 of 1946). This Court, after reproducing the passage, has observed that the learned Judge has put his finger on the correct aspect and object of mental cruelty.

24. In Shobha Rani v. Madhukar Reddi [(1988) 1 SCC 105 : 1988 SCC (Cri) 60] , while dealing with "cruelty" under Section 13(1)(i-a) of the Act, this Court observed that the said provision does not define "cruelty" and the same could not be defined. "Cruelty" may be mental or physical, intentional or unintentional. If it is physical, the court will have no problem to determine it. It is a question of fact and degree. If it is mental, the problem presents difficulty. Thereafter, the Bench proceeded to state as follows: (SCC p. 108, para 4)

"4. ... First, the enquiry must begin as to the nature of the cruel treatment. Second, the impact of such treatment on the mind of the spouse. Whether it caused reasonable apprehension that it would be harmful or injurious to live with the other. Ultimately, it is a matter of inference to be drawn by taking into account the nature of the conduct and its effect on the complaining spouse. There may, however, be cases where the conduct complained of itself is bad enough and per se unlawful or illegal. Then the impact or the injurious effect on the other spouse need not be enquired into or considered. In such cases, the cruelty will be established if the conduct itself is proved or admitted."

25.After so stating, this Court observed inShobha Rani case[(1988) 1 SCC 105 : 1988 SCC (Cri) 60] about the marked change in life in modern times and the sea change in matrimonial duties and responsibilities. It has been observed that: (SCC p. 108, para 5)

"5. ... when a spouse makes a complaint about the treatment of cruelty

by the partner in life or relations, the court should not search for standard in life. A set of facts stigmatised as cruelty in one case may not be so in another case. The cruelty alleged may largely depend upon the type of life the parties are accustomed to or their economic and social conditions. It may also depend upon their culture and human values to which they attach importance."

26. Their Lordships in Shobha Rani case [(1988) 1 SCC 105 : 1988 SCC (Cri) 60] referred to the observations made inSheldon v.Sheldon [1966 P 62 : (1966) 2 WLR 993 : (1966) 2 All ER 257 (CA)] wherein Lord Denning stated, "the categories of cruelty are not closed". Thereafter, the Bench proceeded to state thus: (Shobha Rani case [(1988) 1 SCC 105 : 1988 SCC (Cri) 60] , SCC p. 109, paras 5-6)

"5. ... Each case may be different. We deal with the conduct of human beings who are not generally similar. Among the human beings there is no limit to the kind of conduct which may constitute cruelty. New type of cruelty may crop up in any case depending upon the human behaviour, capacity or incapability to tolerate the conduct complained of. Such is the wonderful (sic) realm of cruelty.

6. These preliminary observations are intended to emphasise that the court in matrimonial cases is not concerned with ideals in family life. The court has only to understand the spouses concerned as nature made them, and consider their particular grievance. As Lord Reid observed in Gollinsv. Gollins [1964 AC 644 : (1963) 3 WLR 176 : (1963) 2 All ER 966 (HL)] : (All ER p. 972 G-H)

7. "... In matrimonial affairs we are not dealing with objective standards, it is not a matrimonial offence to fall below the standard of the reasonable man (or the reasonable woman). We are dealing with this man or this woman.'"

8. (emphasis in original)

9. 27. In V. Bhagat v. D. Bhagat [(1994) 1 SCC 337] , a two-Judge Bench referred to the amendment that had taken place in Sections 10 and 13(1)(i-a) after the (Hindu) Marriage Laws (Amendment) Act, 1976 and proceeded to hold that the earlier requirement that such cruelty has caused a reasonable apprehension in the mind of a spouse that it would be harmful or injurious for him/her to live with the other one is no longer the requirement. Thereafter, this Court proceeded to deal with what constitutes mental cruelty as contemplated in Section 13(1)(i-a) and observed that mental cruelty in the said provision can broadly be defined as that conduct which inflicts upon the other party such mental pain and suffering as would make it not possible for that party to live with the other. To put it differently, mental cruelty must be of such a nature that the parties cannot reasonably be expected to live together. The situation must be such that the wronged party cannot reasonably be asked to put up with such conduct and continue to live with the other party. It was further observed, while arriving at such conclusion, that regard must be had to the social status, educational level of the parties, the society they move in, the possibility or otherwise of the parties ever living together in case they are already living apart and all other relevant facts and circumstances. What is cruelty in one case may not amount to cruelty in another case and it has to be determined in each case keeping in view the facts and circumstances of that case. That apart, the accusations and allegations have to be scrutinised in the context in which they are

made. Be it noted, in the said case, this Court quoted extensively from the allegations made in the written statement and the evidence brought on record and came to hold that the said allegations and counter-allegations were not in the realm of ordinary plea of defence and did amount to mental cruelty.

28. In Parveen Mehta v. Inderjit Mehta [(2002) 5 SCC 706 : AIR 2002 SC 2582] , it has been held that mental cruelty is a state of mind and feeling with one of the spouses due to behaviour or behavioural pattern by the other. Mental cruelty cannot be established by direct evidence and it is necessarily a matter of inference to be drawn from the facts and circumstances of the case. "A feeling of anguish, disappointment and frustration in one spouse caused by the conduct of the other can only be appreciated on assessing the attending facts and circumstances in which the two partners of matrimonial life have been living." (Parveen Mehta case[(2002) 5 SCC 706 : AIR 2002 SC 2582] , SCC p. 716, para 21) The facts and circumstances are to be assessed emerging from the evidence on record and thereafter, a fair inference has to be drawn whether the petitioner in the divorce petition has been subjected to mental cruelty due to the conduct of the other.

29. In Vijaykumar Ramchandra Bhate v. Neela Vijaykumar Bhate [(2003) 6 SCC 334 : AIR 2003 SC 2462] , it has been opined that a conscious and deliberate statement levelled with pungency and that too placed on record, through the written statement, cannot be so lightly ignored or brushed aside.

30. In A. Jayachandra v. Aneel Kaur [(2005) 2 SCC 22] , it has been ruled that the question of mental cruelty has to be considered in the light of the norms of marital ties of the particular society to which the parties belong, their social values, status and environment in which they live. If from the conduct of the spouse, it is established and/or an inference can legitimately be drawn that the treatment of the spouse is such that it causes an apprehension in the mind of the other spouse about his or her mental welfare, then the same would amount to cruelty. While dealing with the concept of mental cruelty, enquiry must begin as to the nature of cruel treatment and the impact of such treatment on the mind of the spouse. It has to be seen whether the conduct is such that no reasonable person would tolerate it.

31. In Vinita Saxena v. Pankaj Pandit [(2006) 3 SCC 778] , it has been ruled that as to what constitutes mental cruelty for the purposes of Section 13(1)(i-a) will not depend upon the numerical count of such incident or only on the continuous course of such conduct but one has to really go by the intensity, gravity and stigmatic impact of it when meted out even once and the deleterious effect of it on the mental attitude necessary for maintaining a conducive matrimonial home.

32. In Samar Ghosh v. Jaya Ghosh [(2007) 4 SCC 511] , this Court, after surveying the previous decisions and referring to the concept of cruelty, which includes mental cruelty, in English, American, Canadian and Australian cases, has observed that: (SCC pp. 545-46, paras 99-100)

"99. ... The human mind is extremely complex and human behaviour is equally complicated. Similarly human ingenuity has no bound, therefore, to assimilate the entire human behaviour in one definition is almost impossible. What is cruelty in one case may not amount to cruelty in the other case. The concept of

cruelty differs from person to person depending upon his upbringing, level of sensitivity, educational, family and cultural background, financial position, social status, customs, traditions, religious beliefs, human values and their value system.

100. Apart from this, the concept of mental cruelty cannot remain static; it is bound to change with the passage of time, impact of modern culture through print and electronic media and value system, etc. etc. What may be mental cruelty now may not remain a mental cruelty after a passage of time or vice versa. There can never be any straitjacket formula or fixed parameters for determining mental cruelty in matrimonial matters. The prudent and appropriate way to adjudicate the case would be to evaluate it on its peculiar facts and circumstances…."

16. In **Ravi Kumar Vs. Julmi Devi 2010 (4) SCC 476**, following was observed in paragraphs 19 to 22:-

19.It may be true that there is no definition of cruelty under the said Act. Actually such a definition is not possible. In matrimonial relationship, cruelty would obviously mean absence of mutual respect and understanding between the spouses which embitters the relationship and often leads to various outbursts of behaviour which can be termed as cruelty. Sometime cruelty in a matrimonial relationship may take the form of violence, sometime it may take a different form. At times, it may be just an attitude or an approach. Silence in some situations may amount to cruelty.

20. Therefore, cruelty in matrimonial behaviour defies any definition and its categories can never be closed. Whether the husband is cruel to his wife or the wife is cruel to her husband has to be ascertained and judged by taking into account the entire facts and circumstances of the given case and not by any predetermined rigid formula. Cruelty in matrimonial cases can be of infinite variety--it may be subtle or even brutal and may be by gestures and words. That possibly explains why Lord Denning in Sheldon v.Sheldon [(1966) 2 WLR 993 : (1966) 2 All ER 257 (CA)] held that categories of cruelty in matrimonial cases are never closed.

21.This Court is reminded of what was said by Lord Reid inGollins v. Gollins[1964 AC 644 : (1963) 3 WLR 176 : (1963) 2 All ER 966 (HL)] about judging cruelty in matrimonial cases. The pertinent observations are: (AC p. 660)

"... In matrimonial cases we are not concerned with the reasonable man as we are in cases of negligence. We are dealing with this man and this woman and the fewer a priori assumptions we make about them the better. In cruelty cases one can hardly ever even start with a presumption that the parties are reasonable people, because it is hard to imagine any cruelty case ever arising if both the spouses think and behave as reasonable people."

The aforesaid passage was quoted with approval by this Court inN.G. Dastane (Dr.) v. S. Dastane [(1975) 2 SCC 326] .

22. About the changing perception of cruelty in matrimonial cases, this Court observed in Shobha Rani v. Madhukar Reddi[(1988) 1 SCC 105 : 1988 SCC (Cri) 60 : AIR 1988 SC 121] at AIR p. 123, para 5 of the report: (SCC p. 108, para 5)

"5. It will be necessary to bear in mind that there has been [a] marked change in the life around us. In

matrimonial duties and responsibilities in particular, we find a sea change. They are of varying degrees from house to house or person to person. Therefore, when a spouse makes complaint about the treatment of cruelty by the partner in life or relations, the court should not search for standard in life. A set of facts stigmatised as cruelty in one case may not be so in another case. The cruelty alleged may largely depend upon the type of life the parties are accustomed to or their economic and social conditions. It may also depend upon their culture and human values to which they attach importance. We, the Judges and lawyers, therefore, should not import our own notions of life. We may not go in parallel with them. There may be a generation gap between us and the parties."

17. Reference in this regard may be made to the judgement in **K. Srinivas Rao Vs. D. A. Deepa, 2013 (5) SCC 226** wherein following has been observed in paragraphs 10 and16:

"10. Under Section 13(1)(i-a) of the Hindu Marriage Act, 1955, a marriage can be dissolved by a decree of divorce on a petition presented either by the husband or the wife on the ground that the other party has, after solemnisation of the marriage, treated the petitioner with cruelty. In a series of judgments this Court has repeatedly stated the meaning and outlined the scope of the term "cruelty". Cruelty is evident where one spouse has so treated the other and manifested such feelings towards her or him as to cause in her or his mind reasonable apprehension that it will be harmful or injurious to live with the other spouse. Cruelty may be physical or mental.

16.Thus, to the instances illustrative of mental cruelty noted inSamar Ghosh[(2007) 4 SCC 511] , we could add a few more. Making unfounded indecent defamatory allegations against the spouse or his or her relatives in the pleadings, filing of complaints or issuing notices or news items which may have adverse impact on the business prospect or the job of the spouse and filing repeated false complaints and cases in the court against the spouse would, in the facts of a case, amount to causing mental cruelty to the other spouse."

18. Court in **N.G. Dastane V. S. Dastane (1975) 2 SCC 326** considered the concept of 'mental cruelty' and observed as follows:

"The enquiry therefore has to be whether the conduct charges as cruelty is of such a character as to cause in the mind of the petitioner a reasonable apprehension that it will be harmful or injurious for him to live with the respondent. "

19. With regard to 'mental cruelty,' reference be made to the judgement in **A. Jaya Chandra Vs. Aneel Kaur, 2005 (2) SCC 22**. The aforesaid judgement has also been considered by a division bench in **Smt. Sarita Devi (supra)** and following has been observed in paragraph-26 of the judgement:

"26. In A. Jayachandra v. Aneel Kaur, (2005) 2 SCC 22, Court observed that conduct of spouse, if established, an inference can legitimately be drawn that treatment of spouse is such that it causes an apprehension in the mind of other spouse, about his or her mental welfare then this conduct amounts to cruelty. Court observed that when a petition for divorce on the ground of cruelty is considered, Court must bear in mind that the problems before it are those of human beings and psychological changes in a

spouse's conduct have to be borne in mind before disposing of petition for divorce. Before a conduct can be called cruelty, it must touch a certain pitch of severity. Mere trivial irritations, quarrels between spouses, which happen in day-to-day married life, may also not amount to cruelty."

20. In **K. Srinivas Rao Vs. D.A. Deepa (2013) 5 SCC 226**, while dealing with the instances of 'mental cruelty,' Court opined that to the illustrations given in the case of **Samar Ghosh vs. Jaya Ghosh (2007) 4 SCC 511**, certain other illustrations could be added. We think it seemly to reproduce the observations:

"Making unfounded indecent defamatory allegations against the spouse or his or her relatives in the pleadings, filing of complaints or issuing notices or news items which may have adverse impact on the business prospect or the job of the spouse and filing repeated false complaints and cases in the court against the spouse would, in the facts of a case, amount to causing mental cruelty to the other spouse."

21. With the aid of meaning of the term "physical cruelty" and "mental cruelty" this Court has now to examine the issue involved in present appeal: Whether plaintiff-appellant was able to establish commission of 'cruelty' by Defendant-Respondent before Court below and findings to the contrary recorded by Court below are illegal, perverse and erroneous or not.

22. When plaint of divorce suit is examined to ascertain as to how allegations regarding commission of cruelty by respondent were pleased, this Court finds that same have been pleased in paragraphs 6 and 7 of plaint. The same are reproduced herein under for ready reference:

6. यह कि वादी की पत्नी प्रतिवादिनी वादी के मकान में ही रह रही है। और विगत तीन बर्षो से असका व्यवहार काफी खराब हो गया है और वह प्रतिवादिनी वादी के साथ बेवजह बगैर सिर पैर की बातों को लेकर वादी के साथ लडती झगडती है और विग्त तीन वर्षों से घर की शान्ति भंग कर दी है तथा अपने क्रूरता पूर्ण आचरण से वादी को मानसिक रूप से उत्पीडित करती रही है तथा साथ में पत्नी धर्म दायित्वों के बिपरीत अपने आचरण व व्यवहार द्वारा वादी की सुख शान्ति को समाप्त कर दिया है और जब कभी वादी उसे समझाने का प्रयास करता है तो प्रतिवादिनी अपने क्रूरता पूर्ण व्यवहार व आचरण से प्रतिक्षण वादी को उत्पीडित करती आ रही है। जिस कारण अब वादी प्रतिवादिनी के साथ एक साथ रहना सम्भव नहीं है।

7. यह कि वादी के मकान में ही प्रतिवादिनी रहती है और विग्त तीन वर्षों से ज्यादा से पत्नी धर्म के दायित्वों का निर्वहन नहीं करती है फिर भी वादी अपने पतिधर्म के दायित्वों को निर्वहन करता आ रहा है और उसे किसी प्रकार की तकलीफ नहीं देता है इसके बावजूद प्रतिवादिनी वादी को हर तरह से असत्य कथनों द्वारा समाज में अपमानित करती आ रही है कि वादी उसका भरण पोषण नहीं करता है उसको मारता पीटता है और खाना पानी नहीं देता है।

That the wife of plaintiff herein called as defendant is staying in the house of plaintiff only and her behaviour has worsened since last three years as defendant picks up quarrel and fights with plaintiff without any rhyme of reason thereby disrupting the peace and tranquillity of the house since last three years. She had been causing mental harassment to the plaintiff by her cruel behaviour and contrary to her duties as a wife, she has destroyed the peace and tranquility of plaintiff by her conduct and behaviour. Whenever plaintiff tries to

reason with her, she causes harassment to the plaintiff by her cruel and traumatic behaviour due to which it has become impossible for plaintiff to cohabit with the defendant.

That the defendant resides in the house of plaintiff only and has failed to discharge obligations of a wife while on the other hand plaintiff continues to discharge dutied of a husband and is not a source of any discomfort to her. Despite this, defendant continues to insult the plaintiff in society by cooking up by all kinds of false narratives like plaintiff refuses to provide maintenance to her, beats her and refuses to provide food as well as nourishment to her.
(English translation by Court)

23. When allegations made in paragraphs 6 and 7 of plaint are examined, it is apparent that they do not spell out specific instances of 'cruelty' but only allegations of 'cruelty'. We may point out that a single instance in isolation is not sufficient for dissolution of marriage on the ground of 'cruelty' as held by Apex Court in **Neelam Kumar Vs. Dayarani, 2010 (13) SCC 298.**

24. Law on the subject now stands crystallized. Plaintiff in order to succeed in a suit for divorce on the ground of commission of 'cruelty' by respondent must plead specific instances of 'cruelty' or make such allegations of 'cruelty' which if considered cumulatively, lead to a reasonable apprehension in the mind of other that it would be harmful or injurious to reside with other spouse. Therefore, what has to be examined by Court in the present case is ''whether averments made in paragraphs 6 and 7 of plaint satisfy the aforesaid test''.

25. Upon examination of averments made in paragraphs 6 and 7 of plaint, it cannot be said that allegations of 'cruelty' alleged by appellant when considered cumulatively lead to the inescapable conclusion that they cannot cause reasonable apprehension in mind of appellant that it would be harmful or injurious to reside with respondent.

26. From perusal of plaint of divorce suit filed by appellant it is apparent that divorce was instituted vide plaint dated 21.03.2009. Therefore, as per mandate of Section 13 (1) (i-b) of Act, 1955, appellant was required to plead that respondent has deserted plaintiff for a continuous period of not less than two years immediately preceding the presentation of the petition. What has been pleaded in paragraph 8 of the plaint is to the following effect :

8. यह कि जब वादी ने दिनांक 10–11–08 को प्रतिवादिनी को समझाया कि वह उसे मानसिक व सामाजिक रूप से अपने गलत आचरण व व्यवहार से अपमानित व उत्पीडित न करें। उसने वादी के विरूद्ध मिथ्या आरोप लगाते हुए धमकाया कि अब वह उसके साथ नहीं रहेगी और उससे भरण पोषण लेकर अलग रहेगी और अपना स्वतन्त्र जीवन व्यतीत करेगी और पत्पश्चात उसने असत्य कथनों के आधार पर अर्न्तगत धारा 125 दं0 प्र0 संहिता के तहत तीनों वालिग बच्चों के फर्जी नाम व नाबालिग उम्र दर्शाकर इस न्यायालय में भरन पोषण दाखिल किया है।

That when plaintiff counselled her to not harass him mentally and stop insulting him in front of society by her wrong conduct and behaviout, she threatened him while levelling false and mythical charges that she shall no longer cohabit with him and shall reside separately and live an independent life after taking maintenance from him. Thereafter she filed an application under Section 125 Cr.P.C. before this Court for maintenance mentioning forged names of all three kids who have attained majority showing them as minors and on the basis of false statements.
(English Translation by Court)

27. Plain reading of paragraph 8 of plaint shows that appellant alleged that respondent has deserted appellant on

10.11.2008 from when Appellant has started residing separately from respondent. The suit has been instituted vide plaint dated 21.3.2009. Therefore, the pre-requisite for grant of divorce on ground of desertion i.e. expirty of two years from the date of desertion, has to be in existence on the date of institution of suit has not been established by appellant. In view of above, finding recorded by Court below that appellant has failed to establish desertion on part of respondent for a continuous period of two years prior to institution of suit cannot be said to be illegal, perverse or erroneous.

28. In view of discussions made herein above, it cannot be said that findings recorded by Court below that appellant has failed to establish commission of 'cruelty' upon him by respondent and also 'desertion' are illegal, perverse or erroneous. As appellant has failed to prove 'cruelty' and desertion on the part of respondent on the basis of which he prayed for a decree of divorce, Court below has rightly dismissed the suit of appellant. Consequently, this appeal fails and is liable to be dismissed. It is accordingly dismissed. Costs made easy.

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(2020)02ILR A1026

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 04.12.2019

BEFORE
THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.

FAFO No. 73 of 1989

State of U.P. & Anr. ...Appellants
Versus
M/s V.B. Construction Co. Ltd. Bhiwani, Haryana & Ors. ...Respondents

Counsel for the Appellants:
S.C.
Counsel for the Respondents:
Sri P.P. Srivastava, Sri Lalji Sinha, Sri Pankaj Narain

A. Arbitration Act (10 of 1940), S.30 - Judicial Review of arbitral Award - function of Courts to oversee that the arbitrators act within the norms of justice - Once they do so and the award is clear, just and fair, the Courts should give effect to the award and make the parties adhere to and obey the decision of their chosen adjudicator (Para 9)

Held **-** Arbitrator considered each item threadbare and has given his findings - while considering all the claim, the Arbitrator has given cogent reasons – No ground to upturn arbitral award

B. Arbitration and Conciliation Act - Grant of pendente lite interest - pendente lite interest will depend upon several factors such as; phraseology used in the agreement clauses conferring power relating to arbitration, nature of claim and dispute referred to arbitrator, and on what items power to award interest has been taken away and for which period.

Held - Awarding of interest does not warrant any interference, however, interest is on higher side - the interest shall be payable at the rate of 9% and not at 12% as that was not the rate fixed. The appeal is partly allowed. (Para 21)

Appeal Partly allowed (E-5)

List of cases cited :

1. FCI Vs Joginderpal Mohinderpal (1989) 2 SCC 347

2. Steel Authority of India Ltd Vs Gupta Brothers Steel Tubes Ltd. (2009) 10 SCC 63

3. Sumitomo Heavy Industries Ltd Vs Oil & Natural Gas Commission of India (2010) 11 SCC 296

4. Rashtriya Ispat Nigam Ltd. Vs M/s Dewan Chand Ram Saran reported as 2012 (5) SCC 306

5. J.G. Engineers Pvt. Ltd. Vs Union of India & Anr. 2011 (5) SCC 758

6. State of Gujarat & Anr. Vs Nitin Construction Company (Guj HC) First Appeal No.137 of 1992 Dt 22.03.2013

7. State of Gujarat Vs Vijay Mistri Construction & Anr (Guj HC) First Appeal No.3688 of 2012 dt 22.03.2013

8. Oil & Natural Gas Corporation Limited Vs Essar Steel Limited 2000 (4) GLR 3652

9. Arosan Enterprises Limited Vs Union of India & Anr. 1999(9)SCC 449

10. Continental Construction Limited Vs State of UP 2003 (8) SCC 4

11. Assam State Electricity Board Vs Buildworth (P) Ltd., AIR 2017 SC 3336

12. Gujarat Water Supply & Sewerage Board Vs Unique Erectors (Gujarat) (P) Ltd., 1989 (1) SCC 532

13. Irrigation Department, State Of Orissa Vs G.C. Roy, 1992 1 SCC 508

14. Jugal Kishore Prabhatilal Sharma Vs Vijayendra Prabhatilal Sharma AIR 1993 SC 864

15. Smt. Aruna Kumari Vs Government Of Andhra Pradesh AIR 1988 SC 873

16 Rajasthan State Road Transport Corporation Vs Indag Rubber Ltd 2006 (7) SCC 700

17. Bharat Coking Coal Ltd Vs Annapurna Construction reported in 2003 (8) SCC 154

18. State of U.P. and others Vs J.M. Construction Company FAFO No. 714 of 2005 dt 11.4.2019

19. K.Marappan (Dead) Vs Superintending Engineer T.B.P.H.L.C. Circle Anantapur 2019 JX(SC) 391

20 Raveechee & Company Vs Union of India AIR 2018 SC 3109

21 Ambica Constructions Vs Union of India,(2017) 14 SCC 323

22 OIL and Natural Gas Corporation Limited VsBirla Techneftegas Exploration Ltd F.A. No. 3256 of 2001 dt 7.4.2016

(Delivered by Hon'ble Dr. Kaushal Jayendra Thaker, J.)

1. Heard Sri S.K. Mehrotra, learned Standing Counsel for the State. None appeared for the respondents even in the revised call.

2. This appeal, at the behest of the State, has been filed against the judgment and order dated 22.11.1988 passed by Civil Judge, Bijnor in original Suit No. 222 of 1986. The appeal challenges the arbitral award as well as confirmation of the same by the Court below.

3. The parties are referred to as State/ Appellant and Contractor /Respondent.

4. The facts for the purpose of our decision as they are culled out from the record that parties entered into the contract but there were certain disputes regarding certain items and the matter was referred to the Arbitrator who passed the award in favour of the present respondents. Objections were raised by the appellant herein with several contentions that were dealt with by the first Court and rejected the objections and made the award Rule of the Court vide order dated 22.11.1988 which is challenged before this Court. The record was missed and the appellant was directed to reconstruct the same which has been reconstructed. Rest of the documents are filed along with the memo of appeal.'

5. It is submitted that the contracted rate for work was Rs. 8.49 per cubic metre and not Rs. 18 per cubic meter as awarded by the Arbitrator.

6. It is submitted that the diesel was supplied by the Department despite that the Arbitrator has awarded the amount for diesel and though the work was performed at Roorkee and payment was made at Haridwar, the Court below had no jurisdiction to pass orders. The District Bijnor where the Collectorate is situated had no jurisdiction to decide this matter as the contract was entered into at Rorkee. The award was made at Aligarh.

7. The Apex Court in **FCI Versus Joginderpal Mohinderpal, (1989) 2 SCC 347** has held that the objection against an arbitral award can be raised only if it falls within the parameters fixed by the provisions of Section 14, and 33 of the Act, 1940. If the award satisfies that it is based on equity, fair play, principles of natural justice and established practice and procedure then the award should not be interfered. In proceedings of arbitration there must be adherence to justice, equity, law and fair play in action. The proceedings must adhere to the principles of natural justice and must be in consonance with such practice and procedure which will lead to a proper resolution of the dispute and create confidence of the people for whose benefit these processes are resorted to **FCI Versus Joginderpal Mohinderpal (supra)**.

8. Sections 30 and 33 of the Act, 1940 read as follows :

*"**Section 30. Grounds for setting aside award.-** An award shall not be set aside except on one or more of the following grounds, namely:-*

(a) that an arbitrator or umpire has misconducted himself or the proceedings

(b) that an award has been made after the issue of an order by the Court superseding the arbitration or after arbitration proceedings have become invalid under section 35;

(c) that an award has been improperly procured or is other- wise invalid."

*"**33. Arbitration agreement or award to be contested by application.-** Any party to an arbitration agreement or any person claiming under him desiring to challenge the existence or validity of an arbitration agreement or an award or to have the effect of either determined shall apply to the Court and the Court shall decide the question on affidavits: Provided that where the Court deems it just and expedient, it may set down the application for hearing on other evidence also, and it may pass such orders for discovery and particulars as it may do in a suit."*

9. The judicial review of an award has been circumscribed by Apex Court in **FCI Versus Joginderpal Mohinderpal (supra)** wherein it has been held that arbitration as a mode for settlement of disputes between the parties, has a tradition in India. It has a social purpose to be fulfilled today,. It has a great urgency today when there has been an explosion of litigation in the courts of law established by the sovereign power . It is, therefore, the function of Courts of Law to oversee that the arbitrators act within the norms of justice. Once they do so and the award is clear, just and fair, the Courts should, as far as possible, give effect to the award of the parties and make the parties compel to adhere to and obey the decision of their chosen

adjudicator. It is in this perspective that one should view the scope and limit of correction by the court of an award made by the arbitrator.

10. In backdrop of this it will have to be decided as to whether can it be said that the decision of arbitrator upheld by the Court below is bad and was wrongly made the Rule of Court as per Arbitration Act, 1940.

11. While perusing the award, it is found that the arbitrator considered each item threadbare and has given his findings. Can it be said that arbitral award does not fulfill the contours of principles which are required to be followed by an arbitrator under the Act, 1940.

12. While going through the award, it is clear that while considering all the claim, the Arbitrator has given cogent reasons. The cement was not given in time. The demand of the claimant has been considered on the economical as well as that which can be granted as the State has objected to the grant of any amount under the provisions of Arbitration Act, 1940. The objection taken by the State were only general and no specific objection item wise was taken and nor was proved by evidence that contractor was not entitled to the damages and interest. They had filed their objection vide Application NO. 654 of 1998.

Judgments on Arbitration Act, 1940

13. **(I) Steel Authority of India Ltd Vs. Gupta Brothers Steel Tubes Ltd. (2009) 10 SCC 63 .**

"..... The courts below have currently held that the arbitrator has gone into the issues of facts thoroughly, applied his mind to the pleadings, evidence before him and the terms of the contract and then passed duly considered award and no ground for setting aside the award within the four corners of Section 30 has been made out..... In what we have already discussed above, the view of the arbitrator in this regard is a possible view. Consequently, appeal has no merit and costs."

(ii) **Sumitomo Heavy Industries Ltd Vs. Oil & Natural Gas Commission of India (2010) 11 SCC 296**

".... award was not only a plausible one but a well reasoned award. In the circumstance the interference by the High Court was not called for. In that view of the matter we allow this appeal and set aside the judgment of the learned Single Judge, as well as that of the Division Bench.…"

(ii) **Rashtriya Ispat Nigam Ltd. Vs. M/s Dewan Chand Ram Saran reported as 2012 (5) SCC 306**

".... There was no reason for the High Court to interfere in the view taken by the arbitrator which was based, in any case on a possible interpretation of clause 9.3. The learned single Judge as well as the Division Bench clearly erred in interfering with the award rendered by the arbitrator. Both those judgments will, therefore, have to be set-aside. Accordingly, the appeal is allowed and the impugned judgments of the learned Single Judge as well as of the Division Bench, are hereby set aside.…"

(iii) **Reported as 2011 (5) SCC 758, in the case of J.G. Engineers Pvt. Ltd. Vs./ Union of India & Anr.**

(iv) First Appeal No.137 of 1992, in the case of **State of Gujarat & Anr. Vs. Nitin Construction Company**, judgment dated 22.03.2013 of the Hon'ble High Court of Gujarat.

(v) First Appeal No.3688 of 2012, in the case of State of **Gujarat Vs. Vijay Mistri Construction & Anr.**, judgment dated 22.03.2013 of the Hon'ble High Court of Gujarat.

(vi) Reported as 2000 (4) GLR 3652 in the case of **Oil & Natural Gas Corporation Limited V/s. Essar Steel Limited**, (Paragraph-8).

(vii) Reported in 1999(9)SCC 449, **Arosan Enterprises Limited V/s. Union of India & Anr.**

(viii) Reported in 2003 (8) SCC 4, **Continental Construction Limited V/s. State of U.P., Assam State Electricity Board V. Buildworth (P) Ltd.,** AIR 2017**,Gujarat Water Supply & Sewerage Board V. Unique Erectors (Gujarat) (P) Ltd.,** 1989 (1) SCC 532**: Irrigation Department, State Of Orissa V. G.C. Roy,** 1992 1 SCC 508 **: Jugal Kishore Prabhatilal Sharma V. Vijayendra Prabhatilal Sharma,** AIR 1993 SC 864 **and Smt. Aruna Kumari V. Government Of Andhra Pradesh**, AIR 1988 SC 873.

(ix) **Rajasthan State Road Transport Corporation Vs. Indag Rubber Ltd, 2006 (7) SCC 700** wherein it has been held that the award can be set aside on the ground of misconduct if relevant documents are not considered by the Arbitrator.

14. Therefore in light of decisions of the Apex Court and the discussion herein above, the scope of interference with the findings of Arbitrator and confirmed by the District Judge, on the basis of principles would not permit to interfere with the findings, as settled in view of decision in case of **Bharat Coking Coal Ltd Vs. Annapurna Construction reported in 2003 (8) SCC 154.**

15. As far as ground of jurisdiction is concerned, the learned Judge has given elaborate reasons. I do not think that there is any perversity in the same. Hence, the said submission cannot be granted to upturn the arbitral award.

16. As far as the rate is concerned, for that also reasons are assigned by the learned Judge. Hence, in absence of the parameter fixed for interference by this Court in appeal, I do not find any reason to interfere.

17. Learned Standing Counsel has submitted that in the alternative, if the award is not set aside, the interest awarded by the Tribunal should be interfered with as has been done by this Court in **First Appeal From Order No. 714 of 2005 (State of U.P. and others Vs. J.M. Construction Company)** decided on 11.4.2019.

18. Recently, the Apex Court in **K.Marappan (Dead) Versus Superintending Engineer T.B.P.H.L.C. Circle Anantapur, 2019 JX(SC) 391** and in **Raveechee and Company Versus Union of India, AIR 2018 SC 3109** has interpreted the role of the Courts while hearing matters under the arbitration Act .The judgments go to show that *pendente lite* interest will depend upon several factors such as ; phraseology used in the agreement clauses conferring power relating to arbitration, nature of claim and

dispute referred to arbitrator, and on what items power to award interest has been taken away and for which period. The Court observed:

"34. Thus our answer to the reference is that if contract expressly bars award of interest pendente lite, the same cannot be awarded by the Arbitrator. And that the bar to award interest on delayed payment by itself will not be readily inferred as express bar to award interest pendente lite by the Arbitral Tribunal, as ouster of power of the arbitrator has to be considered on various relevant aspects referred to in the decisions of this Court , it would be for the Division Bench to consider the case on merits."

19. Further, this Court considered an identical clause in the contract in the case of **Ambica Constructions v. Union of India,(2017) 14 SCC 323**, wherein it observed that the Clause of the GCC did not bar the arbitrator from awarding interest pendente lite and affirmed the award passed by the arbitrator. The three Judge Bench of this Court held that the contention raised by the Union of India based on the Clause of the GCC that the arbitrator could not award interest pendente lite was not a valid contention and the arbitrator was completely justified in granting interest pendente lite. Relying on the three Judge Bench judgment in Union of India v. Ambica Construction (supra) and in Irrigation Deptt., State of Orissa (supra), this Court held that the bar to award interest on the amounts payable under the contract would not be sufficient to deny the payment of interest pendente lite.

20. The interest aspect is looked into by the undersigned in **First Appeal No. 3256 of 2001 (OIL and Natural Gas Corporation Limited Versus Birla Techneftegas Exploration Limited decided on 7.4.2016** by the High Court of Gujarat wherein the following observations are relevant and are extracted herein below:-

".....28. Therefore in light of decisions of the Apex Court and the discussion hereinabove, the scope of interference with the findings of Arbitrators and confirmed by the District Judge, on the basis of principles, we are not inclined to interfere with the findings, as settled in view of decision in case of Bharat Coking Coal Ltd Vs. Annapurna Construction reported in 2003 (8) SCC 154.

29. The award so far as interest is concerned, reads as follows:

"With regard to contention (a) above, it is contended by the respondent that increase in HSD is not by operation of law but on account of the administrative orders and, therefore, the claim is not maintainable under Article 23.1 which deals only with variation in operating costs on account of change in or enactment of law in India or interpretation of existing law in India after the date of opening of price bid. To examine this contention it is essential to refer to the provisions of Essential Commodities Act, 1955. Section 2 of this Act in subsection (a) defines "Essential Commodity". In sub clause (viii) of clause (a) of section 2, petroleum and petroleum products have also been included as "Essential Commodities Act, Central Government has power to regulate and control the prices at which an essential commodity may be bought or sold. Therefore, increase in prices of HSD being a petroleum product is pursuant to the exercise of powers given

to the Central Government under Section 3 of the Essential Commodities Act and is therefore, on account of a change in law."

The Tribunal has relied on the decisions of the Privy Counsel and Apex Court and also relied upon the affidavit of appellant filed before the Tribunal before the Award passed.

The awarding of interest cannot be said to be in any manner, warranting any interference, however, the factum of interest, in our view may be considered, which in our view is on higher side looking to prevalent practice at the relevant time. The quantum of interest, if reduced to 9% from 15%, the same would meet with ends of justice. As a result thereof, we modified the same and factum of interest is ordered to be reduced from 15% to 9%. The rest of the award is not interfered in any manner."

21. Hence, the interest shall be payable at the rate of 9% and not at 12% as that was not the rate fixed. The appeal is partly allowed. The arbitral award and the order of the Court below shall stand modified to the aforesaid extent.

22. Interim relief granted by this Court on 8.12.1989 shall stand vacated forthwith. The amounts if yet not deposited, the same be deposited by recalculating the appellants as expeditiously as possible with the interest accrued not later than 12 weeks from today and, if the amount has already been deposited, the respondent shall refund the amount to the State namely 3% of the award made within three months from today failing which the State shall be at liberty to take action as per the provisions of law as they have failed to appear when the matter is being taken up.

23. This Court is thankful to Sri S.K. Mehrotra, learned Standing Counsel appearing for the State for restructuring the matter and ably assisting the Court. However, no earlier orders has been placed on record of this Court.

(2020)02ILR A1032

APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 05.02.2020

BEFORE

THE HON'BLE MANISH KUMAR, J.

FAFO No. 847 of 2006
with
FAFO No. 256 of 2007
with
FAFO Defective No. 678 of 2008

United India Insurance Company Ltd.
...Appellant
Versus
Smt. Shashi Prabha & Ors....Respondents

Counsel for the Appellant:
Jitendra Narain Misra

Counsel for the Respondents:
J.K. Shukla

A Civil Law-Motor Vehicles Act (59 of 1988) - Section 149 (2) - Fitness Certificate as defence - In the instant case there was no fitness certificate for plying the offending vehicle - *Held* - Requirement of fitness certificate of vehicle is not available as a defence u/s 149(2) to the Insurance Company to escape the liability from payment of compensation - Further if the vehicle is used for private service and not for public vehicle, then fitness certificate is not required (Para 40, 42)

B. Civil Law-Motor Vehicles Act (59 of 1988) - Ss 166, 168 - Future Prospect -

Deceased self-employed - aged about 43 years (between the age of 40 to 50 years) - *Held* - an addition of 25% of the income (Para 46)

C. Civil Law-Motor Vehicles Act, 1988 (59 of 1988) - Ss 166, 168 - Compensation - Selection of Multiplier - deceased aged about 43 years - Held - Operative multiplier is 14 for the age group of 41 to 45 years (Para 44)

D. Civil Law-Motor Vehicles Act (59 of 1988) - Ss 166, 168 - Reasonable figures on conventional heads, namely loss of estate, loss of consortium and funeral expenses should be Rs. 15,000/-, Rs. 40,000/- and Rs. 15,000/- respectively (Para 46)

E. Civil Law-Motor Vehicles Act (59 of 1988) , S.166,168 - Compensation - Enhancement - No direct proof of income- Accident took place in year 2004 - deceased having own shop of Urea fertilizer - *Held* - as per the evidence adduced Tribunal rightly assessed income of the deceased as Rs. 6,000/- per month against the claimed income of Rs. 8,000/- per month (Para 27)

Appeal Partly allowed (E-5)

List of cases cited :

1. Sarla Verma (Smt) & ors Vs Delhi Transport Corporation & Anr (2009) 6 SCC 121

2. National Insurance Company Vs Prannay Sethi (2017)16 SCC 680

3. Chameli Devi & Ors Vs Jivrail Mian & Ors (2019) (4) TAC 724 (SC)

4. South Central Employees Coop. Credit Society Employees Union Vs Yashodabai & Ors (2015)2 SCC 727

5.Dwarikesh Sugar Industries Ltd Vs Prem Heavy Engineering Works Pvt Ltd & Anr AIR (1997) SC 2477

6.Oriental Insurance Company Ltd. Vs Sushil Kumar Pandey & Ors, (2013) (2) TAC 361 (All)

(Delivered by Hon'ble Manish Kumar, J.)

1. Heard Sri Jitendra Narain Misra, learned counsel for the United India Insurance Company Ltd., Sri Jay Krishna Shukla, learned counsel for the vehicle-owner and Sri Mukesh Singh, learned counsel for the claimant.

2. There are three First Appeals From Order under Section 173 of Motor Vehicle Act, 1988, challenging the judgment and order/award dated 10.08.2006 passed by the Motor Accident Claims Tribunal/Additional District Judge Court, No. 4 Pratapgarh. The details of above three First Appeal From Orders are given below:-

(i) First Appeal From Order no. 847 of 2006, preferred by United India Insurance Company Limited,

(ii) First Appeal From Order no. 256 of 2007, preferred by owner of the vehicle,

(iii) First Appeal From Order no. 678 of 2008, preferred by the claimant.

3. The factual matrix in all three cases is the same that on 09.10.2004, one Sri. Gulab Chandra who was driving a motor-cycle was hit by the speeding Marshal Jeep bearing No. U.P. 70 V 5655, driving rashly and negligently due to which Sri Gulab Chandra had fallen on the road and the jeep driver ran away crushing him as a result of which Sri Gulab Chandra got grievous injuries and with the help of local resident and his nephew he was taken to District Hospital on the way he succumbed to his injuries. At the time of the death, deceased Sri Gulab Chandra was about 43 years of age and having good health. Deceased Sri Gulab Chandra was having his own shop of Urea fertilizer in Derwa Bazar and his monthly income was Rs. 8,000/- per month.

FIRST APPEAL FROM ORDER NO. 847 OF 2006 filed by United India Insurance Company

4. The First Appeal From Order No. 847 is preferred by the United India Insurance Company Ltd. challenging the

order/award dated 10.08.2006, mainly on two grounds which are as follows:-

(i) The quantum of compensation awarded in the judgment and order/award dated 10.08.2006 is to be set aside and modify the same in terms of the Schedule 2 under Section 163(A) of the Motor Vehicle Act, 1988, wherein in absence of any proof of income of the deceased as per the Scheduled, the income shall be determined as Rs. 15,000 per annum, whereas the Tribunal in its award has determined the income @ of 6,000/- per month which comes to Rs. 72,000/- per annum.

(ii) There is no direct evidence of proof of income of the deceased Sri Gulab Chandra

5. Learned counsel for the appellant has submitted that the finding in the award pertaining to determination of income i.e. Rs. 6,000 per month, which comes to Rs. 72,000/- per annum is in pursuance of the evidence adduced by the claimant i.e. Insurance Premium Receipt namely Pradarshak 30 (ga), Telephone Bills as Pradarshak 31 (ga), Copy of the Motor Cycle Certificate as Pradarshak 26 (ga), Licence for the sale of Urea as Pradarshak 32 (ga)/3 and the receipts of purchase of Urea from Devendra Kumar Mahadev Prasad amounting to Rs. 10,00,000/- as Pradarshak 32 (ga)/1 to 32 (ga)/35. All these documents which have been enclosed was uptill March 2003, whereas the accident took place on 09.10.2003 in which Sri Gulab Chandra had died. The licence issued in favour of the deceased for sale of Urea was for the period since 15.07.2000 to 31.03.2003. Learned counsel for the appellant has further submitted that since 01.03.2003, till the date of death of Sri Gulab Chandra i.e. on 09.10.2003, but no evidence was adduced by the claimants that after March 2003, whether deceased was employed or how he was earning his livelihood and there is nothing on the record to show the monthly income of deceased.

6. Learned counsel has further contended that at the most as per the judgment of the Apex Court, if there is no proof of income then the calculation should be treated as Rs. 3,000/- per month which comes to Rs. 36,000/- per annum.

7. On the other hand, learned counsel for the claimant has contended as follows:-

(i) There is no mistake in determining the income of the deceased as Rs. 6,000/- per month mainly for the reason that the Apex Court in catena of decisions have already held that minimum income of a person who is unemployed or where there is no direct proof of income shall not be less than 6,000/- per month.

(ii) The evidence which is on the record clearly establishes that the deceased was paying the insurance of Rs. 1,600/- approximately, since 25.03.1987, that was much prior to his death.

(iii) There is no illegality or perversity in appreciation of the evidence adduced before the Tribunal while calculating the loss to the claimants @ Rs. 6,000/- per month.

8. After perusal of the records, it is found that the Tribunal in its judgment/award dated 10.08.2006 has determined the monthly income of the deceasesd as Rs. 6,000/- per month i.e. Rs. 72,000/- per annum and after deducting one-third against the personal expenses of the deceased which comes to Rs. 24,000/- per annum and the compensation was

calculated by the Tribunal as Rs. 48,000/- per annum.

FIRST APPEAL FROM ORDER NO. 256 OF 2007 filed by Owner

9. The First Appeal from Orders No. 256 of 2007 is preferred by the owner of the vehicles with a delay of few months but the same has already been condoned by this Court vide its order dated 30.07.2017. In the present First Appeal From Order an application along with an affidavit under Order 41 Rule 27 C.P.C. was also filed enclosing the driving licence of the driver Rakesh Kumar Yadav who was driving the vehicle at the time of the accident. The reason indicated in the affidavit filed along with the application under Order 41 Rule 27 C.P.C for leading additional evidence before this Court that the appellant-owner of the vehicle had never ever received the summons from the Tribunal and the award has been given ex-parte without providing any opportunity to defend before the Tribunal. In support of the averment made, learned counsel has drawn the attention of this Court towards the lower Court record pertaining to order-sheets of different dates dated 27.09.2004, 12.04.2005, 11.05.2005, 13.07.2005, 05.04.2005 and 23.04.2005.

10. It has further been contended that the Tribunal suddenly passed an order in absence of any thing on record that the claimant had taken any step and notice was sent by the registered post and proceeded ex-parte. Hence, the appellant has no other option except to move an application under Order 41 Rule 27 C.P.C. before this Court.

11. Learned counsel representing owner/appellant has contended that in the award the finding by the Tribunal for holding the licence invalid by giving the finding that on the licence filed by the complainant the name of the driver shown different. The said finding in the award has been given without providing any opportunity to the owner/appellant and solely relied upon the licence filed by the claimants. Whereas, the licence in favour of the driver of the vehicle is valid licence and in support reliance has been placed on the photocopy of the licence filed along with an affidavit in support of application under Order 41 Rule 27 of C.P.C. where only the name i.e. Sri Rakesh Kumar Yadav is written.

12. It has further been contended that in the finding that there is no fitness certificate of the vehicle on the record for plying the vehicle is perverse as per sub-Section 1 of Section 149 of Motor Vehicle Act, 1988 which provides defence available to the Insurance Company for denying the payment but in defence the requirement of fitness certificate is not available with the Insurance Company.

13. Learned Counsel further contended that as per the law laid down by this Court and the Supreme Court, if the vehicle is for private use and not for commercial then fitness certificate is not required.

14. At this stage, this Court asked the learned counsel representing the Insurance Company whether Insurance Company would like to file objection against the applicant under Order 41 Rule 27 C.P.C. Learned counsel for the Insurance company has given a statement on the basis of instruction that there is no need to file any objection against the application for the reason licence enclosed along with application has already been verified from

the Regional Transport Officer (hereinafter referred to as "R.T.O."), Kalayan Mumbai and as per the report of the R.T.O., Kalayan, Mumbai, licence was issued in the name of Sri Rakesh Kumar Yadav and the licence number filed before the Tribunal by the claimant and the owner before this Court is the same.

15. Learned Counsel for the Insurance Company was unable to dispute the contention raised by the learned counsel for the owner/appellant pertaining to the requirement of fitness certificate of the vehicle.

FIRST APPEAL FROM ORDER NO. 678 of 2008 filed by the Claimant

16. The First Appeal From Order is preferred by the claimant with a delay of about two years and neither the delay has been condoned nor the First Appeal From Order has been admitted till date. After examining the affidavits filed along with delay condonation application the reasons indicated in the affidavit are satisfactory, hence, the delay is condoned and the Appeal is admitted.

17. The First Appeal From Order has been preferred by the claimant mainly on the following grounds, which are as under:-

"(i) The multiplier of 10 has wrongly been made by the Tribunal, it shall be 14 as per the Judgment of the Apex Court in the case of ***Sarla Verma (Smt) and others Vs. Delhi Transoport Corporation and another, (2009) 6 SCC, 121.***

(ii) Claim for future prospect as per Para 61(iv) and (viii) of the ***National Insurance Company Vs. Prannay Sethi (2017), 16 SCC, 680.***

18. Learned counsel for the claimants has further submitted that the evidence which has been adduced before the Tribunal corroborate with the determination of income at Rs. 6,000/- per month and there is no illegality in the same. He further submitted that as per the determination in the case of ***National Insurance Company Vs. Prannay Sethi, (2017), 16 SCC, 680*** the claimants are entitled for additional 25 percent as the age of the deceased was 43 years.

19. Learned counsel for the claimant has further drawn the attention of this Court that for consortium and funeral expenses, the Tribunal has granted Rs. 2,000/- each, which is not as per the determination provided by the Apex Court in Para 61(iv) and (viii) of the case of ***National Insurance Company Ltd. Vs. Prannay Sethi, (2017), 16 SCC, 680***, wherein the Apex Court has held that loss of estate, loss of consortium and funeral expenses should be Rs. 15,000/-, Rs. 14,000/- and Rs. 15,000/- respectively.

20. In support of the same, the learned counsel for the claimant has further relied the judgment of ***Chameli Devi and Others Vs. Jivrail Mian and Others, (2019) (4) T.A.C. 724 (S.C.),*** and wherein the benefit as per the case of ***National Insurance Company Ltd. Vs. Prannay Sethi, (2017), 16 SCC, 680*** was given.

21. On the contrary, learned Counsel representing the Insurance Company has submitted that in absence of any proof of income the claimant is entitled for compensation as per Schedule II under Section 163 (A) of Motor Vehicle Act, 1988 and at the most Rs. 3,000/- per month has been laid down by the Apex

Court and not more than that. An addition of 25 percent is admissible in the cases where there is direct proof of established income and in the present case there is no direct proof of established income of the deceased and no evidence was adduced by the claimants before the Tribunal. Hence the claimants are not entitled for an addition of 25 percent. At the same time learned counsel representing Insurance Company has very fairly conceded that as far as loss of estate and loss of consortium and funeral expenses are concerned, he has no objection if the same shall be given as per the determination given by the Apex Court in the case of ***National Insurance Company Ltd. Vs. Prannay Sethi (Supra).***

22. Learned counsel for the Insurance-company has opposed the applicability of judgment in the case of ***Chameli Devi and Others Vs. Jivrail Mian and Others, (2019) (4) T.A.C. 724 (S.C.)*** in the present case for the reason that the deceased in case (Supra) was a carpenter and self-employed, whereas in the present case no evidence was adduced before the Tribunal that after March 2003, the deceased was earning and hence the determination in the case ofChameli Devi and Others Vs. Jivrail Mian and Others, 2019 (4) T.A.C. 724 (S.C.) is per incuriam and not applicable.

23. In reply the learned counsel for the claimant has submitted that in Chameli Devi case, the deceased expired in the year 2001 and the Apex Court had considered the per day wages of an employees as Rs. 200/- meaning hereby in the case of ***Chameli Devi and Others Vs. Jivrail Mian and Others, (2019) (4) T.A.C. 724 (S.C.)***, there was no proof of established income.

24. It has further been contended by the learned counsel for the claimant/appellant that multiplier should be of 14 and in support thereto the reliance has been placed on the judgment in the case of ***Sarla Verma (smt) and Others Vs. Delhi Transport Corporation And Another (2009) 6 SCC, 121*** . The Apex Court has provided a chart of multiplier according to the age of the deceased and as per the chart the claimants are entitled for the multiplier of 14 as the age of the deceased was 43 years and the same was not disputed by the learned Counsel representing the Insurance Company.

25. After hearing the submissions made by learned counsels for all the respective parties representing the Insurance Company, the owner of the vehicle, the claimant and after examining the lower Court records, the submission advanced by the learned counsel representing the Insurance Company that income which has been determined in the award is against the statutory provision i.e. Schedule II under Section 163(A) of the Motor Vehicle Act, 1988 and against the judgment of the Apex Court, wherein it has been provided that in absence of any proof of income, the income should be Rs. 3,000/- per month which comes to Rs. 36,000/- per annum and hence the award dated 10.08.2006 is to be set aside and modified to that extent, the said contention is not acceptable for the following reasons:-

26. Firstly, the Apex Court in the case of **Chameli Devi (Supra)** enhanced the compensation as assessed by the Tribunal as Rs. 3,000 per month to Rs. 5,000/- per month. The Apex Court assessing the income as Rs. 200/- per day being a carpenter. The relevant extract of judgment in the case of **Chameli Devi (Supra)** is reproduced below:-

Para (ii):- This appeal has been filed for enhancement of compensation. The Tribunal assessed the income of the deceased at Rs. 1,250/- per month but since no positive proof of income was led, the income of Rs. 15,000/- per annum was taken as notional income. This obviously is not a correct position of law. The High Court accepted the income at Rs. 3,000/- per month. According to us, the income assessed by the High Court is on the lower side. The accident happened on 2nd January, 2001. The Tribunal and the High Court held that no proof of income has been produced to show that the deceased was alleged to be a carpenter. We fail to understand what proof can lead except to lead oral evidence.

Para (iii):- Keeping in view the fact that the accident took place in 2001 and the deceased was a carpenter, it would not be unjustified to assess his income at Rs. 200/- per day. It is true that carpenter may not get work every day, hence, we assess the income at Rs. 5,000/- per month. Adding 40% for future prospects i.e. Rs. 2,000/-, the total income works out to Rs. 7,000/- Deducting 1/5th for personal expenses, keeping in view a large number of dependents, the datum figure comes out to Rs. 5,600/- per month or Rs. 67,200/- per year. Applying multiplier of 16, the compensation works out to Rs. 10,75,200/- . Rs. 70,000/- is added towards other non-conventional heads as laid down in National Insurance Co. Ltd. Vs. Pranay Sethi & Ors, (2017) 16 S.C.C. : 20117 (4) T.A.C. 673. The total compensation comes out to Rs. 11,45,200/-

27. Secondly, as per the evidence adduced the Tribunal has rightly assessed the income of the deceased as Rs. 6,000/- per month against the claimed income of Rs. 8,000/- per month. The evidence which is on the record i.e. Insurance premium receipts namely Pradarshk 30 (ga) clearly establishes that the deceased was paying the insurance of Rs. 1,600/- approximately since 25.03.1987 i.e. much prior to his death and the period of licence for running a Urea shop since 15.07.2002 to 31.3.2003.

28. Under these circumstances, this Court does not find any reason to interfere in the income of the deceased assessed by the Tribunal and in the light of the judgment in the case of ***Chameli Devi (Supra)***, the Tribunal has rightly assessed the income of the deceased.

29. The submission raised by the learned counsel for the claimant for payment of additional 25 per cent for future prospect, loss of consortium and funeral expenses as per the full Bench decision of Apex Court in the case of ***Prannay Sethi (Supra)***, wherein the Apex Court after the analysis, the conclusion is in para 61(iv) and (viii) of the judgment. The relevant portion which is applicable in the present case is reproduced below:-

"(iv) In case the deceases was self-employed or on a fixed salary, an addition of 40% of the established income should be the warrant where the deceased was below the age of 40 years. An addition of 25% where the deceased was between the age of 40 to 50 years and 10% where the deceased was between the age of 50 to 60 years should be regarded as the necessary method of computation. The established income means the income minus the tax component.

(viii) Reasonable figures on conventional heads, namely loss of estate, loss of consortium and funeral expenses should be Rs. 15,000/-, Rs. 40,000/- and

Rs. 15,000/- respectively. The aforesaid amounts should be enhanced at the rate of 10% in the every three years."

30. Similarly, the Apex Court in the case of ***Chameli Devi (Supra)*** has given the benefit as per the judgment in case of ***National Insurance Company Ltd. Vs. Prannay Sethi (Supra),***. After going through the judgment of the Apex Court the submission raised in pursuance thereof and the learned counsel representing the Insurance Company has not disputed the same and hence as per the law laid down by the Apex Court the claimants are also entitled for the same benefit.

31. The contention of the learned counsel representing the Insurance Company that the judgments cited by the learned counsel representing the claimants in the case of ***Chameli Devi and Others Vs. Jivrail Mian and Others (Supra)*** is per incuriam.

32. The said submission of the learned counsel representing the Insurance Company is not acceptable for the reason that in the case of ***Chameli Devi and Others Vs. Jivrail Mian and Others (Supra)***, the Apex Court has given the benefit of ***National Insurance Company Ltd. Vs. Prannay Sethi (Supra)***, and the applicability of the ***Prannay Sethi (Supra)*** case is not disputed by the learned counsel representing the Insurance Company.

33. If the contention of learned counsel representing the Insurance Company is accepted by this Court then same would be in contravention of the law laid down by the Apex Court in the case of ***South Central Employees Cooperative Credit Society Employees Union Vs. Yashodabai And Others, (2015) 2 SCC, 727***, wherein it has been held that if the High Courts or Subordinate Courts took a different view, there would be total chaos reason being there would be no finality to any order passed by the Apex Court. The High Courts and the Subordinate Courts must follow the decision of the Apex Court unless it is distinguished or overruled or set aside.

34. The Apex Court in the case of ***Dwarikesh Sugar Industries Limited Vs. Prem Heavy Engineering Works Private Limited and Another reported in AIR (1997) S.C. 2477*** has laid down if the position in law is well settled as per the judicial pronouncement, taking a different view by the subordinate Courts including the High Courts clearly amount to judicial impropriety.

35. From the discussions made above, the **First Appeal From Order No. 847 of 2006 filed by the Insurance Company deserves to be dismissed.**

36. The First Appeal From Order No. 256 of 2007 preferred by the owner of the vehicle, the submission raised by the learned counsel representing the owner/appellant for allowing the application under Order 41 Rule 27 C.P.C. along with an affidavit. The reasons shown for allowing the application under Order 41 Rule 27 C.P.C. are satisfactory. After the perusal of the order-sheets of different dates showing that steps were never ever taken by the claimant and notice/summons were never ever served upon the owner of the vehicles and specially when the same has not been disputed by the learned counsel representing the claimant as well as the Insurance Company after examining the lower Court's record and when the learned Counsel representing the Insurance

Company has made a submission after examining the lower Court's record and has further made a submission that he has no objection in allowing the application. On the basis of instructions learned counsel representing the Insurance Company has also given a submission that the licnence filed along with an application under Order 41 Rule 21 C.P.C. has already been verified from the R.T.O., Kalayan, Mumbai and as per the report the licence is valid issued in favour of Sri Rakesh Kumar Yadav. The Counsel representing the claimant has also made a submission that there is no objection in allowing the application under Order 41 Rule 27 C.P.C. **Application under Order 41 Rule 27 C.P.C. along with an affidavit is hereby allowed.**

37. From the perusal of the licence filed along with an affidavit in support of application under Order 41 Rule 27 of C.P.C., the licence is in the name of Sri Rakesh Kumar Yadav, the driver who was driving the vehicle at the time of the accident on 09.10.2004 and when the same was supported by the statement given by the learned counsel representing the Insurance Company that the said licence got verified from the R.T.O., Kalyan, Mumbai and as per the report of the R.T.O., Kalayan, Mumbai the licence issued in favor of the Sri Rakesh Kumar Yadav, The finding given by the Tribunal in award dated 10.08.2006 to the extent of validity of the licence is not acceptable. The validity of the licence verified by the R.T.O., Kalayan, Mumbai, has not been disputed by the learned Counsel representing the claimants.

38. Hence finding to the effect of the invalid licence of the driver by the Tribunal in its award dated 10.08.2006 is set aside.

39. The finding of the Tribunal in the award dated 10.08.2006 pertaining to the absence of fitness certificate is not in consonance with the sub-Section 2 of Section 149 of Motor Vehicle Act 1988 which is reproduced below:-

"(2) No sum shall be payable by an insurer under sub-section (1) in respect of any judgment or award unless, before the commencement of the proceedings in which the judgment or award unless, before the commencement of the proceedings in which the judgment or award is given the insurer had notice through the Court or, as the case may be, the Claims Tribunal of the bringing of the proceedings, or in respect of such judgment or award so long as execution is stayed thereon pending an appeal; and an insurer to whom notice of the bringing of any such proceedings is so given shall be entitled to be made a party thereto and to defend the action on any of the following grounds, namely :-

(a) that there has been a breach of a specified condition of the policy, being one of the following conditions, namely -

(i) a condition excluding the use of the vehicle-

(a) for hire or reward, where the vehicle is on the date of the contract of insurance a vehicle not covered by a permit to ply for hire or reward, or

(b) for organized racing and speed testing, or

(c) for a purpose not allowed by the permit under which the vehicle is used, where the vehicle is a transport vehicle, or

(d) without side-car being attached where the vehicle is a motor cycle; or

(ii) a condition excluding driving by a named person or persons or by disqualified for holding or obtaining a driving licence during the period of disqualification; or

(iii) a condition excluding liability for injury caused or contributed to by conditions of war, civil war, riot or civil commotion; or

(b) that the policy is void on the ground that it was obtained by the non-disclosure of a material fact or by a representation of fact which was false in some material particular."

40. From the perusal of the sub-Section 2 of Section 149 of the Motor Vehicle Act, 1988, the fitness certificate of vehicle is not required as a defence to the Insurance Company to escape the liability from payment of compensation to the family of the deceased. The Counsel representing the Insurance Company and the claimants has failed to dispute to the fact that fitness certificate is not required for payment of compensation by fixing the liability of the Insurance Company for the purposes of payment of compensation.

41. The judgment relied by the learned counsel representing owner/appellant in the case of ***Oriental Insurance Company Ltd. Vs. Sushil Kumar Pandey and Others, (2013) (2) T.AC. 361 (All.)***, wherein it has been held that if the vehicle is used for private service and not for another service or public vehicle, then fitness certificate is not required. The relevant portion of the above-mentioned judgment is reproduced below:-

"(4) The case of the learned Counsel for the appellant is that the offending vehicle is a private service vehicle and, therefore, it is the transport vehicle and hence the fitness certificate is required for the said vehicle under Section 56 of the Act. Private service vehicle is defined by Section 2(33) of the Act (referred hereinabove). Only those motor vehicles, which carries persons for, or in connection with trade or business of the owner shall be considered as private service vehicle and not any other private service vehicle or public vehicle. Therefore, in order to cover the vehicle under the definition of private vehicle it is to be established that the vehicle is being used in connection with his trade or business by the vehicle owner.

(5) In the present case, it is not the case of the Insurance Company that the offending vehicle was being used for carrying of the passengers for the purposes of his trade or business by the owner of the vehicle, therefore, it cannot be private service vehicle. In so far as the Transport Commissioner's circular is concerned, it cannot be read in isolation and it is to be read alongwith provisions of the Act. If it is read alongwith provisions of the Act, it comes down to, that only those vehicle having capacity of more than six persons, is required to have a fitness certificate, which is being used for carrying the passengers for, or in connection with, his trade or business by the owner of vehicle. Moreover, it is the settled principle of law that any circular, which is contrary to the provisions of the Act is not binding and cannot override the provisions of the Act."

42. Learned counsel representing the Insurance Company and the claimant has failed to dispute the legal position settled by the High Court in the case of ***Oriental Insurance Company Ltd. Vs. Sushil Kumar Pandey (Supra).***

43. Under these circumstances, the finding in the award to the extent of fixing the liability of the owner on the above-mentioned case is hereby set aside and the First Appeal From Order No. 256 of 2007 is allowed to the extent of finding in the judgment and fixing the liability of the owner/appellant is set aside and the **First Appeal From Order No. 256 of 2007 is hereby allowed.**

44. As far as First Appeal From Order No. 678 of 2008 preferred by the claimant/appellant is concerned, from the discussion made above and as per the law laid down by the Apex Court in the case of ***National Insurance Company Ltd. Vs. Prannay Sethi (Supra)*** and ***Chameli Devi and Others Vs. Jivrail Mian and Others (Supra)***, the claimant is entitled for the benefit as provided in Para 61(IV) and (VIII) of the Judgment in the case of ***National Insurance Company Ltd. Vs. Prannay Sethi (Supra)***. As per the judgment passed by the Apex Court in the case of ***Sarla Verma (smt) and Others Vs. Delhi Transport Corporation And Another (Supra)***, wherein the chart has been provided for applying the multiplier for determination of compensation and as per the same in the case of the claimants the Tribunal in its award has wrongly applied the multiplier of 10. Looking at the age of the deceased multiplier of 14 is applicable. The same has not been disputed by the Counsel representing the Insurance Company.

45. Hence to the extent of multiplier of 10 in the order/judgment of the Tribunal is hereby set aside.

46. Under these circumstances, the First Appeal From Order No. 678 of 2008 is allowed and modifed to the extent to which claimants are entitled are as follows:-

(i) Compensation with Multiplier (M-14) X Annual Income as shown in the Award has come to Rs. 48,000/- per annum (after deducting 1/3rd of the income against personal expenses) = Rs. 6,72,000/- (ii) 25 percent of future prospects be added i.e. Rs. 1,68,000/- (iii) Loss of estate i.e. Rs. 15,000/-, loss of consortium i.e. Rs. 40,000, funeral charges, i.e. Rs. 15,000, which comes to be Rs. 70,000/- Less Rs. 4,000 (already determined by the Tribunal in its award for loss of consortium and funeral charges) = Rs. 66,000/-

Total = Rs. 6,72,000/- + Rs. 1,68,000/- + Rs. 66,000 = Rs. 9,06,000/-

47. Under these circumstances **First Appeal From Order No. 678 of 2008 is hereby allowed** and the order/award dated 10.08.2006 passed by Motor Accident Claims Tribunal is modified in terms as specified above.

48. United India Insurance Company is directed to pay the balance amount within a period of two months from today after deducting the amount which has already been paid, if any, to the claimant failing which the interest will be paid as already determined by the Tribunal in its award dated 10.08.2006.

49. Office is directed to send the lower Court's record to the concerned Tribunal.

50. Copy of this judgment shall be placed in all the three First Appeals From Order separately.

(2020)02ILR A1043

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 16.01.2020

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.
THE HON'BLE RAJEEV MISRA, J.

FAFO No. 1020 of 2017
connected with
FAFO No. 1859 of 2017
connected with
FAFO No. 342 of 2015

National Insurance Co. Ltd. ...Appellant
Versus
Smt. Manju Shukla & Ors. ...Respondents

Counsel for the Appellant:
Sri Kuldip Shanker Amist

Counsel for the Respondents:
Sri Rakesh Bahadur, Sri Sudhakar Pandey

A. Civil Law-Uttar Pradesh Motor Vehicles Rules, 1998 - Rule 220A - cannot control the obligation of Tribunal to determine just compensation

Held - Rule 220A of U.P. Rules, 1998 lays down only a guideline with respect to award of compensation under different heads but ultimate authority is that of Tribunal to determine and award appropriate compensation which is "just" -Tribunal ought not to have referred to Rules 220A and 220B for awarding compensation under any head and instead it ought to have guided itself by law already settled (Para 95)

B. Motor Accident Claim - Motor Vehicles Act (59 of 1988) - Ss.166, 168 - Compensation - under the head of medical expenses, treatment, medical care etc - deceased in coma - II stage for about 21 months

Deceased remained in coma - II stage for about 21 months - Pecuniary damages in such case of fatal injuries and disability cover all the expenses which have been incurred not only in actual medical treatment i.e. Doctor fee, Hospital fee, testing fee, medicines cost etc. but also expenses incurred for hiring nursing services, expenses incurred by persons present to take care of the injured, boarding, lodging and travelling expenses and also the expenses incurred during shifting of injured from one place to another - Such expenses cannot be excluded from the total amount of compensation to be awarded to claimant (Para 105)

C. Civil Law-Motor Vehicles Act (59 of 1988) - Ss. 166,168 - Compensation - termination of pregnancy due to accident - deceased pregnant at the time of accident - Held - a lump sum of Rs. 2,50,000/- awarded for loss of foetus due to termination of pregnancy in accident (Para 110)

D. Civil Law- Motor Vehicles Act (59 of 1988) - S.166 - Compensation – for Pain, shock, disability etc. - deceased in Coma-II stage for about 21 months - Held - what deceased suffered, may not be weighed very accurately in terms of money, still Rs. 10,00,000/- awarded under the head of mental shock, pain etc (Para 111)

E. Civil Law-Motor Vehicles Act (59 of 1988) - Ss. 166, 168 - Compensation - loss of love and affection - Held Rs. 50,000/- awarded for loss of love and affection (Para 112)

F. Civil Law-Motor Vehicles Act (59 of 1988) - Ss. 166, 168 - Compensation - loss of employment of the claimant husband - as he was engaged in the care and treatment of his wife who remained in Coma-II stage

Deceased was housewife - claimant was husband - loss of employment of Claimant on account of long duration Coma-II stage of deceased for about 21 months - *Held* - loss of job of claimant husband directly attributable to the accident & injuries suffered by deceased - Claimant stated that he was capable of saving about Rs. 15,000/- per month - Allowing margin to be discounted, at least loss of saving of Rs. 10,000/- per month awarded- Rs. 2,10,000/-, in lump sum, awarded to claimant for loss of employment. (Para 109)

G. Civil Law-Motor Vehicles Act (59 of 1988) - Ss. 166, 168 - Claim petition - Negligence of driver - Non examination of drivers - could not have rendered claim

for compensation by claimant not maintainable

Held - there was no onus on the part of claimant to show that accident took place due to rash and negligent driving, as it was not objected or otherwise pleaded by Insurers- 1 and 2 and owners of two tortfeasing vehicles admitted the factum of rash and negligent - since both vehicles were insured with Insurers- 1 and 2, respectively, responsibility directed to be shared by both Insurance Companies - non-examination of Drivers could not have rendered claim for compensation by claimant not maintainable (Para 77, 78)

First Appeal From Order Partly allowed (E-5)

List of cases cited :

1. Smt. Manjuri Bera Vs The Oriental Insurance Company Ltd & Anr AIR 2007 SC 1474

2. The Oriental Insurance Co. Ltd. etc. Vs Hansrajbhai V.Kodala & Ors 2001(5) SCC 175

3. U.P. State Road Transport Corporation and Ors. Vs Trilok Chandra & Ors 1996(4) SCC 362

4. Deepal Girishbhai Soni & Ors Vs United India Insurance Co. Ltd. 2004(5) SCC 385

5. Sarla Verma & Ors Vs Delhi Transport Corporation & Anr 2009(6) SCC 121

6.Shashikala & Ors Vs Gangalakshmamma & Ors 2015(9) SCC 150

7. Mehmet Vs Perry (1977) 2 All ER 52

8. Arun Kumar Agrawal & Anr Vs National Insurance Company Limited & Ors 2010(9) SCC 218

9. R.D. Hattangadi Vs M/s. Pest Control (India) Pvt. Ltd. & Ors 1995(1) SCC 551

10. Raj Kumar Vs Ajay Kumar & Anr 2011(1) SCC 343

11. Sanjay Verma Vs Haryana Roadways 2014(3) SCC 210

12. Syed Sadiq & Ors Vs Divisional Manager, United India Insurance Company Ltd 2014(2) SCC 735

13. Rajan Vs Soly Sebastian & Anr 2015(10) SCC 506

14. Sanjay Kumar Vs Ashok Kumar & Anr 2014(5) SCC 330

15. Kanhsingh Vs Tukaram 2015(1) SCALE 366

16.Kalpanaraj & Ors Vs Tamil Nadu State Transport Corporation 2015(2) SCC 764

17. Asha Verman & Ors Vs Maharaj Singh & Ors 2015(4) SCALE 329

18.Jitendra Khimshanker Trivedi & Ors Vs Kasam Daud Kumbhar & Ors 2015(4) SCC 237

19. National Insurance Company Limited Vs Lavkush & Ors 2017 (4) ALJ 391, III (2018) ACC 319 (All)

20.National Insurance Company Limited Vs Pranay Sethi & Ors 2017 (16) SCC 680

21.Prakash & Ors Vs Arun Kumar Saini and Another 2010 (3) TAC 114

22. Malarvizhi & Ors Vs. United India Insurance Company Ltd & Anr (Civil Appeal No. 9196-97 of 2019 @ SLP (C) Nos. 9630-31 of 2019) 09.12.2019

(Delivered by Hon'ble Sudhir Agarwal, J.)

1. First Appeal From Order No. 1020 of 2017 *(hereinafter referred to as "FAFO-1")* has been filed by defendant-Insurance Company under Section 173 of

Motor Vehicles Act, 1988 *(hereinafter referred to as "Act, 1988")* challenging judgement and award dated 29.09.2014 passed by Sri Ashwani Kumar Singh, Additional District Judge, Court No. 1, Ballia/ Presiding Officer, Motor Accidents Claims Tribunal, Ballia *(hereinafter referred to as "Tribunal")* in Motor Accident Claim Petition *(hereinafter referred to as "MACP")* No. 57 of 2010 awarding compensation of Rs. 72,47,000/-, payable 50 per cent by appellant-Insurance Company, namely, National Insurance Company Limited *(hereinafter referred to as "Insurer-1")* and remaining 50 per cent by New India Assurance Company Limited *(hereinafter referred to as "Insurer-2")* impleaded as respondent-3 in this appeal. Tribunal has also awarded 8 per cent interest on the amount of compensation which is to be computed from 11.06.2010, i.e., the date on which application for compensation was filed, till the date of payment. Respondent-1, who is claimant-respondent, is now substituted by respondent- 1/1, since died during litigation. Respondent-2, Maruti Bhai, is the owner of Truck No. MH 15G 4212 while respondent-4 Ahmad Jalil Shekh is the owner of Qualis bearing registration No. MH 04BN 1138.

2. First Appeal From Order No. 342 of 2015 *(hereinafter referred to as "FAFO-2")* has been filed by New India Assurance Company Limited i.e. Insurer-2 against the same award and grounds taken therein are also similar as taken in FAFO-1.

3. First Appeal From Order No. 1859 of 2013 *(hereinafter referred to as "FAFO-3")* is claimant's appeal which has also come up against same award being dissatisfied with quantum of compensation awarded therein and seeks enhancement of compensation to Rs. 1,12,50,000/-.

4. In FAFO-1, Sri Kuldip Shanker Amist, Advocate has appeared for appellant i.e. Insurer-1, Sri Sudhakar Pandey, Advocate has appeared for claimant-respondent and Sri Rakesh Bahadur, Advocate has appeared for respondent-3, i.e., Insurer-2.

5. In FAFO-2, Sri Rakesh Bahadur, Advocate, has appeared for appellant, i.e., Insurer-2, Sri Sudhakar Pandey, Advocate, has appeared for claimant-respondent and Sri Kuldip Shanker Amist, learned counsel for respondent-2 i.e. Insurer-1

6. In FAFO-3, Sri Sudhakar Pandey, Advocate, has appeared for claimant-appellant; Sri Rakesh Bahadur, Advocate, has appeared for for respondent-3, i.e., Insurer-2; and, Sri Kuldip Shanker Amist, learned counsel for respondent-1, i.e., Insurer-1.

7. Since all these appeals having arisen from common judgement and award, they are similar. Therefore, we briefly describe the facts as under.

8. On 15.09.2009 at 07:00 AM, Smt. Manju Shukla wife of Arvind Kumar Shukla went for darshan of Sai Baba at Shirdi (State of Maharashtra) along with her relatives in a vehicle Toyota Qualis being registration No. MH 04BN 1138. When they reached at village Kokan, P.S. Sangamner, District Ahmednagar, a Truck No. MH 15G 4212 which was being driven rashly and negligently by its Driver, collided with Toyota Qualis vehicle causing serious injuries to Smt. Manju Shukla and other passengers. Injured were taken to Tambe Hospital, Sangamner and

report was also lodged in P.S. Sangamner. Smt. Manju Shukla sustained injuries on head and went in Coma-II stage. She remained admitted in Tambe Hospital from 15.09.2009 to 08.10.2009 and during treatment, she underwent several testings and medical examinations. As her situation could not be controlled, she was referred to Kokilaben Dhirubhai Ambani Hospital where she was admitted on 08.10.2009 and remained under treatment upto 20.05.2010. During period of treatment, husband of Smt. Manju Shukla and others, who were taking care, resided there by hiring rooms in hotel. She was discharged on 20.05.2010 and brought to her home at Ballia where she was given treatment at Gaurav Nursing Home, Tikampur, run by Dr. D. Rai. She was treated there till 06.06.2011. In the evening at around 06:00 PM on 06.06.2011, when she was at home, she breathed her last and was declared dead by Dr. D. Rai. At the time of accident, Smt. Manju Shukla was in family way having 2 months and 15 days foetus which was terminated due to accident as per Doctor's report. Claimant was working as Business Development Manager in Tata AIG Life Insurance Company. At the time of death, Smt. Manju Shukla was age of about 26 years.

9. During her life time, Smt. Manju Shukla filed Claim Petition No. 166 of Act, 1988 vide application dated 11.06.2010. At the time of filing of aforesaid claim petition, she was undergoing treatment and in the stage of Coma-II at Kokilaben Dhirubhai Ambani Hospital. After her death, claim petition was amended and her husband Arvind Kumar Shukla was impleaded as claimant-1/1. He sought compensation of Rs. 1,12,50,000/- and its description was given as under:

22. Amount of compensation claimed by Claimant-Respondent.		
1.	Towards loss of earning of deceased and future prospects.	Rs. 15,00,000/-
2.	Expenses towards treatment of deceased.	Rs. 40,00,000/-
3.	Expenses likely to occur in future, in case she was surviving.	Rs. 20,00,000/-
4.	Expenses towards conveyance and on relatives during treatment of deceased.	Rs. 25,00,000/-
5.	Expenses towards Food Supplements, like milk, fruits, etc., given to deceased during treatment.	Rs. 10,00,000/-
6.	Claim towards pains and suffering suffered by deceased and relatives on account of injuries sustained in the accident.	Rs. 10,00,000/-
7.	Claim towards loss of consortium, love and affection.	Rs. 2,00,000/-
8.	Expenses towards funeral and other rituals.	Rs. 50,000/-
	Total	Rs. 1,12,50,000/-

10. Contesting the claim, Insurer-1 filed written statement through Senior Divisional Manager, Branch at Mau denying the facts stated in various paragraphs of claim petition in general. The objection taken is that claimant Arvind Kumar Shukla has no right to maintain said petition; Death of Smt. Manju Shukla on 06.06.2011 was not admitted to Insurer-1; no report was registered with regard to her death in P.S. Sangamner, District Ahmednagar in the context of accident in question; Claim of compensation under various heads is exaggerated, artificial and not payable; documents in evidence submitted before Tribunal in a sealed box having been sent by Insurer-1 are not acceptable; no evidence was adduced to show that deceased was in family way; facts regarding admission of patient at Tambe Hospital and Kokilaben Dhirubhai Ambani Hospital are fictitious; when deceased being a housewife, there is no question of loss of earning and entire claim is fictitious; earlier notices were issued when injured's claim was allowed but since she has not died, fresh notice must have been issued.

11. A separate written statement was filed by New India Assurance Company Limited, i.e. Insurer-2, wherein it also denied facts stated in the claim petition. In additional pleas, it was stated that claim is excessive and exaggerated; Claimant has no right to file claim petition and not entitled for any compensation; Claim petition was not maintainable at Ballia; Entire negligence causing accident was that of Truck Driver and, therefore, Insurer-2, Insurer of vehicle Toyota Qualis, was not liable to pay any compensation. Copy of written statement of Insurer-2 is at page- 63 of paper book in FAFO-3.

12. Defendant-2 in claim petition, i.e., Sri Maruti Bhai, owner of Truck No. MH 15G 4212, in his written statement though denied the facts stated in claim petition but in additional pleas, he admitted that accident occurred on 15.09.2009 at 07:00 AM at Nasik-Shani Shingnapur road near village Kokar, P.S. Sangamner, District Ahmednagar but pleaded that it was due to negligence of Driver of vehicle Toyota Qualis and not of Truck Driver, therefore, he was not liable to pay any compensation. He also admitted that his Truck No. MH 15G 4212 is insured with Insurer-1 vide Policy No. 311500/31/04/630002877 effective from 05.05.2009 to 04.05.2010 and, therefore, liability, if any, would be that of Insurer-1. It was also pleaded that Driver driving Truck was having a valid Driving Licence and all other documents were also in order.

13. Defendant-4 Sri Ahmed Zalil Shekh, owner of Toyota Qualis bearing no. MH 04BN 1138 also filed a written statement which is at page 74 of paper book in FAFO-3. In general, facts stated in claim petition were denied by him though he admitted that he is the owner of Toyota Qualis No. MH 04BN 1138. In additional pleas, he challenged the right of claimant to file claim petition against him. He claimed that there was no negligence on the part of Driver of Toyota Qualis and in any case, it was duly insured with Insurer-2 on the date of accident vide Policy No. 11060/31/00/01/00024833 effective from 28.12.2008 to 27.12.2009 and, therefore, liability, if any, is that of Insurance Company.

14. On the basis of respective pleadings, Tribunal formulated following seven issues:-

"1. क्या श्रीमती मंजू शुक्ला की ओर से उनके पति अरविन्द कुमार शुक्ला को प्रस्तुत याचिका योजित करने का अधिकार है?

2. क्या दिनांक 15.09.09 को प्रातः काल 7.00 बजे नासिक शनि सिंगडापुर रोड पर ग्राम कोकउ थाना संगमनेर जिला अहमदनगर महाराष्ट् के अन्तर्गत कथित दुर्घटना में लिप्त वाहन ट्क संख्या एम0एच0 15जी0 4212 व वाहन क्वालिश संख्या एम0एच0 04बी0एन0 1138 के चालकों ने अपने अपने वाहनों को तेजी व लापरवाही से चलाकर एक दूसरे को टक्कर मारी, जिससे वाहन संख्या एम0एच0 04बी0एन0 1138 पर सवार श्रीमती दुर्घटना की तिथि पर वैध एवं प्रभावी चालक लाईसेन्स नहीं था?

3. क्या दुर्घटना में लिप्त वाहन संख्या एम0एच0 15 जी0 4212 के चालक के पास दुर्घटना की तिथि पर वैध एवं प्रभावी चालक लाईसेन्स नहीं था?

4. क्या दुर्घटना में लिप्त वाहन संख्या एम0एच0 04बी0एन0 1138 के चालक के पास दुर्घटना की तिथि पर वैध एवं प्रभावी चालक लाईसेन्स नहीं था?

5. क्या दुर्घटना में लिप्त वाहन संख्या एम0एच0 15 जी0 4212 विपक्षी संख्या–3 दि न्यू इन्डिया इन्श्योरेन्स कम्पनी लिमिटेड से बीमित था?

6. क्या दुर्घटना में लिप्त वाहन संख्या एम0एच0 04बी0एन0 1138 विपक्षी संख्या–1 नेशनल इन्श्योरेन्स कम्पनी लिमिटेड द्वारा बीमित था।

7. अनुतोष?''

"1 . Whether Arvind Kumar Shukla has a right to file the instant petition on behalf of his wife Smt Manju Shukla?

2 . Whether on 15.9.09 at 7 am, on Nashik Shani Shignapur Road, in Village Kakau, P.S. Sangamner, Distt Ahmedabad, Maharashtra, drivers of Truck no MH 15G 4212 and Qualis no MN 04BN 1138 speedily and recklessly drove and thus rammed their respective vehicles into each other, as a result of which Smt Manju aboard vehicle no MH 04BN 1138 sustained serious injuries and consequently died during her treatment ?

3 . Whether driver of vehicle no M.H.15 G4212, involved in accident, did not have a valid and effective driving license on the date of accident?

4 . Whether driver of vehicle no. MH 04BN 1138, involved in accident, did not have a valid and effective driving license on the date of accident?

5 . Whether vehicle no M.H.15 G4212 involved in accident was insured with respondent no 3 The New India Insurance Company Limited?

6 . Whether vehicle no. MH 04BN 1138 involved in accident was insured with respondent no 1 The National Insurance Company Limited?

7. Relief?"

(English Translation by Court)

15. After amendment of claim petition, Insurers- 1 and 2 both filed their written statements and thereafter six more issues were framed as under:-

''1. क्या दिनांक 15.09.09 को प्रातः काल 7.00 बजे नासिक शनिसंगारपुर रोड पर ग्राम कोकड थाना संगमनेर जिला अहमदनगर, महाराष्ट् के अन्तर्गत कथित दुर्घटना में लिप्त वाहन ट्क संख्या एम0एच0 15 जी0 4212 व वाहन क्वालिश संख्या एम0एच0 04बी0एन0 1138 के चालकों ने अपने अपने वाहन को तेजी व लापरवाही से चलाकर एक दूसरे को टक्कर मार दिया जिससे वाहन संख्या एम0एच0 04बी0एन0 1138 पर सवार श्रीमती मंजू शुक्ला को गम्भीर चोटें आयी, जिसके परिणामस्वरूप दौरान इलाज उसकी मृत्यु हो गयी?

2. क्या दुर्घटना में लिप्त वाहन संख्या एम0एच0 15 जी0 4212 के चालक के पास दुर्घटना की तिथि पर वैध एवं प्रभावी चालक लाईसेन्स नहीं था?

3. क्या दुर्घटना में लिप्त वाहन संख्या एम0एच0 04बी0एन0 1138 के चालक के पास दुर्घटना की तिथि पर वैध एवं प्रभावी चालक लाईसेन्स नहीं था?

4. क्या दुर्घटना में लिप्त वाहन संख्या एम0एच0 15 जी0 4212 विपक्षी संख्या–3 दि न्यू इन्डिया इन्श्योरेन्स कम्पनी लिमिटेड से बीमित था?

5. क्या दुर्घटना में लिप्त वाहन संख्या एम0एच0 04बी0एन0 1138 विपक्षी संख्या–1 नेशनल इन्श्योरेन्स कम्पनी लिमिटेड द्वारा बीमित था।

6. अनुतोष?''

" 1. Whether on 15.9.09 at 7 am on Nashik Shani Shignapur Road in Village Kakau, PS Sangamner, Distt Ahmedabad, Maharashtra, the drivers of Truck no M.H. 15G 4212 and Qualis no MH 04BN 1138 speedily and recklessly drove and thus rammed their respective vehicles into each other, as a result of which Smt Manju aboard vehicle no MH 04BN 1138 sustained serious injuries and consequently died during her treatment ?

2 . Whether driver of vehicle no M.H.15 G4212, involved in accident, did not have a valid and effective driving license on the date of accident?

3 . Whether driver of vehicle no. MH 04BN 1138, involved in accident, did not have a valid and effective driving license on the date of accident?

4 . Whether vehicle no M.H.15 G4212, involved in accident, was insured with respondent no 3 The New India Insurance Company Limited?

5 . Whether vehicle no. MH 04BN 1138, involved in accident, was insured with respondent no 1 The National Insurance Company Limited?

6. Relief?"

(English Translation by Court)

16. In support of claim, claimant adduced oral evidence by deposing himself as PW-1; Sri Kedar Chaudhary as PW-2; Kumari Sudha Shukla as PW-3; Dr. Dadan Rai as PW-4; Dr. Rajendra Bhau as PW-5; Sri Ravi Ranjan as PW-6; Sri Avinash Srivastava as PW-7 and Sri Bhola Nath as PW-8. The written evidence comprised of First Information Report *(hereinafter referred to as "FIR")*, Insurance Cover Note of both vehicles, Driving License, permit, fitness certificate, medical bills, certificate issued by Chief Medical Officer regarding permanent disability of Smt. Manju Shukla to the extent of 100 per cent, appointment letter of claimant-respondent, document about his salary and various bill vouchers showing expenditure incurred on the treatment of Smt. Manju Shukla.

17. After examining evidence, Tribunal held that both tortfeasing vehicles were insured with respective Insurance Companies; both Drivers possessed valid Driving License and vehicles have other requisite documents like Fitness Certificate, Registration Certificate etc., and these facts are duly proved. The factum of accident was also found proved. Thereafter, it examined expenditure incurred on treatment of Smt. Manju Shukla and on the basis of medical bills and other documents, it held that Rs. 55 to 56 lacs were spent by husband of deceased; she was in the stage of Coma-II during the period of treatment since after accident; being a housewife, her notional income was assessed at Rs. 4,500/- per month which comes to Rs. 54,000/- per annum. Applying multiplier of 18, her total income comes to Rs. 9,72,000/- and thereafter deducting 1/3, it was reduced to Rs. 6,48,000/-. Further, Tribunal added 50 per cent for future prospects as per Rules 220A and 220B added in U.P. Motor Vehicles Rules, 1998 *(hereinafter referred to as "Rules, 1998")* vide UP Motor Vehicles (Eleventh Amendment) Rules, 2011 *(hereinafter referred to as "Amendment Rules, 2011")* and this comes to Rs. 9,72,000/-. It allowed Rs. 10,000/- towards loss of estate; Rs. 10,000/- towards loss of consortium and Rs. 5,000/- towards funeral expenses. Tribunal also

awarded compensation of Rs. 9,97,000/- plus Rs. 55 lacs towards medical expenses and a sum of Rs. 5,00,000/- towards pain and mental torture, since deceased suffered 100 per cent permanent disability and remained in Coma-II stage for about one year nine months. Thus, total compensation of Rs. 72,47,000/- was awarded. Thereafter, it held that both vehicles were equally responsible for said accident and, therefore, held Insurers- 1 and 2 liable to pay equal amount of compensation and has accordingly directed both to pay 50 per cent each towards compensation out of total compensation of Rs. 72,47,000/- awarded by Tribunal along with 8 per cent interest to be computed from the date of filing of application i.e. 11.06.2010 till actual payment.

18. Sri Rakesh Bahadur, learned counsel appearing for Insurer-2 contended that Drivers were not examined and, therefore, it could not have been proved that accident was due to rash and negligent driving by both the Drivers; there is no finding recorded by Tribunal on the point of negligence; medical expenses as per evidence adduced, were much less than what was actually claimed and awarded by Tribunal, therefore, award in question is bad in law to that extent; deceased was a house-wife, therefore, claimant-husband cannot be said to be dependent upon her and, hence, there was no loss of dependency for awarding any compensation.

19. Adopting his argument, Sri K.S. Amist, Advocate submitted that amount of medical expenses awarded by Tribunal is highly excessive. Referring to Ground-20, he urged that as per documents adduced by claimant, total amount of medical expenses comes to Rs. 26,60,344/- though Rs. 55 lakhs has been awarded by Tribunal which is apparently perverse; no future prospects could have been allowed by relying on Rule 220A added by Amendment Rules, 2011 with effect from 26.09.2011 as accident took place on 15.09.2009 and said Rule was not available on that date.

20. Learned counsel for Claimant in support of his claim for enhancement of compensation contended that Tribunal has awarded only 8 per cent interest though it ought to be 12 per cent and that too, should have been awarded from the date of accident and not from the date of claim petition. He further submits that due to long duration of treatment of deceased, Claimant has to leave his job and sustained serious financial scarcity but no compensation under this head has been awarded; the amount of compensation awarded under the head of loss of estate, love and affection and financial expenses are also meagre and not consistent with law laid down by Supreme Court; for termination of pregnancy due to accident, Claimant was entitled for appropriate compensation but Tribunal awarded only Rs. 2,50,000/- under the said head which is quite inadequate; assessment of notional income of Rs. 4,500/- per month is inadequate, unjust and meagre and it should have been real, just and much higher.

21. On the arguments raised by learned counsel for parties as noticed above and perusal of record, the points for determination which have arisen in these appeals are formulated as under:-

(i) Whether non-examination of Drivers would affect the findings of Tribunal in any manner on the issue of rash and negligence driving.

(ii) Whether Tribunal has erred in law in allowing future prospects and has

rightly followed Rule 220A or no future prospects were awardable ?

(iii) Whether Rule 220A could have been relied for determination of just compensation ?

(iv) Whether notional income of deceased has been determined by Tribunal rightly or it needs be increased as claimed by Claimant or reduced as claimed by Insurers-1 and 2 ?

(v) Whether amount of compensation awarded by Tribunal towards medical expenses and for treatment is excessive, based on no evidence or it is on the lower side as claimed by Claimant or is justified and warrants no interference ?

(vi) Whether loss of employment of Claimant on account of long duration Coma-II stage of deceased, running for about 21 months, termination of pregnancy etc., deserves to be awarded any amount of compensation and non-consideration and non-award of any amount on this aspect by Tribunal is erroneous ?

(vii) Whether amount of compensation awarded under the head of loss of estate, love and affection, funeral expenses etc., is just, valid, adequate or needs be increased ?

22. Before coming to aforesaid issues, evidence as adduced before Court below and admitted or proved, may be re-collected at this stage.

23. With regard to Insurance of Truck No. MH 15G 4219, Sri Vinod Kumar Sinha, Development Officer of Insurer-1 appeared as DW-1 and proved that vehicle was insured with Insurer-1 and had a valid period of insurance from 05.05.2009 to 04.05.2010.

24. Similarly, in respect of Insurance of Toyota Qualis, Sri Ashok Kumar, Assistant Manager of Insurer-2 appeared in person and proved insurance of said vehicle with Insurer-2.

25. Giving details of documents which have been considered by Tribunal for awarding Rs. 55,00,000/- towards expenses on treatment, medicines and other incidental expenses, it has referred to a list of 32 documents as under:-

S.No.	Paper No.	No. of Bills/ Vouchers	Expenses towards	Amount in Rs.
1.	GA-70	40	Care Pharma (Medical and General Stores)	Rs. 26,887.57/-
2.	GA-71	1	Tambe Hospital at Sangamner	Rs. 2,44,800.00/-
3.	GA-72	7	Shri Siddheshwar Medicals	Rs. 6,522.00/-
4.	GA-73	5	C.T. Scan Center Pvt. Ltd.	Rs. 8,100.00/-
5.	GA-74	4	Blood Bank	Rs. 1620.00/-
6.	GA-75	3	Ambulance	Rs. 800.00/-

7.	GA-76	50	Care Pharma (Medical and General Stores)	Rs. 71,472.16/-
8.	GA-77	4	Care Pharma (Medical and General Stores)	Rs. 79,087.00/-
9.	GA-78	1	Fooding and lodging	Rs. 1,82,800.00/-
10.	GA-80	102	Hospital: Kokilaben Dhirubhai Ambani	Rs. 19,25,483.00/-
11.	GA-81	21	Hospital: Kokilaben Dhirubhai Ambani	Rs. 17,25,483.00/-
12.	GA-82	4	Bina Nurses Bureau	Rs. 25,943.00/-
13.	GA-83	3	Medicines	Rs. 4,785.00/-
14.	GA-84	1	Hotel Divya International 10.10.09 to 20.5.10	Rs. 2,66,400.00/-
15.	GA-86	9	Radhika Travels 13.09.09 to 20.05.10	Rs. 9,65,200.00/-
16.	GA-87	96	Fooding at Sharma Veg Fast Food 08.10.09 to 31.10.09	Rs. 45,264.00/-
17.	GA-88	120	Fooding at Sharma Veg Fast Food 1.11.09 to 30.11.09	Rs. 59,858.00/-
18.	GA-89	124	Fooding at Sharma Veg Fast Food 1.12.09 to 31.12.09	Rs. 62,047.00/-
19.	GA-90	124	Fooding at Sharma Veg Fast Food 1.1.10	Rs. 64,495.00/-

			to 31.1.10	
20.	GA-91	112	Fooding at Sharma Veg Fast Food 1.2.10 to 28.2.10	Rs. 56,153.00 /-
21.	GA-92	124	Fooding at Sharma Veg Fast Food 1.3.10 to 31.3.10	Rs. 63,748.00 /-
22.	GA-93	120	Fooding at Sharma Veg Fast Food 1.4.10 to 31.4.10	Rs. 61,047.00 /-
23.	GA-94	80	Fooding at Sharma Veg Fast Food 1.5.10 to 20.5.10	Rs. 41,337.00 /-
24.	GA-95	90	Medicine at Sri Ram Medical Store	Rs. 67,422.00 /-
25.	GA-96	10	Medicine at Sri Ram Medical Store	Rs. 4,848.00/-
26.	GA-97	8	Agrawal Surgical Emporium	Rs. 17,449.00 /-
27.	GA-98	20	Gaurav Nursing Home	Rs. 3,87,050.00/-
28.	GA-99	2	Surgery and Pathology	Rs. 3,850.00/-
29.	GA-135	6	Bed Charge of Gaurav Nursing Home	Rs. 1,75,800.00/-
30.	GA-136	6	X-Ray and Pathology of Gaurav Nursing Home	Rs. 13,350.00 /-
31.	GA-137	14	Medicine at Sri Ram Medical Store	Rs. 6,727.00/-
32.	GA-138	5	Agrawal Surgical Emporium	Rs. 6,257.00/-

26. Before examining points for determination as formulated above, we find it appropriate to have a glimpse of statutory provisions and the purpose and objective for which Act, 1988 makes provisions for compensation in case of death or injury sustained by a person in a motor accident as that will be a guiding factor in examining the various questions raised in these appeals.

27. It is also evident from record that initially application for compensation was filed by Smt. Manju Shukla through her representative, having sustained serious injuries leading her to Coma-II stage. From the date of accident and during her treatment, lot of expenses were incurred by her husband. Admittedly, application was filed under Section 166 of Act, 1988 by Smt. Manju Shukla. Subsequently, after her death, necessary amendments were made and husband of deceased Smt. Manju Shukla became Claimant. The relevance of application having been filed under Section 166 of Act, 1988 is for a reason. In fact, in Act, 1988, there are three provisions whereunder compensation can be awarded to a victim or his/ her legal heirs as the case may be.

28. Chapter X, having Sections 140 to 144, deals with the provisions relating to "liability without fault", in certain cases. Provisions under this Chapter have been given overriding effect by virtue of Section 144. Section 140(1) provides, where death or permanent disablement has resulted to a person from an accident arising out of use of a motor vehicle or motor vehicles, owner/owners of vehicle shall, jointly and severely, be liable to pay compensation, in respect of such death or disablement, in accordance with said section. Sub-section (2) provides a fixed amount of Rs. 50,000/- in case of death and Rs. 25,000/- in case of permanent disablement. In order to attract Section 140 there is no necessity or requirement to show that accident took place due to rash and negligent driving of tortfeaser vehicle. It recognizes principle of "no fault liability". The amount awardable thereunder is fixed by legislature itself. Liability is that of owner. Insurer does not come into picture when claim is made under Section 140. This "no fault liability" envisaged in Section 140 is distinct from the "rule of strict liability". In other words, liability under Section 140 is a statutory liability. If an amount under Section 140 has been paid and thereafter claim is made under Section 166, amount paid under Section 140 is liable to be deducted from final amount of compensation awarded by Tribunal. The amount under Section 140 being a fixed/crystallized amount, same has to be considered as part of estate of deceased as held in **Smt. Manjuri Bera vs. The Oriental Insurance Company Ltd. and another, AIR 2007 SC 1474.**

29. Liability under Section 140 has to be borne by owner if vehicle was not insured or there was a breach of conditions of insurance. Though Section 140 makes owner of vehicle responsible for payment of compensation but if vehicle is insured, it is always open to owner to make Insurer liable to pay amount of compensation for the reason that once vehicle is covered under the terms of policy, it is for Insurer to make payment of liability of owner to the extent indicated in policy, be it under Section 166 or Section 140 of Act, 1988.

30. In the scheme of Act, 1988, Chapter X, by virtue of Section 140, contemplates quick relief to a victim by awarding a fixed amount of compensation,

if death or permanent disability has resulted from an accident arising out of use of a motor vehicle and for this purpose there is no requirement of pleading or establishing that death or permanent disablement was due to any wrongful act, negligence or default of owner of vehicle.

31. Section 141 declares that right to claim compensation under Section 140 is in addition to any other right to claim compensation on the principle of "fault liability" but it only excludes right to claim compensation under Section 163A. In other words, if a compensation is claimed under "no fault liability" then either it can be an application under Sections 140 or 163A and not both. This is what has also been clarified in **The Oriental Insurance Co. Ltd. etc. vs. Hansrajbhai V.Kodala and others, 2001(5) SCC 175.**

32. Section 142 classifies injuries which are considered "permanent disablement" for the purpose of Chapter X of Act, 1988.

33. By virtue of Section 143 of Act, 1988, benefit of "no fault liability" under Chapter X has also been extended to a workman to claim compensation in respect of death or permanent disablement either by approaching Workman Compensation Commissioner under Workmen's Compensation Act, 1923 *(hereinafter referred to as the "Act, 1923")* or Tribunal under Act, 1988, by filing application under Section 140 of Act, 1988.

34. Next provision under Act, 1988 is Section 161 read with Section 163, which is a special provision for compensation in case of a hit and run motor accident where identity of vehicle/ tortfeaser is not ascertainable despite reasonable efforts for the purpose. In this regard Section 163 empowers Central Government to make a scheme for payment of compensation in hit and run accident cases and subject to such scheme, Section 161(3) provides compensation of fixed sum of Rs. 25,000/- in case of death and Rs. 12,500/- in case of grievous injuries.

35. Initially when Act, 1988 was enacted there was no provision for compensation in case of "no fault liability" based on a structured formula which provides scope for determination of compensation. By Act 54 of 1994, and w.e.f. 14.11.1994, Section 163A was inserted making special provision for payment of compensation on structured formula. This Section commences with a "non-obstente" clause and overrides provisions of Act, 1988 or any other law for the time being in force or instrument having force of law. It says that owner of vehicle or authorized Insurer shall be liable to pay compensation as indicated in Second Schedule in case of death, to legal heirs and in case of permanent disablement, to the victim, as the case may be. Explanation to Section 163A(1) incorporates by Reference, meaning of "permanent disability" as provided in Act, 1923 to the word "permanent disablement" used under Section 163A of Act, 1988. For claiming compensation under Section 163A(1) claimant is not required to plead or establish that accident occurred due to any wrongful act, neglect or default on the part of owner of vehicle concern or of any other person.

36. There is a note appended to Second Schedule of Act, 1988, raising a legal fiction stating that injuries deemed to result in permanent total disablement/

permanent partial disablement and percentage of loss of earning capacity shall be as per Schedule First under Act, 1923. In para 5 of Second Schedule of Act, 1988, provisions of First Schedule of Act, 1923 have been incorporated by reference. To attract Section 163A and to claim compensation thereunder, one has to establish factum of accident, age of deceased/ injured, as the case may be and his/her income. Broadly, these are the only relevant factors to be brought before Tribunal for determining compensation under Section 163A.

37. However, while determining compensation, Tribunal has to consider relevant factors and it cannot be expected to go by a ready reckoner as held in **U.P. State Road Transport Corporation and Ors. vs. Trilok Chandra and others, 1996(4) SCC 362.**

38. Next provision relating to compensation is Chapter XII, i.e., Section 166 read with Section 165.

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39. State Government has empowered by Section 165(1) to constitute one or more Tribunals for the purpose of adjudicating upon claims for compensation in respect of accidents involving death of, or bodily injury, to persons, arising out of use of motor vehicles or damages of any property of a third party so arising or both.

40. Section 166 provides that an application for compensation arising out of an accident of the nature specified in Section 165(1) may be made and these are:

"(a) by the person who has sustained the injury; or

(b) by the owner of the property; or

(c) where death has resulted from the accident, by all or any of the legal representatives of the deceased; or

(d) by any agent duly authorized by the person injured or all or any of the legal representatives of the deceased, as the case may be."

41. Section 168 requires Tribunal to determine amount of compensation which appears to it, "just" after giving opportunity to parties including Insurer.

42. Application under Section 166 can be filed by heirs and legal representatives of victim, in case of death, and it is not relevant, whether they are financially dependent upon the victim or not. Further no other person can apply for compensation under Section 166, if he/she does not come within the term "legal representative" even if he or she is proved to be financially dependent upon the victim.

43. Term "legal representative" has not been defined in Act, 1988, therefore, Court can look into Section 2(11) of Code of Civil Procedure *(hereinafter referred to as the "CPC")* defining "Legal Representatives".

44. In **Smt. Manjuri Bera vs. The Oriental Insurance Company Ltd. (supra)** Court held that under Section 2(11) CPC, "legal representative" means a person who in law represents the estate of deceased person and includes any person who inter-meddles with the estate of deceased and where a party sues or is sued in a representative character, the person to whom estate devolves on the death of party so suing or sued.

45. Section 166 contemplates application for compensation which is commonly called as "claim on fault

liability". The inter relationship of Sections 163A and 166 was considered in **Deepal Girishbhai Soni and others vs. United India Insurance Co. Ltd. 2004(5) SCC 385**. Court said that Section 163A is for grant of immediate relief and award made thereunder would be in full and final settlement of claim. It is not interim in nature. Amount of compensation payable thereunder is not to be altered or varied in any other proceedings unlike the amount paid under Section 140 which can be set off against a higher compensation.

46. In **Smt. Sarla Verma and Ors. vs. Delhi Transport Corporation and another, 2009(6) SCC 121** it was held, where application is filed under Section 163A of Act, 1988, it is possible to calculate compensation on the structured formula basis even where compensation is not specified, with reference to annual income of deceased if it is not more than Rs. 40,000/-, by applying the formula; (2/3 x AI x M), i.e., two-thirds of the annual income multiplied by multiplier applicable to the age of deceased would be compensation. Several principles of tortious liability are excluded when claim is under Section 163A of Act, 1988 but when application is under Section 166, Tribunal is under a statutory obligation to determine "just" amount of compensation.

47. Section 168 contemplates determination of "just compensation". 'Just' means, fair, reasonable and equitable amount accepted by legal standards. "Just compensation" does not mean perfect or absolute compensation. "Just compensation" principle requires examination of particular situation obtaining uniquely in an individual case.

48. When compensation is to be determined on an application under Section 166, various heads under which damages are to be assessed, have to be looked into by Tribunal and not by merely determining income and applying multiplier.

49. We may consider some broad aspects in the context of injury/ disability and death separately.

Bodily Injury/Disability

50. Here damages are broadly in two categories, i.e., pecuniary damages and special damages. Pecuniary damages are those which victim has actually incurred and which are capable of being calculated in terms of money. Pecuniary damages may include: (i) medical attendance; (ii) loss of earning profit upto the date of trial; (iii) other material loss.

51. Non-pecuniary damages are such which are incapable of being assessed by arithmetical calculation. They may include; (i) damages for mental and physical shock, pain suffering, already suffered or likely to be suffered in future; (ii) damages to compensate for the loss of amenities of life which may include a variety of matters, i.e., on account of injury the claimant may not be able to walk, run or sit; (iii) damages for the loss of expectation of life, i.e., on account of injury the normal longevity of the person concerned is shortened; (iv) inconvenience, hardship, discomfort, disappointment, frustration and mental stress in life.

Death

52. In the case of death, for the purpose of compensation claimant(s) must establish: (i) age of deceased; (b) income of deceased; and, (c) number of dependents. Thereupon Tribunal assesses loss of dependency by considering: (i)

additions/deductions to be made for arriving at income; (ii) deductions to be made towards personal living expenses of deceased; and, (iii) multiplier to be applied with reference to the age of deceased.

53. For the time being, the multiplier which has to be applied has been settled by Court in **Smt. Sarla Verma and Ors. vs. Delhi Transport Corporation (supra)** and the same reads as under:

Age Group		**Multiplier**
15-20	–	18
21-25	–	18
26-30	–	17
31-35	–	16
36-40	–	15
41-45	–	14
46-50	–	13
51-55	–	11
56-60	–	9
61-65	–	7
Above 65	–	5

54. In the case of employed deceased, future prospects are also to be taken into consideration to determine loss of dependency. There are some authorities which provide that compensation under the head of future prospect can be allowed even to self employed persons. Presently this question is pending before a Larger Bench on a reference made in **Shashikala and others vs. Gangalakshmamma and others, 2015(9) SCC 150.** Besides, under following heads also due compensation needs to be awarded.

(i) Love and affection (to be considered separately for wife, children and parents)

(ii) Loss of estate

(iii) Loss of consortium

(iv) Funeral expenses

55. In case of death of a housewife, Courts have referred to certain additional heads which should be considered to assess pecuniary value of housewife. In **Mehmet vs. Perry, (1977) 2 All ER 52**, following heads were stated for grant of damages after assessing pecuniary value of a housewife's services:

"(a) Loss to the family of the wife's housekeeping services.

(b) Loss suffered by the children of the personal attention of their mother, apart from housekeeping services rendered by her.

(c) Loss of the wife's personal care and attention, which the husband had suffered, in addition to the loss of her housekeeping services."

56. This judgment has been referred to with approval in **Arun Kumar Agrawal and another Vs. National Insurance Company Limited and others, 2010(9) SCC 218.**

57. Besides above, there are two general heads which are applicable to all category of cases, namely, (i) litigation expenses and (ii) interest.

58. Tribunal has to consider quantum of compensation in the light of discussion made above considering the facts of the case and it is a statutory duty of Tribunal to determine a just compensation which must be allowed to claimant.

59. In **R.D. Hattangadi vs. M/s. Pest Control (India) Pvt. Ltd. and others, 1995(1) SCC 551** it was observed that process of determination of amount of compensation involves some guess work,

some hypothetical consideration, some amount of sympathy linked with the nature of the disability caused but all aforesaid elements have to be viewed with objective standards. Process of determination involves a reasonable estimate and a justifiable guess work on the part of Tribunal. In the nature of claims involving fatal accident cases, what is required is determination of "what would have been" and not "what actually is". However, approach has to be pragmatic and sympathetic. Court is expected not only to take fortuitous circumstances and good possibilities of future, the advantages in favour of deceased as well as dependents but also the unexpected misfortunes that may happen. Taking all these aspects into account, a fair and justifiable conclusion, striking a fair balance, tranquilised with a sympathetic chord, but devoid of all emotionalism, sensationalism and melodramatic blood and thunder, has to be arrived at by Tribunal. These factors with some minor modification may apply in the case of permanent disability also.

60. Broadly it has been observed that in deciding, what damages should be awarded to a claimant, same should be tested on three principles, first, that the award should be moderate, just and fair and it should not be oppressive to respondent, second, award should not be punitive, exemplary and extravagant and third, as far as possible similar cases must be decided similarly so that community of public at large may not carry the grievance of discrimination.

61. The question of determination of compensation directly came up before Supreme Court in **Raj Kumar Vs. Ajay Kumar and another, 2011(1) SCC 343**. Therein, claimant sustained fracture of both bones of left leg and fracture of left radius in a motor accident on 01.10.1991. Tribunal awarded compensation under the heads of loss of future earning, pain and sufferings, loss of earning during period of treatment, medical expenses, conveyance and special diet. He was awarded total compensation of Rs. 94,700/- and 9% interest. His appeal for enhancement was rejected by Tribunal and ultimately went in appeal to Supreme Court. It observed that scheme of Act, 1988 shows that award must be "just", which means that compensation should, to the extent possible, fully and adequately restore claimant to the position prior to the accident. The object of awarding damages is to make good the loss suffered as a result of wrong done as far as money can do so, in a fair, reasonable and equitable manner. A person is not only to be compensated for physical injury, but also for the loss which he suffered as a result of such injury. It means that he is to be compensated for his inability to lead a full life, his inability to enjoy those normal amenities which he would have enjoyed but for the injuries, and his inability to earn as much as he used to earn or could have earned. The heads under which compensation needs be awarded in "personal injury" cases are detailed in para 6 of the judgment in **Raj Kumar Vs. Ajay Kumar (supra)** and it reads as under:

"6. The heads under which compensation is awarded in personal injury cases are the following:

Pecuniary damages (Special Damages)

(i) Expenses relating to treatment, hospitalization, medicines,

transportation, nourishing food, and miscellaneous expenditure.

(ii) Loss of earnings (and other gains) which the injured would have made had he not been injured, comprising:

(a) Loss of earning during the period of treatment;

(b) Loss of future earnings on account of permanent disability.

(iii) Future medical expenses.

Non-pecuniary damages (General Damages)

(iv) Damages for pain, suffering and trauma as a consequence of the injuries.

(v) Loss of amenities (and/or loss of prospects of marriage).

(vi) Loss of expectation of life (shortening of normal longevity).

In routine personal injury cases, compensation will be awarded only under heads (i), (ii)(a) and (iv). It is only in serious cases of injury, where there is specific medical evidence corroborating the evidence of the claimant, that compensation will be granted under any of the heads (ii)(b), (iii), (v) and (vi) relating to loss of future earnings on account of permanent disability, future medical expenses, loss of amenities (and/or loss of prospects of marriage) and loss of expectation of life."

62. "Disability" refers to any restriction or lack of ability to perform an activity in the manner considered normal for a human-being. "Permanent disability" refers to the residuary incapacity or loss of use of some part of the body, found existing at the end of period of treatment and recuperation, after achieving maximum bodily improvement or recovery which is likely to remain for remainder life of injured. Permanent disability can be either partial or total. "Partial permanent disability" refers to a person's inability to perform all the duties and bodily functions that he could perform before the accident, though he is able to perform some of them and is still able to engage in some gainful activity. "Total permanent disability" refers to a person's inability to perform any avocation or employment related activities as a result of the accident.

63. The percentage of disability certified in medical terms has been considered and Courts have observed that percentage of disability in respect of a part of body does not mean the same percentage with respect to whole body and it may be different. Para 9 of judgment in **Raj Kumar Vs. Ajay Kumar (supra)** said as under:

"9. The percentage of permanent disability is expressed by the Doctors with reference to the whole body, or more often than not, with reference to a particular limb. When a disability certificate states that the injured has suffered permanent disability to an extent of 45% of the left lower limb, it is not the same as 45% permanent disability with reference to the whole body. The extent of disability of a limb (or part of the body) expressed in terms of a percentage of the total functions of that limb, obviously cannot be assumed to be the extent of disability of the whole body. If there is 60% permanent disability of the right hand and 80% permanent disability of left leg, it does not mean that the extent of permanent disability with reference to the whole body is 140% (that is 80% plus 60%). If different parts of the body have suffered different percentages of disabilities, the sum total thereof expressed in terms of the permanent disability with reference to the whole body, cannot obviously exceed 100%."
(emphasis added)

64. Court also castigated that Tribunals wrongly assume that percentage of permanent disability is same in terms of percentage of loss of future earning capacity. The two aspects are different. Relevant observations in para 10 of the judgment in **Raj Kumar Vs. Ajay Kumar (supra)** are reproduced as under:

"10. Where the claimant suffers a permanent disability as a result of injuries, the ***assessment of compensation under the head of loss of future earnings, would depend upon the effect and impact of such permanent disability on his earning capacity.*** *The Tribunal should not mechanically apply the percentage of permanent disability as the percentage of economic loss or loss of earning capacity. In most of the cases,* ***the percentage of economic loss, that is, percentage of loss of earning capacity, arising from a permanent disability will be different from the percentage of permanent disability.*** *Some Tribunals wrongly assume that in all cases, a particular extent (percentage) of permanent disability would result in a corresponding loss of earning capacity, and consequently, if the evidence produced show 45% as the permanent disability, will hold that there is 45% loss of future earning capacity. In most of the cases, equating the extent (percentage) of loss of earning capacity to the extent (percentage) of permanent disability will result in award of either too low or too high a compensation." (emphasis added)*

65. Court also held that in some cases that where evidence and assessment shows that percentage of loss of earning capacity as a result of permanent disability is approximately the same as percentage of permanent disability then in such a situation, said percentage of permanent disability for determination of compensation may be adopted but it is not always. It is in this context Court further said that in order to determine, whether there is any permanent disability and if so the extent of such disability, a Tribunal should consider, and decide, with reference to evidence:

"(i) whether the disablement is permanent or temporary;

(ii) if the disablement is permanent, whether it is permanent total disablement or permanent partial disablement;

(iii) if the disablement percentage is expressed with reference to any specific limb, then the effect of such disablement of the limb on the functioning of the entire body, that is the permanent disability suffered by the person."

66. It was also observed that ascertainment of the effect of permanent disability on actual earning capacity involves three steps. First is to ascertain what activities claimant could carry on inspite of permanent disability and what he could not do as a result of permanent disability. The second is to ascertain claimant's avocation, profession and nature of work before accident, as also his age. The third step is to find out whether claimant is totally disabled from earning any kind of livelihood or despite permanent disability, claimant could still effectively carry on activities and functions, which he was earlier carrying on and whether he was prevented or restricted from discharging his previous activities and functions, but could carry on some other or lesser scale of activities and functions so that he continues to earn or can continue to earn his livelihood.

67. The role of Tribunal was elaborated by observing that it is not a silent spectator when medical evidence is tendered in regard to the injuries and their effect, in particular the extent of permanent disability. Tribunal does not function as a neutral umpire as in a civil suit. It is an active explorer and seeker of truth who is required to hold an enquiry into the claim for determining 'just compensation'. Tribunal should take an active role to ascertain the true and correct position so that it can assess 'just compensation'. Court also observed that when a doctor gives evidence about percentage of permanent disability, Tribunal must find out whether such percentage of disability is functional disability with reference to whole body or whether it is only with reference to a limb. In para 19 of the judgment in **Raj Kumar Vs. Ajay Kumar (supra)** Court summarized the principles in respect of "permanent disability" and assessment of compensation and in para 20 it gives certain illustrations in regard to assessment of loss of future earning. Same are reproduced as under:

"19. We may now summarize the principles discussed above:

(i) All injuries (or permanent disabilities arising from injuries), do not result in loss of earning capacity.

(ii) The percentage of permanent disability with reference to the whole body of a person, cannot be assumed to be the percentage of loss of earning capacity. To put it differently, the ***percentage of loss of earning capacity is not the same as the percentage of permanent disability*** *(except in a few cases, where the Tribunal on the basis of evidence, concludes that percentage of loss of earning capacity is the same as percentage of permanent disability).*

(iii) The doctor who treated an injured-claimant or who examined him subsequently to assess the extent of his permanent disability can give evidence only in regard the extent of permanent disability. The loss of earning capacity is something that will have to be assessed by the Tribunal with reference to the evidence in entirety.

(iv) The same permanent disability may result in different percentages of loss of earning capacity in different persons, depending upon the nature of profession, occupation or job, age, education and other factors.

20. The assessment of loss of future earnings is explained below with reference to the following illustrations:

Illustration 'A': The injured, a workman, was aged 30 years and earning Rs. 3000/- per month at the time of accident. As per Doctor's evidence, the permanent disability of the limb as a consequence of the injury was 60% and the consequential permanent disability to the person was quantified at 30%. The loss of earning capacity is however assessed by the Tribunal as 15% on the basis of evidence, because the claimant is continued in employment, but in a lower grade. Calculation of compensation will be as follows:

a) Annual income before the accident	*Rs. 36,000/-*
b) Loss of future earning per annum (15% of the prior annual income)	*Rs. 5400/-*
c) Multiplier applicable with reference to age	*17*
d) Loss of future	*Rs. 91,800/-*

earnings: (5400x17)	

Illustration 'B': The injured was a driver aged 30 years, earning Rs. 3000/- per month. His hand is amputated and his permanent disability is assessed at 60%. He was terminated from his job as he could no longer drive. His chances of getting any other employment was bleak and even if he got any job, the salary was likely to be a pittance. The Tribunal therefore assessed his loss of future earning capacity as 75%. Calculation of compensation will be as follows:

a) Annual income before the accident	*Rs. 36,000/-*
b) Loss of future earning per annum (75% of the prior annual income)	*Rs. 27,00/-*
c) Multiplier applicable with reference to age	*17*
d) Loss of future earnings: (27,000x17)	*Rs. 4,59,000/-*

Illustration 'C': The injured was 25 years and a final year Engineering student. As a result of the accident, he was in coma for two months, his right hand was amputated and vision was affected. The permanent disablement was assessed as 70%. As the injured was incapacitated to pursue his chosen career and as he required the assistance of a servant throughout his life, the loss of future earning capacity was also assessed as 70%. The calculation of compensation will be as follows:

a) Minimum annual income he would have got if had been employed as an engineer	*Rs. 60,000/-*
b) Loss of future earning per annum (70% of the expected annual income)	*Rs. 42,000/-*
c) Multiplier applicable (25 years)	*18*
d) Loss of future earnings: (42,000x18)	*Rs. 7,56,000/-*

Note: The figures adopted in illustrations (A) and (B) are hypothetical. The figures in Illustration (C) however are based on actuals taken from the decision in Arvind Kumar Mishra (supra).

68. A three Judge Bench considered the question of "just compensation" in a case of permanent disability in **Sanjay Verma Vs. Haryana Roadways, 2014(3) SCC 210.** Court observed that besides determination of damages under the head "loss of income" and "medical expenses", Tribunal must also award compensation under the head "future treatment" and "pain and sufferings" and where there is requirement of an attendant, cost of attendant should also be included in award of compensation.

69. In **Syed Sadiq and others Vs. Divisional Manager, United India**

Insurance Company Ltd., 2014(2) SCC 735, claimant sustained injuries in a road accident on 14.02.2008 to lower end of right femur and his right leg was amputed. Medical certificate, verified 24% disability to upper limb and 85% to lower limb. Claimant therein was a Vegetable Vendor. Tribunal allowed compensation treating disability of whole body at 30%, which was enhanced by High Court to 65%. Supreme Court said that a Vegetable Vendor might not require mobility to the extent that he sells vegetables at one place but the occupation of vegetable vending is not confined to selling vegetables from a particular location. It rather involves procuring vegetables from whole-sale market or farmers and then selling it in retail market. This often involves selling vegetables in cart which requires 100% mobility. Court said that even if it is presumed that vegetable vending by claimant involved selling vegetables from one place, claimant would require assistance with his mobility in bringing vegetables to market place which otherwise would be extremely difficult for him with an amputated leg. Court further observed that in manual labour cases, loss of limb is often equivalent to loss of livelihood. In that case Court upheld disability of 85% since claimant was capable to earn his livelihood once he is brought in market place.

70. In **Rajan Vs. Soly Sebastian and another, 2015(10) SCC 506** claimant was a driver and in a road accident sustained injury causing blurred vision. Doctor certified body disability to the extent of 60%. High Court treated disability to the extent of 100% since it was not possible for claimant to earn his livelihood by working as driver and there was a total permanent disablement to the extent of 100% in respect of earning capacity. Supreme Court also upheld permanent disability with regard to earning capacity as 100%.

71. In **Sanjay Kumar Vs. Ashok Kumar and another, 2014(5) SCC 330** claimant sustained injuries resulting in amputation of right thigh. As per Entry 18 in Part II of Schedule I of Act, 1923, loss of earning capacity was assessed as 70% and Tribunal determined compensation accordingly. Claimant was an Embroider, a skilled workman. Court upheld 70% disability and loss of earning capacity. One more aspect was added that claimant may need assistance in order to travel and move around, regular check-ups and will most likely use a crutch to walk, all of which will incur expenses. It is also a factor which is bound to cause loss of marriage prospects, which is a major loss, keeping in mind the young age of claimant. Thus under the head of loss of future prospect, Court awarded compensation separately at Rs. 75,000/-. It was also observed that amputation, i.e., loss of a limb causes a profusion of distress and claimant has to deal with same for rest of his life. He might have to deal with discrimination and stigma in society due to the fact that he is an amputee. Claimant, therefore, was also allowed compensation of Rs. 1,00,000/- towards loss of amenities. The injury has permanently disabled claimant, reducing his enjoyment of life and full pursuit of all activities he was engaged in, prior to accident.

72. In matter of death, of late, usual award of compensation under the heads "loss of life" and "loss of consortium" is to the extent of Rs. 100000/- under each head; and in respect of loss of love, it is

for each category of legal representative, i.e., children behind wife. Under the head of "funeral expenses", 25,000/- is being awarded very frequently. Interest is being allowed at the rate of 9%. Some of the recent authorities in this regard are, **Kanhsingh Vs. Tukaram, 2015(1) SCALE 366; Kalpanaraj and others Vs. Tamil Nadu State Transport Corporation, 2015(2) SCC 764; Asha Verman and others Vs. Maharaj Singh and others, 2015(4) SCALE 329; and, Jitendra Khimshanker Trivedi and others Vs. Kasam Daud Kumbhar and others, 2015(4) SCC 237.**

73. Now, in the backdrop of statutory provisions as also the precedents discussed above, we now proceed to consider points for determination formulated above in detail.

74. Coming to question-(i), regarding non-examination of Drivers, we find that owner of Truck No. MH 15G 4212 was impleaded as defendant-2 and owner of vehicle Toyota Qualis bearing no. MH 04BN 1138 was impleaded as defendant-4 in the claim petition. Kaleem Babu was driving vehicle Toyota Qualis while Madhukar Ramchandra Vikram was driving tortfeasing Truck. Defendant-2 i.e. owner of Truck before Tribunal while admitting the factum of accident, causing injuries to passengers of Toyota Qualis, stated in paras - 3 and 5 of his written statement that accident took place due to negligence of Driver of Toyota Qualis and not that of Driver of Truck. Similarly, owner of Toyota Qualis in his written statement while admitting accident, pleaded in para-5 that Driver of Truck was negligent and rash in driving which caused accident and there was no negligence on the part of Driver of Toyota Qualis.

75. Insurer-1 in its written statement dated 28.08.2010 initially disputed the very factum of accident and the same stand was taken in additional written statement also. Insurer-2 also in written statement, initially disputed the very factum of accident and claimed that no such accident took place. In the additional written statement dated 13.03.2012 filed by Insurer-2, it reiterated its stand that no such accident took place as is evident from para-3 of additional written statement. There was no pleading at all either on the part of Insurer- 1 or Insurer-2 that accident had taken place not on account of rash and negligent driving of the Drivers but despite of all precautions, unfortunate incident has occurred.

76. Thus, with regard to the factum that there was rash and negligent driving by Drivers or not, no such plea was taken by Insurers- 1 and 2, both, either in their written statements or additional written statements.

77. On the contrary, owners of two tortfeasing vehicles admitted the factum of accident but pleaded that driving of vehicle was rash and negligent on the part of Driver of vehicle other than the one owned by each of them. Meaning thereby, owners of tortfeasing vehicles admitted that accident took place and also admitted that there was rash and negligent driving by Driver. The only difference is that Truck owner pleaded it to be on the part of Driver of Toyota Qualis while owner of Toyota Qualis pleaded it to be on the part of Driver of Truck. That being so, there was no onus on the part of claimant to show that accident has taken place due to rash and negligent driving since this fact, as it is, was not objected or otherwise pleaded by Insurers- 1 and 2 and owners of

two tortfeasing vehicles admitted the factum of rash and negligent driving but levelled allegations against each other's Drivers. Thus, there was no initial burden on Claimant to prove the factum of rash and negligent driving and on the contrary, it was for the defendants i.e. owners of two tortfeasing vehicles to adduce evidence in support of their plea that rash and negligent driving was attributable to the Driver of another vehicle than the one owned by them which they failed. That being so, Tribunal has affixed liability upon both the vehicles and since both vehicles were insured with Insurers- 1 and 2, respectively, responsibility has been directed to be shared by both Insurance Companies.

78. In view of above pleadings and discussion, we are clearly of the view that non-examination of Drivers in the case in hand, could not have rendered claim for compensation by claimant not maintainable and for this reason alone, it cannot be said that judgment and award in question is erroneous in any manner. **Question-(i)**, therefore, is answered against Insurers- 1 and 2 i.e. appellants- 1 and 2 in FAFOs- 1 and 3.

79. Now, we come to Questions- (ii) and (iii) which, in our view, can be dealt with together.

80. Certain provisions of Act, 1988 have conferred power upon State Government concerned to make Rules on the subjects stated under aforesaid provisions. Relevant provisions of Act, 1988, in this regard, we may refer in brief as hereunder:-

81. Section 28 confers power of making rules upon State Government for the purpose of carrying into effect provisions of Chapter II other than the matters specified in Section 27. Chapter II, contemplates provisions of licensing of drivers of motor vehicles. In sub-section (2) of Section 28 certain specific subjects are mentioned but the same are also in the context of licensing of connected matters therewith.

82. Similarly, Section 38 confers power upon State Government to make rules for the purpose of carrying into effect provisions of Chapter III. Sub-section (2) specifies certain subjects which also relates to matters concerned with Chapter III which deals with provisions of licensing of conductors of stage carriages.

83. Then comes Section 65 which confers similar power upon State Government for framing rules for carrying into effect the provisions of Chapter IV relating to registration of motor vehicles.

84. Next is Section 95 which confers power upon State Government to frame rules as to Stage Carriages and Contract Carriages and conduct of passengers in such vehicles. This Section 95 is part of Chapter V which contains provisions relating to control of transport vehicles.

85. Section 96 confers power upon State Government to frame rules for the purpose of carrying into effect, provisions of Chapter V.

86. Section 107 confers power to frame rule for carrying into effect the provisions of Chapter VI which deals with special provisions relating to State transport undertakings.

87. Section 111 confers power upon State Government to frame rules regulating construction, equipment and maintenance of motor vehicles and

Trailers, with respect to all matters other than the matters specified in sub-section (1) of Section 110. This Section 111 is part of Chapter VII which contains provisions of construction, equipment and maintenance of motor vehicles.

88. Section 138 confers power to frame rules upon State Government for the purpose of carrying into effect the provisions of Chapter VIII which contains provisions relating to control of traffic.

89. Section 176 is the only relevant provision which takes into its ambit Sections 165 to 174 which are part of Chapter XII relating to Claims Tribunal. Section 176 reads as under:

"176. Power of State Government to make rules.--A State Government may make rules for the purpose of carrying into effect the provisions of sections 165 to 174, and in particular, such rules may provide for all or any of the following matters, namely:--

(a) the form of application for claims for compensation and the particulars it may contain, and the fees, if any, to be paid in respect of such applications;

(b) the procedure to be followed by a Claims Tribunal in holding an inquiry under this Chapter;

(c) the powers vested in a Civil Court which may be exercised by a Claims Tribunal;

(d) the form and the manner in which and the fees (if any) on payment of which an appeal may by preferred against an award of a Claims Tribunal; and

(e) any other matter which is to be, or may be, prescribed."

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90. Lastly, it is Section 213 which is part of Chapter XIV, i.e., "Miscellaneous". Section 213 confers power upon State Government to establish a Motor Vehicles Department and appoint officers therefor as it thinks fit.

91. In exercise of powers under Sections 28, 38, 65, 95, 96, 107, 111, 138, 176, 213 of Act, 1988 read with Section 21 of General Clauses Act, 1897 *(hereinafter referred to as "Act, 1897)*, Governor of Uttar Pradesh in supersession of all existing Rules on the subject, promulgated the Rules, 1998. Initially, only Rule 220 of Rules, 1998 was available on the statute book with reference to judgement and award of compensation and read as under:-

"220. Judgement and award of compensation - (1) The Claims Tribunal, in passing orders, shall record concisely in judgement the findings on each of the issues framed and the reasons for such finding and make an award, specifying the amount of compensation to be paid by the insurer or in the case of a vehicle exempted under sub-section (2) or (3) of Section 146 by the owner thereof and shall also specify the person or persons to whom compensation shall be payable.

(2) Where compensation is awarded to two or more persons under sub-rule (1) the Claims Tribunal shall also specify the amount payable to each of them.

(3) The Claims Tribunal may, while disposing of claims for compensation, make such orders regarding costs and expenses incurred in the proceeding as it thinks fit."

92. Subsequently, vide Amendment Rules, 2011 published in U.P. Gazette Extraordinary dated 26.09.2011, an

amendment was made in Rules, 1998 and Rules 220A and 220B were inserted therein.

93. Admittedly, aforesaid Rules 220A and 220B, neither were in existence when accident took place i.e. 15.09.2009 nor when application for compensation under Section 166 of Act, 1988 was filed by Smt. Manju Shukla herself on 11.06.2010 nor on the date when she died on 06.06.2011 resulting in amendment of application and substitution of husband of deceased as claimant 1/1. Thus, it can be said that Rules 220A and 220B may not have been invoked by Tribunal while adjudicating claim in hand for the reason that there is nothing on record to show that Rules 220A and 220B were given any retrospective effect.

94. Even otherwise, we find that aforesaid Rules only recognize various Heads of damages/compensation which are to be considered for award of compensation by Tribunal and simultaneously it has also quantified amount under certain heads. Considering the aforesaid Rules, a Division Bench of this Court in **National Insurance Company Limited Vs. Lavkush and Others 2017 (4) ALJ 391 and III (2018) ACC 319 (All.)** has held that statutory obligation of determination of just compensation is that of Tribunal and it cannot be checked and controlled by way of subordinate legislation. This Court, therefore, has held that above Rules at best can be taken as guidelines with respect to award of compensation under different heads but cannot control the obligation of Tribunal to determine just compensation. The amount to be determined by Tribunal has to be considered by Tribunal independently without being hazed by any extraneous material or subordinate legislation and, therefore, Rule 220A cannot control determination of amount of compensation to be awarded by Tribunal. The relevant observations made by this Court in paras - 81, 85 and 86 of the judgement read as under:-

"81. In the light of aforesaid concept of determination of compensation which should be "just" and having been held, a statutory obligation of Tribunal, we find it difficult to accept that such statutory obligation of Tribunal can be restricted, checked or controlled by subordinate delegated legislation, by making a rule, specifying a particular amount and excluding scope of determination of "just compensation" under respective heads for which rule is framed."

"85. As we have already noted that under Section 176 of Act, 1988, power of framing rules in the context of Sections 165 to 174 has been conferred but subjects specified nowhere talks of fixation of amount towards compensation by way of rule, on the part of State Government. When Act contemplates and confers this power upon Tribunal, since compensation has to be determined by process of adjudication, it cannot be said that by fixing certain amount towards compensation under different heads by State Government by framing rule, it has exercised its power to carry out performance of relevant provisions of Act. On the contrary, it runs otherwise. Since there is no challenge to the rules in the case in hand, therefore, ***we find it appropriate to read Rule 220A, at the best, as a guideline, but ultimate adjudication/ determination has to be made by Tribunal, on the question of amount of compensation which is "just" and payable to claimant.***

86. Section 168 confers power upon Tribunal to determine "just" compensation. ***We are of the view that State Government in exercise of rule***

framing power cannot control, and exclude scope of determination by Tribunal of "just compensation" under various heads. The attempt of rule making authority in controlling function of Tribunal making a rule, is beyond its competence and would render such Rules ultra vires of Section 168. Hence, in order to read rules in question in harmony, we have no option but to hold that Rule 220A of U.P. Rules, 1998 lays down only a guideline with respect to award of compensation under different heads but ultimate authority is that of Tribunal to determine and award appropriate compensation which is "just". *(Emphasis added)*

95. We, therefore, answer **questions- (ii) and (iii)** partly in favour of Insurers- 1 and 2, i.e. appellants of FAFOs- 1 and 3 to the extent that Tribunal ought not to have referred to Rules 220A and 220B in the present case for awarding compensation under any head and instead it ought to have guided itself by law already settled some of which has been referred and discussed above.

96. However, we make it clear that simply for the reason that deceased was a house-wife, it cannot be said that no compensation for future prospects could have been allowed. On this aspect, issue has now been settled by a Constitution Bench in **National Insurance Company Limited Vs. Pranay Sethi and Others 2017 (16) SCC 680** wherein Court in para-59 has answered issues considered by it giving its conclusions as under:-

"59. In view of the aforesaid analysis, we proceed to record our conclusions:-

(59.1) The two-Judge Bench in Santosh Devi should have been well advised to refer the matter to a larger Bench as it was taking a different view than what has been stated in Sarla Verma, a judgment by a coordinate Bench. It is because a coordinate Bench of the same strength cannot take a contrary view than what has been held by another coordinate Bench.

(59.2) As Rajesh has not taken note of the decision in Reshma Kumari, which was delivered at earlier point of time, the decision in Rajesh is not a binding precedent.

(59.3) While determining the income, an addition of 50% of actual salary to the income of the deceased towards future prospects, where the deceased had a permanent job and was below the age of 40 years, should be made. The addition should be 30%, if the age of the deceased was between 40 to 50 years. In case the deceased was between the age of 50 to 60 years, the addition should be 15%. Actual salary should be read as actual salary less tax.

(59.4) In case the ***deceased was self-employed or on a fixed salary, an addition of 40% of the established income should be the warrant where the deceased was below the age of 40 years.*** *An addition of 25% where the deceased was between the age of 40 to 50 years and 10% where the deceased was between the age of 50 to 60 years should be regarded as the necessary method of computation. The established income means the income minus the tax component.*

(59.5) For determination of the multiplicand, the deduction for personal and living expenses, the tribunals and the courts shall be guided by paragraphs 30 to 32 of Sarla Verma which we have reproduced hereinbefore.

(59.6) The selection of multiplier shall be as indicated in the

Table in Sarla Verma read with paragraph 42 of that judgment.

(59.7) The age of the deceased should be the basis for applying the multiplier.

(59.8) Reasonable figures on conventional heads, namely, loss of estate, loss of consortium and funeral expenses should be Rs. 15,000/-, Rs. 40,000/- and Rs. 15,000/- respectively. The aforesaid amounts should be enhanced at the rate of 10% in every three years." (Emphasis added)

97. In view of above judgement in **Pranay Sethi and others (supra)**, an addition of 40 per cent of established income will have to be applied since the age of deceased was 26 years i.e. below 40 years at the time of death.

98. Now, we proceed to consider **question-(iv)**. Tribunal has assessed notional income of deceased who was admittedly a house-wife at Rs. 150/- per day observing that she was an young lady, well-educated and belong to a good family. For assessing above income, he accepted the above contention advanced on behalf of claimant-appellant in FAFO-2 that even a labour, employed in employment scheme under Mahatma Gandhi National Rural Employment Guarantee Act earn wages of Rs. 150/- per day and, therefore, no income lower than that can be assessed in respect of deceased. Consequently, Tribunal has held monthly income of deceased as Rs.4,500/- and concurrently annual income of Rs.54,000/-. Thereafter, Tribunal has allowed a deduction of 1/3rd of the income towards personal expenses and that is how, the multiplicant has been computed to arrive at compensation as Rs. 6,48,000/-.

99. Learned counsel for Claimant-Appellant in FAFO-2 contended that notional income of deceased has been taken on much lower side but when pointed out, could not dispute, that it is the contention of claimant-appellant himself which has been accepted by Tribunal to determine income at Rs. 150/- per day. That being so, we find no reason to allow claimant-appellant to change his stand before this Court in appeal to claim higher notional income. As we have already noticed above, in case of death of a house-wife, in order to assess pecuniary value of services rendered by a house-wife, Court has upheld determination of pecuniary value after considering following aspects :-

(a) Loss to the family of wife's housekeeping services.

(b) Loss suffered by children of personal attention of their mother, apart from housekeeping services rendered by her.

(c) Loss of wife's personal care and attention suffered by husband in addition to loss of housekeeping services.

100. Here family consisted of a large number of members i.e. Sri Shiv Kumar Shukla (father-in-law), Smt. Shashikala Shukla (mother-in-law), Kumari Sudha Shukla (sister-in-law - nand) etc. All of them have suffered loss of household services as also love and affection and care in different capacities in the family i.e. daughter-in-law, sister-in-law, wife etc. In the claim petition, though claimant-appellant stated that pecuniary value of services rendered by Smt. Manju Shukla worth about Rs. 10,000/- per month but he did not render any evidence so as to prove the same but instead pleaded before Tribunal that pecuniary value/ notional income of deceased should not be less than Rs. 150/- per day and the same has been accepted by Tribunal. In that view of the matter, we find no reason to take a different view and we hold that notional

income of deceased determined by Tribunal warrants no interference. **Question-(iv)** is, therefore, answered against claimant-appellant in FAFO-2.

101. Now, we come to question-(v). Tribunal has referred to various documents and oral deposition of various witnesses and thereafter has awarded Rs. 55,00,000/- towards expenses incurred by claimant on the treatment of deceased. Here, we find a few misreading on the part of Tribunal. Medical bill i.e. Paper No. Ga-82 is shown to be of Rs. 25,00,943/- but as a matter of fact, it is of only Rs. 25,943/-, therefore, about Rs. 24,75,000/- has been read excess in the said document and to this extent, finding of Tribunal is apparently perverse.

102. We, therefore, ourselves have examined the documents and prepared chart as aforesaid. Serial Nos. 10 to 13 (Paper Nos. GA-80 to GA-83) and 24 to 32 (Paper Nos. GA-95 to GA-99 and GA-135 to GA-138) refers to various payments made to hospitals, medical stores for purchase of medicines etc. and employment of nursing staff. Further, a close scrutiny of Paper Nos. GA-80 and GA-81 shows that GA-80 contains details of various expenses incurred in the treatment of deceased at Kokilaben Dhirubhai Ambani Hospital at Mumbai and it is for Rs. 19,25,483/- whereas GA-81 contains receipts of payment made to said Hospital, therefore, both cannot be taken together since amount of expenses shown in GA-80 are same as GA-81 which contains receipts of payment to those expenses. Therefore, GA-81 has also to be excluded. It leaves only following documents of expenses towards medical treatment:-

S.No.	Paper No.	No. of Bills/ Vouchers	Expenses towards	Amount in Rs.
1.	GA-80	102	Hospital: Kokilaben Dhirubhai Ambani	Rs. 19,25,483.00/-
2.	GA-82	4	Bina Nurses Bureau	Rs. 25,943.00/-
3.	GA-83	3	Medicines	Rs. 4,785.00/-
4.	GA-95	90	Medicine at Sri Ram Medical Store	Rs. 67,422.00/-
5.	GA-96	10	Medicine at Sri Ram Medical Store	Rs. 4,848.00/-
6.	GA-97	8	Agrawal Surgical Emporium	Rs. 17,449.00/-

7.	GA-98	20	Gaurav Nursing Home	Rs. 3,87,050.00/-
8.	GA-99	2	Surgery and Pathology	Rs. 3,850.00/-
9.	GA-135	6	Bed Charge of Gaurav Nursing Home	Rs. 1,75,800.00/-
10.	GA-136	6	X-Ray and Pathology of Gaurav Nursing Home	Rs. 13,350.00/-
11.	GA-137	14	Medicine at Sri Ram Medical Store	Rs. 6,727.00/-
12.	GA-138	5	Agrawal Surgical Emporium	Rs. 6,257.00/-
Total				Rs. 26,38,964.00/-
Total : Twenty Six Lakh Thirty Eight Thousand Nine Hundred Sixty Four only				

103. Learned counsel for Insurers contended that only the amount which have actually been incurred towards medical treatment, as above, could have been allowed by Tribunal and that is only Rs. 26,38,964/-. Hence, award of compensation of Rs. 55,00,000/- towards expenses incurred on the treatment of deceased by Tribunal is patently erroneous. We find it difficult to accept above submission. Whenever there is a permanent disability, it has been held that pecuniary damages may include (i) medical attendance; (ii) loss of earning profit upto the date of trial; (iii) other material loss.

104. Courts have also held that non-pecuniary damages may also include: (i) damages for mental and physical shock, pain suffering, already suffered or likely to be suffered in future; (ii) damages to compensate for the loss of amenities of life which may include a variety of matters; (iii) damages for the loss of expectation of life, (iv) inconvenience, hardship, discomfort, disappointment, frustration and mental stress in life etc.

105. Facts of the case, which have been considered by Tribunal and not disputed before us, if summarized, show that claimant, deceased and other family members started their journey from Mumbai to Shirdi, travelling in tortfeasing vehicle Toyota Qualis on 15.09.2009 at 07:00 AM. Due to cruel hands of destiny, they met with ill-fated vehicle which collided with a Truck causing injuries to passengers in vehicle Toyota Qualis. Deceased suffered serious injuries and went in Coma-II stage. She was immediately admitted in Tambe Hospital at Sangamner, Maharashtra where she remained admitted from 15.09.2009 to

08.10.2009. She underwent various medical examinations including CT Scan etc. Her condition deteriorated at Tambe Hospital, Sangamner and, therefore, she was referred to Kokilaben Dhirubhai Ambani Hospital. She was taken by ambulance to Hospital at Mumbai where she was admitted on 08.10.2009 and remained there for about seven and a half months i.e. 20.05.2010. Total expenses incurred at Kokilaben Dhirubhai Ambani Hospital, Mumbai are Rs. 19,25,483/-. Since deceased was in Coma on the date of accident itself, she could not have undertaken her care, therefore, she had to be looked after by qualified nurses. Her family members were also supposed to be present for general medical care and arranging treatment. For this purpose, bills of Bina Nurses Bureau, Mumbai (Paper No. GA-82) was produced and claimant also produced various bills of Hospital where he and his family members during the period of treatment of deceased at Sangamner as also Mumbai, incurred expenses towards fooding, lodging, travelling etc. On 20.05.2010, deceased while lying in Coma-II stage was discharged and it is quite common that family members could not be expected to take care of deceased at a distant place from their parental residence i.e. Ballia for a very long time. Therefore, they brought her to Ballia and got admitted at Gaurav Nursing Home, Tikampur under the treatment of Dr. D. Rai. In the aforesaid local Hospital, she remained admitted for almost more than an year and 15 days and died on 06.06.2011. Pecuniary damages in such case of fatal injuries and disability are inclusive and cover all the expenses which have been incurred not only in actual medical treatment i.e. Doctor fee, Hospital fee, testing fee, medicines cost etc. but also expenses incurred for hiring nursing services, expenses incurred by persons present to take care of the injured for the entire period. It will also include boarding, lodging and travelling expenses, if any, by persons taking care of injured in the Hospital and also the expenses incurred during shifting of injured from one place to another. Such expenses cannot be excluded from the total amount of compensation to be awarded to claimant. Therefore, expenses proved by claimant through documents i.e. Paper Nos. GA-75, GA-78, GA-84 and GA-86 to GA-94 cannot be excluded from the amount of compensation and Tribunal having allowed the same, in our view, has proceeded rightly. The total amount proved by aforesaid documents, as expenses incurred by claimant-appellant comes to Rs. 49,46,601.57/-.

106. Therefore, we answer **question-(v)** holding that under the head of medical expenses, treatment, medical care etc., Tribunal erred in awarding Rs. 55,00,000/- and the same should have been Rs.49,46,602/- (round off).

107. Now, we come to question- (vi). This issue involves three aspects:-

(a) Loss of employment by claimant for getting involved/ engaged in the care and treatment of his wife who remained in Coma-II stage for almost 21 months.

(b) Loss of foetus due to termination of pregnancy in accident.

(c) Pain, shock, disability etc., suffered by deceased during the period, she was in Coma-II stage for about 21 months.

108. Evidence has come on record that claimant Arvind Kumar Shukla was

appointed as Business Development Manager in Tata AIG Life Insurance Company Limited, Mumbai vide appointment letter dated 17.09.2008 on a monthly salary of Rs. 25,833/-. Within one year of appointment, the ill-fated accident took place on 15.09.2009 whereafter claimant got engaged in the treatment and care of his wife who was under Coma-II stage and lost his job. It is evident from record and evidence that Smt. Manju Shukla having gone under Coma-II stage on the date and time of accident itself, did not come out of it and in that condition she died on 06.06.2011. Statement of PW-2 Kedar Chaudhary proves that she was brought from Mumbai to Ballia when she was in Coma-II stage. He was also travelling in tortfeasing vehicle Toyota Qualis and an eyewitness to the accident. He has stated that it was a head-on collision between two vehicles.

109. The loss of job of claimant is directly attributable to the accident in question. Fatal injuries suffered by deceased and her continuous treatment ran for about 21 months. In our view, above loss was liable to be taken into consideration for awarding just compensation to claimant since it was directly attributable to the accident in question and injuries suffered by deceased. Claimant has stated that he was capable of saving about Rs. 15,000/- per month. If some margin is allowed to be discounted, at least loss of saving of Rs. 10,000/- per month can be awarded. Thus, in our view, Rs. 2,10,000/-, in lump sum, should have been awarded to claimant for loss of employment.

110. The second aspect is termination of pregnancy. Appellant-PW-1 and Sudha Shukla-PW-3 have stated that deceased was pregnant at the time of accident. Nothing has been brought to our notice from the statement of above witnesses to dislodge the truth of above statement of said witnesses who being family members could have such information and their evidence is quite natural on this aspect. Tribunal has followed the judgement of Delhi High Court in **Prakash and Others vs. Arun Kumar Saini and Another 2010 (3) TAC 114** whereby a lump sum of Rs. 2,50,000/- was awarded for termination of foetus in accident. We find no reason to defer from above view and, therefore, uphold the award of Rs. 2,50,000/- on this aspect.

111. Then we come to third aspect i.e. pain, shock etc., suffered by deceased during the period of 21 months when she remained in Coma. Under this head, Tribunal has awarded a lump sum amount of Rs. 5,00,000/-. In our view, this amount is much inadequate and unjust. A young lady, not only suffered pain, mental shock etc., but lost unborn child, went under trauma, remaining in Coma for about 21 months. Her condition was such that Doctors declared her 100 per cent disabled during the above period of 21 months. What she suffered, may not be weighed very accurately in terms of money, still we are of the view that sufferings had continued for almost 21 months i.e. one year and nine months. Thus, the head of mental shock, pain etc., a sum of Rs. 10,00,000/- would have been appropriate to be awarded and we order accordingly. **Question-(vi)** is, therefore, answered by holding that for loss of job, a sum of Rs. 2,10,000/-; for loss of pregnancy Rs. 2,50,000/- as awarded by Tribunal and for pain and shock etc. a sum of Rs. 10,00,000/- deserves to be awarded.

112. Then, we come to question-(vii). Here, we do not find much difficulty in answering the same for the reason that a Constitution Bench in **National Insurance Company Limited vs. Pranay Sethi (supra)** has directed that reasonable amount on conventional heads, namely, loss of estate, loss of consortium and funeral expenses should have been awarded. Court itself has awarded Rs. 40,000/-, Rs. 15,000/- and Rs. 15,000/-, respectively under the aforesaid heads.

113. Further in **Malarvizhi and Others Vs. United India Insurance Company Limited and Another (Civil Appeal No. 9196-97 of 2019 @ SLP (C) Nos. 9630-31 of 2019)** decided on 09.12.2019, Court has awarded under the head of loss of love and affection Rs. 50,000/-.

114. In view of above, we hold that claimant-appellant of FAFO-2 is entitled for compensation in the heads of loss of dependency Rs.6,48,000/-; future prospects Rs.2,59,200/-; medical expenses of medical care and medical attendants etc. Rs.49,46,602/-; loss of profit (loss of employment), termination of pregnancy and mental pain, shock etc. Rs.14,60,000/- and loss of love and affection Rs.1,20,000/-. Total comes to Rs.74,33,802/-. and it is accordingly awarded.

115. Judgment and award dated 29.09.2014 passed by Tribunal is accordingly modified to the above extent and in respect of all other aspects, it is confirmed.

116. All the three appeals are accordingly partly allowed.

117. In view of divided success, cost is made easy.

(2020)02ILR A1075

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 31.10.2019

BEFORE
THE HON'BLE PRADEEP KUMAR SRIVASTAVA, J.

FAFO No. 1056 of 2014

National Insurance Company Ltd. ...Appellant

Versus

Smt. Vimla Devi & Ors. ...Respondents

Counsel for the Appellant:
Sri Manish Kumar Nigam, Sri Suvansit Kumar Jaiswal

Counsel for the Respondents:
Sri Shree Prakash Singh, Smt. Archana Singh, Sri Prashant Sharma

A. Civil Law-Motor Vehicles Act, 1988 - Ss 166, 168 - Compensation - Determination of age for multiplier - postmortem report cannot be an evidence on the basis of which the age could be determined

In the postmortem report age of the deceased mentioned as 58 years - Held - Tribunal rightly determined the age of the deceased on the basis of the oral testimony in which witnesses stated the age of the deceased to be 53 yrs. The postmortem report cannot be an evidence on the basis of which the age could be determined (Para 7)

B. Civil Law-Motor Vehicles Act, 1988 - Ss 166, 168 - Compensation - Reasonable figures on conventional heads, namely, loss of estate, loss of consortium and funeral expenses is Rs. 15,000/, Rs. 40,000/ and Rs. 15,000/ respectively (Para 10)

First Appeal From Order partly allowed (E-5)

List of cases cited :

1. Sarla Verma Vs. Delhi Transport Corporation Ltd. AIR 2009 SC 3104
2. National Insurance Company Vs. Pranay Sethi & ors AIR 2017 SC 5157

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

1. Heard Sri Manish Kumar Nigam, learned counsel for the appellant-National Insurance Company and Sri Prakash Singh, learned counsel for the claimant-respondents. Perused the record.

2. This appeal has been filed against the judgement and award dated 09.1.2014 passed in M.A.C.P. No. 177 of 2011 (Smt. Vimla Devi and others Vs. Balloo and others) by which, the learned Tribunal has awarded Rs.4,27,000/- as compensation along with simple interest at the rate of 7% per anum from the date of institution of petition.

3. Learned counsel for the appellant has challenged the said award on the basis that the age of the deceased was wrongly determined to be 53 years, whereas in the postmortem report, it is mentioned that the age of the deceased was 58 years, hence multiplier of 11 which was applied by the learned Tribunal is incorrect and the multiplier of 9 should have been applied. Moreover, towards loss of consortium Rs.1,00,000/- and for funeral expenses Rs.25,000/- have been awarded which is not correct in view of the U.P. Motor Vehicle Amended Rules, 2011 which provides for consortium from Rs.5,000/- to Rs.10,000/- and for funeral expenses Rs.5,000/- which ever is less. As such, the compensation which was awarded by the learned Tribunal is excessive and, therefore, the amount of compensation is liable to be modified, accordingly.

4. This claim petition came up before the learned Tribunal on account of death of the deceased by the accident caused by the offending vehicle which was being driven by its driver rashly and negligently which caused the death of the deceased as the offending vehicle went to the wrong side and dashed the deceased. The claim petition was filed by the widow, son, daughter and the mother of the deceased which was contested by the owner and driver of the offending vehicle and the same was also contested by the Insurance Company. On the basis of the pleadings, the following issues were framed:-

(1) Whether, the driver of vehicle no. R.J. 20 C.B.1927 on 13.2.2011 at about 4.00 p.m. driving the vehicle rashly and negligently dashed Matadeen near Badagaon Bus Stand due to which Matadeen received serious injuries and due to that injuries, Matadeen died?

(2) Whether on the date of accident, the driver of vehicle no. R.J. 20 C.B.1927 was having valid and effective license?

(3) Whether on the date of accident, the vehicle no. R.J. 20 C.B.1927 was fully insured with the Insurance Company?

(4) Whether the claimant-respondents are entitled for compensation? If yes, then how much and from whom?

5. In support, oral evidence was given by the claimants along with police papers, such as, FIR, postmortem report, charge sheet, driving license of driver, registration certificate of the offending vehicle and the papers relating to the insurance. No oral evidence was given from by the opposite parties nor any document was filed. On the basis of evidence on record, after due perusal, the impugned award was passed by the learned Tribunal.

6. The learned counsel for the Insurance Company has agitated the impugned award on the basis that the amount awarded for loss of consortium and against the funeral expenses is excessive. The second argument is that the age of the deceased was determined to be 53 years, whereas it should have been 58 years in view of postmortem report. As such, multiplier applied by the learned Tribunal was wrong and instead of multiplier of 11, the multiplier of 9 should have been applied.

7. So far as second argument is concerned, the learned Tribunal has determined the age of the deceased on the basis of the oral testimony given from the side of the claimant-respondents in which witnesses have stated the age of the deceased to be 53 years. The postmortem report cannot be an evidence on the basis of which, the age could be determined by the learned Tribunal and, therefore, the learned Tribunal has rightly determined the age of the deceased to be 53 years. The multiplier of 11 has been applied by the learned Tribunal. In **Sarla Verma Vs. Delhi Transport Corporation Ltd., AIR 2009 SC 3104**, the Supreme Court has laid down as below:

"We therefore hold that the multiplier to be used should be as mentioned in column (4) of the Table above (prepared by applying Susamma Thomas, Trilok Chandra and Charlie), which starts with an operative multiplier of 18 (for the age groups of 15 to 20 and 21 to 25 years), reduced by one unit for every five years, that is M-17 for 26 to 30 years, M-16 for 31 to 35 years, M-15 for 36 to 40 years, M-14 for 41 to 45 years, and M-13 for 46 to 50 years, then reduced by two units for every five years, that is, M-11 for 51 to 55 years, M-9 for 56 to 60 years, M-7 for 61 to 65 years and M-5 for 66 to 70 years."

8. The above multiplier system has been further affirmed by the Supreme Court in ***National Insurance Company Vs. Pranay Sethi & others, AIR 2017 SC 5157*** and it cannot be said that there is any illegality in applying the multiplier of 11 years as the available multiplier is of 11 at the age from 51 to 55 years in view of the law laid down by the Supreme Court. It is pertinent to mention that multiplier system has been provided under law law to maintain uniformity in determining quantum of compensation in order to avoid variation. A multiplier of 11 has rightly been applied by the learned Tribunal and I do not find any illegality in that.

9. In **Sarla Verma (supra)**, it has been held by the Supreme Court that a proceeding before the Tribunal is in the nature of inquiry in which a very few thing

is required to be established. The Court observed:

"Basically only three facts need to be established by the claimants for assessing compensation in the case of death: (a) age of the deceased; (b) income of the deceased; and the (c) the number of dependents. The issues to be determined by the Tribunal to arrive at the loss of dependency are (i) additions/deductions to be made for arriving at the income; (ii) the deduction to be made towards the personal living expenses of the deceased; and (iii) the multiplier to be applied with reference of the age of the deceased."

10. So far as the award of compensation under the conventional head is concerned of consortium and funeral expenses is concerned, in order to maintain uniformity in this respect, the Supreme Court has made it clear in ***Pranay Sethi (supra)*** that ***"Reasonable figures on conventional heads, namely, loss of estate, loss of consortium and funeral expenses should be Rs. 15,000/-, Rs. 40,000/- and Rs. 15,000/- respectively."*** There is no reason which could afford opportunity for deviation from the above principle laid down in ***Pranay Sethi (supra)***. As such, the learned counsel for the appellant has submitted that the said amount for the loss of consortium is liable to be reduced to Rs.40,000/- and for the funeral expenses, the same is liable to be reduced to Rs.15,000/-. The learned Tribunal has awarded Rs. 100000/- for loss of consortium, Rs. 25000/- against funeral expenses and Rs. 5000/- for the loss of estate.

11. Learned counsel for the claimant-respondents has submitted that the learned Tribunal has not considered that the amount for the loss of estate should be much more in view of pronouncement of Supreme Court in ***Pranay Sethi (supra)*** and the learned Tribunal has also not calculated the income in the head of future prospect and nothing has been awarded for the loss of affection to the children.

12. The learned counsel for the appellant has submitted that if it was so and the claimant-respondent was feeling that the awarded amount is in lower side and has not been properly calculated in view of legal principles, he should have filed appeal. The learned counsel for the respondent has however countered it on the ground that even if no appeal has been filed, the Court is enough authorized to correct the amount in the aforesaid head under Order 41 Rule 33 of the Civil Procedure Code.

13. It should be noted that the income which has been determined by the learned Tribunal is on the basis of the notional income as the Tribunal determined that claimants were not able to show any income and the finding was given by the learned Tribunal that the deceased was not having any income at all. When this finding has been given that the deceased was not having any income at all, it was not necessary for the learned Tribunal to add any future income as the future income is only permissible in the case of income and not in the case of no income. Therefore, the finding reached by the Tribunal on that point is not required to be disturbed. So far as the amount of loss of estate is concerned, the Tribunal should have awarded Rs. 15000/-, whereas, only Rs. 5000/- has been awarded.

14. In view of above, I do not find any force in other arguments from either side and with the modification that amount of loss of consortium should be Rs.40,000/- and funeral expenses should be Rs.15,000/-. As such an amount of Rs.

70000/- is required to be deducted and Rs. 10000/- should be added against the loss of estate in view of the submission of the learned counsel to respondent-claimant as the amount for the loss of estate should be Rs. 15000/- and not Rs. 5000/- which has been awarded by the learned Tribunal. Thus, a deduction of Rs.60,000/- from the total amount of compensation is required to be made.

15. In view of above discussion, the amount of compensation comes to Rs.3,67,000/-. With this modification, the impugned award is upheld and this appeal is finally disposed.

16. The amount of Rs.25,000/- deposited by the appellant shall be remitted back to the Tribunal which shall be adjusted against the amount of compensation.

(2020)02ILR A1079

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 04.12.2019

BEFORE
THE HON'BLE ARVIND KUMAR MISHRA-I, J.

FAFO No. 2711 of 2017

Smt. Shyama @ Rani Tyagi & Ors.
...Appellants
Versus
I.C.I.C.I., Lombard General Insurance Co. Ltd. Lucknow & Ors. ...Respondents

Counsel for the Appellants:
Sri G.C. Maurya, Sri Abhay Kushwaha

Counsel for the Respondents:
Sri Ajeet Kumar Singh, Sri Saurabh Srivastava

Motor Vehicles Act, 1988 - Ss 166, 168 - Selection of Multiplier - deceased aged about 60 years - Operative multiplier is 7 for the age group of 60 - 65 (Para 20)

Appeal Partly allowed (E-5)

List of case cited :

Sarla Verma and others Versus Delhi Transport Corporation and another reported 2009 Lawsuit(SC) 613

(Delivered by Hon'ble Arvind Kumar Mishra-I, J).)

1. Heard the learned counsel for the appellant, learned Standing counsel and perused the record.

2. By way of the instant appeal, the appellants have prayed for enhancement of the compensation amount awarded by the Tribunal vide its award dated 5.8.2010 in Motor Accident Claim Petition No.72 of 2008 Smt. Shyama @ Rani and others Vs. I.C.I.C.I. Lombard General Insurance Company and others.

3. The claim petition was moved for and over all compensation amount of Rs. 5 lakhs to be realized from the opposite parties, whereas, the Tribunal, under the facts and circumstances of the case, awarded Rs.1,29,500/- along-with interest at the simple rate of 6% per annum.

4. The facts relevant for adjudication of this appeal appear to be that the accident in question was caused on 17.1.2007 while driving rashly and negligently motorcycle No. U.P. 60-H 2126 and dashing the same with the deceased at 7.30 p.m. within village Bharauli Aala on the southern Gazipur Ballia Road near culvert leading from

Mohammadabad to Ballia due to which the deceased Agamram Tyagi succumbed to his injuries and died on 18.1.2007. The matter was reported to the police station by the Chaukidar of the concerned village whereupon first information report was lodged and necessary action followed.

5. Later on, the claim petition was moved by the appellants whereby it was claimed that the appellants are the legal heirs of the deceased Agamram Tyagi who was a retired manual labour from coalmine and he would be getting Rs. 3,000/- per month as pension if he had been alive. On account of sudden demise of the deceased Agamram Tyagi, the future of the entire family has been left in the lurch and no one is to look after the family. In the trial court, the matter was contested between the parties and the written statement was filed and on the basis of pleadings, the trial court framed as many as seven issues.

6. Issue no. 1 related to the fact of the incident whether the same was caused by rash and negligent driving of the aforesaid motorcycle on the aforesaid date, time and place by dashing the same with the deceased Agamram Tyagi which resulted into his death during the course of his treatment ?

7. Issue no. 2 related to the fact of holding and possessing valid driving licence by the driver of the offending vehicle.

8. Issue no. 3 related to the fact of insurance of the aforesaid motorcycle No. U.P. 60-H 2126.

9. Issue No.4 related to the fact of compensation, if any, from whom the appellants were entitled to receive.

10. Issue No. 5 related to the fact whether the petition is barred by non-joinder of the necessary party.

11. Issue no. 6 related to the fact of mis-joinder of necessary party.

12. Issue no. 7 related to the point of relief to be given to the appellants.

13. Contention raised on behalf of the appellants is confined to the ambit that the Tribunal while assessing the amount of compensation to be awarded to the appellants erred in law and failed to apply the correct multiplier applicable in the annual dependency amount of the deceased and it wrongly calculated that multiplier of 5 would be applicable to the annual dependency Rs. 24,000/-, whereas, in a catena of cases and particularly in the case of **Sarla Verma and others Versus Delhi Transport Corporation and another reported 2009 Lawsuit(SC) 613,** Hon'ble Apex Court analyzed the entire multiplier system and has arrived at conclusion that in such cases, normally multiplier of 7 should have been applied by the Tribunal.

14. Learned counsel for the appellants has also engaged attention of this Court to paragraphs 19 and 21 of the judgment and claimed that the principles laid down in *Sarla Verma and others (Supra)* would prevail but the Tribunal ignored it for no worthy reason. Admittedly, the deceased was 60 years of age. His age should be treated between 60-65 years and while calculating from that point, proper multiplier will be 7 instead of 5.

15. Per contra, learned counsel for the insurance company has vehemently

claimed that considering the various facts and the circumstances of the case, obviously it cannot be said with certainty that a person 60 years old would spend only 1/3 of the income for his own use. Here the amount deducted from the annual dependency should have been to the margin of 50% instead of 1/3. Further, the age of the deceased is much more than that which has been shown by the appellants.

16. Considering the siblings of the deceased as old as 7, 10, 12 and 14 years, it cannot be said with certainty that what age the deceased was having at that point of time. Admittedly, the deceased was a retired employee and he was above 60 years and the age factor has not been properly counted by the Tribunal while assessing the case of the appellants. However, the learned counsel submitted that application of proper multiplier say - 5 was rightly applied by the Tribunal and that needs no interference.

17. Considered the submissions.

18. Both sides have filed their papers which have been discussed in the body of the judgment of the Tribunal. The Tribunal, while considering the point of accident, decided issue no. 1 in affirmative in favour of the appellants. Similarly, the factum of insurance of the aforesaid offending vehicle with the insurance company ICICI was also found proper, accordingly finding was recorded by the Tribunal. Similar was the finding that the driver of the offending vehicle was having a legal, valid and effective driving licence. On issue nos. 5 and 6, no evidence was adduced, therefore, the same were decided accordingly.

19. Issue nos. 4 and 7 related to the point of compensation to be awarded to the petitioners, whereas, the Tribunal after considering the claim of the appellants based on the relevant papers and the affidavit, recorded finding to the effect that the deceased Agamram Tyagi was getting only Rs. 3,000/- per month as pension. Therefore, the annual dependency was fixed to Rs.36,000/- and after slicing off 1/3 out of the same, it was pegged to Rs. 24,000/- per annum. Now, considering the age above 60 years, the multiplier of 5 was applied by the Tribunal in this case. However, the principles have been laid down by the Hon'ble Apex Court in the case of **Sarla Verma and others Versus Delhi Transport Corporation and another reported 2009 Lawsuit(SC) 613,** in para 21, which is extracted as herein below.

"(21)We therefore hold that the multiplier to be used should be as mentioned in column (4) of the Table above (prepared by applying Susamma Thomas, Trilok Chandra and Charlie), which starts with an operative multiplier of 18 (for the age groups of 15 to 20 and 21 to 25 years), reduced by one unit for every five years, that is M-17 for 26 to 30 years, M-16 for 31 to 35 years, M-15 for 36 to 40 years, M-14 for 41 to 45 years, and M-13 for 46 to 50 years, then reduced by two units for every five years, that is, M-11 for 51 to 55 years, M-9 for 56 to 60 years, M-7 for 61 to 65 years and M-5 for 66 to 70 years."

20. In view of above citation of Hon'ble Apex Court, the claim raised on behalf of the appellants is that proper multiplier applied should have been seven instead of five.

21. Upon consideration of the rival submission and perusal of the aforesaid citation of Hon'ble Apex Court in the case of Sarla Verma (Supra) wherein reflection made in para 21 is indicative of the fact that in such cases, like the present one, the

proper multiplier to be applicable would be 7 instead of 5 and the Tribunal erred in law while it applied multiplier of 5 in the annual dependency, therefore, the amount of annual dependency, ought to have been multiplied by 7. Thus, counting at the rate of 7, it is aggregated to Rs.1,68,000/- along-with 7% interest per annum. The Tribunal has also awarded rest of the amount under various other heads - say loss of companionship and estate and the funeral expenses i.e. Rs. 5000/-, Rs.2000/- and Rs. 2,500/- respectively which are justified amount and needs no interference by this Court. The total compensation amount would thus swell to Rs. 1,77,500/- along-with 7% interest instead of 1,29,500/-.

22. In view of above analysis, the instant appeal is partly allowed for and over all compensation amount Rs.1,77,500/-. The judgment and award of the tribunal dated 5.8.2010 passed in Motor Accident Claim Petition No. 72 of 2008 Smt. Shyama @ Rani and others Vs. I.C.I.C.I. Lombard General Insurance Company and others, is hereby modified to the aforesaid extent.

23. Proportional distribution of aforesaid amount among the claimants shall be in line with the disbursement as ordered by the tribunal.

24. The aforesaid entire amount is to be realized from the insurance company and deposited with the tribunal within one month from today.

25. Costs easy.

(2020)02ILR A1082

APPELLATE JURISDICTION

CIVIL SIDE
DATED: ALLAHABAD 20.01.2020

BEFORE
THE HON'BLE SAUMITRA DAYAL SINGH, J.

FAFO No. 3706 of 2018

Meerut Development Authority, Meerut ...Appellant

Versus

M/s. Civil Engineering Construction Corporation & Ors. ...Respondents

Counsel for the Appellant:
Sri Faizan Ahmad, Sri Bhupeshwar Dayal, Sri S.F.A. Naqvi

Counsel for the Respondents:
Sri Murshid Khan, Sri Amit Saxena, Sri Mushir Khan

A. Arbitration Act - "entering upon the reference" - meaning - An arbitrator enters on a reference when he first applies his mind to the dispute - when arbitrator actually enters upon the matter of reference & not when an arbitrator accepted the office or took upon himself that duty

Fact - on 04.09.2004 Civil Judge directed to appoint arbitrator make his award with a period of four months - Civil Judge vide order dated 25.10.2004 appointed sole arbitrator - on 15.11.2004 arbitrator accepted the appointment and entered into reference accordingly and issued notice fixing the first date in the proceedings, on 20.11.2004 for appearance of the parties - Appellant case that award dated 19.03.2005 was time barred made after the mandate of four months had expired - *Held* - on 20.11.2004 arbitrator applied his mind to the subject matter of dispute put up for arbitration - thus arbitrator entered reference on 20.11.2004 - Computed from the first date fixed in arbitration, he had time upto 19 March 2005 to make the award as his four month mandate survived till then - - No interference (Para 51)

B. Arbitration Act, 1940 - Arbitration & Conciliation Act, 1996 - S. 85 - Abatement - no provision for abatement of any existing arbitration proceeding under 1940 Act on enforcement of the 1996 Act – S. 85(2)(a) of 1996 Act saves operation of 1940 Act - however parties have option to plead & establish existence of an agreement between the parties or consent to apply the New 1996 Act

Held - No provision for abatement of any existing arbitration proceeding under 1940 Act upon enforcement of the New 1996 Act – Even upon the enforcement of the New Act w.e.f. 25.01.1996, the proceedings instituted under Section 20 of the Old 1940 Act, that were pending (on that date), survived - arbitration to be governed by the provision of the 1940 Act (Para 29, 30, 36)

C. Practice & Procedure - Arbitration proceeding - Consent - Stage - stage when consent may be given by the parties to adopt the procedure under the New 1996 Act - parties to an arbitration contract could agree to the applicability of the New 1996 Act even before the New 1996 Act came into force and even when the Old 1940 Act was still holding the field.

Appellant contention that even upon enforcement of the New 1996 Act the claimant pressed application made under Section 20 of the Old 1940 Act (for appointment of arbitrator) - thus parties consented in negative to not proceed under the New 1996 Act - subsequent conduct of the parties of consenting before the arbitrator on 15.02.2005 (to allow the arbitration proceedings to be conducted under the New Act), is an act of no legal consequence - *Held* - by virtue of Clause 34 of the contract bonds, the New 1996 Act became available upon its enforcement - on 15.02.2005 parties signified to follow the procedure prescribed under the New 1996 Act only - submission by appellant that the option to proceed under the New Act had to be exercised at the first instance, i.e. at the earliest upon enforcement of the New Act, is plainly unsubstantiated - nothing in the New Act or in the language of Section 85, as may allow such an interpretation to arise - consent given by the parties, on 15.02.2005 (before the learned arbitrator), to proceed under the New Act is valid consent - award made in accordance with the provisions of the New Act (Para 40)

D. Arbitration Act (10 of 1940) - S.20(4) - Appointment of sole arbitrator - failure to appoint arbitrator upon specific request - Gives right to other party to invoke jurisdiction of Court for appointment of arbitrator.

MDA contention appointment of the arbitrator by Civil Judge was without jurisdiction as such jurisdiction to appoint arbitrator was available only to Vice Chairman of the MDA -*Held* - once MDA failed to appoint an arbitrator upon specific request made by the claimant - claimant within its rights to move an application for appointment of an arbitrator - once parties could not agree to appointment of a consented arbitrator - it was left only to the Court to make that appointment - appointment of sole arbitrator did not suffer from any defect. (Para 47)

E. Practice & Procedure – Jurisdiction - acquiescence - Long participation and acquiescence in the proceeding preclude such a party from contending that the proceedings were without jurisdiction - principle is that a party shall not be allowed to blow hot and cold

Held - Once the MDA participated in the proceedings for appointment of arbitrator without raising any objection as to his jurisdiction on account of New 1996 Act having been enforced and allowed such appointment to be made and participated in the proceedings before the arbitrator so appointed - clearly MDA acquiesced - therefore despite defect of jurisdiction, the plea of nullity does not arise - objection raised by the appellant as to inherent lack of jurisdiction and consequently to the award being void ab initio, rejected. (Para 36)

First Appeal From Order Dismissed (E-5)

List of cases cited :

1.Food Corporation of India & Anr. Vs A. Mohd. Yunus AIR 1987 Kerala 231

2.Oriental Insurance Company Limited Vs Narbheram Power & Steel Pvt. Ltd. (2018) 6 SCC 534

3.M/s Dozco India Pvt. Ltd. Vs M/s Doosan Infracore Co. Ltd. (2011) 6 SCC 179

4.M/S N. S. Nayak & sons Vs State of Goa & Anr. (2003) 6 SCC 56

5.M/s Setty's Construction Co. Pvt. Ltd. Vs M/s Kundan Railway Construction Co. Pvt. Ltd. AIR 1999 SC 1535

6.Thyssen Stahlunion GMBH Vs Steel Authority of India Ltd (1999) 9 SCC 334

7. Milkfood Ltd. Vs GMC Ice Cream (P) Ltd (2004) 7 SCC 288

8. Delhi Transport Corporation Vs Rose Advertising AIR 2003 SC 2523

9. National Aluminium Co. Ltd. Vs Pressteel & Fabrications Pvt. Ltd. & Ors. AIR 2005 SC 1514

10. State of U.P. Vs Allied Construction Engineers & Contractors 2009 (2) AWC 1953

11. Nandyal Coop. Spinning Mills Ltd. Vs K.V. Mohan Rao (1993) 2 SCC 654

12. G. Ramachandra Reddy & Co. Vs Chief Engineer, Madras Zone, M.E.S, (1994) 5 SCC 142

13. Agra Development Authority, Agra & Ors. Vs Sheikhein International & Anr., 2007 (3) AWC 2371

14.Agra Development Authority Agra & Ors. Vs. M/S Sheikhein International & Anr. Civil Appeal No. 5349 of 2009 decided on 24.07.2019

15. UCO Bank Vs Workmen AIR 1951 SC 230

16. Prasun Roy Vs Calcutta Metropolitan Development Authority (1987) 4 SCC 217

17. Dharma Pratisthanam Vs Madhok Construction (Pvt. Ltd.) (2005) 9 SCC 686

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

1. The present first appeal from order has been filed by the appellant-Meerut Development Authority (in short 'MDA') against rejection of it's objections filed under Section 34 of the Arbitration & Conciliation Act, 1996 (hereinafter referred to as the 'New Act'). The award framed by the learned sole arbitrator dated 19.03.2005 has become enforceable, thus entitling the respondent - M/S Civil Engineering Corporation Ltd. through its proprietor Ms. Tripti Garg (hereinafter referred to as the 'claimant') to monies awarded by the learned arbitrator.

2. Admittedly in 1987, the MDA invited two separate tenders for construction of 62 MIG and 92 LIG houses. Two separate bids were submitted by the claimant for award of the aforesaid two works. They were accepted by MDA. Two separate contract bonds - for construction of 62 MIG and 92 LIG houses, were then executed between the parties on 17.02.1987 and 12.05.1987. The work itself was to be completed within ten months from the date of commencement. However, it remains a fact, despite repeated extensions of time granted, the work could not be completed by the claimant. Ultimately, the MDA cancelled the two contract bonds awarded to the claimant on 01.09.1989. Further, the claimant was black-listed.

3. In such background facts, relying on Clause-34, that was identical in both the contract bonds and which contained an arbitration agreement, the claimant issued a notice dated 08.05.1989 to the MDA to appoint an arbitrator under provisions of

the Arbitration Act, 1940 (hereinafter referred to as the 'Old Act').

4. It is also an undisputed fact that no arbitrator came to be appointed by the Vice Chairman, MDA. According to the claimant, it therefore filed an application under Section 20 of the Old Act before the Civil Judge (Senior Division), Meerut, which came to be registered and described as Original Suit No. 904 of 1989. Admittedly, the MDA filed appearance and also it's objections, in that case. Vide order dated 04.09.2004, the said proceeding was allowed and the Additional Civil Judge (Senior Division), Meerut, directed for appointment of an arbitrator. Perusal of that order reveals, in the application filed under Section 20 of the Old Act, the claimant had sought directions to the Vice Chairman of MDA to:- (i) appoint an independent arbitrator and; (ii) to restrain the MDA from awarding the remaining works to any other person. A further direction was sought to issue a commission to prepare inventory of the materials/goods.

5. The order dated 04.09.2004 also reveals that the learned Additional Civil Judge (Senior Division), Meerut directed the parties to propose names of three persons each for appointment of the sole arbitrator. It was further indicated that the arbitrator would be directed to make his award within a period of four months. Before passing the order dated 04.09.2004, the learned Additional Civil Judge (Senior Division), Meerut, appears to have framed five issues, broadly: (i) whether under the contract bonds dated 17.02.1987 and 12.05.1987, there existed any right to appoint an arbitrator; (ii) whether adequate court fee had been paid; (iii) whether the claimant was entitled to any relief; (iv) whether there were any disputes between the claimant & MDA? If yes, it's effect and; (v) whether the application filed under Section 20 was maintainable. All the issues were decided in favour of the claimant.

6. In those proceedings, no objection appears to have been raised by MDA and therefore no issue appears to have been framed as to whether, upon the enforcement of the New Act w.e.f. 25.01.1996, the proceedings instituted by the claimant under Section 20 of the Old Act, that were pending (on that date), survived. Also, it is an undisputed fact that the MDA did not challenge the order dated 04.09.2004 or the consequential order appointing the learned arbitrator, in any separate proceedings.

7. Again undisputedly, neither the MDA appointed any arbitrator during pendency of those proceedings nor any consented arbitrator came to be appointed therein, upon order dated 04.09.2004. Thus, the learned Additional Civil Judge (Senior Division) Meerut, vide his further order dated 25.10.2004 appointed Sri V.K. Tyagi, as the learned sole arbitrator.

8. Upon such order (of appointment), Sri V.K. Tyagi, the learned sole arbitrator issued notice fixing the first date in the proceedings, on 20.11.2004. Both parties then appeared before the learned Arbitrator. It may be noted here itself that even in the course of those arbitration proceedings before the learned arbitrator, no objection was raised by the MDA as to any defect of jurisdiction.

9. At the same time, perusal of the order passed under Section 34 of the New Act reveals, on 15.2.2005 (before the

learned Arbitrator) the parties specifically consented to allow the arbitration proceedings to be governed by the New Act. Thereupon, the learned Arbitrator appears to have framed his award dated 19.3.2005. The same was challenged by the MDA on 19.4.2005 by filing objections under Section 34 of the New Act. That proceedings was registered as Arbitration Case No. 49 of 2005. It came to be rejected by the impugned order dated 23.3.2013.

10. Perusal of the impugned order reveals that no specific finding has been returned by the the learned District Judge. Though submissions made have been noticed being - the appointment of the arbitrator was made without jurisdiction, such jurisdiction being available only by the Vice Chairman of the MDA; that appointment had been made contrary to the terms of contract between the parties; in any case, the award dated 19.3.2005 was time barred and; the award is against public policy of India, after noting the counter submissions made on behalf of the claimant, the learned District Judge proceeded to reject the objections filed by the MDA, on a cryptic observation - *"After considering the entire facts and circumstances of the case I am of the opinion that the application deserves to be dismissed"*. No other or separate reason has been assigned to deal with the objections raised by the MDA. Only submissions made have been recorded.

11. Heard Sri Bhupeshwar Dayal, learned counsel for the appellant- MDA and Sri Amit Saxena, learned Senior Advocate, assisted by Sri Mushir Khan, learned counsel for the respondents.

12. First, it has been submitted by learned counsel for the appellant, under Clause 34 of the agreement, the sole arbitrator could be appointed only by the Vice Chairman of MDA and by no other person. If, for any reason whatsoever, as in the present case, it was not possible for the Vice Chairman to appoint an arbitrator, the matter could not be referred to arbitration at all. In this regard, non-appointment of an arbitrator simpliciter (after demand made by the claimant), has been canvassed as sufficient to invoke non-arbitrability clause between the parties. Reliance has been placed on a decision of Kerala High Court in **Food Corporation of India & Anr. Vs. A. Mohd. Yunus, AIR 1987 Kerala 231.**

13. By way of another reasoning, it has been further submitted, the terms of the agreement i.e. Clause 34 of the contract bonds must be construed strictly, both as to subject matter of arbitration as also the procedure for appointment of the arbitrator. In the instant case though there is no dispute as to the subject matter of dispute (which is clearly arbitrable), yet, in view of the binding clause providing that arbitration may arise only if the arbitrator be appointed by the Vice Chairman, MDA, the appointment made by the learned Additional Civil Judge (Senior Division), Meerut is void. Reliance has been placed on **Oriental Insurance Company Limited Vs. Narbheram Power & Steel Pvt. Ltd., (2018) 6 SCC 534 and; M/s Dozco India Pvt. Ltd. Vs. M/s Doosan Infracore Co. Ltd., (2011) 6 SCC 179.**

14. Alternatively, since the application made under Section 20 of the Old Act (for appointment of arbitrator), had been pressed by the claimant even upon enforcement of the New Act, clearly therefore, at the first opportunity available, the parties consented to proceed under the Old Act alone. No further power or occasion survived thereafter, to allow the

parties to later change their consent, to continue the arbitration proceedings under the New Act. The Old Act alone would govern the arbitration proceedings that followed. In this regard, reliance has also been placed on **M/S N. S. Nayak & sons Vs. State of Goa & Anr., (2003) 6 SCC 56.**

15. Section 85(2) of the New Act does not contemplate or allow parties to switch between procedures prescribed or created under the Old Act and the New Act. In the instant case, at the first instance, the claimant proceeded to continue with the application filed under Section 20 of the Old Act and the learned sole arbitrator was appointed upon order passed in those proceedings. The parties thus consented in the negative - to not proceed under the New Act. They, bound themselves to be governed by the Old Act. No further scope or occasion survived to the parties, to later agree to proceed with the arbitration under the New Act. Thus, the subsequent conduct of the parties noted in the order passed under Section 34 of the New Act, of consenting before the arbitrator on 15.02.2005 (to allow the arbitration proceedings to be conducted under the New Act), is an act of no legal consequence. Reliance has been placed on **M/s Setty's Construction Co. Pvt. Ltd. Vs M/s Kundan Railway Construction Co. Pvt. Ltd., AIR 1999 SC 1535**. Since, no proceedings were pending before the arbitrator on 25.01.1996, there did not exist a stage for grant of consent to proceed under the New Act. In such facts, execution of the award that arose later could be pressed only under the Old Act, after obtaining a Rule of Court, as is also clearly held in the case of **Thyssen Stahlunion GMBH Vs. Steel Authority of India Ltd., (1999) 9 SCC 334** (in the case of Thyssen itself)**. Milkfood Ltd. Vs GMC Ice Cream (P) Ltd., (2004) 7 SCC 288** has also been relied as to stage when consent may be given by the parties to adopt the procedure under the New Act.

16. Still alternatively, it has been submitted, if by any stretch, Clause 34 of the contract bonds dated 17.2.1987 and 12.5.1987, is read as evidence - parties had "otherwise agreed" to be governed by the New Act, the proceedings under Section 20 must necessarily be seen to have lost their legal sanction, immediately upon enforcement of the New Act. The continuance of proceedings under Section 20 of the Old Act and the appointment of arbitrator made thereafter, was contrary to Section 11 of the New Act and therefore wholly *void ab initio.*

17. Last, it has been submitted, without prejudice to the above, in any case, the arbitrator was appointed by the learned Additional Civil Judge (Sr. Div.), Meerut vide order dated 25.10.2004 whereas the award was made on 19.03.2005 well after the mandate of four months had expired. In that regard, it has been further submitted, in any case, the learned sole arbitrator has to be treated to have entered reference on 15.11.2004 - when he issued notice fixing the date 20.11.2004. Computed from that date, the mandate of four months expired on 14.03.2005. Therefore, the award made on 19.03.2005 was time barred. On such submissions, the order passed by the learned District Judge, Meerut rejecting the objections filed under Section 34 of the Act has been assailed.

18. Other grounds of challenge as had been raised in proceedings under Section 34 of the New Act, relating to the

merits and other issues have not been canvassed in the present proceedings. Hence, the same are not being adverted to here.

19. Responding first to the second alternate submission made by learned counsel for the MDA, learned Senior Counsel for the claimant submits - the MDA never raised any challenge to the appointment of the learned sole arbitrator made by the learned Additional Civil Judge (Sr. Div.), Meerut (vide his orders dated 04.09.2004 and 25.10.2004), on ground of the New Act becoming the governing law between the parties, MDA did not raise any challenge under Section 33 of the Old Act, on that count and it also did not raise any such challenge in its objections filed under Section 34 of the New Act. Hence, no objection may be raised at this belated stage.

20. On the first alternate submission advanced by learned counsel for the MDA - regarding consent to abide by the Old/New Act, reference has been made both to Clause 34 of the contract bonds that clearly records that the parties agreed to proceed under the New Act, in case of disputes arising between them in future. Reference has been made to the decision of the Supreme Court in the case of **Rani Constructions Pvt. Ltd. (CA No. 61 of 1999) Vs. Thyssen Stahlunion (supra)** as followed and applied in **Delhi Transport Corporation Vs. Rose Advertising, AIR 2003 SC 2523** as approved in **Milkfood Ltd. Vs GMC Ice Cream (P) Ltd. (supra)**. Thus, it has been submitted, there is no defect in the pre-existing/prior consent given by the parties to be governed by the New Act, in the event of any disputes arising between them, in future, though on the date of execution of the contract, the New Act had not seen the light of day. The decision of the Supreme Court in **M/s N.S. Nayak & Sons Vs St. of Goa (supra)** nowhere holds that consent cannot be given to adopt and apply the procedure under the New Act, after appointment of an arbitrator. Thus the consent given by the parties, on 15.02.2005 (before the learned arbitrator), to proceed under the New Act is stated to be a valid consent. In that regard reliance has been placed on a decision of the Supreme Court in **National Aluminium Co. Ltd. Vs. Pressteel and Fabrications Pvt. Ltd. & Ors., AIR 2005 SC 1514** and another decision of this Court in **State of U.P. Vs. Allied Construction Engineers & Contractors, 2009 (2) AWC 1953.**

21. As to the first submission raised by learned counsel for the MDA it has been submitted that the objection raised to the appointment of the learned arbitrator made by the learned court below under Section 20 of the Old Act has no merit inasmuch as it has never been the case of the MDA, either in proceedings under Section 20 of the Old Act or in objections filed under Section 34 of the New Act or in the present appeal that it was, in any way, impossible for the Vice Chairman of MDA to appoint an arbitrator. Therefore, in terms of Section 20(4) of the Old Act, the learned Additional Civil Judge (Sr. Div.), Meerut acquired the jurisdiction to make such an appointment. Reliance has been placed on the decisions of the Supreme Court in the cases of **Nandyal Coop. Spinning Mills Ltd. Vs. K.V. Mohan Rao, (1993) 2 SCC 654** and **G. Ramachandra Reddy & Co. Vs. Chief Engineer, Madras Zone, Military Engineering Service, (1994) 5 SCC 142.** Reliance has also been placed on a decision of this Court in **Agra**

Development Authority, Agra & Ors. Vs. Sheikhein International & Anr., 2007 (3) AWC 2371 as affirmed by the Supreme Court in **Civil Appeal No. 5349 of 2009 (Agra Development Authority Agra & Ors. Vs. M/S Sheikhein International & Anr.) decided on 24.07.2019.**

22. Next, it has been submitted, the award dated 19.03.2005 was made well within the mandate of four months in as much as it was made within four calendar months from the first date fixed by the arbitrator, in the arbitration proceedings, being 20.11.2004.Last, it has been submitted, if the appointment of the learned arbitrator is treated to have been made under the Old Act and therefore, the award framed is also treated to be one under the Old Act, then, on such reasoning the objections filed by the MDA and it's appeal filed under Section 37, both under the New Act, would also be not maintainable.

23. Last, it has been submitted, if the appointment of the learned arbitrator is treated to have been made under the Old Act and therefore, the award framed is also treated to be one under the Old Act, then, on such reasoning the objections filed by the MDA under Section 34 and it's appeal filed under Section 37, both under the New Act, would also be not maintainable.

24. Having heard learned counsel for the parties and having perused the record, in the first place, by way of a principle, it cannot be disputed to any extent that lack of inherent jurisdiction, if established, may result in the order dated 04.09.2004 being nullity in all or any proceedings. For any order passed by any authority, court or even arbitrator to have legal effect, it must be shown to be fulfilling inherent jurisdictional requirements. The majority view of four out of the seven judge Constitution Bench of the Supreme Court, in the case of **UCO Bank Vs. Workmen, AIR 1951 SC 230** had laid down in early days of our constitutional law:-

"The final contention that the sittings in the interval constituted only an irregularity in the proceedings cannot again be accepted because, in the first place, an objection was raised about the sitting of the two members as the Tribunal. That objection, whether it was raised by the appellants or the other party, is immaterial. The objection having been overruled, no question of acquiescence or estoppel arises. Nor can consent give a court jurisdiction if a condition which goes to the root of the jurisdiction has not been performed or fulfilled. No acquiescence or consent can give a jurisdiction to a court of limited jurisdiction which it does not possess. In our opinion, the position here clearly is that the responsibility to work and decide being the joint responsibility of all the three members, if proceedings are conducted and discussions on several general issues took place in the presence of only two, followed by an award made by three, the question goes to the root of the jurisdiction of the Tribunal and is not a matter of irregularity in the conduct of those proceedings. The absence of a condition necessary to found the jurisdiction to make the award or give a decision deprives the award or decision of any conclusive effect. The distinction clearly is between the jurisdiction to decide matters and the ambit of the matters to be heard by a Tribunal having jurisdiction to deal with the same. In the second case, the question of acquiescence or irregularity may be considered and

overlooked. When however the question is of the jurisdiction of the Tribunal to make the award under the circumstances summarized above, no question of acquiescence or consent can affect the decision."

25. Undisputedly, the application under Section 20 of the Old Act had been filed on 11.10.1989. On that date, the only law applicable for appointment of arbitrator was the Arbitration Act, 1940. Under Section 20 of that Act, in face of an arbitration agreement between the parties and upon arising a difference, either party to that agreement could have applied the Court to require filing of such agreement, in Court. Thereafter, upon notice to the other party, the Court was empowered to make an order of reference to the arbitrator, in the first place, appointed by the parties or if the parties were unable to agree to such an appointment, to an arbitrator appointed by the Court.

26. In the present facts, there is no doubt that there existed an arbitration agreement between the parties and also that there had arisen a dispute between them. Further, despite service of notice dated 08.05.2019 issued by the claimant to the MDA, to appoint an arbitrator, no such appointment came to be made. Hence, the pre-requirement for filing an application under Section 20 of the Old Act undisputedly stood established on the date 11.10.1989, when that application came to be filed by the claimant. It is also a fact that such application remained pending for a long period of time i.e. till 04.09.2004 which is close to 15 years.

27. On the other hand, the New Act that is the Arbitration & Conciliation Act, 1996 was enforced on 25.01.1996. Up to that date, the application filed by the claimant under Section 20 of the Old Act did not suffer from any defect of jurisdiction or otherwise. In fact, that application had remained fully maintainable till then. If it had been decided till as late as 24.01.1996 (as, in fact, it should have been), there would have no issue with any party.

28. Thus, clearly the application filed by the claimant under Section 20 of the Old Act did not suffer from any inherent lack of jurisdiction, on the date of its filing. Therefore, the plea of nullity set up by MDA has to be examined only in the context of the enforcement of the New Act and its impact on proceedings that upto that point in time, were within jurisdiction. In this regard, Section 85 of the New Act reads as below:-

"85. Repeal and savings.-- *(1) The Arbitration (Protocol and Convention) Act, 1937 (6 of 1937), the Arbitration Act, 1940 (10 of 1940) and the Foreign Awards (Recognition and Enforcement) Act, 1961 (45 of 1961) are hereby repealed.*

(2) Notwithstanding such repeal,--

(a) the provisions of the said enactments shall apply in relation to arbitral proceedings which commenced before this Act came into force unless otherwise agreed by the parties but this Act shall apply in relation to arbitral proceedings which commenced on or after this Act comes into force;

(b) all rules made and notifications published, under the said enactments shall, to the extent to

which they are not repugnant to this Act, be deemed respectively to have been made or issued under this Act."

Also, Section 21 of the New Act reads as below:-

***"21. Commencement of arbitral proceedings.**--Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent."*

29. Plainly, in absence of any agreement, otherwise drawn, the statutory scheme clearly protects the arbitral proceedings that had been instituted before enforcement of the New Act. By virtue of Section 21 of the New Act, arbitral proceedings commenced as soon as notice for appointment of arbitrator was received by the opposite party. In absence of any dispute to service of notice (to appoint arbitrator), on MDA, prior to 25.01.1996, it has to be accepted that in the first place the application filed under Section 20 of the Old Act, by the claimant on 11.10.1989 and the arbitration to follow would be governed by the provision of the Old Act. Not only pending arbitration proceedings been saved, but also, the provisions of the Old Act have been saved in entirety with respect to any arbitral proceedings that may be found to have commenced. Moreover, there is no provision for transfer or abatement of any existing arbitral proceeding or any arbitration proceeding. Therefore there was no inherent lack of jurisdiction in institution of those proceedings even upon enforcement of the New Act.

30. By virtue of saving clause contained in Section 85 of the New Act, it became a fact or a ground available to the parties to be pleaded and proved, that the proceedings under Section 20 of the Old Act would not survive because the New Act came into force on 25.01.1996. In other words, the legislative action did not, by its own force, oust the jurisdiction of the learned Additional Civil Judge (Senior Division), Meerut, to proceed with the application filed under Section 20 of the Old Act. It only allowed the parties an option to plead that the New Act applied. Such plea could be accepted only if the party pleading such fact could establish existence of an agreement between the parties or consent of the other, to apply the New Act.

31. Then, for ready reference, Clause 34 i.e. the arbitration clause (identical in both contract bonds), is quoted below:

***"Clause 34-** Except where otherwise provided in the arbitration contract all questions and disputes relating to the meaning of the specification, designs, drawing and instruction herein mentioned, and as to the quality of workmanship of materials used on the work or as to any other questions, claim right materials used or thing whatsoever, in any way arising out of relating, to the contract, designs, drawing, specifications, estimates, instruction, order or these conditions or otherwise the work or the execution or failure to execute the same whether arising during or failure to execute the same whether arising during the progress of the work or after the completion or abandonment thereof shall be referred to the Sole Arbitration of the person appointed by the Vice Chairman M.D.A. Of the work at the time of dispute. It will be no objection to any such appointment that the Arbitrator is a Government servant then he had to deal with matters, to which the contract relates and that in the course of his duties as*

Government servant, he had expressed views on all or any of the matters in dispute or difference in the event of the arbitrator or to whom the matter is originally referred being transferred or vacating his office or being unable to act for any such reason, Chief Engineer at the time of such transfer, vacation of office or inability to act, shall appoint another person to act as Arbitrator in accordance with the terms of the Contract. Such person shall be entitled to proceed with reference from the stage at which it was left by his predecessor. It is also a term of this contract that no person other than a person appointed by the Vice Chairman should act as Arbitrator, and if for any reason that is not possible, the matter is not to be referred to arbitrator at all.

Subject as aforesaid-the provision of the Arbitration Act, 1940 or any statutory modification or re-enactment thereof and the rules made thereunder and for the time being in force shall apply to the arbitration proceeding under this clause."

32. Undoubtedly, in view of categorical pronouncement of the Supreme Court in the case of **Rani Constructions Pvt. Ltd. (CA No. 61 of 1999)** as reported in **Thyssen Stahlunion (supra) and DTC Corporation Ltd. (supra)** there can be no doubt that aforesaid Clause 34 constitutes a valid, pre-existing agreement between the parties, to allow the New Act to govern the proceedings for arbitration that arose between them. Therefore, all that then survives for consideration is, whether in face of such an agreement, the appointment of arbitrator by the learned Additional Civil Judge (Senior Division), Meerut was void.

33. As noted above, the proceedings under Section 20 of the Old Act did not suffer from any inherent lack of jurisdiction or defect on the date of institution. Also, it did not itself become void upon enforcement of the New Act. Had the plea based on Clause 34 of the contract bonds been raised and pressed by the MDA, before the learned Additional Civil Judge (Senior Division), Meerut passed the order dated 04.09.2004, the claimant would have had a right to object to the same and the learned Civil Judge would have been obliged to decide the same. If it had been found, on such objections, that the application filed by the claimant could not be pressed, in that case, a right would have survived to the claimant to seek appointment of an independent arbitrator under Section 11 of the New Act. By not raising any objection at the stage when it became available to it, the MDA allowed the proceedings under Section 20 of the Old Act to continue and conclude. In **Prasun Roy v. Calcutta Metropolitan Development Authority, (1987) 4 SCC 217**, appointment of an arbitrator, made by the Court, in year 1983 was first challenged in the year 1985, that too after submitting to the jurisdiction of the learned arbitrator so appointed and after long participation in such arbitration proceedings. The Supreme Court considered :-

"5. Can a party be permitted to do that? In Jupiter General Insce. Co. Ltd. v. Corporation of Calcutta P.B. Mukharji, J. as the learned Chief Justice then was observed:

"It is necessary to state at the outset that courts do not favour this kind of contention and conduct of an applicant who participates in arbitration proceedings without protest and fully avails of the entire arbitration proceedings and then when he sees that the award has gone against him he comes forward to challenge the whole of the arbitration proceedings as without jurisdiction on the ground of a known disability of a party. That view of the court is ably stated by the

editor of the 15th edn. of Russell on the Law of Arbitration at page 295 in the following terms:

"Although a party may by reason of some disability be legally incapable of submitting matters to arbitration that fact is not one that can be raised as a ground for disputing the award by other parties to a reference who were aware of the disability. If one of the parties is incapable the objection should be taken to the submission. A party will not be permitted to lie by and join in the submission and then if it suits its purpose attack the award on that ground. The presumption in the absence of proof to the contrary will be that the party complaining was aware of the disability when the submission was made'."

6. Mr Kacker submitted that this principle could be invoked only in a situation where the challenge is made only after the making of an award, and not before. We are unable to accept this differentiation. The principle is that a party shall not be allowed to blow hot and cold simultaneously. Long participation and acquiescence in the proceeding preclude such a party from contending that the proceedings were without jurisdiction.

7. Russell on Arbitration, 18th edn. page 105 explains the position as follows:

"If the parties to the reference either agree beforehand to the method of appointment, or afterwards acquiesce in the appointment made, with full knowledge of all the circumstances, they will be precluded from objecting to such appointment as invalidating subsequent proceedings. Attending and taking part in the proceedings with full knowledge of the relevant fact will amount to such acquiescence.

8. The Judicial Committee in its decision in Chowdhri Murtaza Hossein v. Mussumat Bibi Bechunnissa observed at page 220:

On the whole, therefore, Their Lordships think that the appellant, having a clear knowledge of the circumstances on which he might have founded an objection to the arbitrators proceeding to make their awards, did submit to the arbitration going on; that he allowed the arbitrators to deal with the case as it stood before them, taking his chance of the decision being more or less favourable to himself; and that is too late for him, after the award has been made, and on the application to file the award, to insist on this objection to the filing of the award."

Relying on the aforesaid observations this Court in N. Chellappan v. Secretary, Kerala State Electricity Board acted upon the principle that acquiescence defeated the right of the applicant at a later stage. In that case the facts were similar. It was held by conduct there was acquiescence. Even in a case where initial order was not passed by consent of the parties a party by participation and acquiescence can preclude future challenges.

9. In the grounds of appeal no prejudice has been indicated by the appointment of the second arbitrator.

10. Mr S.N. Kacker, learned Counsel for the respondents drew our attention to the fact that the decision in the Chowdhri Murtaza Hossein case was where the party challenged the appointment of the receiver after the award was made. He also submits that in this case the respondents herein had challenged the order of appointment of the arbitrator on 19-4-1983 and not after the arbitrator had made the award. We are unable to accept this distinction. Basically

the principle of waiver and estoppel is not only applicable where the award had been made but also where a party challenges the proceedings in which he participated. In the facts of this case, there was no demur but something which can be called acquiescence on the part of the respondents which precludes them from challenging the participation (sic proceedings)."

34. In **Dharma Pratisthanam Vs Madhok Construction (Pvt. Ltd.), (2005) 9 SCC 686**, a three judge bench of the Supreme Court had the occasion to consider the effect of acquiescence on appointment of arbitrator. In that regard, the Supreme Court examined the difference between the unilateral appointment and unilateral reference. While both were termed to be illegal, at the same time, it was observed that it would make a difference if in respect of unilateral appointment and reference, other party submits to the jurisdiction of the arbitrator and waives its rights which it had under the agreement. In that situation, the arbitrator was held entitled to proceed with reference and the party submitting to his jurisdiction and participating in the proceedings precluded and estopped from raising any objection in that regard, at a later stage. If, however, that party had failed to act when called upon, it could not lead to an inference of implied consent or acquiescence being drawn. Thus, the appellant in that case was found to have not responded to the proposal by the other side to join in the appointment of the sole arbitrator. Such an act was not construed as its consent. It was held:-

*"**31.** Three types of situations may emerge between the parties and then before the court. Firstly, an arbitration agreement, under examination from the point of view of its enforceability, may be one which expresses the parties' intention to have their disputes settled by arbitration by using clear and unambiguous language, then the parties and the court have no other choice but to treat the contract as binding and enforce it. Or, there may be an agreement suffering from such vagueness or uncertainty as is not capable of being construed at all by culling out the intention of the parties with certainty, even by reference to the provisions of the Arbitration Act, then it shall have to be held that there was no agreement between the parties in the eye of the law and the question of appointing an arbitrator or making a reference or disputes by reference to Sections 8, 9 and 20 shall not arise. Secondly, there may be an arbitrator or arbitrators named, or the authority may be named who shall appoint an arbitrator, then the parties have already been ad idem on the real identity of the arbitrator as appointed by them beforehand; the consent is already spelled out and binds the parties and the court. All that may remain to be done in the event of an occasion arising for the purpose, is to have the agreement filed in the court and seek an order of reference to the arbitrator appointed by the parties. Thirdly, if the arbitrator is not named and the authority who would appoint the arbitrator is also not specified, the appointment and reference shall be to a sole arbitrator unless a different intention is expressly spelt out. The appointment and reference -- both shall be by the consent of the parties. Where the parties do not agree, the court steps in and assumes jurisdiction to make an appointment, also to make a reference, subject to the jurisdiction of the court being invoked in that regard. We hasten to add that mere inaction by a party*

called upon by the other one to act does not lead to an inference as to implied consent or acquiescence being drawn. The appellant not responding to the respondent's proposal for joining in the appointment of a sole arbitrator named by him could not be construed as consent and the only option open to the respondent was to have invoked the jurisdiction of court for appointment of an arbitrator and an order of reference of disputes to him. It is the court which only could have compelled the appellant to join in the proceedings."

35. A converse position (on facts), exists in the present case. Here, the claimant had issued a notice requiring the MDA to appoint an arbitrator. In the least, the MDA failed to appoint an arbitrator. This led to the filing of an application under Section 20 of the Old Act by the claimant. As noted above, that application was wholly maintainable in law on the date of its filing. Also, enforcement of the New Act did not *ipso facto* render that application, not maintainable. The only situation when that application could have been rejected or dealt with in a manner as may have had the effect of it being held not maintainable, would be if the MDA had brought to the knowledge of the learned Additional Civil Judge (Senior Division), Meerut, Clause 34 of the contract bonds and if it had pressed before that Court that that application be dismissed, for that reason. Even in that case such an objection would have had to be adjudicated by the learned court below. Otherwise no inference could arise that the application had been rendered not maintainable or infructuous. Despite being called upon, the MDA had not raised such objection.

36. What therefore necessarily follows from the above - merely upon enforcement of the New Act, the proceedings on the application filed under Section 20 of the Old Act were not rendered void or lacking in jurisdiction. Therefore, in absence of any objection being raised by the MDA as to jurisdiction, there was no inherent lack of jurisdiction on part of the learned Additional Civil Judge (Senior Division), Meerut in proceeding to decide the application under Section 20 of the Old Act. Thus, the conduct of the MDA is relevant and in fact decisive to the issue. Once the MDA participated in the proceedings for appointment of arbitrator without raising any objection in light of Clause 34 of the contract bonds, read with Sections 85 and 21 of the New Act and allowed such appointment to be made and further did not challenge that order but also participated in the proceedings before the learned arbitrator so appointed, clearly, the MDA acquiesced to the position and, therefore, the present case falls in the category of cases discussed by the Supreme Court in the case of **Dharma Pratisthanam VS. Madhok Construction (Pvt. Ltd.) (supra)**, where despite defect of jurisdiction, the plea of nullity does not arise.

37. Similar approach appears to have been taken by the Division Bench of this Court in the case of **Agra Development Authority (supra)**, wherein, referring to the decision of the Supreme Court in **Prasun Roy Vs. Calcutta Metropolitan Development Authority & Anr., AIR 1988 SC 205**, it was held that long participation and acquiescence in the proceedings preclude a party from contending that the proceedings were without jurisdiction. The principle of waiver and estoppel were held applicable to proceedings for challenge of appointment of arbitrator as applicable to the proceedings to challenge the award. The division bench of this Court further observed that the words 'long participation' have to be read in conjunction with the word 'acquiescence'.

38. Here, appointment of the arbitrator was made on 04.09.2004. However, no challenge was raised thereto. Later, the MDA participated in the proceedings before the arbitrator and allowed the award to be made without any let or objection as to his jurisdiction on account of New Act having been enforced. The only objection that appears to have been raised, is that the Vice Chairman MDA alone and not the Court could have made the appointment. However, that objection is quite distinct from the objection as to lack of jurisdiction upon enforcement of the New Act. The division bench decision of this Court is also shown to have been confirmed in appeal by the Supreme Court in **Civil Appeal Nos. 5349 and 5350 of 2009, Agra Development Authority Vs M/s Sheikhein International & Anr.** decided on **24.07.2019**, wherein it was observed as under:

"Having heard the learned counsel appearing for the appellants, the learned counsel appearing for the respondents and carefully scrutinizing the material available on record, we see no reason to interfere with the impugned order dated 6.4.2007 passed by the High Court of Judicature at Allahabad in F.A.F.O. Nos. 552 of 1996 and 553 of 1996 respectively.

The Civil Appeals are, accordingly, dismissed.

If any proceeding is pending before the Civil Judge, Agra under Section 34 of the Arbitration and Conciliation Act, 1996, the same shall be proceeded with in accordance with law and both the parties at liberty to argue the matter before the said Court."

39. That being an order passed on the civil appeal, its precedential value clearly exists. Accordingly, the objection raised by the appellant as to inherent lack of jurisdiction and consequently to the award being *void ab initio*, is rejected. The issue of defect if any in the appointment of the learned arbitrator remained unexamined and undetermined in absence of any objection being raised by the MDA, at the appropriate time i.e. before the court of first instance or the learned Additional Civil Judge (Senior Division), Meerut who decided the application under Section 20 of the Old Act. The objection if raised would have involved appreciation of evidence, besides law, before it could be adjudicated. In absence of that adjudication, it cannot be entertained now, at this late stage. Consequently, for purpose of the present appeal, the appointment of the learned sole arbitrator has to be treated as valid in law.

40. As to the consent and its effect, in the first place, in the proceedings before the arbitrator, in view of Clause 34 of the contract bonds, read in light of Section 85 and Section 21 of the New Act as also the consent recorded on 15.02.2005 in the proceedings before the arbitrator, it has to be treated as an award made in accordance with the provisions of the New Act. In the first place, by virtue of Clause 34 of the contract bonds, the New Act became available upon its enforcement. Then, by specific consent given by the parties on 15.02.2005, they signified to follow the procedure prescribed under the New Act only. The submission advanced by learned counsel for the appellant that the option to proceed under the New Act had to be exercised at the first instance, i.e. at the earliest upon enforcement of the New Act, is plainly unsubstantiated. There is nothing in the New Act or in the language of Section 85, as may allow such an interpretation to arise. Plainly, two Acts deal with resolution of disputes by means of an alternative and well-recognized

mode of arbitration. A rule of procedure which has been allowed to be moulded by the parties according to their will, cannot be restricted in the manner suggested by learned counsel for the appellant. In absence of any statutory indication for the same and in absence of any reasonable ground being shown for such construction to be made, the submission advanced has to be rejected. Beginning from **M/s Rani Constructions Pvt. Ltd. (C.A. No. 61 of 1999)** as reported in **Thyssen Stahlunion GMBH (supra)** and as followed in **Delhi Transport Corporation Vs Rose Advertising (supra)** as also **Milkfood Ltd. (supra)**, the law has remained unequivocally constant, that parties to an arbitration contract could agree to the applicability of the New Act even before the New Act came into force and even when the Old Act was still holding the field. Reliance has wrongly been placed by the appellant on the following observation made in **N.S. Nayak & Sons v. State of Goa (supra)** :-

"16. The aforesaid discussion only deals with the contention that parties could not have agreed to the application of the new Act till they had the knowledge about the provisions thereof and, therefore, the agreement to the effect that to the arbitral proceedings, the provisions of the Arbitration Act, 1940 or any statutory modification or re-enactment thereof would be applicable, is not valid. The Court negatived the said contention by interpreting the expression "unless otherwise agreed". The Court held that such agreement could be entered into even before coming into force of the new Act. However, it nowhere lays down that in a pending arbitral proceeding, which was being conducted as per the procedure prescribed under the old Act, the parties have option of changing the procedure."

41. That was a case where arbitrators had been appointed much prior to enforcement of the New Act though individual awards came into existence thereafter. An objection was raised by the claimant that appeals filed by the State Government of Goa against those awards, under Section 37 of the Old Act, be decided on the basis of the New Act, in view of the following pre-existing agreement between the parties:

"Subject as aforesaid, the provisions of the Arbitration Act, 1940, or any statutory modification or re-enactment thereof and the Rules made thereunder and for the time being in force shall apply to the arbitration proceedings under this clause."

42. In such facts, the Supreme Court noticed the ratio of its earlier decision in **Thyssen Stahlunion GMBH (supra)** and categorically observed:-

"12. In our view, paragraph 22 nowhere lays down that after the new Act came into force, even appeals filed under the provisions of the old Act are to be decided on the basis of the provisions contained in the new Act....."

43. Therefore, the ratio of the case has to be read, limited to what was actually decided being, that clause of the contract bonds (in the instant case), cannot alter the basis for decision in appeals if those appeals had been filed (by MDA). Such is not the fact here. In fact, by filing objections under Section 34 of the New Act, the MDA has itself further acted otherwise, apparently on its consent recorded both in Clause 34 of the contract bonds and also before the arbitrator, on 15.02.2005. It cannot now, be permitted to turn around and object to the procedure adopted with its consent obtained in

accordance with law, especially in absence of any other defect being claimed in the award.

44. Insofar as the decision in the cases of **Oriental Insurance Company (supra)** and **M/S Dozco India Pvt. Ltd. (supra)** are concerned, the same have no application to the facts of the present case inasmuch as in the case of **Oriental Insurance Company (supra)**, the arbitration clause restricted the scope of reference to such cases only where the insurance company did not dispute its liability under or in respect of the policy. A reference made contrary to the opinion of the insurance company, in those facts, was found to be unenforceable. Similarly, in the case of **M/S Dozco India Pvt. Ltd. (supra)**, the arbitration agreement between the parties had fixed the place of arbitration at Korea and the governing law to be that of the Korea. Therefore, no reference could be contemplated or allowed to be made contrary to such an agreed clause.

45. Insofar as the ratio in the case of **M/S Setty's Constructions Co. Pvt. Ltd. (supra)** is concerned, in that case, the dispute though pertained to appointment of arbitrator pending under the Old Act and the effect of Section 85 of the New Act was considered, however, it remained undisputed that in that case, the High Court had dismissed the claim as premature. That was the main issue considered by the Supreme Court whereon the matter was adjourned. In such proceedings, a preliminary issue was raised as to whether the proceedings for appointment of arbitrator would, in light of enforcement of the New Act, be governed by or under that Act. That preliminary objection was answered holding that the Old Act would continue to govern the proceedings for appointment of arbitrator in view of the fact that such proceedings had been instituted prior to the enforcement of the New Act. However, there was no pre-existing or other agreement between the parties in dispute (in that case), similar to Clause 34 of the contract bonds, in this case. In any case, that objection was not raised by the MDA at the relevant time as was done in **M/s. Setty's Construction Co. Pvt. Ltd. (supra)**. Here, the MDA also appears to have filed objections under Section 34 of the New Act against such award and the same have been dealt with accordingly. The objection to the contrary is again found unsubstantiated and therefore rejected.

46. As to the first submission advanced by learned counsel for the MDA that the appointment of the arbitrator by the learned Additional Civil Judge (Senior Division), Meerut was invalid, in face of the stipulation contained in Clause 34 of the contract bonds giving that power of appointment to the Vice Chairman of MDA, the issue is no longer *res integra* in view of the categorical pronouncement made by the Supreme Court in the case of **Nandyal Coop. Spinning Mills Ltd. (supra)** where the in it has been held:

"11. It would thus be clear that if no arbitrator had been appointed in terms of the contract within 15 days from the date of receipt of the notice, the administrative head of the appellant had abdicated himself of the power to appoint arbitrator under the contract. The court gets jurisdiction to appoint an arbitrator in place of the contract by operation of Section 8(1)(a). The contention of Shri Rao, therefore, that since the agreement

postulated preference to arbitrator appointed by the administrative head of the appellant and if he neglects to appoint, the only remedy open to the contractor was to have recourse to civil suit is without force. It is seen that under the contract the respondent contracted out from adjudication of his claim by a civil court. Had the contract provided for appointment of a named arbitrator and the named person was not appointed, certainly the only remedy left to the contracting party was the right to suit. That is not the case on hand. The contract did not expressly provide for the appointment of a named arbitrator. Instead power has been given to the administrative head of the appellant to appoint sole arbitrator. When he failed to do so within the stipulated period of 15 days enjoined under Section 8(1)(a), then the respondent has been given right under Clause 65.2 to avail the remedy under Section 8(1)(a) and request the court to appoint an arbitrator. If the contention of Shri Rao is given acceptance, it would amount to putting a premium on inaction depriving the contractor of the remedy of arbitration frustrating the contract itself."

47. Again in **G. Ramachandra Reddy & Co. (supra)**, a similar view had been expressed. Therefore, once the MDA failed to appoint an arbitrator upon specific request made by the claimant, the latter was within its rights to move an application under Section 20 of the Old Act for appointment of an arbitrator. In such proceedings, once the parties could not agree to appointment of a consented arbitrator, it was left only to the Court to make that appointment. Thus, the appointment of Shri V.K. Tyagi as the sole arbitrator did not suffer from any defect.

48. As to the last submission advanced by learned counsel for the appellant, by virtue of Para 3 Schedule I to the Old Act read with Section 3 thereof, the limitation to make the award was four months from the date the learned arbitrator entered reference. On one hand, the MDA has failed to prove any specific date on which it claims, the arbitrator entered reference. In that regard, even the copy of the notice alleged to be dated 15.11.2004 has not been proved. Thus, a bald allegation appears to exist that the learned arbitrator had entered reference on or before 15.11.2004.

49. On the other hand, it admitted the first date in the proceedings, fixed by the learned arbitrator to be 20.11.2004. The learned arbitrator has also stated in his award - *"....I accepted the appointment and entered into reference accordingly and fixed Saturday, the 20th Nov 2004 as the 1st date for appearance of the parties and their respective Counsels"*. This being admitted, clearly, the arbitrator did enter reference on that date and not later. A division bench of this Court in **Sardar Mal & Ors. Vs. Sheo Bakhsh Rai & Ors., AIR 1922 All 106**, relying on two decisions of English Courts opined, "entering upon the reference" means not when an arbitrator accepted the office or took upon himself that duty, but when he actually entered upon the matter of the reference, when the parties were before him, or under some peremptory order compelling him to conclude the hearing *ex parte*. Thus, it was observed :

*"**3.** We are of opinion that the provisions "entering on the reference" and "having been called upon to act by notice in writing" are alternative in this sense that where no reference is entered upon at all then the time runs from the notice calling upon the arbitrators to act. But, on the other hand, even although the arbitrators may be called upon to act by entering upon the reference, if they enter upon the reference, they have three months from that moment for making their award and for enlarging the time for making the*

award if the circumstances at the reference satisfy them that they cannot complete the award within three months. To hold otherwise would seem to strike out from Clause 3 the words "within three months after entering on the reference" in a case where one of the parties happened to call upon the arbitrators to act before they began the reference.

4. *This clause was considered by the English Court of Appeal inBaring-Gouldv. Sharpington(1899) 2 Ch., 80 and the view which we take seems to be that which was laid down by the Master of the Rolls, the late LordLindley, in a passage contained in page 91 of the report.*

5. *In addition to that, under the old clause in England, which was slightly different in form, an equally strong court came to the conclusion in Baker v. Stephens(1867) L.R.2 Q.B. 523 that "entering upon the reference" means "not when an arbitrator accepts the office, or takes upon himself the duty, but when he actually enters upon the matter of the reference, when the parties are before him, or under some peremptory order compelling him to conclude the hearing ex parte."*

50. Similar view was taken by a Full Bench of the Calcutta High Court in **Ramanath Agarwalla Vs. Goenka & Co. & Ors., AIR 1973 Cal. 253**, wherein the Full Bench of the Calcutta High Court, first took note of the above Division Bench decision of this Court in **Sardar Mal (supra)** and thereafter concluded as below:

*"**28.**We have already observed that an Arbitrator under the provisions of the Arbitration Act is required to act as an Arbitrator. His acting as arbitrator includes (a) entering on reference, (b) proceeding with the reference, and (c) making an award. It follows that the expression "acting as an Arbitrator" is wider than "entering on the reference". Now, the dictionary meaning of "to enter on", in the context in which the expression has been used in the Arbitration Act, is "to take the first step upon or in" or "to begin to deal with a subject" : vide Shorter Oxford English Dictionary. Vol. 1. p. 646.*

29.*Entering on reference, therefore refers to the first step that the Arbitrator takes in the reference, that is to say, when he begins to deal with the reference. The Arbitrator, under the Act, may have to do various ministerial acts but the doing of any of the ministerial acts is not entering on the reference. It is only when he first applies his mind to the dispute referred to him that he enters on the reference. When, however, in a particular case, he first applied his mind to the dispute would depend, on the facts and circumstances of that case.*

30.*There have been a number of recent decisions on this point which we may conveniently refer to. The Patna High Court in Sonevlal Thakur v. Lachhminarain, AIR 1957 Pat 395 at p. 397 in paragraph 5 has stated that an Arbitrator does not enter upon a reference the moment he accepts to work as an arbitrator, nor can it be said that he enters upon a reference only when he actually hears the reference. An Arbitrator enters upon a reference when, after having accepted the reference, he applies his mind and does something in furtherance and execution of the work of arbitration. The exact date as to when an arbitrator enters on a reference in a particular case however, has to be determined on the facts and circumstances of the case."*

51. Thus, the fact of issuance of notice dated 15.11.2004 by the arbitrator, even if assumed to be correct, would not itself amount to the learned arbitrator

having entered reference on that date. He entered reference on 20.11.2004. Computed from the first date fixed in arbitration, he had time upto 19 March 2005 to make the award as his four month mandate survived till then. In absence of any earlier date being shown to exist, on which the learned arbitrator applied his mind to the subject matter of dispute put up for arbitration, the award made on 19.03.2005, appears to have been made within time and it also does not suffer from any defect of limitation.

52. Appeal lacks merit and is accordingly **dismissed**. Interim order granted earlier is vacated.

(2020)02ILR A1101

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.12.2019

BEFORE
THE HON'BLE ARVIND KUMAR MISHRA-I, J.

FAFO No. 3792 of 2017

State of U.P. ...Appellant
Versus
Chhuttan Lal & Ors. ...Respondents

Counsel for the Appellant:
C.S.C.

Counsel for the Respondents:
Sri Arun Kumar Vishvakarma, Sri Rajeev K. Srivastava

A. Civil Law-Claimants mother, father and one minor brother - deceased was an auto mechanic - monthly income of deceased assessed to Rs.3000/- annual income Rs.36,000/- After slicing off 2/3 of the same, it was pegged to Rs.24,000/- multiplicand of 8 was applied - which after multiplication aggregated to Rs.1,92,000/- and Rs.2000/- was awarded as funeral expenses - Claim Tribunal directed compensation amount to the tune of Rs.1,94,000/- along with 8% interest to be realized from opposite party no.2 (appellant herein) - Held - no infirmity - appeal dismissed (Para 17)
Appeal dismissed. (E-5)

(Delivered by Hon'ble Arvind Kumar Mishra-I, J.)

1. Heard learned counsel for appellant, learned counsel for the claimant-respondents and perused the material brought on record.

2. By way of the instant appeal, challenge has been made to the award and order dated 15.09.2009 passed by Motor Accident Claim Tribunal / Additional District Judge, Court No.7, Mathura, in Motor Accident Claim Case No.29 of 2008 Chhuttan Lal Vs. Jeep Chalak Jeep No.UP 70 S 5228, Maan Singh and another whereby compensation amount to the tune of Rs.1,94,000/- along with 8% interest was directed to be realized from opposite party no.2, (the present appellant herein) in this appeal.

3. Brief reference of the relevant facts of the case as discernible from the certified copy of the impugned award appears to be that the accident took place on 16.10.2007 at 5:30 pm at Tank Crossing, Mathura while the deceased was proceeding towards his home by scooter no. U.P. 81 F 0840 along with Mormukut Yadav, Advocate when the Government Jeep No.U.P.70 S 5228 being driven rashly and negligently dashed the same with the aforesaid scooter due to which the deceased Harish Chandra succumbed to his injury while he was being taken to the hospital at Mathura.

4. The claimant-respondents preferred the claim petition before the Tribunal whereby it was claimed that the deceased Harish Chandra was bread earner for the entire family and he was head of his family. After his sudden demise, there is no one to look after family of the deceased. The claimant-respondents are mother, father and one minor brother. The deceased was an auto mechanic. He used to earn Rs.15,000/- per month. Under various heads, Rs.38,40,000/- was sought to be realized from the present appellant.

5. The claim petition was contested and both the parties raised their respective pleadings on the basis of which relevant issues were framed by the Tribunal.

6. Issue no.1 related to the point of the accident in question as to whether the accident in question was caused on 16.10.2007 at 5:30 pm at Tank Crossing Mathura by rash and negligent driving of the aforesaid jeep by its driver rashly and negligently due to which it dashed with the scooter of the deceased Harish Chandra, consequently, he sustained injury and succumbed to it while on way to the hospital at Mathura ?

7. Issue no.2 related to the quantum of compensation to be given to the claimant-respondents then its proportion?

8. Issue no.3 also related to the point of compensation to the claimant-respondents?

9. The claimant-respondents produced Mormukut Yadav PW-1, Chandra Bhan PW-2 and Chhuttan Lal PW-3 and also produced documentary evidence by moving list 6-C, which contained relevant papers, apart from producing papers vide 7-C/1 to 9C and 31-C to 36 C.

10. The opposite parties got examined Man Singh DW-1, driver of the aforesaid offending jeep. Thereafter, the Tribunal upon consideration of the submissions of both the parties and upon evaluation of the evidence on record, partly awarded the claim along with interest against the appellant.

11. Consequently, this appeal.

12. Crux contention raised on behalf of the appellant is that in this case, proper evaluation / assessment of the situation on the spot was not made by the Tribunal, for specific reason that the road was being constructed on that date when the accident took place while the deceased scooterist was himself driving the scooter on the wrong side and he suddenly came and crossed the offending jeep due to which the jeep driver applied his brake but in the meanwhile, the deceased scooterist himself driving the scooter at high speed dashed the scooter with the jeep.

13. To vindicate his claim, learned counsel for the appellant has engaged attention of the Court to the testimony of Maan Singh DW-1, driver of the offending vehicle and has claimed that evidence so tendered by the driver of the offending vehicle was truthful and trustworthy, however, it was wrongly disbelieved by the Tribunal and the version of Mormukut Yadav was taken to be correct, whereas, he being an Advocate was well versed to suit the interest of the claimant-respondents. The amount awarded as compensation is excessive and the rate of interest is also at enhanced rate than was required to be applied and the proper

interest would have been fixed at the rate of 7% instead of 8%.

14. Per contra, learned counsel for the claimant-respondents has supported the finding of the Tribunal and claimed that the amount of the impugned award under facts and circumstances of the case is justified.

15. Considered the rival submissions apart from testimony available on record.

16. Obviously, there are two witnesses namely Mormukut Yadav PW-1 and Maan Singh PW-2. Insofar as testimony of PW-1 is concerned, it cannot be said that PW-1 being an Advocate was highly interested person and biased in favour of the claimant-respondents. However, it was duty of every witness to come out with truth as to what was seen by him on the spot. No doubt, testimony of PW-1 is exposed to cross examination to be carried out by the other side.

17. However, I have also perused testimony of PW-1 wherein nothing adverse as claimed was found, on the other hand cross examination of DW-2 done on behalf of the claimant respondents throws certain doubt on the claim raised regarding mistake of the deceased himself in the accident. Apart from that, monthly income of the deceased under facts and circumstances of the case was found to be proper. The monthly income of the deceased was assessed to Rs.3000/- Consequently, annual income was Rs.36,000/-. After slicing off 2/3 of the same, it was pegged to Rs.24,000/-. While considering the dependency factor and primarily age of the parents of the deceased, multiplicand of 8 was applied to the aforesaid annual income Rs.24,000/- which after multiplication aggregated to Rs.1,92,000/- and Rs.2000/- was awarded as funeral expenses. The total amount so fixed was Rs.1,94,000/-. Insofar as rate of interest is concerned, it cannot be said to be excessive when the accident took place admittedly in the year 2007. After overall assessment of the award impugned and the entire interest, no infirmity is perceptible as such and the present appeal sans merits and is dismissed.

18. However, Rs.25,000/- deposited by the appellant at this stage shall be remitted to the Tribunal concerned for adjustment of the distribution of the amount of compensation directed as above.

(2020)02ILR A1103

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 18.02.2020

BEFORE

THE HON'BLE ALOK MATHUR, J.

Misc. Single No. 2785 of 2008
with
Misc. Single No. 4111 of 2008
& with
Misc. Single No. 4110 of 2008

Smt. Leelawati & Ors. ...Petitioners
Versus
The U.P. Cooperative Tribunal, Lko. ...Respondent

Counsel for the Petitioners:
Ram Raj

Counsel for the Respondent:

C.S.C., Rakesh Kumar Chaudhary, Rakesh Srivastava

A. U.P Co-operative Societies Act-Sec.70-challenging-common order-refusing to interfere with the award-cancelling the allotment of plot & cancellation of registered sale deed-entered into by Late husband of petitioner-on the ground-the then President of society-near relatives of Petitioner-relationship b/w president with son of petitioner-was of sadhu (sister-in-law's husband)-not covered u/s.2(u)-non application of mind-remanded back to arbitrator-Disposed of.

B. Held, It is clear from the Rules that the relationship of the petitioner with the President of the society is not hit by Rule 2(u) and even the arbitrator has nowhere adequately considered this fact and only on the basis of inquiry report submitted at the fag end of proceedings given this finding. The findings also indicates non application of mind as the arbitrator should have recorded specific finding with regard to the exact relationship of the husband of the petitioner with the President of the society and also the fact that the said relation is covered by the definition of the relations as provided under Rule 2 (u) of the Rules of 1968. No such finding has been recorded by the arbitrator. The findings of the arbitrator in this regard are liable to be set aside.

List of cases cited:-

1. M/s Neelakantan & Bros. vs Superintending Engineer, National Highways Salem and others (1988) 4 SCC 462

2. M/s Construction India vs Secretary, Works Department Government of Orissa and others (1998) 2 SCC 89.

3. M.K.Shah Engineers & Contractors vs State of M.P (1999) 2 SCC 594

4. Smt Kusum Lata vs State of U.P and others (2018) 4 UBLBEC 3048

(Delivered by Hon'ble Alok Mathur, J.)

1. Heard Shri Ram Raj and Sri Sunil Sharma learned counsel for the petitioners, learned Standing counsel for respondent No.1, Sri Rakesh Srivastava for respondent No.3 while Sri Rakesh Kumar Chaudhary is present for U.P. Awas Evam Vikas Parishad.

2. By means of above writ petitions the petitioners have assailed the common order of U. P. Cooperative Tribunal dated 21st May, 2008 whereby while deciding the appeal against the petitioner the Tribunal has refused to interfere with the award dated 22.8.2005 passed under Section 70 of U.P. Cooperative Societies Act.

3. It has been submitted by learned counsel for the petitioner that the late husband of the petitioner was allotted a plot by Meerut Sahkari Awas Samiti Ltd.-respondent No.3 (hereinafter referred to as the Samiti) after becoming a member of the said society applied for and was allotted a plot having an area of 1200 square yards and deposited an amount of Rs.10,20,000/- at the rate of Rs.850/- per square yards by means of two demand drafts. The said amount was deposited by the petitioner on 14th June, 1999. He has further submitted that certain other amounts were deposited by him towards development charges etc. Subsequent to allotment of the said plot, a perpetual lease deed was entered into between the petitioner and Meerut Sahkari Awas Samiti Ltd. which was registered on 5th July, 1999; that in the meanwhile the Committee of Management of Meerut Sahkari Awas Samiti Ltd. was superseded and an Administrator was appointed for looking into the affairs of the said Samiti. The Administrator who was appointed on 3rd April, 2000 within one week of

assuming the charges of Administrator annulled the resolutions of the Samiti dated 10th September, 1998 and 20th May, 1999 by which the plots in question were allotted to late Laxmi Chand-the husband of the petitioner and subsequently while declaring the registered perpetual lease deed executed on 5.7.1999 void also ordered that the said plot would become the property of the said Samiti and no person shall have any claim on the said plot.

4. The order dated 3rd April, 2000 was challenged by the petitioners by moving an application before the Registrar /Housing Commissioner under Section 70 of the U.P. Housing and Cooperative Societies Act. The Registrar/Housing Commissioner, Uttar Pradesh on 23rd January, 2001 passed an interim order whereby the operation and implementation of the impugned order dated 3.4.2000 was stayed and the arbitration proceedings were referred to Additional Registrar/Managing Director, Uttar Pradesh Sahkari Awas Sangh Limited, 6 Sarojini Naidu Marg, Lucknow. Before the Arbitrator the society filed its written statement. The petitioner as well as the society were afforded full opportunity of hearing and the arbitrator was of the view that cancellation of the plots as well as cancellation of registered lease deed was not in accordance with law but during the course of hearing a fact was brought to the knowledge of the arbitrator that the plot had been allotted to the petitioner by the President of the society, who was a near relative. On coming to know of this facts an inquiry was instituted and an inquiry report was submitted to the arbitrator on 25.6.2005 wherein this fact was endorsed that the husband of petitioner No.1 was a close relative of the President of the society and, therefore, the allotment of the plot was illegal and a perusal of the operative portion of the impugned order clearly indicates that the claim of the petitioner was rejected only on this count.

5. Aggrieved by the aforesaid order the petitioner preferred an appeal under Section 98 of U.P. Cooperative Societies Act before the U.P. Cooperative Tribunal. It has been submitted that after exchange of pleadings when the matter was at the stage of final hearing, a preliminary objection was filed by one of the respondents submitting that appointment of arbitrator by the Housing Commissioner was not in accordance with law and the award suffered from inherent lack of jurisdiction and, therefore, was liable to be set aside and the appeal preferred by the petitioner was liable to be rejected. The Tribunal taking into account various notifications issued by the State of U. P. under Section 3(2) of U. P. Cooperative Societies Act and after considering the same came to the conclusion that the valuation of the claim preferred by the petitioner was more than Rs.1 lakhs and, therefore, the application made to the Housing Commissioner was erroneous as he did not have the jurisdiction in this regard and consequently the nomination of arbitrator was illegal, therefore, the award passed by opposite party No.2 was declared to be a nullity. The Tribunal only considered the preliminary objection of the respondents and the upholding the said preliminary objection rejected the appeal of the petitioner.

6. Assailing the order passed by the Tribunal learned counsel for the petitioner has submitted that Housing Commissioner was fully competent to entertain the application under Section 70 of U.P.

Cooperative Societies Act and there was no error nominating the arbitrator. He has drawn the attention of this Court towards sub-section 2 of Section 3 of the Act which provides as under:-

"(2) The State Government may, for the purposes of this Act, also appoint other persons to assist the Registrar and by general or special order confer on any such person all or any of the powers of the Registrar."

7. Section 71 of U. P. Cooperative Societies Act, 1965 provides reference of a dispute to arbitration which is quoted as under:-

"71. ***Reference of dispute to arbitration.-*** *(1) On receipt of a reference under sub-section (1) of Section 70, the Registrar may, subject to the provisions of the rules, if any-*

(a) decide the dispute himself, or

(b) refer it for decision to an arbitrator appointed by him, or

(c) refer it, if the parties so request in writing, for decision to a board of arbitrators consisting of the three persons to be appointed in the prescribed manner.

(2) ***The Registrar may,*** *for reasons to be recorded, withdraw any reference made under clause (b) or (c) of sub-section (1) and refer it to another arbitrator or board of arbitrators or decide it himself.*

(3) The Registrar, the arbitrator or the board of arbitrators, to whom a dispute is referred for decision under this section may, pending the decision of the dispute make such interlocutory orders including attachment of property as he or they may deem necessary in the interest of justice.

(4) The decision given by the Registrar, the arbitrator or the board of arbitrators under this section shall hereinafter be termed as award.

(5) The procedure to be followed by the Registrar, the arbitrator or the board of arbitrators in deciding a dispute and making an award under this section shall be as may be prescribed."

8. The State Government in exercise of the power under Section 3 of the Act conferred the power upon the Housing Commissioner, U.P. by notification dated 15.6.1976 was which is quoted as under:-

"In exercise of the powers under sub-section (2) of Section 3 of the Uttar Pradesh Co-operative Societies Act, 1965 (U.P. Act XI of 1966) and in suppression of the Government Notification No.1538/XIJ-C-1-12 (AS)-74, dated May 17, 1976, the Governor, for the purpose of the said Act, is pleased to appoint the Housing Commissioner, Uttar Pradesh ex-officio to assist the Registrar and to confer on him all the powers of the Registrar in respect of Uttar Pradesh Sahkari Avas Sangh Limited and of all Urban Co-operative Housing Societies in Uttar Pradesh."

9. It has also been submitted that subsequently vide notification dated 10.8.1989 the State Government has conferred the jurisdiction and power of the Registrar to the Deputy Housing Commissioner and Deputy Registrar and Assistant Housing Commissioner, Assistant Registrar (Co-operative). It has been said that in case the value of the property of the amount of claim involved exceeds rupees one lakh, then under sub-rule (1) of Rule 229 the matter may be sent to the Additional Registrar. Vide another

notification dated 31.10.1998 several amendments were carried out under Cooperative Societies Rules including Rule 229 and 229 (1) (c) which is as under:-

"(c) in case the value of the property or the amount of claim involved in the dispute exceeds rupees fifty thousand but does not exceed rupees three lakh, be made to the Additional Registrar having jurisdiction over the region concerned."

10. The affidavit filed by the housing Commissioner also states that by notification dated 08/09/17 the pecuniary amount regarding a petition has been changed by the State Government and the Additional Housing Commissioner/Additional Registrar Cooperative was conferred the jurisdiction in respect of disputes involving a sum of Rs. 5 Lacs to 10 lakhs. In the present case the valuation of the case would be 10 lakhs and therefore in light of the notification dated 08/09/17 which though has been passed subsequently but empowers the Additional Housing Commissioner to act as arbitrator. The Tribunal rejected the appeal of the petitioner on the ground that the Housing Commissioner did not have to entertain any complaint and consequently did not have any power to appoint the arbitrator, and the appeal was therefore rejected because the Additional Registrar does not have jurisdiction to enter upon reference.

11. In the present case the dispute was referred to the Housing Commissioner and Registrar by the High Court vide its judgement and order dated 22.12.2000 passed in writ petition No. 32744 of 2000 and the then Housing Commissioner, referred the dispute for arbitration to Additional Registrar (Co-operative) who was posted as Managing Director, Housing Federation.

12. The U.P. Cooperative Tribunal while appreciating the facts of the case it seems has totally ignored the fact that the dispute in the present case was referred to the Housing Commissioner by the High Court in its order passed on 22/12/00 in writ petition number 32744/2000. The Tribunal has recorded a finding that the present dispute was not cognizable by the housing Commissioner and the housing Commissioner had no authority to firstly entertain the said dispute and subsequently to refer the same for arbitration. The Tribunal has allowed the preliminary objection preferred by the respondent and dismissed the appeal filed by the petitioner, and the matter was remanded for arbitration before the competent authority for a fresh adjudication. By means of interim order dated 20/06/08 this court had stayed the operation of the judgement and order of the tribunal.

13. During the pendency of the instant writ petition, in order to resolve the controversy this court and directed the standing counsel to seek instructions the matter regarding the position of the Housing Commissioner to discharge the duties of Registrar in respect to Section 70 and 71 of the U.P. Cooperative Societies Act. In pursuance to the said directions of this court dated 20/08/2019 an affidavit of the Housing Commissioner was filed. In the said affidavit it has been stated that the power of the Registrar was conferred upon the Housing Commissioner, U.P in respect of inter alia all urban cooperative of the societies in U.P by the State Government by notification dated 15/06/76.

Subsequently by notification dated 10/08/89 the State Government has conferred the jurisdictional power of the Registrar and Deputy Housing Commissioner/Deputy Registrar and Assistant Housing Commissioner/Assistant Registrar, Cooperative Societies posted under the Housing Commissioner. As per rule of 4(c) it has been submitted that in case the amount involved, 1 lakhs that as per rule 229 (1) the matter may be sent to additional registrar.

14. With regard to the facts relating to the present case it is been submitted that the same was referred to the Housing Commissioner/Registrar by the order of the High Court dated 22/12/00 passed in Writ Petition No.32744/2010 and even otherwise the Housing Commissioner had been conferred the power of Registrar as per notification dated 15/06/76 and subsequently the dispute was referred to the then Additional Registrar Cooperative Housing. It has been stated that as per rule 229 (1) (c) the Additional Registrar Cooperative was empowered to deal with the matter of arbitration and therefore he had rightly decided the said arbitration.

15. Sri Rakesh Srivastava, counsel for opposite party No.3 submitted that in view of the statutory provisions contained in U.P Cooperative Societies Act as well is the rules framed thereunder, it is only the Registrar of the U.P. Cooperative Society could have referred the dispute for arbitration, while in the present case the Housing Commissioner having entertained the dispute and therefore the reference of the dispute for arbitration, was totally without jurisdiction and a nullity and therefore has supported the order of the Tribunal.

16. The learned Counsel the petitioner has submitted that before the arbitrator, the grounds of maintainability of the reference of the dispute for arbitration was never raised. The respondents appeared and contested the matter before the arbitrator and therefore they were precluded from challenging the award on the ground of jurisdiction, having acquiesced to his jurisdiction. It is further submitted that in any view of the matter, the reference was made in pursuance to the orders passed by the High Court dated 22/12/2000 in writ petition No.32744 of 2000 and therefore the proceedings were conducted in pursuance and in compliance with the said directions and the same cannot be set aside on the ground of Jurisdiction by the Tribunal.

17. It is also admitted that the order of the High court dated 22/1/2000 attained finality as it was not further challenged and was passed in the presence of the respondents.

18. Considering the arguments raised by both the parties with regard to the jurisdiction of the Housing Commissioner to refer the dispute for arbitration it is noticed that admittedly this High Court at Allahabad by means of order dated 20/02/00 was pleased to direct the petitioner to file the arbitration case before the Housing Commissioner/Registrar and directions were issued to the Housing Commissioner/Registrar that in case of filing of arbitration case then the matter may be decided expeditiously. In furtherance of the aforesaid order the petitioner had approached the Housing Commissioner, and this fact was duly disclosed to the tribunal by the petitioner who had filed additional objection to the preliminary objection, and the Tribunal did

not take cognizance of the said fact and proceed to record a finding to the effect that the Housing Commissioner had no jurisdiction to entertain the dispute and refer the same for arbitration. The findings recorded by the Tribunal is, on the face of it, contrary to the order of the High Court and therefore illegal and arbitrary and cannot be sustained.

19. The tribunal in the present case has held that the Housing Commissioner has no authority of jurisdiction to entertain the dispute, despite the fact that it was the High Court which had directed him to entertain the said dispute. The Tribunals do not have any power or authority to sit in appeal over the orders passed by the High Court. Despite this fact having been pointed out by the petitioner in the pleadings before the Tribunal, they choose to blatantly ignore this fact, and proceeded to strike down the order passed by the Housing Commissioner. In this view of the matter also, the order of the Tribunal deserves to be set aside.

20. The second ground of challenge to the order of Tribunal is that as no objection regarding jurisdiction was raised by the respondent before the arbitrator, he would have been deemed to have acquiesced to the award and the same cannot be challenged on this ground subsequently. In the case of ***M/s Neelakantan & Bros. vs Superintending Engineer, National Highways Salem and others (1988) 4 SCC 462*** it has been held *"If the parties to the reference either agree beforehand to the method of appointment, or afterwards acquiescence in the appointment made with full knowledge of all the circumstances. they will be precluded from objection~ to such appointment as invalidating subsequent proceedings. Attending and taking part in the proceedings with full knowledge of the relevant fact will amount to such acquiescence,"*

21. The aforesaid judgement has been referred with approval by the Hon'ble Apex Court in the case of ***M/s Construction India vs Secretary, Works Department Government of Orissa and others (1998) 2 SCC 89.***

22. In the case of ***M.K.Shah Engineers & Contractors vs State of M.P (1999) 2 SCC 594*** the honourable apex court has held:-

"18. The subsequent conduct of the respondents involuntarily agreed to the appointment of arbitrators in both the cases and not pursuing their objection under section 33 of the arbitration act, shall be valid on their part on the plea of non-compliance with the earlier part of clause 3.3 .29, if only there was such non-compliance. The respondent State of MP has acquiesced in the appointment of arbitrators and the proceedings for settlement of disputes by arbitration. The respondent cannot be permitted to turn around and plead invalidity or non-maintainability of arbitration proceedings by reference to clause 3.3 .29."

23. Applying the ratio laid down by the Hon'ble Apex Court in the above judgements to the facts of the present case, it can safely be concluded that the respondent having appeared before the arbitrator and having actively participated in the proceedings, they would have been deemed to be participating with knowledge of full facts of the case and did not raise any objections regarding the jurisdiction and competence of the

arbitrator or legality of the reference, had, therefore, acquiesced to his jurisdiction. The award was passed against the petitioner. He preferred an appeal to the Cooperative Tribunal, where the respondent raised for the 1st time a preliminary objection with regard to the competence of the Housing Commissioner to refer the dispute raised by the petitioner. The Tribunal proceeded to consider the objections raised by the respondents on merits, without taking into account the order of the High Court dated 22/12/2000 whereby the petitioner was directed to approach the housing Commissioner/registrar.

24. The Tribunal had clearly misdirected itself, while instead of rejecting the preliminary objection raised by the respondents at the very outset, proceeded to consider the merits of the same. The very fact that the Housing Commissioner exercised powers under the UP cooperatives Societies Act on the directions of the High Court, and the exercise of the said power, even otherwise, could not have been be held by the Tribunal to be illegal and arbitrary, coupled with the fact that the respondent who willingly participated before the arbitrator, never raised any objections with regard to the either the reference or the competence of the arbitrator was clearly precluded from raising the same by means of the preliminary objection before the Tribunal. This Court no hesitation in holding that the order of the Tribunal is clearly illegal, arbitrary, and contrary to the settled legal principles. We are not proceeding to adjudicate upon the powers of the housing Commissioner/registrar in entertaining the dispute and to further referring the same to the competent authority in exercise powers under section 3 (2) of the U.P Cooperative Societies Act inasmuch as the same was done under the orders of the court and not on his own motion.

25. Petitioner has also challenged the award passed by the Additional Registrar dated 22.8.2005. The Additional Registrar after considering the entire conspectus of facts as well as material was of the considered view that the cancellation of the allotment of the plot as well as subsequent cancellation of lease deed is illegal and arbitrary and deserves to be set aside but he proceeded to reject the claim of the petitioner solely on the ground that an inquiry report has been received which indicates that the petitioner is near relative of the President of the society and, therefore, the allottment of the plot was illegal. It has been submitted that the arbitrator has not considered the rules or definition as given in Section 2 (u) of the U.P. Cooperative Societies Rules, 1968 and, therefore, the judgement is without any application of mind and being contrary to the statutory provisions and, therefore, liable to be set aside.

26. Section 2(u) of which defines near relation of a person is as follows:-

(u) "Near relation of a person" refers to his following relations: -

(i) wife, (ii) husband, (iii) son, (iv) daughter, (v) father-in-law, (vi) mother-in-law. (vii) wife's sister, (viii) wife's brother, (ix) husband's sister, (x) husband's brother (xi) father, (xii) mother, (xiii) grand-son or grand-daughter, (xiv) father's sister, (xv) brother, (xvi) brother's son, (xvii) sister, (xviii) sister's son, (xix) father's brother, (xx) mother's brother, (xxi) son-in-law, (xxii) daughter-in-law, (xxiii) sister's husband;"

27. It has been submitted that son of the petitioner was "साढू" of the President of the society and this relationship does not fall under definition of "near relative" as per Rule 2 (u) of the Rules of 1968 and, therefore, the allottment of the plot in question is not hit by aforesaid rules and the finding given by the arbitrator in this regard is contrary to the provisions as quoted hereinabove.

28. Challenge was also been made to the cancellation of the lease deed by the administrator which after due consideration returned a finding that same was not in accordance with the rules. The counsel for the petitioner has further submitted that it is only a competent civil court which can cancel a set aside such of registration after examining oral documentary evidence adduced by the parties as held by a full bench of this court in the case of ***Smt Kusum Lata vs State of U.P and others (2018) 4 UBLBEC 3048.*** This issue does not deserve any further consideration in this petition in as much as the same has been decided in favour of the petitioner by the arbitrator.

29. It is clear from the Rules that the relationship of the petitioner with the President of the society is not hit by Rule 2(u) and even the arbitrator has nowhere adequately considered this fact and only on the basis of inquiry report submitted at the fag end of proceedings given this finding. The findings also indicates non application of mind as the arbitrator should have recorded specific finding with regard to the exact relationship of the husband of the petitioner with the President of the society and also the fact that the said relation is covered by the definition of the relations as provided under Rule 2 (u) of the Rules of 1968. No such finding has been recorded by the arbitrator. The findings of the arbitrator in this regard are liable to be set aside.

30. As discussed above, the order of Cooperative Tribunal dated 21.5.2008 as well as award dated 22.8.2008 are hereby set aside.

31. As a result of the above discussion, the matter is remanded to the arbitrator, who shall be appointed by the Registrar on an application made by the petitioner. The petitioner is given liberty to make an application to the Registrar along with the certified copy of this judgement, and on receipt of the application the Registrar shall refer the matter for arbitration in accordance with law. The arbitrator is directed to decide the claim of the petitioner within six months from the claim made by the petitioner. The arbitrator shall only consider and decide the issue relating to rejection of the claim of the petitioner on the ground of his being the relative of the President. The respondents having not challenged the findings of the arbitrator with regard to cancellation of plot and of lease deed in favour of petitioner, the same have become final.

32. It has further been submitted that interest of the petitioner has been protected by various interim orders passed during the proceedings and he is continuing in possession till date. It is, therefore, provided that till the decision of the arbitrator status quo with regard to the plot in question shall be maintained.

33. With aforesaid direction the petition stands **disposed of.**

(2020)02ILR A1112

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 20.02.2020

BEFORE

THE HON'BLE VED PRAKASH VAISH, J.
THE HON'BLE NARENDRA KUMAR JOHARI, J.

Misc. Bench No. 4433 of 2013

Radhey Krishna Trivedi ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Dhruv Mathur

Counsel for the Respondents:
C.S.C., Girish Chandra Sinha

A. Challenging-notice dated 20.02.2013-proceedings initiated against him-by Economic Offences Wing-seeking declaration of the same as illegal-on the ground that-investigation initiated-without lodging of FIR-notices served on him-instead of appearing or filing reply-before Economic Offences Wing-filed present petition-prel. enquiry permissible-before lodging of FIR-no illegality in impugned notice-Petition Dismissed.

B. Held, in the instant case, on receipt of a complaint against the petitioner, Economic Offences Wing issued a letter dated 21st January, 2013 to the petitioner, another letter dated 20th February, 2013 (annexure-1 to the writ petition) was sent to the petitioner to appear within one week and submit his reply. The petitioner instead of appearing in the office of Economic Offences Wing or filing reply to the queries made by them, file the present petition.We are of the considered opinion that the Economic Offences Wing has taken recourse to a preliminary inquiry which is inconsonance with the decision in Lalita Kumari's case (supra). We do not find any illegality in the impugned notice dated 20th February, 2013. In the light of aforesaid discussion, we are of the view that the writ petition is without any merit, same deserves to be dismissed and the same is hereby dismissed.

List of cases cited:-

1. P. Sirajuddin, ETC vs. State of Madras, ETC', 1970 (1) SCC 595

2. Lalita Kumari vs. State Government of Uttar Pradesh and others', (2014) 2 SCC 1

(Delivered by Hon'ble Ved Prakash Vaish, J.)

1. Heard Sri Dhruv Mathur, learned counsel for the petitioner, Sri Raj Baksh Singh, learned Additional Chief Standing Counsel for respondents No.1 to 5 and Sri Girish Chandra Sinha, learned counsel for respondent No.9.

2. The petitioner, Sri Radhey Krishna Trivedi has filed the present writ petition under Article 226 of the Constitution of India with the following prayer:-

"(i) Issue a writ, order or direction in the nature of mandamus declaring the impugned investigation/proceeding being conducted against the Petitioner by the Economic Offences Wing of the State Government as illegal.

(ii) Issue a writ, order or direction in the nature of certiorari for quashing the impugned investigation/proceeding being carried out by the Economic Offences Wing of the State Government against the petitioner.

(iii) Issue a writ, order or direction in the nature of mandamus directing the Respondents not to harass and proceed against the Petitioner in any manner.

(iv) Issue an appropriate writ, order or direction for summoning of all letters, orders, notices, Government Orders pursuant to which the impugned

investigation is being conducted against the Petitioner and to quash the same."

3. Briefly stating, the facts as set out in the petition are that the petitioner retired from the post of Assistant Branch Manager, Life Insurance Corporation of India in the year 1997; a letter dated 20th February, 2013 from the office of Economic Offences Wing U.P. was received by the petitioner requiring him to appear within one week and produce all relevant documents and cooperate in the investigation; earlier another letter dated 21st January, 2013 was sent to the petitioner which was referred in the letter dated 20th February, 2013; the petitioner sent reply vide letter dated 04th March, 2013 and requested to provide copy of letter dated 21st January, 2013 pursuant to which the investigation was initiated against him; on 04th March, 2013, the petitioner made an application under Right to Information Act seeking certain information regarding the jurisdiction of the Economic Offences Wing; same was replied by the Economic Offences Wing of the State Government wherein no specific reply was given, however, it was mentioned that the investigation against the petitioner was being conducted in furtherance of G.O. No.V.I.P.-13/25-8-12-17(170)/2012 dated 27.11.2012. It is also stated by the petitioner that the petitioner reliably learnt that there was neither any F.I.R. nor any other request from the Life Insurnace Corporation of India; there is no direction from the competent court to investigate the petitioner but it was only a letter in the form of a complaint from the District President (Raebareli) of the Samajwadi Party making vague, unsubstantiated and incorrect allegations against the petitioner and his family members on the basis of which the Chief Minister's Office required the Economic Offences Wing to investigate the petitioner. It is further stated by the petitioner that the notice issued by the Economic Offences Wing is in complete defiance of law and without registration of any F.I.R.

4. The petition has been contested by respondents No.1 to 4 by filing counter affidavit dated 17.09.2013. Respondent No.5 has filed the separate counter affidavit. Rejoinder affidavit has been filed by the petitioner.

5. A supplementary counter affidavit has also been filed on behalf of respondents No.1 to 4 dated 03.12.2019. In the supplementary counter affidavit, it is stated that Government of U.P. issued several Government Orders giving authority/power to the Economic Offices Wing to enquire into certain matters, and in this context G.O. dated 30.10.2006 and G.O. dated 23.06.2015 have been issued, it is clear from the said Government Orders that the Economic Offences Wing of U.P. Police has been empowered to make enquiries into the matters relating to revenue and economic matters including the matters relating to economic offences. The photocopies of Government Orders dated 30.10.2006 and 23.06.2015 have been filed as annexure-SCA-1 and 2 respectively with the supplementary counter affidavit.

6. The relevant part of the Government Order dated 30th October, 2006 issued by Government of Uttar Pradesh reads as under:-

"ख" शासन के अर्द्धशासकीय पत्र संख्या–39/11/70–सी0एक्स–4, दिनांक 06.12.

1989 के अनुसार संगठन को विवेचना हेतु मामले संस्तुत किये जाने से पूर्व प्रत्येक मामले में सम्बन्धित विभाग द्वारा प्रारम्भिक जांच कराकर यह देख लिया जाय कि मामला आर्थिक अपराध का है या केवल विभागीय कार्यवाही से सम्बन्धित है। यदि मामले में विभाग को आर्थिक क्षति हुई हो और आर्थिक अपराध सृजित हो तो विभाग द्वारा सम्बन्धित थाने पर प्रथम सूचना रिपोर्ट विधिवत अंकित कराकर विवेचना कराये जाने की संस्तुति गोपन विभाग से की जाय।

(ग) तत्कालीन मुख्य सचिव, उ0प्र0 के अर्द्ध शासकीय पत्र संख्या–242/25–8–99–17(2)/99 दिनांक 28.01.1999 के अनुसार प्रशासकीय विभागों द्वारा ऑडिट आपत्तियों एवं प्रारम्भिक जांच से सम्बन्धित प्रकरण अर्थ विषयक अभिसूचना एवं अनुसंधान संगठन को जांच हेतु यथा सम्भव संदर्भित न किये जाय। जब तक जांच मे यह स्पष्ट न हो कि मामला आर्थिक अपराध का बनता है। इसी सम्बन्ध में मुख्य सचिव के अर्द्धशा0 पत्रांक–सी0एम0–32/25–8–2006–17(60)/2005, दिनांक 07 अगस्त 2006 मे भी यह भी स्पष्ट किया गया है कि विभागीय अनियमितताओं के प्रकरणों में विभागों द्वारा अपने स्तर पर वांछित कार्यवाही न कर उन्हें अर्थ विषयक अभिसूचना एवं अनुसंधान संगठन को जांच हेतु संदर्भित करना उचित नहीं है। विभागीय जांच और ऑडिट कराने के बाद यदि किसी अधिकारी व कर्मचारी के विरूद्ध अनियमितता प्रकाश में आती है तो उनके विरूद्ध अनुशासनात्मक कार्यवाही की जाय और विभागयी कार्यवाही के समापन पर यदि इस प्रकार का आपराधिक कृत्य प्रथम दृष्टया सामने आता है तो सम्बन्धित के विरूद्ध प्रथम सूचना रिपोर्ट दर्ज करने के उपरान्त मामला अर्थ विषयक अभिसूचना एवं अनुसंधान संगठन को विवेचना हेतु संदर्भित किया जाय।"

7. Learned counsel for the petitioner submitted that the petitioner retired as Assistant Branch Manager, Life Insurance Corporation of India in the year 1997, after about 16 years of retirement, the petitioner received a letter dated 20.02.2013 from the office of Economic Offences Wing U.P. requiring the petitioner to appear along with relevant documents; there is no F.I.R. against the petitioner; there is no complaint from the Life Insurance Corporation of India or any direction from any competent authority to investigate the petitioner.

8. Learned counsel for the petitioner also submitted that one Brijendra Singh made a complaint to the Chief Minister of Uttar Pradesh against the petitioner, the said complaint was marked to Economic Offences Wing and on the basis of said complaint the Economic Offences Wing has issued a letter dated 20th February, 2013 requiring the petitioner to appear along with all the relevant documents. He further submitted that a letter dated 12th March, 2013 was also issued to the petitioner requiring him to answer certain questions mentioned therein.

9. Learned counsel for the petitioner further submitted that the Economic Offences Wing has no jurisdiction to interrogate the petitioner without registration of any F.I.R.

10. Per contra, learned Additional Chief Standing Counsel for the respondents urged that on receiving a complaint against the petitioner, the petitioner was asked to appear vide lettter dated 21st January, 2013, another letter dated 20th February, 2013 was sent to the petitioner and another letter dated 12th March, 2013 was sent to the petitioner requiring him to submit information mentioned therein.

11. Learned Additional Chief Standing Counsel for the respondents further submitted that the letter in question was sent to the petitioner in terms of Government Orders dated 30.10.2006 and

23.06.2015 and the petitioner was asked to submit information required in the said letter.

12. Learned Additional Chief Standing Counsel for the respondents also submitted that it is not necessary to register F.I.R. and the Economic Offences Wing can make inquiries/investigation before registration of F.I.R.

13. We have carefully considered the submissions made by learned counsel for both the parties. We have also gone through the material available on record.

14. At the outset, it may be mentioned that the writ petition under Article 226 of the Constitution of India is not maintainable, however, the petition is pending since 2013, interim order was passed on 05.08.2013, counter affidavit has been filed by the respondents and rejoinder affidavit has been filed by the petitioner, therefore, the present petition is being decided on merits.

15. The Code of Criminal Procedure (hereinafter referred to as "Cr.P.C.") is an enactment designed to ensure a fair investigation of the allegations against a person charge with criminal misconduct. Chapter XII of the Cr.P.C. deals with Information to the Police and their powers to investigate into cases whether cognizable or non-cognizable in the manner provided therein.

16. Section 154 of the Cr.P.C. reads as under:-

***"154. Information in cognizable cases.**--(1) Every information relating to the commission of a cognizable offence, if given orally to an officer in charge of a police station, shall be reduced to writing by him or under his direction, and be read over to the informant; and every such information, whether given in writing or reduced to writing as aforesaid, shall be signed by the person giving it, and the substance thereof shall be entered in a book to be kept by such officer in such form as the State Government may prescribe in this behalf.*

(2) A copy of the information as recorded under sub- section (1) shall be given forthwith, free of cost, to the informant.

(3) Any person aggrieved by a refusal on the part of an officer in charge of a police station to record the information referred to in sub-section (1) may send the substance of such information, in writing and by post, to the Superintendent of Police concerned who, if satisfied that such information discloses the commission of a cognizable offence, shall either investigate the case himself or direct an investigation to be made by any police officer subordinate to him, in the manner provided by this Code, and such officer shall have all the powers of an officer in charge of the police station in relation to that offence."

17. Section 160 of the Cr.P.C. empowers a police officer making an investigation to require the attendance before himself or any person who appears to be acquainted with the circumstances of the case. Section 161(1) of the Cr.P.C. gives a right to examine orally any person supposed to be acquainted with the facts and circumstances of the case, sub-Section 2 of Section 161 of the Cr.P.C. exempts a person from answering any question which would have a tendency to expose him to a penal charge or to a penalty for forfeiture. Under sub-Section 3 of Section 161 of the Cr.P.C. the police officer is empowered to reduce into writing any statement made to him in the course of such examination. Section 162 of the Cr.P.C. expressly lays

down that such a statement made in the course of an investigation, if reduced into writing is not to be signed by the maker thereof and no part of such statement except as expressly provided is to be used for any purpose at any enquiry or trial in respect of any such offence under investigation at the time when the statement was made. Section 163(1) of the Cr.P.C. lays down an embargo on the investigating authority using any inducement, threat or promise to the maker which might influence his mind and lead him to suppose that thereby he would gain any advantage or avoid any evil in reference to his conduct as disclosed in the proceedings. Whereas the other section contain guidelines for the police officer in making investigation, this section expressly provides that any person in a authority even if he is not a police officer must guide himself accordingly, in case, where a crime is being investigated under this Chapter of the Cr.P.C. Section 169 of the Cr.P.C. empowers a police officer making investigation to release an accused person from custody, if there is no sufficient evidence or reasonable ground of suspicion to justify the forwarding of him to a Magistrate by taking a bond from him with or without sureties.

18. The Hon'ble Supreme Court in the case of **'P. Sirajuddin, ETC vs. State of Madras, ETC'**, 1970 (1) SCC 595 considered the importance of a preliminary inquiry before the lodging of a first information report in a matter involving alleged corruption by a public servant. It was observed as under:-

"..... Before a public servant, whatever be his status, is publicly charged with acts of dishonesty which amount to serious misdemeanour or misconduct of the type alleged in this case and a first information is lodged against him, there must be some suitable preliminary enquiry into the allegations by a responsible officer. The lodging of such a report against a person, specially one who like the appellant occupied the top position in a department, even if baseless, would do incalculable harm not only to the officer in particular but to the department he belonged to, in general. If the Government had set up a Vigilance and Anti-Corruption Department as was done in the State of Madras and the said department was entrusted with enquiries of this kind, no exception can be taken to an enquiry by officers of this department but any such enquiry must proceed in a fair and reasonable manner. the enquiring officer must not act under any preconceived idea of guilt of the person whose conduct was being enquired into or pursue the enquiry in such a manner as to lead to an inference that he was bent upon securing the conviction of the said person by adopting measures which are of doubtful validity or sanction. The means adopted no less than the end to be achieved must be impeccable. In ordinary departmental proceedings against a Government servant charged with delinquency, the normal practice before the issue of a charge-sheet is for some one in authority to take down statements of persons involved in the matter and to examine documents which have a bearing on the issue involved. It is only thereafter that a charge-sheet is submitted and a full-scale enquiry is launched. When the enquiry is to be held for the purpose of finding out whether criminal proceedings are to be resorted to the scope thereof must be limited to the examination of persons who have

knowledge of the affairs of the delinquent officer and documents bearing on the same to find out whether there is prima facie evidence of guilt of the officer. Thereafter the ordinary law of the land must take its course and further inquiry be proceeded with in terms of the Code of Criminal Procedure by lodging a first information report."

19. The Hon'ble Supreme Court emphasized the requirement of a preliminary inquiry, where a public servant is alleged to have committed an act of dishonestly involving a serious misdemeanor. The purpose of a preliminary inquiry is to ascertain whether a cognizable offence is made out on the basis of which a first information report can be lodged. On the basis of a first information report under section 154 of the Cr.P.C. is information relating to commission of cognizable offence which is furnished to an officer incharge of a police station. It is with a view to ascertain whether a cognizable offence seems to have been implicated in a case involving an alleged act of corruption by a public servant that a preliminary inquiry came to be directed in the judgment in P. **Sirajuddin's case** (supra).

20. The Constitution Bench of the Supreme court in **'Lalita Kumari vs. State Government of Uttar Pradesh and others'**, (2014) 2 SCC 1 after considering the judgment in **P. Sirajuddin's case** (supra) observed that while section 154 of the Cr.P.C. postulates mandatory registration of a first information report on the receipt of information indicating the commission of a cognizable offence yet there could be situations where a preliminary inquiry may be required. The Hon'ble Supreme Court indicated the cases where a preliminary inquiry may be warranted and was held:-

"120.5. The scope of preliminary inquiry is not to verify the veracity or otherwise of the information received but only to ascertain whether the information reveals any cognizable offence.

120.6. As to what type and in which cases preliminary inquiry is to be conducted will depend on the facts and circumstances of each case. The category of cases in which preliminary inquiry may be made are as under:

a) Matrimonial disputes/ family disputes

b) Commercial offences

c) Medical negligence cases

d) Corruption cases

e) Cases where there is abnormal delay/laches in initiating criminal prosecution, for example, over 3 months delay in reporting the matter without satisfactorily explaining the reasons for delay."

21. The purpose of conducting a preliminary inquiry has been elaborated in the following manner:-

"119. Therefore, in view of various counterclaims regarding registration or non-registration, what is necessary is only that the information given to the police must disclose the commission of a cognizable offence. In such a situation, registration of an FIR is mandatory. However, if no cognizable offence is made out in the information given, then the FIR need not be registered immediately and perhaps the police can conduct a sort of preliminary verification or inquiry for the limited purpose of ascertaining as to whether a cognizable offence has been committed. But, if the

information given clearly mentions the commission of a cognizable offence, there is no other option but to register an FIR forthwith. Other considerations are not relevant at the stage of registration of FIR, such as, whether the information is falsely given, whether the information is genuine, whether the information is credible, etc. These are the issues that have to be verified during the investigation of the FIR. At the stage of registration of FIR, what is to be seen is merely whether the information given ex facie discloses the commission of a cognizable offence. If, after investigation, the information given is found to be false, there is always an option to prosecute the complainant for filing a false FIR."

22. A close scrutiny of the aforesaid judgments leads to the conclusion that a preliminary inquiry is permissible before the lodging of a first information report.

23. Moreover, Government Orders dated 30.10.2006 and 23.06.2015 issued by Government of Uttar Pradesh empower the Economic Offences Wing to make inquiries into the matters relating to Economic Offences Wing.

24. In the instant case, on receipt of a complaint against the petitioner, Economic Offences Wing issued a letter dated 21st January, 2013 to the petitioner, another letter dated 20th February, 2013 (annexure-1 to the writ petition) was sent to the petitioner to appear within one week and submit his reply. The petitioner instead of appearing in the office of Economic Offences Wing or filing reply to the queries made by them, file the present petition.

25. We are of the considered opinion that the Economic Offences Wing has taken recourse to a preliminary inquiry which is inconsonance with the decision in **Lalita Kumari's case** (supra). We do not find any illegality in the impugned notice dated 20th February, 2013.

26. In the light of aforesaid discussion, we are of the view that the writ petition is without any merit, same deserves to be dismissed and the same is hereby **dismissed**.

27. Interim application(s), if any, stands disposed of.

(2020)02ILR A1118

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 14.02.2020

BEFORE

THE HON'BLE ANIL KUMAR, J.
THE HON'BLE SAURABH LAVANIA, J.

Misc. Bench No. 4902 of 2019

Jaiswal Canteen(A) & Anr. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Mohd. Mansoor, Mohammad Danish

Counsel for the Respondents:
C.S.C., Dinesh Kumar Singh, I.P. Singh, Ramendra Kumar Yadav, Sanjay Bhasin, Sunil Sharma

A. Petitioners-challenging-order dated 01.12.2018-declaring resp.6-as lowest bidder &consequential work order in f/o resp.6-on the ground of-awarding the work in question-contrary to-terms & condition of e-tender-work awarded-on the basis of experience certificate-upon verification-an agreement also executed-petitioner-least competent-even if-the award is cancelled-it won't fall in the lap of petitioner-Petition Dismissed.

B. Held, question which was canvassed before the High Court and which has been pressed before us relates to the merits of the nominations made to the reserved seats. It seems to us that the appellants do not have any right to challenge the nominations made by the Central Government. They do not compete for the reserved seats and have no locus standi in the matter of nomination to such seats. The assumption that if nominations to reserved seats are not in accordance with the rules all such seats as have not been properly filled up would be thrown open to the general pool is wholly unfounded." Needless to say that the respondent no. 6 is providing the services to the Institute and an agreement in regard to providing the services has also been executed on 31.03.2019. For the foregoing reasons, the writ petition for the reliefs sought lack merit and accordingly dismissed.

Writ Petition dismissed. (E-8)

List of cases cited:-

1. Jagdish Mandal vs State of Orissa & Others, (2007) 14 SCC 517

2. Sterling Computers Ltd vs. M & N Publications Ltd [1993 (1) SCC 445]

3. Tata Cellular v. Union of India [AIR 1996 SC 11]

4. Raunaq Internationa Ltd. vs. I.V.R. Construction Ltd. [1999 (1) SCC 492]

5. Air India Ltd vs. Cochin International Airport Ltd [2000 (2) SCC 617]

6. Association of Registration Plates vs Union of India [2005 (1) SCC 679]

7. B.S.N. Joshi v. Nair Coal Services Ltd [2006 (11) SCALE 526]

8. Civil Appeal No. 1050 of 2019 arising out of SLP(C) No. 27818 of 2018 Vidarbha Irrigation Development Corporation vs M/s Anoj Kumar Garwala

9. Bakshi Security and Personnel Services Pvt. Ltd. v. Devkishan Computed Pvt. Ltd. and Ors., (2016) 8 SCC 446

10. Ganesh Engg. Works [Poddar Steel Corpn. v. Ganesh Engg. Works, (1991) 3 SCC 273]

11. Afcons Infrastructure Ltd v. Nagpur Metro Rail Corpn. Ltd, (2016) 16 SCC 818

12. Ramana Dayaram Shetty v. International Airport Authority of India [Ramana Dayaram Shetty v. International Airport Authority of India, (1979) 3 SCC 489]

13. Sobhikaa Impex (P) Ltd & another vs Central Medical Services Society (2016) 16 SCC 233

14. Master Marine Services (P) Ltd. v. Metcalfe & Hodgkinson (P) Ltd and another

15. Jagdish Mandal v. State of Orissa and others

16. Union of India and another v. International Trading Co. and another

17. Civil Appeal No. 3588 of 2019 (arising out of SLP(C) No. 46 of 2019) Caretel Infotech Ltd vs Hindustan Petroleum Corporation Ltd & Others

18. Bihar State Financial Corporation & Others vs Chemicot India (P) Ltd & Others (2006) 7 SCC 293

19. Dr. N. C. Singhal Vs. Union of India,(1980) 3 SCC 29

20. Chitra Ghosh Vs. Union of India, (1969) 2 SCC 228

(Delivered by Hon'ble Saurabh Lavania, J.)

1. Heard Shri Mohd. Mansoor, learned counsel for petitioners, learned

State Counsel, learned counsel appearing for respondents no. 2 to 5 and Shri Sanjay Bhasin, Senior Advocate, assisted by Shri Sunil Sharma, appearing on behalf of respondent no. 6.

2. By means of present writ petition the petitioners has prayed for quashing of order dated 01.12.2018 by which respondent no. 6, M/s Hotel Rajasthan was declared as lowest bidder for providing Patient Kitchen and Dietary Services in Sanjay Gandhi Post Graduate Institute of Medical Sciences, Lucknow and consequential work order dated 01.12.2018, as contained in Annexure No. 1 to writ petition, issued in favour of respondent no. 6- M/s Hotel Rajasthan.

3. Shri Mohd. Mansoor, learned counsel for petitioners submits that the Director of Sanjay Gandhi Post Graduate Institute of Medical Sciences, Lucknow (hereinafter referred as 'Institute') on 28.09.2018 invited e-tender for "Patient Kitchen and Dietary Services'. The said e-tender was in two parts, Technical Bid and Financial Bid. Subsequently, on 18.10.2018 and 14.11.2018 corrigendums were also issued. In response to the same the petitioners along with following firms submitted tender bid:

1) M/s Mohani Caterers, Ahmedabad.

2). M/s Buddha India Hotels Pvt Ltd, Lucknow.

3). M/s Capri Hospitality Services Pvt Ltd, Indore.

4). M/s Vrindavan Enterprises, Gorakhpur.

5). M/s Hotel Rajsthan, Khagaria.

6). M/s Amrit Foods, Lucknow.

3.1 Subsequently by means of impugned order dated 01.12.2018 (annexed as Annexure no. 1) tender in regard to "Patient Kitchen and Dietary Services' in the 'Institute' has been awarded to respondent no. 6-

M/s Hotel Rajasthan, for an amount of Rs 7,19,82,470.12/- by the respondent 'Institute'.

3.2 The quotation submitted by various parties against the aforesaid e-tender is reproduced as under:

Price comparison-kitchen-Adv/NIT no. I-53/Contract/2018-19									Sheet-1
Sl. No.	Diet	No. of Projected Diets	Price quoted by bidders						
			M/s Mohani Caterers, Ahmedabad	M/s Buddha India Hotels Pvt Ltd Lucknow	M/s Capri Hospitality Ser	M/s Vrindavan Enterprises, Gor	M/s Hotel Rajasthan, Khagaria Bi	M/s Jaiswal Canteen (A	M/s Amrit Foods, Lucknow

					vices Pvt Ltd, Indore	akhpur	har	), Ahmedabad	
1	1	2	3	4	5	6	7	8	9
2	G1	288731	49087157.31	49228635.30	490871157.31	490871157.31	490871157.31	490900044.62	490900044.62
3	G2	11249	1856197.49	1867334.00	18561197.49	18561197.49	18561197.49	18563099.98	18563099.98
4	G3	10059	1508950.59	1518909.00	15089500.59	15089500.59	15089500.59	15090051.18	15090051.18
5	P1	36636	8609826.36	8646096.00	8609826.36	8609826.36	8609826.36	8610192.77	8610192.72
6	P2	114	23371.14	23484.00	23371.14	23371.14	23371.14	23372.28	23372.28
7	P3	772	127387.72	128152.00	127387.72	127387.72	127387.72	127395.44	127395.44
8	High Protein Diet	141951	6389214.51	6529746.00	6389214.51	6389214.51	6389214.51	6390634.02	6390634.02
9	Nu	36500	4380365	4416500.	43	4380	4380	43	4380

	rsing Hostel Diet			00	80365.00	365.00	80730.00	730.00
	Total	526012	71982470.12	72358856.50	719824470.12	719824470.12	71987730.24	71987730.24
	Remarks		Rejected in pursuance to clause no. 5 of Corrigendum dated 18/20.10.2018	Rejected in pursuance to clause no. 5 of Corrigendum dated 18/20.10.2018	L-1 (Tie with bidders at colu	L-1 (Tie with bidders at column no. 5 &	L-1 (Tie with bidders at column no. 5 &	L-2	L-2

					mn no.6 & 7)	7)	6)			

4. Shri Mohd. Mansoor, learned counsel for petitioners while challenging the impugned order submitted that the action on part of the official respondents i.e. authorities of the "Institute' thereby accepting the tender and awarding the work in question in favour of respondent no. 6 is contrary to terms and conditions of the e-tender and requires interference by this Court.

5. Elaborating his arguments he submits that Clause 3 of Section II of the bid "Instruction for Technical & Financial Bid', which is a part of e-tender, provides rejection of bid in certain contingencies. Under Sub-Clause "d' of Clause "3' it is mentioned that the bid shall be rejected if authenticity of any of the supporting document is found to be fabricated and in the instant case the bid of respondent no. 6 ought to have been rejected under Clause 3(d) of bid documents on account of reasons that:

(i) With tender documents respondent no. 6 submitted experience certificate dated 26.11.2018 issued by Hind Institute of Medical Sciences, however the said experience certificate is a forged document and in this regard he submitted that the Chairperson of Management Committee of Hind Institute of Medical Sciences has sent a

letter stating therein that no such certificate was issued in favour of the respondent no. 6.

(ii) Respondent no. 6 in support of his bid also submitted experience certificate dated 27.11.2018 issued by the Nova Hospitals Limited, Lucknow. However, on enquiry, Dr. Pancham Singh, one of the authorities of the Nova Hospitals Limited, Lucknow clarified that M/s Hotel Rajasthan has provided dietary services on our verbal instructions to patients on chargeable basis but there was no written Agreement/MoU with M/s Hotel Rajasthan.

(iii) Respondent no. 6 also submitted experience certificate dated 19.11.2018 issued by Awadh Hospital and Heart Center, Lucknow and later on the said hospital clarified that the certificate dated 19.11.2018 which was issued in favour of the respondent no. 6 is to the fact that respondent no. 6 has provided services to patients on chargeable basis but there was no written Agreement/Contract with M/s Hotel Rajasthan.

6. Shri Mohd. Mansoor, learned counsel for petitioners further submits that as per Section II of the bid "Instruction for Technical & Financial Bid', which is a part of e-tender, under Sub-Clause "h' of Clause "3' it is mentioned that the bid shall be rejected if the bid is found to be conditional and the bid of respondent no. 6, being conditional, ought to have been rejected and the same was not done by the "Institute' which is in violation of term of tender document. In this regard he has placed reliance on the note made by respondent no. 6 in the Price Bid/Financial Bid (Annexure 6 to the writ petition) which reads as under:

"In column No. 4 (Quoted Amount of Overhead Expenses) our price 0 (Zero) is not accepted. Our price for column No.4 will change to 0.01(one paisa) as we have not received any communication regarding our query for the same mailed on 28.11.2018. The contract value will change accordingly."

7. Learned counsel for petitioners further submitted that as per Clause "2' of the corrigendum issued by the "Institute' (which is annexed as Annexure no. 4 to the petition) says that *"The price in the "Price Bid / Financial Bid', uploaded through corrigendum dated 18.10.2018 /20.10.2018 shall be quoted in Indian Rupees (INR) and its lowest unit shall be paisa'*. However in the present case respondent no. 6 has quoted "zero'. Thus violated the condition and accordingly, also, the bid of respondent no. 6 ought to have been rejected, however in utter violation of terms of tenter it has accepted.

8. Learned counsel for petitioners further submitted that clause "7' of the Corrigendum/Clarifications to NIT/Adv. No. I-53/Contract/2018-19 for "Patient Kitchen and Dietary Service' says that:

"Overhead expenses shall include fuel/gas, utensils, disposables, equipments and administrative charge and/or any other charge required to prepare diet as per specification, given in tender document or by the Institute.'

8.1 However, the respondent no. 6 in his tender towards "overhead expenses' has mentioned "zero', whereas the petitioner has mentioned Rs. 0.1/- and even then the tender respondent no. 6 has been accepted.

9. Lastly learned counsel for petitioners argued that the Tax Identification Number (TIN) which was mentioned by petitioners was canceled for the period 06.07.2011 to 2014 and during the said period no commercial transaction was made by respondent no. 6.

10. In support of his case, learned counsel for petitioners placed reliance on the law laid down by the Hon'ble Apex Court in the case of Jagdish Mandal vs State of Orissa & Others, (2007) 14 SCC 517, relevant part of which is as under:

'21. We may refer to some of the decisions of this Court, which have dealt with the scope of judicial review of award of contracts.

21.1) In Sterling Computers Ltd vs. M & N Publications Ltd [1993 (1) SCC 445], this Court observed :

"While exercising the power of judicial review, in respect of contracts entered into on behalf of the State, the court is concerned primarily as to whether there has been any infirmity in the decision making process the courts can certainly examine whether 'decision making process' was reasonable, rational, not arbitrary and violative of Article 14 of the Constitution."

21.2) In Tata Cellular v. Union of India [AIR 1996 SC 11], this Court referred to the limitations relating to the scope of judicial review of administrative decisions and exercise of powers in awarding contracts, thus :

(1) The modern trend points to judicial restraint in administrative action.

(2) The Court does not sit as a court of appeal but merely reviews the manner in which the decision was made.

(3) The Court does not have the expertise to correct the administrative action. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise which itself may be fallible.

(4) The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. More often than not, such decisions are made qualitatively by experts.

(5) The Government must have freedom of contract. In other words, a fairplay in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of Wednesbury principle of reasonableness (including its other facets pointed out above) but must be free from arbitrariness not affected by bias or actuated by mala fides.

(6) Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure.

This Court also noted that there are inherent limitations in the exercise of power of judicial review of contractual powers. This Court also observed that the duty to act fairly will vary in extent, depending upon the nature of cases, to which the said principle is sought to be applied. This Court held that the State has the right to refuse the lowest or any other tender, provided it tries to get the best person or the best quotation, and the power to choose is not exercised for any collateral purpose or in infringement of Article 14.

21.3) In Raunaq Internationa Ltd. vs. I.V.R. Construction Ltd. [1999 (1) SCC 492], this Court dealt with the matter in some detail. This Court held : "The award of a contract, whether it is by a

private party or by a public body or the State, is essentially a commercial transaction. In arriving at a commercial decision considerations which are of paramount importance are commercial considerations. These would be : (1) The price at which the other side is willing to do the work; (2) Whether the goods or services offered are of the requisite specifications; (3) Whether the person tendering has the ability to deliver the goods or services as per specifications. When large works contracts involving engagement of substantial manpower or requiring specific skills are to be offered, the financial ability of the tenderer to fulfil the requirements of the job is also important; (4) the ability of the tenderer to deliver goods or services or to do the work of the requisite standard and quality; (5) past experience of the tenderer, and whether he has successfully completed similar work earlier; (6) time which will be taken to deliver the goods or services; and often (7) the ability of the tenderer to take follow up action, rectify defects or to give post contract services. Even when the State or a public body enters into a commercial transaction, considerations which would prevail in its decision to award the contract to a given party would be the same. However, because the State or a public body or an agency of the State enters into such a contract, there could be, in a given case, an element of public law or public interest involved even in such a commercial transaction.

What are these elements of public interest? (1) Public money would be expended for the purposes of the contract; (2) The goods or services which are being commissioned could be for a public purpose, such as, construction of roads, public buildings, power plants or other public utilities. (3) The public would be directly interested in the timely fulfilment of the contract so that the services become available to the public expeditiously. (4) The public would also be interested in the quality of the work undertaken or goods supplied by the tenderer. Poor quality of work or goods can lead to tremendous public hardship and substantial financial outlay either in correcting mistakes or in rectifying defects or even at times in re-doing the entire work - thus involving larger outlays or public money and delaying the availability of services, facilities or goods, e.g. A delay in commissioning a power project, as in the present case, could lead to power shortages, retardation of industrial development, hardship to the general public and substantial cost escalation. When a writ petition is filed in the High court challenging the award of a contract by a public authority or the State, the court must be satisfied that there is some element of public interest involved in entertaining such a petition. If, for example, the dispute is purely between two tenderers, the court must be very careful to see if there is any element of public interest involved in the litigation. A mere difference in the prices offered by the two tenderers may or may not be decisive in deciding whether any public interest is involved in intervening in such a commercial transaction. It is important to bear in mind that by court intervention, the proposed project may be considerably delayed thus escalating the cost far more than any saving which the court would ultimately effect in public money by deciding the dispute in favour of one tenderer or the other tenderer. Therefore, unless the court is satisfied that there is a substantial amount of public interest, or the transaction is entered into mala fide, the court should not intervene under

Article 226 in disputes between two rival tenderers."

21.4) In Air India Ltd vs. Cochin International Airport Ltd [2000 (2) SCC 617], this Court summarized the scope of interference as enunciated in several earlier decisions thus :

"The award of a contract, whether it is by a private party or by a public body or the State, is essentially a commercial transaction. In arriving at a commercial decision considerations which are paramount are commercial considerations. The State can choose its own method to arrive at a decision. It can fix its own terms of invitation to tender and that is not open to judicial scrutiny. It can enter into negotiations before finally deciding to accept one of the offers made to it. Price need not always be the sole criterion for awarding a contract. It is free to grant any relaxation, for bona fide reasons, if the tender conditions permit such a relaxation, for bona fide reasons, if the tender conditions permit such a relaxation. It may not accept the offer even though it happens to be the highest or the lowest. But the State, its corporations, instrumentalities and agencies are bound to adhere to the norms, standards and procedures laid down by them and cannot depart from them arbitrarily. Though that decision is not amenable to judicial review, the court can examine the decision- making process and interfere if it is found vitiated by mala fides, unreasonableness and arbitrariness. The State, its corporations, instrumentalities and agencies have the public duty to be fair to all concerned. Even when some defect is found in the decision-making process the court must exercise its discretionary power under Article 226 with great caution and should exercise it only in furtherance of public interest and not merely on the making out of a legal point. The court should always keep the larger public interest in mind in order to decide hether its intervention is called for or not. Only when it comes to a conclusion that overwhelming public interest requires interference, the court should intervene." [Emphasis supplied]

21.5) In Association of Registration Plates vs Union of India [2005 (1) SCC 679], this Court held:

"..Article 14 of the Constitution prohibits government from arbitrarily choosing a contractor at its will and pleasure. It has to act reasonably, fairly and in public interest in awarding contracts. At the same time, no person can claim a fundamental right to carry in business with the government. All that he can claim is that in competing for the contract, he should not be unfairly treated and discriminated, to the detriment of public interest. ..."

21.6) In B.S.N. Joshi v. Nair Coal Services Ltd [2006 (11) SCALE 526], this Court observed :

"It may be true that a contract need not be given to the lowest tenderer but it is equally true that the employer is the best judge therefor; the same ordinarily being within its domain, court's interference in such matter should be minimal. The High Court's jurisdiction in such matters being limited in a case of this nature, the Court should normally exercise judicial restraint unless illegality or arbitrariness on the part of the employer is apparent on the face of the record."

22. Judicial review of administrative action is intended to prevent arbitrariness, irrationality, unreasonableness, bias and malafides. Its purpose is to check whether choice or decision is made 'lawfully' and not to check whether choice or decision is

'sound'. When the power of judicial review is invoked in matters relating to tenders or award of contracts, certain special features should be borne in mind. A contract is a commercial transaction. Evaluating tenders and awarding contracts are essentially commercial functions. Principles of equity and natural justice stay at a distance. If the decision relating to award of contract is bona fide and is in public interest, courts will not, in exercise of power of judicial review, interfere even if a procedural aberration or error in assessment or prejudice to a tenderer, is made out. The power of judicial review will not be permitted to be invoked to protect private interest at the cost of public interest, or to decide contractual disputes. The tenderer or contractor with a grievance can always seek damages in a civil court. Attempts by unsuccessful tenderers with imaginary grievances, wounded pride and business rivalry, to make mountains out of molehills of some technical/procedural violation or some prejudice to self, and persuade courts to interfere by exercising power of judicial review, should be resisted. Such interferences, either interim or final, may hold up public works for years, or delay relief and succour to thousands and millions and may increase the project cost manifold. Therefore, a court before interfering in tender or contractual matters in exercise of power of judicial review, should pose to itself the following questions :

i) Whether the process adopted or decision made by the authority is mala fide or intended to favour someone.

OR Whether the process adopted or decision made is so arbitrary and irrational that the court can say : 'the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached.'

ii) Whether public interest is affected.

If the answers are in the negative, there should be no interference under Article 226. Cases involving black-listing or imposition of penal consequences on a tenderer/contractor or distribution of state largesse (allotment of sites/shops, grant of licences, dealerships and franchises) stand on a different footing as they may require a higher degree of fairness in action.'

10. Learned counsel for petitioners also placed reliance on law laid down by the Hon'ble Apex Court in judgment dated 23.01.2019 passed in Civil Appeal No. 1050 of 2019 arising out of SLP(C) No. 27818 of 2018 Vidarbha Irrigation Development Corporation vs M/s Anoj Kumar Garwala, relevant part of which is as under:

"10. We may now come to Clause 2.35 which makes it clear that a substantially responsive bid is one which conforms to all terms, conditions and specifications without any material deviation. Inter alia, a material deviation is one which limits, in any substantial way, or is inconsistent with the bidding documents or the employer's rights or bidder's obligations under the Contract. It cannot be gainsaid that a bank guarantee, which is for a period of six months and not for a period of 40 months, would not only be directly inconsistent with the bidding documents but would also be contrary to the employers' right to a bank guarantee for a longer period. This being the case, since a material deviation from the terms and conditions of the tender document was made by Respondent No. 2, when it

furnished a bank guarantee for only six months initially, it would be clear that such bid would have to be considered as not substantially responsive and ought to have been rejected by the employer. Clause 2.35.2 also makes it clear that such a bid would have to be rejected outrightly and may not be subsequently made responsive by correction.

13. The law on the subject is well settled. In Bakshi Security and Personnel Services Pvt. Ltd. v. Devkishan Computed Pvt. Ltd. and Ors., (2016) 8 SCC 446, this Court held:

"14. The law is settled that an essential condition of a tender has to be strictly complied with. In Poddar Steel Corpn. v. 12 Ganesh Engg. Works [Poddar Steel Corpn. v. Ganesh Engg. Works, (1991) 3 SCC 273] this Court held as under: (SCC p. 276, para 6)

"6. ... The requirements in a tender notice can be classified into two categories-those which lay down the essential conditions of eligibility and the others which are merely ancillary or subsidiary with the main object to be achieved by the condition. In the first case the authority issuing the tender may be required to enforce them rigidly. In the other cases it must be open to the authority to deviate from and not to insist upon the strict literal compliance of the condition in appropriate cases."

15. Similarly in B.S.N. Joshi & Sons Ltd. v. Nair Coal Services Ltd. [B.S.N. Joshi & Sons Ltd. v. Nair Coal Services Ltd., (2006) 11 SCC 548] this Court held as under: (SCC pp. 571-72, para 66)

"(i) if there are essential conditions, the same must be adhered to;

(ii) if there is no power of general relaxation, ordinarily the same shall not be exercised and the principle of strict compliance would be applied where it is possible for all the parties to comply with all such conditions fully;

(iii) if, however, a deviation is made in relation to all the parties in regard to any of such conditions, ordinarily again a power of relaxation may be held to be existing;

(iv) the parties who have taken the benefit of such relaxation should not ordinarily be allowed to take a different stand in relation to compliance with another part of tender contract, particularly when he was also not in a position to comply with all the conditions of tender fully, unless the court otherwise finds relaxation of a condition which being essential in nature could not be relaxed and thus the same was wholly illegal and without jurisdiction;

(v) when a decision is taken by the appropriate authority upon due consideration of the tender document submitted by all the tenderers on their own merits and if it is ultimately found that successful bidders had in fact substantially complied with the purport and object for which essential conditions were laid down, the same may not ordinarily be interfered with;..."

16. We also agree with the contention of Shri Raval that the writ jurisdiction cannot be utilised to make a fresh bargain between parties.

14) However, learned counsel appearing on behalf of the appellant strongly relied upon Afcons Infrastructure Ltd v. Nagpur Metro Rail Corpn. Ltd, (2016) 16 SCC 818, and paragraphs 14 and 15 in particular, which state:

"14. We must reiterate the words of caution that this Court has stated right from the time when Ramana Dayaram Shetty v. International Airport Authority of India [Ramana Dayaram Shetty v.

International Airport Authority of India, (1979) 3 SCC 489] was decided almost 40 years ago, namely, that the words used in the tender documents cannot be ignored or treated as redundant or superfluous -- they must be given meaning and their necessary significance. In this context, the use of the word "metro" in Clause 4.2(a) of Section III of the bid documents and its connotation in ordinary parlance cannot be overlooked.

15. We may add that the owner or the employer of a project, having authored the tender documents, is the best person to understand and appreciate its requirements and interpret its documents. The constitutional courts must defer to this understanding and appreciation of the tender documents, unless there is mala fide or perversity in the understanding or appreciation or in the application of the terms of the tender conditions. It is possible that the owner or employer of a project may give an interpretation to the tender documents that is not acceptable to the constitutional courts but that by itself is not a reason for interfering with the interpretation given."

15) It is clear even on a reading of this judgment that the words used in the tender document cannot be ignored or treated as redundant or superfluous - they must be given meaning and their necessary significance. Given the fact that in the present case, an essential tender condition which had to be strictly complied with was not so complied with, the appellant would have no power to condone lack of such strict compliance. Any such condonation, as has been done in the present case, would amount to perversity in the understanding or appreciation of the terms of the tender conditions, which must be interfered with by a constitutional court."

11. Reliance has also been placed on the law laid down by Hon'ble Apex Court in the case of Sobhikaa Impex (P) Ltd & another vs Central Medical Services Society (2016) 16 SCC 233, relevant part of which is as under:

"19. The thrust of the matter is whether the decision by the Registration Committee by itself can be regarded as grant of registration certificate. It is luminescent that its decision to grant registration certificate is subject to conditions. Apart from that, it had not granted any certificate but only a decision was taken. There is a clear distinction between a decision taken and the decision acted upon or given effect to. Therefore, the appellant cannot claim benefit of the said decision. The appellants cannot lay stress on clause 5.4.1 to avail the benefit of treating itself as a responsive bidder. As far as Instructions to Bidders is concerned, the initial clause was that the bidder must be registered under CIB under the Act and the documentary evidence in this regard shall be submitted along with the bid. Amendment elaborating the same postulates that the registration certificate shall be submitted along with the bid at the time of opening of the tender and if it is not done, the bid shall be held as non-responsive. A submission is advanced by the first respondent that it is a clarificatory condition. As we have already opined, decision by the Registration Committee of CIB to provisionally approve registration does not amount to registration by itself with the CIB. So the condition, as such, was not satisfied under the unamended stipulation. The amended clause only provides about the consequence thereof. It can be stated without any shadow of doubt that even if clause 6 would not have been amended, the first respondent, on the ground of non-production of the registration certificate, would have been legally justified to reject

the bid. It is an essential condition incorporated in the Instructions to Bidders. In this context, we may profitably refer to the authority in B.S.N. Joshi & Sons Ltd. v. Nair Coal Services Ltd. and others where a two-Judge Bench, after referring to series of judgments has culled out the following principles:-

"(i) if there are essential conditions, the same must be adhered to;

(ii) if there is no power of general relaxation, ordinarily the same shall not be exercised and the principle of strict compliance would be applied where it is possible for all the parties to comply with all such conditions fully;

(iii) if, however, a deviation is made in relation to all the parties in regard to any of such conditions, ordinarily again a power of relaxation may be held to be existing;

(iv) the parties who have taken the benefit of such relaxation should not ordinarily be allowed to take a different stand in relation to compliance with another part of tender contract, particularly when he was also not in a position to comply with all the conditions of tender fully, unless the court otherwise finds relaxation of a condition which being essential in nature could not be relaxed and thus the same was wholly illegal and without jurisdiction;

(v) when a decision is taken by the appropriate authority upon due consideration of the tender document submitted by all the tenderers on their own merits and it it is ultimately found that successful bidders had in fact substantially complied with the purport and object for which essential conditions were laid down, the same may not ordinarily be interfered with;

(vi) the contractors cannot form a cartel. If despite the same, their bids are considered and they are given an offer to match with the rates quoted by the lowest tenderer, public interest would be given priority;

(vii) where a decision has been taken purely on public interest, the court ordinarily should exercise judicial restraint."

20. In Master Marine Services (P) Ltd. v. Metcalfe & Hodgkinson (P) Ltd and another, it has been held that the State can choose its own method to arrive at a decision and it is free to grant any relaxation for bona fide reasons, if the tender conditions permit such a relaxation. It has been further held that the State, its corporations, instrumentalities and agencies have the public duty to be fair to all concerned. Even when some defect is found in the decision-making process, the court must exercise its discretionary powers under Article 226 with great caution and should exercise it only in furtherance of public interest and not merely on the making out of a legal point.

21. In Jagdish Mandal v. State of Orissa and others, it has been ruled that when the power of judicial review is invoked in matters relating to tenders or award of contracts, certain special features should be borne in mind. A contract is a commercial transaction. Evaluating tenders and awarding contracts are essentially commercial functions. Principles of equity and natural justice stay at a distance. If the decision relating to award of contract is bona fide and is in public interest, courts will not, in exercise of power of judicial review, interfere even if a procedural aberration or error in assessment or prejudice to a tenderer, is made out. The power of judicial review will not be permitted to be invoked to protect private interest at the cost of public interest, or to decide contractual disputes.

22. In Union of India and another v. International Trading Co. and

another, it has been held that the basic requirement of Article 14 is fairness in action by the State, and non-arbitrariness in essence and substance is the heartbeat of fair play. Actions are amenable, in the panorama of judicial review only to the extent that the State must act validly for a discernible reason, not whimsically for any ulterior purpose. It has been further opined that the meaning and true import and concept of arbitrariness is more easily visualized than precisely defined. A question whether the impugned action is arbitrary or not is to be ultimately answered on the facts and circumstances of a given case.

23. In Jespar I. Slong v. State of Meghalaya and others, this Court stated that fixation of a value of the tender is entirely within the purview of the executive and courts hardly have any role to play in this process except for striking down such action of the executive as is proved to be arbitrary or unreasonable.

24. Keeping in view the aforesaid authorities, we have to consider whether the High Court has fallen into error by not interfering with the grant of contract in favour of the fourth respondent. As the factual analysis would reveal, the appellant No.1 had not filed an application for grant of registration. It was appellant No.2 who had filed it. Be that as it may, the decision dated 31.03.2015 was taken by the Registration Committee of CIB to approve the registration subject to the condition DAC granting permission for commercialization. That apart, the decision taken by the concerned authority, even if it is put on the website, despite the astute submission of Mr. Singh, would not tantamount to grant of registration certificate. The amendment was made, as we perceive, to clarify the position. We have already stated, even if the amendment was not brought in, the first respondent would have been in a position, by applying objective standards, to treat the appellants' bid as non-responsive and non-compliant. The use of the word "must" adds a great degree of certainty to the same; it is a requisite parameter as thought of by the respondent No.1. The tender was floated for purchase which is needed for the nation. The first respondent along with respondent Nos.2 and 3 were taking immense precaution. In such a circumstance, needless to emphasize, public interest is involved. It cannot succumb to private interest. The action on the part of the respondent Nos.1 to 3 cannot be regarded as arbitrary or unreasonable. By no stretch of imagination it can be construed to be an act which is not bonafide or to have been done to favour the fourth respondent. Nothing has been pleaded that the fourth respondent is not eligible or qualified. In our considered opinion, the essential condition of tender being not met with, the tenderer, the appellants herein, were ineligible and the tender was non-responsive. That apart, the amendment was applicable to all. Additionally, the High Court in the first round of litigation had not held that the registration certificate granted on 31.03.2015 would enure to the benefit of the writ petitioners from the date of the decision of the registration authority, and it had rightly not said so. Judged from any angle, we do not perceive any substance in the grounds raised in this appeal."

12. In view of the above learned counsel for petitioners prayed that the order dated 01.12.2018 issued by the "Institute', which is annexed as Annexure No. 1 to writ petition, is liable to be set aside.

13. Per contra, Shri Sanjay Bhasin, Senior Advocate, appearing for "Institute' submitted that so far as the submission of learned counsel for petitioners, on the basis of Sub-clause "d' of clause "3' of

Section II of the bid "Instruction for Technical & Financial Bid', which is a part of e-tender, i.e. authenticity of experience certificates, is concerned, it has no force and is misconceived because in the present case the experience certificate dated 26.11.2018 issued by Hind Institute of Medical Sciences, Lucknow was not considered in view of two affidavits submitted by the respondent no. 6 and conflicting communications of Hind Institute of Medical Sciences, Lucknow and tender of respondent no. 6 has been accepted being L-1 and subject to verification of the experience certificates submitted by the respondent no. 6. In this regard he has placed reliance on Minutes of Meetings dated 23.02.2019 and impugned order dated 01.12.2018. The relevant part of Minutes of Meetings reads as under:

"Since the two affidavit furnished by M/s Hotel Rajasthan are not precise as per tender conditions and as per conflicting, communications from Hind Institute, the experience of Hind Institute of Medical Sciences, Lucknow should not be considered while making calculation for deciding eligible successful bidder."

13.1 It appears from impugned order dated 01.12.2018 that tender of respondent no. 6 was accepted being L-1 and subject to verification of the experience certificate.

14. Shri Sanjay Bhasin further submits that so far as the arguments raised by learned counsel for petitioners in regard to experience of Patient Kitchen and Dietary Services rendered by the respondent no. 6 in Nova Hospitals Limited, Lucknow and in Awadh Hospital and Heart Center, Lucknow is concerned, there was no written agreement / MoU with respondent no. 6 with these parties.

14.1 However the concerned have categorically stated that M/s Hotel Rajasthan/respondent no. 6 had provided Patient Kitchen and Dietary Services to patients and also certified their respective certificates dated 27.11.2018 and 19.11.2018 issued in favour of respondent no. 6. The reliance has been placed on the Minutes of Visit (Annexure No. RA-1 to rejoinder affidavit), relevant portion of the same reads as under:

"2. Nova Hospital Limited, Lucknow:

The committee met Dr Pancham Singh, the Hospital Medical Superintendent and enquired about the issuance of experience certificate dated 27.11.2018. Dr Pancham Singh confirmed about issuance of the certificate dated 27.11.2018 and further clarified that M/s Hotel Rajasthan had provided dietary services on our verbal instructions to patients on chargeable basis but there was no written agreement/MOU with M/s Hotel Rajasthan.

The letter ref no Nil dt 24.12.2018 addressed to Pro Uttam Singh, Joint Director(admin) issued by Hospital Medical Superintendent is attached herewith as Annexure II.

3. Awadh Hospital and Heard Centre Lucknow:

The committee met Chief Finance Officer, Mr Satyendra Bhawani, and enquired about the issuance of experience certificate dated 19.11.18. Mr Bhawani confirmed that the experience letter dated 19.11.18 was issued by him and further clarified that M/S Hotel Rajsthan has provided services to patients

on chargeable basis but there was no written agreement/contract with M/S Hotel Rajasthan."

14.2 In addition to the above facts, Shri Sanjay Bhasin submitted that so far as experience is concerned, as a matter of fact, respondent no. 6 is providing catering services in the "Institute' since 2014 and there is no complaint whatsoever in regard to services.

15. Shri Sanjay Bhasin, also submitted that so far as argument raised by learned counsel for petitioners, based on Sub-Clause "h' of Clause "3' of Section II of the bid "Instruction for Technical & Financial Bid', which is a part of e-tender, is concerned, it does not, in any manner, debar from quoting "zero" in the technical bid/financial bid and in fact it is not a conditional bid.

16. Shri Sanjay Bhasin, learned counsel appearing on behalf of "Institute' has further submitted that so far as arguments raised by learned counsel for petitioners in regard to validity of Tax Identification Number (TIN) is concerned, the same has been renewed in favour of respondent no. 6 with retrospective effect and as such the argument which has been raised by learned counsel for petitioners in this regard has got no force.

17. In view of the facts as stated above Shri Sanjay Bhasin, Learned Senior Advocate, further submitted that in view of the law laid down by Hon'ble Apex Court in Civil Appeal No. 3588 of 2019 (arising out of SLP(C) No. 46 of 2019) Caretel Infotech Ltd vs Hindustan Petroleum Corporation Ltd & Others, no interference in matter is required by this Court. Relevant part of judgment is as under:

''36. We consider it appropriate to make certain observations in the context of the nature of dispute which is before us. Normally parties would be governed by their contracts and the tender terms, and really no writ would be maintainable under Article 226 of the Constitution of India. In view of Government and Public Sector Enterprises venturing into economic activities, this Court found it appropriate to build in certain checks and balances of fairness in procedure. It is this approach which has given rise to scrutiny of tenders in writ proceedings under Article 226 of the Constitution of India. It, however, appears that the window has been opened too wide as almost every small or big tender is now sought to be challenged in writ proceedings almost as a matter of routine. This in turn, affects the efficacy of commercial activities of the public sectors, which may be in competition with the private sector. This could hardly have been the objective in mind. An unnecessary, close scrutiny of minute details, contrary to the view of the tendering authority, makes awarding of contracts by Government and Public Sectors a cumbersome exercise, with long drawn out litigation at the threshold. The private sector is competing often in the same field. Promptness and efficiency levels in private contracts, thus, often tend to make the tenders of the public sector a non-competitive exercise. This works to a great disadvantage to the Government and the Public Sector.'

18. Shri Sanjay Bhasin, learned counsel for respondent no. 6, further submits that out of seven (7) firms, which submitted the e-tender bid, financial bid of two bidders namely M/s Mohini Caterers, Ahmedabad and M/s Buddha India Hotels Pvt Ltd Lucknow were in violation of

condition no. 5 of corrigendum dated 18.10.2018 and due to which the same were rejected. Two bidders namely M/s Jaiswal Canteen (A), Ahmedabad and M/s Amrit Foods, Lucknow were declared as L-2. He further submits that thereafter the financial bid of **three lowest bidders namely M/s Capri Hospitality Services Pvt Ltd, Indore, M/s Vrindavan Enterprises, Gorakhpur and M/s Hotel Rajasthan, Khagaria, Bihar** were considered and decided according to tie breaker by respondent "Institute'.

18.1 After considering the tender documents/bids submitted by three L-1 bidders, named above and taking into consideration Clause 1(i) and 1(ii) of the corrigendum dated 14.11.2018 the respondent no. 6 was declared successful bidder.

19. Shri Sanjay Bhasin learned counsel for respondent no. 2 to 5 and Shri Sunil Sharma, learned counsel appearing on behalf of respondents no. 6 have stated the writ petition for the reliefs claimed by the petitioners i.e. for quashing of the order dated 01.12.2018, passed in favour of respondent no. 6, by issuance a writ of certiorari with consequential reliefs is not maintainable as if it would be issued then it would be futile exercise as bid of petitioners is L-2 and other two bidders namely M/s Capri Hospitality Services and M/s Vrindavan Enterprises are L-1, who were in tie alongwith respondent no. 6 and in this view the bid in issue cannot be finalised in favour of petitioners. In this regard reliance has been placed on judgment of Hon'ble Apex Court in the case of Bihar State Financial Corporation & Others vs Chemicot India (P) Ltd & Others (2006) 7 SCC 293, relevant part of which is as under:

''11. We, therefore, in the peculiar facts if this case, are of the opinion that it would be futile to issue a writ of or in the nature of mandamus directing the Corporation to pay the aforementioned amount of Rs.15 lakhs to the respondent-Company. We may, however, hasten to add that we have not gone into the question as to whether the respondent-Company had paid any amount to the Corporation as against the loan amount which had admittedly been received by it. If the respondent-Company had not done so, the Corporation may take such steps in relation thereto, as it may be advised in this behalf but it goes without saying that it would be open to the respondent-Company to raise such contentions, including the payment of additional subsidy to it and/or effect thereof in the proceedings, which may be initiated by the Corporation. We are, therefore, of the opinion that the impugned judgment cannot be sustained. It is set aside accordingly.'

20. Accordingly, it is submitted by learned counsel for respondents that the present writ petition lacks merits and is liable to be dismissed.

21. We have heard arguments of learned counsel for parties and perused the record.

22. In view of the settled legal proposition in respect of interference by this Court in the contractual matter or tender process, we have considered the facts and submissions made by the counsels for the respective parties.

23. Undisputedly the respondent no. 6 (M/s Hotel Rajasthan), M/s Vrindavan Enterprises and M/s Capri Hospitality

Services Pvt. Ltd. were declared L-1 (Lowest Bidder) and in the tie breaker, after taking into account Clause 1 (i) and (ii) of the Corrigendum dated 14.11.2018, the contract was awarded to respondent no. 6 vide impugned order dated 01.12.2018, which was subject to verification of experience certificate and petitioner firm was declared L-2 and after verification the certificates issued by Nova Hospital, Lucknow and Awadh Hospital and Heart Centre, Lucknow, where found genuine, as appears from Annexure No. RA-1 (Minutes of Visit, signed by Three Member Committee of the Institute for verifying the genuineness of experience certificates submitted by respondent no. 6, the relevant part of which is quoted hereinabove) to the rejoinder affidavit filed by the petitioners, and the experience certificate given by the Hind Institute of Medical Sciences, Lucknow was not considered in view of affidavits furnished by the respondent no. 6 and conflicting communications made by Hind Institute of Medical Sciences, Lucknow, as appears from Annexure No. RA-3 (Minutes of the CRFC Meeting held on 23.02.2019, the relevant part of which is quoted hereinabove) to the rejoinder affidavit filed by the petitioners. Accordingly, we find that the challenge of award of contract to the respondent no. 6 on the ground of experience certificate by the petitioners is unsustainable.

24. The next contention/ground of the petitioners is based on Sub Clause (h) of Clause 3 of Section II of the bid "Instruction for Technical & Financial Bid" on which basis it has been stated that the bid submitted by the respondent no. 6 was conditional and ought to have been rejected. In this regard we find from the record i.e. Annexure No. 6 to the writ petition (Price Bid/Financial Bid), wherein it is mentioned that **"L-1 bidder shall be the bidder, whose total quoted rates at column no. 7 (sum of column no. 7) are found to be LOWEST" and Criteria for deciding L-1 mentioned in Clause 4(ii) wherein it is mentioned that "The L-1 bidder shall be decided after adding the rates of all the meals i.e. G-1, G-2, G-3, P-1, P-2, P-3, High Protein Diet and Nursing Hostel Diet and standing at lowest out of all the eligible bids"** and accordingly it is undisputed that the total amount mentioned in column no. 7 was to be considered while deciding L-1 and in the column no. 7 of the Price Bid/Financial Bid (Annexure No. 6 to the writ petition) submitted by the respondent no. 6, no condition has been mentioned and the note mentioned therein to our view is not a material deviation from the terms and conditions of the tender and on the basis of amount mentioned in column no. 7 the respondent no. 6 declared L-1. Accordingly, we are of the view that the contention of the petitioners that the tender was conditional and ought to have been rejected has no force.

25. In regard to the challenge of award of contract to respondent no. 6 on the ground that as per corrigendum the price in the "Price Bid/Financial Bid" shall be quoted in Indian Rupees and its lowest unit shall be Paisa and in the instant case the respondent no. 6 in the Financial Bid has mentioned "0" (Zero) in column no. 4 of Price Bid/Financial Bid and as such violated the condition of the corrigendum and accordingly accepting the tender in the favour of respondent no. 6 is illegal and arbitrary as well as unjustifiable, we considered the condition no. 2 of the corrigendum annexed as Annexure No. 4 to the writ petition and found that the said

condition does not say that the "0" (Zero) could not be mentioned. It is without going to say that "1" (one) is the lowest natural number and "0" is lowest whole number. In view of the same mentioning of "0" (Zero) in Financial Bid by the respondent no. 6, in our view, would not vitiate the financial bid submitted by respondent no. 6.

26. The last ground taken by the petitioners for challenging the award of contract in favour of respondent no. 6 vide order dated 01.12.2018 to the effect that the respondent no. 6 was not having the valid TIN number has also got no force as the TIN number was revived from the retrospective date, as specifically mentioned in para 12 of the counter affidavit filed by the respondent no. 6 and this fact has not been refuted by the petitioners.

27. In addition to above we would also like to observe that the admitted fact is that the petitioner firm was declared L-2 and in addition to respondent no. 6 there were two other firms namely, M/s Vrindavan Enterprises and M/s Capri Hospitality Services Pvt. Ltd., which were declared L-1 and accordingly even if we interfere in matter the tender would not fall in the lap of petitioners and being so as well as in view of the observations made in para 21, which is quoted below, of the judgment passed by the Hon'ble Apex Court in the case of Dr. N. C. Singhal Vs. Union of India, reported as (1980) 3 SCC 29, the writ petition filed by the petitioners challenging the order dated 01.12.2018 is not maintainable.

"21. ..... Even if their promotions are struck down appellant will not get any post vacated by them. Incidentally High Court also upheld their promotions observing that by the time the petition was heard each one of them had requisite service qualification and, therefore, the promotions could not be struck down. Once the challenge on merits fails the second string to the bow need not be examined. Having said all this, appellant is least competent to challenge their promotions. In a slightly comparable situation this Court in Chitra Ghosh Vs. Union of India, (1969) 2 SCC 228, observed as under:

The other question which was canvassed before the High Court and which has been pressed before us relates to the merits of the nominations made to the reserved seats. It seems to us that the appellants do not have any right to challenge the nominations made by the Central Government. They do not compete for the reserved seats and have no locus standi in the matter of nomination to such seats. The assumption that if nominations to reserved seats are not in accordance with the rules all such seats as have not been properly filled up would be thrown open to the general pool is wholly unfounded."

28. Needless to say that the respondent no. 6 is providing the services to the Institute and an agreement in regard to providing the services has also been executed on 31.03.2019.

29. For the foregoing reasons, the writ petition for the reliefs sought lack merit and accordingly **dismissed**. No order as to costs.

(2020)02ILR A1136

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 19.02.2020

BEFORE

THE HON'BLE VED PRAKASH VAISH, J.
THE HON'BLE NARENDRA KUMAR JOHARI, J.

Misc. Bench No. 6166 of 1986

Smt. Waseem Khan{Civil} ...Petitioner
Versus
Nagar Mahapalika ...Respondent

Counsel for the Petitioner:
P.K. Khare, Akshat Srivastava, Apoorva Tewari, Meha Rashmi, P. Chandra, Subhash Vidyarthi, U.K. Srivastav

Counsel for the Respondent:
U. Chandra, Savitra Vardhan Singh, Shailendra S. Chauhan, Shashi Prakash Singh, U.P. Srivastava

A. Civil Law-Ode of CivilProcedue, 1908-O.XLVII R.1- Review of J & O dated 04.05.2015-petition filed seeking direction-for execution of lease deed-in pursuance to order of allotment-petition disposed of-on submission of petitioner-for refund of amount-to which nagar palika agreed-error apparent-as allotment-contrary to U.P Nagar Palika Rules, 1958-now he cannot resilefromthe statement made before H.C-unequivocal stamen binding on the applicant-no sufficient ground for review.

(Delivered by Hon'ble Ved Prakash Vaish, J.)

1. Heard Sri Prashant Chandra, learned Senior Advocate assisted by Ms. Meha Rashmi, learned counsel for the petitioner and Sri Savitra Vardhan Singh, learned counsel for respondent.

2. This is an application for review of judgment and order dated 04th May, 2015 passed by a Bench comprising of Hon'ble Mr. Justice Amreshwar Pratap Sahi and Hon'ble Mr. Justice Aditya Nath Mittal in Writ Petition No.6166 (MB) of 1986 and since his lordship (Hon'ble Mr. Justice Amreshwar Pratap Sahi) has been elevated as Hon'ble the Chief Justice and Hon'ble Mr. Justice Aditya Nath Mittal has retired, hence, this review application has come up before this Bench.

3. The brief facts giving rise to the present application are that the petitioner filed a writ petition seeking directions to the respondent to execute the formal Lease Deed in favour of the petitioner in pursuant of the order of allotment dated 07th November, 1985. The said petition was disposed of by this Court vide order dated 04th May, 2015.

4. The relevant portion of judgment and order dated 04th May, 2015 reads as under:

"...Having considered the submissions raised, the Court proceeded to resolve the matter by allowing the petitioner to withdraw the amount which has already been lying with the Nagar Mahapalika in the circumstances indicated above, for which Sri Apoorva Tewari contends that the petitioner should be refunded an appropriate amount as it has been lying with the Nagar Mahapalika for long.

This, in the opinion of the Court, is the only way out inasmuch as the petitioner has not been able to establish that the offer made to her was a valid transaction in accordance with law. Secondly, in the absence of a lease, there was no concluded contract for being enforced. Thirdly, there was also no legitimate expectation in the absence of any right so as to interfere with the decision of the respondents to rescind the offer made to the petitioner. The Uttar Pradesh Nagar Mahapalika Adhiniyam,

1959, envisages the settlement of the properties of such local bodies through Sections 128 and 129 thereof. The order relied on by the petitioner, that was later on rescinded, appears to be more in the nature of a concession or a grant that does not appear to be as an outcome of a lawful exercise under the provisions referred to herein above. No material has been placed to establish that the procedure prescribed in the aforesaid provisions was followed nor any exercise appears to be available to determine the market value of the property prior to it's settlement.

In view of this concluded legal position and the refund sought by the learned Counsel for the petitioner to which learned Counsel for the Nagar Mahapalika has no objection, we find, in the interest of justice, that since the amount deposited by the petitioner has already been offered to be refunded by the Nagar Mahapalika, it would be appropriate that a sum of Rs.5 Lacs in all is refunded to the petitioner in the background aforesaid. Sri Tewari for the petitioner and Sri Singh for the Nagar Mahapalika are not at variance to this arrangement to finally settle the dispute.

This writ petition is, therefore, disposed of with a direction that in view of these developments, the order aforesaid has been passed with the agreement of the parties and the petitioner would be entitled to refund of Rs.5 Lacs only from the Nagar Mahapalika which shall be handed over to the petitioner within 15 days from today."

5. Learned counsel for the applicant submitted that there is an error apparent on the face of the record in holding that entire allotment proceedings were contrary to the U.P. Nagar Mahapalika Rules, 1958 without referring to any such rule and even in the absence of letter dated 27nd February, 1988 as well as resolution dated 21st April, 1988.

6. Learned counsel for the applicant also submitted that the writ petition was disposed of on the concession given by the earlier counsel and no such authority was given by the petitioner to make such statement.

7. On the other hand, learned counsel for the respondent urged that the writ petition was disposed of on 04th May, 2015 on the basis of statement made by learned counsel for the petitioner and there is no ground for review of judgment and order dated 04th May, 2015.

8. Learned counsel for the respondent further submitted that the petitioner challenged the order dated 04th May, 2015 by filing Special Leave Petition which was dismissed by the Hon'ble Supreme Court on 14.03.2016.

9. We have carefully considered the submissions made by learned counsel for both the parties and gone through the material available on record.

10. At the outset, it may be mentioned that aggrieved by the judgment and order dated 04th May, 2015 passed in Writ Petition No.6116 (MS) of 1986, the applicant filed a petition bearing Special Leave to Appeal (C) No.4384 of 2016. Vide order dated 14.03.2016, the said writ petition was dismissed by the Hon'ble Supreme Court. The Hon'ble Supreme Court passed the following order:

"Delay condoned.

No ground for interference is made out to exercise our jurisdiction under Article 136 of the Constitution of India.

The special leave petition is dismissed.

Pending application (s), if any, stand(s) disposed of. "

11. Now, coming to the merits of the review petition, it may be mentioned that the grounds taken in the review petition amount to almost rehearing of the matter and some of arguments advanced are such as were not raised earlier. A review petition cannot be made as an opportunity to re-argue the matter.

12. On perusal of Rule 1 of Order 47 of the C.P.C., 1908 it is manifestly clear that power of review is a creature of the statute and no court or quasi-judicial body can review its judgment or order unless it is legally empowered to do so. It must be conferred by law either specifically or by necessary implication. The review court cannot sit as appellate court. The mere possibility of two views is not a ground for review.

13. It is well settled that power of review can be exercised for the correction of a mistake and not to substitute a view. The error contemplated under the rule must be such which is apparent on the face of the record and not an error which has to be searched. It must be an error of inadvertence. A court of review has only a limited jurisdiction and it can allow a review on the grounds; (i) discovery of new and important matter or evidence, which after the exercise of due diligence, was not within the applicant's knowledge or could not be produced by him at the time when the decree was passed or order was made; (ii) mistake or error apparent on the face of the record, or (iii) for any other sufficient reason.

14. Rule 1 of Order 47 of the C.P.C., 1908 reads as under:

R. 1. Application for review of Judgment *- (1) Any person considering himself aggrieved-*

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred.

(b) by a decree or order from which no appeal is allowed, or

(c) by a decision on a reference from a Court of Small Causes,

and who from the discovery of new and important matter or evidence which after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree passed or order made against him, may apply for a review of judgment to the Court which passed the decree or made the order.

15. In '**Thungabhadra Industries Ltd. Vs. The Government of Andhra Pradesh**',AIR 1964 SC 1372 the Court said:

"A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected, but lies only for patent error."

16. In '**Aribam Tuleshwar Sharma Vs. Aribam Pishak Sharma**' 1979 (4) SCC 389 the Court said:

"... there is nothing in Article 226 of the Constitution to preclude a High Court from exercising the power of review which inheres in every Court of plenary

jurisdiction to prevent miscarriage of justice or to correct grave and palpable errors committed by it. But, there are definitive limits to the exercise of the power of review. The power of review may be exercised on the discovery of new and important matter or evidence which, after the exercise of due diligence was not within the knowledge of the person seeking the review or could not be produced by him at the time when the order was made; it may be exercised where some mistake or error apparent on the face of the record is found; it may also be exercised on any analogous ground. But, it may not be exercised on the ground that the decision was erroneous on merits. That would be the province of a Court of Appeal. A power of review is not to be confused with appellate powers which may enable an Appellate Court to correct all manner of errors committed by the Subordinate Court."

17. Again, in **'Meera Bhanja v. Nirmala Kumari Choudhury'**, AIR 1995 SC 455 while quoting with approval the above passage from **Abhiram Taleshwar Sharma Vs. Abhiram Pishak Shartn (supra)**, the Court once again held that review proceedings are not by way of an appeal and have to be strictly confined to the scope and ambit of Order 47 Rule 1 CPC.

18. In **'Parsion Devi and others Vs. Sumitri Devi and others'**, 1997 (8) SCC 715 it was held that an error, which is not self evident and has to be detected by process of reasoning, can hardly be said to be error apparent on the face of the record justifying the court to exercise powers of review in exercise of review jurisdiction.

19. In **'Rajendra Kumar Vs. Rambai'**, AIR 2003 SC 2095, the Apex Court has observed about limited scope of judicial intervention at the time of review of the judgment and said:

"The limitations on exercise of the power of review are well settled. The first and foremost requirement of entertaining a review petition is that the order, review of which is sought, suffers from any error apparent on the face of the order and permitting the order to stand will lead to failure of justice. In the absence of any such error, finality attached to the judgement/order cannot be disturbed."

20. A close scrutiny of the aforesaid judgments mentioned above it is clear that review is not an appeal in disguise. Rehearing of the matter is impermissible in the garb of review. It is an exception to the general rule that once a judgment is signed or pronounced, it should not be altered. In **'Lily Thomas Vs. Union of India'**, AIR 2000 SC 1650, the Court held that power of review can be exercised for correction of a mistake and not to substitute a new. Such powers can be exercised within limits of the statute dealing with the exercise of power. The aforesaid view is reiterated in **'Inderchand Jain Vs. Motilal'**, (2009) 4 SCC 665.

21. In another case, **'Kamlesh Verma Vs. Mayawati and others',** 2013 (8) SCC 320, it was observed:

"19. Review proceedings are not by way of an appeal and have to be strictly confined to the scope and ambit of Order 47 Rule 1 of CPC. In review jurisdiction, mere disagreement with the view of the judgment cannot be the ground for invoking the same. As long as the point is already dealt with and answered, the parties are not entitled to challenge the

impugned judgment in the guise that an alternative view is possible under the review jurisdiction.

Summary of the Principles:

20. Thus, in view of the above, the following grounds of review are maintainable as stipulated by the statute:

20.1. When the review will be maintainable:-

(i) Discovery of new and important matter or evidence which, after the exercise of due diligence, was not within knowledge of the petitioner or could not be produced by him;

(ii) Mistake or error apparent on the face of the record;

(iii) Any other sufficient reason.

The words "any other sufficient reason" has been interpreted in Chhajju Ram vs. Neki, AIR 1922 PC 112 and approved by this Court in Moran Mar Basselios Catholicos vs. Most Rev. Mar Poulose Athanasius & Ors., AIR 1954 SC 526, to mean "a reason sufficient on grounds at least analogous to those specified in the rule". The same principles have been reiterated in Union of India vs. Sandur Manganese & Iron Ores Ltd. & Ors., 2013 (8) SCC 337.

22.2. When the review will not be maintainable:-

(i) A repetition of old and overruled argument is not enough to reopen concluded adjudications.

(ii) Minor mistakes of inconsequential import.

(iii) Review proceedings cannot be equated with the original hearing of the case.

(iv) Review is not maintainable unless the material error, manifest on the face of the order, undermines its soundness or results in miscarriage of justice.

(v) A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected but lies only for patent error.

(vi) The mere possibility of two views on the subject cannot be a ground for review.

(vii) The error apparent on the face of the record should not be an error which has to be fished out and searched.

(viii) The appreciation of evidence on record is fully within the domain of the appellate court, it cannot be permitted to be advanced in the review petition.

(ix) Review is not maintainable when the same relief sought at the time of arguing the main matter had been negatived." (emphasis supplied) ".

22. In the instant case, we find that the writ petition was disposed of on the submissions made by learned counsel for the petitioner for refund of the amount to which learned counsel for the Nagar Mahapalika agreed.

23. Recently, a similar issue was considered by the Hon'ble Supreme Court in the case of **'Om Prakash v. Suresh Kumar'**, Civil Appeal Nos.833-834 of 2020 decided on 30.01.2020 and it was held :

" 9. The moot question is: whether the appellant should be bound by the statement made by his counsel before the High Court that the respondent- tenant will be reinducted in equal area in the newly constructed building within one month i.e. on or before 30.11.2017 from the date of completion of the construction work i.e. 31.10.2017. From the tenor of the statement made before the High Court on behalf of the appellant, it is obvious that it is an unequivocal statement made by the counsel engaged by the appellant to espouse his (appellant's) cause before the High Court. It is not the case of the appellant that he had expressly instructed

his counsel not to make such a statement. Further, the statement was in respect of the commitment of the appellant qua the subject matter of the proceedings in which the counsel was engaged and instructed to appear. Not only that, right from the beginning and even before this Court, an attempt was made by the parties to explore possibility of working out an amicable solution, as is evident from the order dated 9.1.2017 before the respondent was put to notice of these appeals, and more particularly, dated 14.11.2017.

10. Considering the above, the appellant cannot now be allowed to resile from the statement made before the High Court, which the High Court justly declined to undo in the review petition filed by the appellant for that purpose. In the peculiar facts of this case, the decision of this Court in ***Himalayan Coop. Group Housing Society*** *(supra) will be of no avail to the appellant. Inasmuch as, it is not a case where the counsel, who made the statement was not engaged by the appellant before the High Court. The engagement was in respect of eviction proceedings and the statement was in relation to the commitment of the appellant qua the subject matter thereof and being an unequivocal statement, it will be binding on the appellant. In any case, even this Court showed indulgence to the appellant on the basis of impression given to this Court about the possibility of at least sparing a small room for the respondent, which was the basis for issuing notice to the respondent, as is evident from the orders dated 9.1.2017 and 15.2.2017."*

24. Applying the aforesaid law to the facts and circumstances of the present case, we are of the considered opinion that there is no sufficient ground for review of judgment and order dated 04th May, 2015.

25. In the light of aforesaid judgments, the application for review deserves to be dismissed and the same is hereby **dismissed**.

(2020)02ILR A1142

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 28.01.2020

BEFORE
THE HON'BLE RAJAN ROY, J.

Misc. Single No. 35387 of 2018

Smt. Rinki ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Satya Prakash Mishra

Counsel for the Respondents:
C.S.C., Subhas Bisaria, W.U. Ahmad

A. Petitioner-seeking-declaration of result-of B.Ed examination-in the academi session 2013-2014-to bring admission-to logical conclusion-reliance placed-on a judgment passed by-coordinate bench-in Ankit Kumar's case-overlooking the judgment of Hon'ble Apex Court-where declarationof result-post 16.9.2013-rendered impermissible.

Refered to larger bench-

1. Whether open to State Govt. or this Court to relax the time sch. Fixed by Hon'ble Apex Court?- No.

2. Whether instruction of state to be acted upon or this would amount to be act of disobedience?-No deliberate attempt to mislead the Court-Not liable under contempt jurisdiction.

Writ Petition dismissed. (E-8)

Held, since instructions of State Government contained in its communication dated 28.11.2018 did not disclose full and complete facts including the order dated 10.09.2018 passed by Hon'ble Supreme Court on the interlocutory application moved by State of U.P. itself (IA No.1216 of 2017), the said instructions could not be acted upon, however, in absence of any specific instruction to learned State counsel to submit before this Court that State did not have any objection if result of those admitted students is declared by the University, the contempt proceedings against officers of the State may not be initiated/instituted. Reference made is answered thus.

List of cases cited:-

1. College of Professional Education and others vs. State of U.P. and others, 2013 (2) SCC 721

2. Maa Vaishno Devi Mahila Mahavidyalaya vs. State of U.P. and others, (2013) 2 SCC 617

3. Bharat Builder Pvt Ltd and others vs. Parijat Flat Owners Coop. Housing Society Ltd., (1999) 5 SCC 622

4. Bharat Earth Movers vs. Commissioner of Income Tax, Karnataka, (2000) 6 SCC 645

5. Assistant Collector of Central Excise, Chandan Nagar, West Bengal vs. Dunlop India Ltd and others,(1985) 1 SCC 260

(Delivered by Hon'ble Rajan Roy, J.)

1. Heard learned counsel for the petitioner, Shri Rajesh Tiwari for the State and Shri Subhas Bisaria, learned counsel for the opposite parties no. 3, 4 and 5.

2. This petition was filed on 05.12.2018 seeking the following relief:-

"(i) Issue a writ order or direction in the nature of mandamus thereby commanding and directing the opposite party no. 1 and 2 to issue necessary directive to the respondent no. 3 and 4 to declare the result of the petitioner of the B.Ed. examination so held for the academic session 2013-14 so that the admission of the petitioner so made in pursuance of the Government order dated 26.09.2013 and 08.10.2013 is brought to its logical conclusion, in the interest of justice."

3. Reliance was placed by the petitioner upon a judgment dated 03.12.2018 passed by a Coordinate Bench in a bunch of similar petitioners leading petition being 4289 (M/S) of 2014, Ankit Kumar and 7 others Vs. State of U.P. and others. When this petition came up for hearing, this Court found the said judgment to be in conflict with the decision of the Hon'ble Supreme Court, as such, vide order dated 17.12.2018 following questions were referred for consideration by a larger Bench:-

"(i) Whether it was open for the State Government or this Court to have relaxed the time schedule fixed under the orders of the Apex Court in College of Professional Education (Supra), as reiterated and re-enforced in Maa Vaishno Devi Mahila Mahavidyalaya (Supra), as also the order dated 25.11.2013 passed in I.A. No. 109 and 110 of 2013 in College of Professional Education, fixing 16th September, 2013, by permitting/directing declaration of results of students admitted in B.Ed Course in the Academic Session 2013-14 after 16.09.2013?

(ii) Whether the instructions of the State Government dated 28th November, 2018 could be acted upon or that it amounts to an act in disobedience/derogation of the orders of

the Apex Court, referred to above, rendering the responsible officers of the State liable to be proceeded with under contempt jurisdiction, in view of the observations contained in para 90.2 of the Supreme Court judgment in Maa Vaishno Devi Mahila Mahavidyalaya (Supra)?

4. The larger Bench considered the said questions and answered the same vide its judgment dated 18.10.2019. The relevant extract of the said judgment answering question no. 1 is as under:-

"The said prayer was rejected, as observed above, by Hon'ble Supreme Court on 10.09.2018. Thus, it appears that the said order was not brought to the notice of this Court in the case of ***Ankit Kumar*** *which was decided subsequent to the order dated 10.09.2018 passed by Hon'ble Supreme Court i.e. on 03.12.2018. Dismissal of IA No. 1216 of 2017 filed by the State of U.P. by Hon'ble Supreme Court vide its order dated 10.09.2018 does not leave anyone in doubt that time schedule relating to admission etc. in B.Ed courses by Hon'ble Supreme Court in the case of* ***College of Professional Education and others*** *(supra) was to be strictly followed and in view of what we have discussed above in reference to provision of Article 141 and 144 of the Constitution of India, we have no hesitation to hold that it was open for any authority or body, be it the State Government or even this Court, to have in any manner relaxed the time schedule as fixed by Hon'ble Supreme Court in the case of* ***College of Professional Education and others*** *(supra).*

We thus answer the question no. 1 referred to us as follows.

It was not open either for the State Government or this Court to have relaxed the time schedule fixed by Hon'ble Supreme Court in the case of ***College of Professional Education and others*** *(supra) and that declaration of result of students admitted in B.Ed course in the academic session 2013-2014 after 16.09.2013 is impermissible."*

5. The relevant extract of the judgment answering question no. 2 is as under:-

"As regards question no.2 referred to us, we may observe that instructions of the State Government contained in its communication dated 28.11.2018 did not instruct the State Counsel to submit before this Court that the State Government did not have any objection if the result of the petitioners in the said matter, was declared. Nonetheless, we may notice that the said communication dated 28.11.2018 though notices the order dated 25.11.2013 whereby Interlocutory Application Nos. 109-110 were dismissed by Hon'ble Supreme Court, however, it does not make any mention of the order dated 10.09.2018 which was passed by Hon'ble Supreme Court on the interlocutory applications made by the State of U.P. itself (IA No. 1216 of 2017) whereby prayer of the State Government Order dated 08.10.2013, was rejected.

It is needless to say that it is the duty of every authority including the authorities of the State Government and its instrumentalities as well not only to disclose correct facts before the Court but also to disclose full and complete facts so as to assist the Court appropriately in discharge of its judicial functions.

Having observed as above, we may only point out at this juncture that the communication dated 28.11.2018 did not

instruct learned Standing Counsel appearing for the State of U.P. to make any such statement that the State had no objection in case result of the petitioners of the said case was declared by University. the manner in which the case of ***Ankit Kumar*** *was conducted on behalf of State of U.P. though cannot be appreciated for non-disclosure of full and complete facts, however, we do not find it a case of any deliberate attempt by the officers of the State Government to mislead the Court so as to make the officers liable to be proceeded against, under contempt jurisdiction. In this view of the matter, question no. 2 referred to us is answered as follows:*

Since instructions of State Government contained in its communication dated 28.11.2018 did not disclose full and complete facts including the order dated 10.09.2018 passed by Hon'ble Supreme Court on the interlocutory application moved by State of U.P. itself (IA No. 1216 of 2017), the said instructions could not be acted upon, however, in absence of any specific instruction to learned State Counsel to submit before this Court that State did not have any objection if result of those admitted students is declared by the University, the contempt proceedings against officers of the State may not be initiated/instituted.

Reference made is answer thus."

6. In view of the aforesaid decision of the larger Bench and the answer given to the questions referred to it, as admittedly the petitioner was granted admissions subsequent to 16.09.2013, in non-adherence and violation to the time schedule fixed by the Hon'ble Supreme Court, the relief prayed for in this petition cannot be granted. It is accordingly declined.

7. The petition is **dismissed** with the aforesaid observations.

(2020)02ILR A1145

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 06.02.2020

BEFORE

THE HON'BLE SIDDHARTHA VARMA, J.

Matters Under Article-227 No. 118 of 2020 (Civil)

Akhilesh ...Petitioner

Versus

A.D.J./Special Judge E.C. Act, Varanasi & Ors. ...Respondents

Counsel for the Petitioner:
Sri Ajay Kumar Singh, Sri Ashish Kumar Singh

Counsel for the Respondents:
Sri Raj Kumar Kesari

A. Election Petition - U.P. Kshettra Panchayats and Zila Panchayats Adhiniyam, 1961- Section 27- Disputes as to membership or disqualification - U.P. Zila Panchayats (Settlement of Disputes Relating to Membership) Rules, 1994 - Rule 3 - Manner of raising disputes under Section 27(1) – Rule 4 - Manner of raising disputes under Section 27(2)(a) and (b) - Limitation Act, 1963 - Section 3 - Bar of limitation - Section 5 – delay condonation - Election Petition filed beyond the Limitation - defence of limitation not taken, under Section 3(1) of the of the Limitation Act - question of limitation is a question of jurisdiction - order rejecting recall application no. 111C and order condoning delay in filing Election petition - quashed.(Para-11,12)

An election for electing a member of Zila Panchayat Ward/Sector was held – result declared – writ petition filed challenging

election result – dismissed on the round of alternate remedy under section 27 of U.P. Kshettra Panchayats and Zila Panchayats Adhiniyam, 1961 – Election petition filed – belatedly – codonation application – allowed - Election petition served by publication – no notice served on the petitioner - Election petition proceeded ex parte – Application No.111C filed for recall – rejected – objection filed – Election Tribunal rejected application (Para-1,2,3)

Held :- An Election Petition could not have been filed beyond the Limitation provided - even if the defence of limitation is not taken, under Section 3(1) of the of the Limitation Act the Court itself could have looked into the question of limitation and could have refused to proceed with the Election Petition - question of limitation is a question of jurisdiction and could have been raised at any point of time while the case was being proceeded with.(Para-11)

Matters Under Article 227 allowed. (E-7)

List of cases cited:-

1. Foreshore Co-operative Housing Society Limited Vs. Praveen D.Desai (Dead) thr. Lrs. and others, 2015 (6) SCC 412

2. Smt. Sharda Devi Vs. State of U.P., 2013 (2) AWC 1649

3. Kanwar Singh Saini Vs. High Court of Delhi , 2012 (4) SCC 307

(Delivered by Hon'ble Siddhartha Varma, J.)

1. An election for electing a member of Zila Panchayat Ward/Sector No. 6, Vikas Khand Narayanpur, District - Varanasi was held on 17.10.2015. The result of that election was declared on 2.11.2015. The respondent no. 6 Rakesh who was aggrieved by the election of petitioner filed a writ petition being Writ - C No. 3466 of 2016 to challenge the election result dated 2.11.2015. On 27.1.2016, the writ petition was dismissed on the ground that an alternative remedy was available to the petitioner of that writ petitioner (respondent no. 6 in this writ petition) and that he could have availed the remedy of filing an Election Petition under Section 27 of the U.P. Kshettra Panchayats and Zila Panchayats Adhiniyam, 1961. Thereafter, the respondent no. 6 filed an Election Petition being Election Petition No. 43 of 2016 on 30.1.2016.

2. This Election Petition, as was filed belatedly, was accompanied by an application to condone the delay in filing the election petition as it was filed beyond the limitation prescribed by Rule 4 of the U.P. Zila Panchayats (Settlement of Disputes Relating to Membership) Rules, 1994. Notices, it appears, were issued in the Election Petition and on 21.7.2016 after deeming sufficient notice on the petitioner, through publication, the application under Section 5 of the Limitation Act was allowed. As the petitioner here and the opposite party in the Election Petition was served by publication and as the notice, in fact, was not served on the petitioner, the proceedings in the Election Petition proceeded ex parte.

3. Upon knowledge being gained by the petitioner on 29.1.2018 about the Election Petition a written statement was filed by the petitioner Akhilesh. During the course of hearing, the petitioner Akhilesh who was a candidate and who had won the Election filed an application being Application No. 111C to recall the order dated 21.7.2016 by which the delay in filing the election petition had been condoned. This application was filed on 23.10.2019. The election petitioner (respondent no. 6 here) filed his objection

and prayed that the application filed on 23.10.2019 i.e. application no. 111C be rejected. On 3.12.2019, the Election Tribunal i.e. the Court of the Additional District Judge/Special Judge, E.C. Act, Varanasi, rejected the application of the petitioner, hence the instant writ petition.

4. Learned counsel for the petitioner relied upon Section 27 of the U.P. Kshettra Panchayats and Zila Panchayats Adhiniyam, 1961, and upon Rules 3 and 4 of the U.P. Zila Panchayats (Settlement of Disputes Relating to Membership) Rules, 1994 and submitted that against the result of an election which was declared on 2.11.2015 as per Rule 4 of the U.P. Zila Panchayats (Settlement of Disputes Relating to Membership) Rules, 1994, an Election Petition could have been filed within a period of 30 days. Since the learned counsel for the petitioner took recourse to the provisions of Section 27 of the U.P. Kshettra Panchayats and Zila Panchayats Adhiniyam, 1961, and to Rules 3 and 4 of the U.P. Zila Panchayats (Settlement of Disputes Relating to Membership) Rules, 1994, the same are being reproduced here as under:-

27. **Disputes as to membership or disqualification.**--(1) if any dispute arises as to whether a particular person is a member of Zila Panchayat under clause (a) of Section 18 the dispute shall be referred in the manner prescribed to the State Government and the decision of the State Government shall be final and binding. (2) If a dispute arises as to whether a person-

(a) has been lawfully chosen a member of a Zila Panchayat under Section 18 or

(b) has ceased to remain eligible for being chosen a member of the Zila Panchayat for the purposes of Section 20 or

(C) has become disqualified to be Adhyaksha or Upadhyaksha for the purposes of Section 19,

the dispute shall be referred in the manner prescribed to the Judge whose decision shall be final and binding.

Rule 3. Manner of raising disputes under Section 27(1). (1) If any dispute arises as to whether a person is a member of the Zila Panchayat under clause (a) of sub-section (1) of Section 18 , the same may be raised by any person whose name is registered as an elector in the Electoral roll for the territorial constituency of the concerned Zila Panchayat.

(2) The application shall specify the ground on which the dispute is raised and shall be presented to the District Magistrate by the person making the application and if there are more signatories to it by any or all of them.

(3) The District Magistrate shall, as soon thereafter as may be, refer the application alongwith the entire records and his own comments to the State Government for decisions.

(4) The State Government may, after such enquiry as it considers necessary and after affording a reasonable opportunity of hearing to the parties, pass such order as it considers just and proper.

Rule 4. Manner of raising disputes under Section 27(2)(a) and (b).--(1) If a dispute arises as to whether a person has been lawfully chosen under clause (b) of sub-Section (1) of Section 18 the matter shall be referred by means of a written petition by any person who could legally be a candidate at such choosing to the Judge within **thirty days** of the date of choosing.

(2) If a dispute arises as to whether a person has ceased to remain eligible for being chosen a member, the matter shall in the manner as provided in sub-rule (1) be raised by any person whose name is registered as an elector in the Electoral roll for the territorial constituency of the concerned Zila Panchayat.

(3) Every petition under sub-rule (1) or sub-rule (2) shall be presented in person by the petitioner, and if there are more than one petitioners by any or all of them.

5. Learned counsel for the petitioner submitted that when the Election Petition itself was not filed within the limitation provided then it should have been dismissed on the ground of limitation even if the question of limitation was not raised.

6. In this regard, learned counsel for the petitioner relied upon Section 3(1) of the Limitation Act, 1963, and, therefore, the same is being reproduced here as under:-

S.3 : Bar of limitation. (1) Subject to the provisions contained in sections 4 to 24 (inclusive), every suit instituted, appeal preferred, and application made after the prescribed period **shall be dismissed although limitation has not been set up as a defence.**

7. Learned counsel for the petitioner submitted that a question of jurisdiction could be raised at any point of time during the continuance of a case and further submitted that limitation in a given case was a question of jurisdiction and if the petitioner raised the same even after some delay then that question had to be looked into and answered. Learned counsel submitted that question of limitation is a plea of law which covered the jurisdiction of a Court and could be raised at any stage. To emphasize this proposition of law, learned counsel relied upon **2015 (6) SCC 412 (Foreshore Co-operative Housing Society Limited v. Praveen D.Desai (Dead) thr. Lrs. and others).** Since the learned counsel specifically relied upon paragraphs 49 to 54 they are being reproduced here as under:-

"49. A Constitution Bench of five Judges of this Court in the case of Pandurang Dhondi Chougule vs. Maruti Hari Jadhav, 1966 SC 153, while dealing with the question of jurisdiction, observed that a plea of limitation or plea of res judicata is a plea of law which concerns the jurisdiction of the court which tries the proceeding. The Bench held:-

"10. The provisions of Section 115 of the Code have been examined by judicial decisions on several occasions. While exercising its jurisdiction under Section 115, it is not competent to the High Court to correct errors of fact however gross they may, or even errors of law, unless the said errors have relation to the jurisdiction of the court to try the dispute itself. As clauses (a), (b) and (e) of Section 115 indicate, it is only in cases where the subordinate court has exercised a jurisdiction not vested in it by law, or has failed to exercise a jurisdiction so vested, or has acted in the exercise of its jurisdiction illegally or with material irregularity that the revisional jurisdiction of the High Court can be properly invoked. It is conceivable that points of law may arise in proceedings instituted before subordinate courts which are related to questions of jurisdiction. It is well settled that a plea of limitation or a plea of res

judicata is a plea of law which concerns the jurisdiction of the court which tries the proceedings. A finding on these pleas in favour of the party raising them would oust the jurisdiction of the court, and so, an erroneous decision on these pleas can be said to be concerned with questions of jurisdiction which fall within the purview of Section 115 of the Code. But an erroneous decision on a question of law reached by the subordinate court which has no relation to questions of jurisdiction of that court, cannot be corrected by the High Court under Section 115."

50. In the case of Manick Chandra Nandy vs. Debdas Nandy, (1986) 1 SCC 512, this Court, while considering the nature and scope of High Court's revisional jurisdiction in a case where a plea was raised that the application under Order IX Rule 13 was barred by limitation, held that a plea of limitation concerns the jurisdiction of the court which tries a proceeding for a finding on this plea in favour of the party raising it would oust the jurisdiction of the court.

51. In the case of National Thermal Power Corpn. Ltd. vs. Siemens Atkeingesellschaft, 2007 (4) SCC 451, this Court considering the similar question under the Arbitration and Conciliation Act held as under:-

"17. In the larger sense, any refusal to go into the merits of a claim may be in the realm of jurisdiction. Even the dismissal of the claim as barred by limitation may in a sense touch on the jurisdiction of the court or tribunal. When a claim is dismissed on the ground of it being barred by limitation, it will be, in a sense, a case of the court or tribunal refusing to exercise jurisdiction to go into the merits of the claim. In Pandurang Dhoni Chougule v. Maruti Hari Jadhav this Court observed that: (AIR p. 155, para 10)

"10.....It is well settled that a plea of limitation or a plea of res judicata is a plea of law which concerns the jurisdiction of the court which tries the proceedings. A finding on these pleas in favour of the party raising them would oust the jurisdiction of the court, and so, an erroneous decision on these pleas can be said to be concerned with questions of jurisdiction which fall within the purview of Section 115 of the Code."

52. In the case of Official Trustee vs. Sachindra Nath Chatterjee, AIR 1969 SC 823, a three Judges Bench of this Court while deciding the question of jurisdiction of the Court under the Trust Act observed:-

"15. From the above discussion it is clear that before a Court can be held to have jurisdiction to decide a particular matter it must not only have jurisdiction to try the suit brought but must also have the authority to pass the orders sought for. It is not sufficient that it has some jurisdiction in relation to the subject-matter of the suit. Its jurisdiction must include the power to hear and decide the questions at issue, the authority to hear and decide the particular controversy that has arisen between the parties."

53. In the case of ITW Signode India Ltd. vs. CCE, (2004) 3 SCC 48, a similar question came before a three Judges Bench of this Court under the Central Excise Act, 1944, when this Court opined as under:-

"69. The question of limitation involves a question of jurisdiction. The finding of fact on the question of jurisdiction would be a jurisdictional fact. Such a jurisdictional question is to be determined having regard to both fact and law involved therein. The Tribunal, in our opinion, committed a manifest error in not determining the said question, particularly, when in the absence of any finding of fact that such short-levy of excise duty related to any positive act on the part of the appellant by way of fraud, collusion,

wilful misstatement or suppression of facts, the extended period of limitation could not have been invoked and in that view of the matter no show-cause notice in terms of Rule 10 could have been issued."

54. In the case of Kamlesh Babu vs. Lajpat Rai Sharma, (2008) 12 SCC 577, the matter came to this Court when the trial court dismissed the suit on issues other than the issue of limitation. The Bench held:-

"23. The reasoning behind the said proposition is that certain questions relating to the jurisdiction of a court, including limitation, goes to the very root of the court's jurisdiction to entertain and decide a matter, as otherwise, the decision rendered without jurisdiction will be a nullity. However, we are not required to elaborate on the said proposition, inasmuch as in the instant case such a plea had been raised and decided by the trial court but was not reversed by the first appellate court or the High Court while reversing the decision of the trial court on the issues framed in the suit. We, therefore, have no hesitation in setting aside the judgment and decree of the High Court and to remand the suit to the first appellate court to decide the limited question as to whether the suit was barred by limitation as found by the trial court. Needless to say, if the suit is found to be so barred, the appeal is to be dismissed. If the suit is not found to be time-barred, the decision of the first appellate court on the other issues shall not be disturbed."

8. In this regard, learned counsel for the petitioner also relied upon a judgement reported in ***2012 (4) SCC 307 (Kanwar Singh Saini v. High Court of Delhi).*** He specifically relied upon paragraph 22 and, therefore, the same is being reproduced here as under:-

"22. There can be no dispute regarding the settled legal proposition that conferment of jurisdiction is a legislative function and it can neither be conferred with the consent of the parties nor by a superior court, and if the court passes order/decree having no jurisdiction over the matter, it would amount to a nullity as the matter goes to the roots of the cause. Such an issue can be raised at any belated stage of the proceedings including in appeal or execution. The finding of a court or tribunal becomes irrelevant and unenforceable/inexecutable once the forum is found to have no jurisdiction. Acquiescence of a party equally should not be permitted to defeat the legislative animation. The court cannot derive jurisdiction apart from the statute. (VideUnited Commercial bank Ltd. v. Workmen, Nai Bahu v. Lala Ramnaraya, Natraj Studios(P) Ltd. v. Navrang Studios, Sardar hasan Siddiqui v Stat. A.R Antulay v. R.S. Nayak, Union of India v. Deoki Nandan Aggarwal, karnal Improvement Trust v. Parkash Wanti, U.P. Rajkiya Nirman Nigam Ltd. v. Indure (P) Ltd., State of Gujarat v. Rajesh Kumar Chimanlal Barot, Kesar Singh v. Sadhu, Kondiba Dagadu Kadam v. Savitribai Sopan Gujar and CCE v. Flock (India) (P) Ltd."

9. Learned counsel for the petitioner, therefore, submitted that the judgement of the Court below which had stated that the decision on the point of limitation, wherein the delay in filing the Election Petition was condoned on 21.7.2016 could not have been questioned in the proceedings of the Election Petition was absolutely erroneous and, therefore, the impugned order dated 3.12.2019 be set aside.

10. Learned counsel appearing for the Election Petitioner (the respondent no. 6 here), however, submitted that the question of limitation could not have been raised after the lapse of almost 3 years and six months. Learned counsel for the respondent no. 6 relied upon Section 23

and stated that the Act provided a limitation of five years for the declaration of any candidate as incapable. Alongwith the written submissions which have been made a part of the record of the case, learned counsel submitted a certified copy of the order sheet of the case and stated that the question of limitation could not have been raised in the manner the petitioner had raised and, therefore, submitted that the order passed by the Election Tribunal was absolutely correct.

11. Having heard the learned counsel for the parties, I am of the view that an Election Petition could not have been filed beyond the Limitation provided. This has also been held in the judgement reported in **2013 (2) AWC 1649 Smt. Sharda Devi vs. State of U.P.** Further, I am of the view that even if the defence of limitation is not taken, under Section 3(1) of the of the Limitation Act the Court itself could have looked into the question of limitation and could have refused to proceed with the Election Petition. Still further, I am of the view that a question of limitation is a question of jurisdiction and could have been raised at any point of time while the case was being proceeded with.

12. Under such circumstances, the order dated 3.12.2019 by which the application no. 111C was rejected and the order dated 21.7.2016 by which the delay in filing the Election Petition was condoned both are being quashed.

13. Since the order dated 21.7.2016 is being set aside, the Election Petition being Election Petition No. 43 of 2016 cannot now be further proceeded with.

14. With the above observation, the writ petition stands allowed.

(2020)02ILR A1151

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 20.02.2020

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.

U/S 482/378/407 No. 3665 of 2010

Rajendra Nath Bajpai ...Applicant
Versus
State of U.P. & Anr. ...Opposite Party

Counsel for the Applicant:
Kapil Misra

Counsel for the Opposite Party:
Govt. Advocate

A. Criminal Law-Code of Criminal Procedure, 1973-Section 319 - Scope-Power under Section 319 Cr.P.C. can be exercised by Court against a person not named in First Information Report or no charge-sheet is filed by Police against him and the accused can be summoned only on the basis of examination-in-chief of witness and the Court need not wait for cross-examination.
A person not named in the FIR or in the chargesheet can be summoned by the Court u/s 319 Cr.Pc only on the basis of examination-in- chief of the witness.

B. Criminal Law-Code of Criminal Procedure, 1973- Section 319- Degree of satisfaction of Court for summoning the accused under Section 319 Cr.P.C- the tests are not only same as applicable for framing charge, but a little more in degree. Mere taking of name is not sufficient to exercise power under Section 319 Cr.P.C. but there must be something more i.e. evidence must be such wherefrom on judicious consideration, Court must be satisfied that such person can be tried alongwith accused already facing trial**.** It cannot be said that Trial Court, in the case in hand, has exercised jurisdiction casually or in a cavalier manner and there is no appropriate and reasonable evidence to summon applicant. Name of the person who has filed the

Application is different from the name of the person summoned by means of the impugned order. Therefore, this application, even otherwise, is not sustainable. (Para 12,13,15)

Application u/s 482 rejected.

Case law discussed: -

1. Hardeep Singh Vs. St. of Pun. & ors. (2014) 3 SCC 92

2. Brijendra Singh & ors. Vs. St. of Raj. (2017) 7 SCC 706

3. Shiv Prakash Mishra Vs. St. of U.P & ors (2019) 7 SCC 806

(Delivered by Hon'ble Sudhir Agarwal, J.)

1. Sri Jyotindra Misra, Senior Advocate, assisted by Sri Kapil Misra, Advocate has appeared for applicant and learned A.G.A. for State of U.P. Opposite party 2 was issued notice and as per report dated 29.11.2010 submitted by Chief Judicial Magistrate, Bareilly, notice has been served upon opposite party 2 but he has not chosen to appear either in person or through counsel. In fact opposite party 2 is an officer of Police Department, hence learned A.G.A. stated that he represent both opposite parties. In the circumstances, I have heard the matter finally and this application is being decided by this judgment.

2. This is an application filed under Section 482 Cr.P.C. with the prayer to quash order dated 03.9.2004 passed by Sri Shamshad Ali, Additional Sessions Judge/F.T.C. No.2, Lakhimpur Khiri in Sessions Trial No.610 of 2001 arising from Case Crime No.135 of 1998 summoning applicant under Section 319 Cr.P.C., for trial in offence under Section 271, 201 IPC.

3. Facts giving rise to this application are that a First Information Report *(hereinafter referred to as "FIR")* being Case Crime No.135 of 1998 dated 14.01.1997 was registered at Police Station Kotwali, Lakhimpur Khiri, under Sections 218, 201, 217 IPC on the information given by Surendra Singh Dongari, Inspector Mahila Sahayata Prakoshth, Apraadh Anusandhan Vibhag, Zonal Office, Bareilly alleging that investigation in Case Crime No.35/97 under Section 498A, 304B IPC read with 3/4 Dowry Prohibition Act was conducted by Informant against accused Anil Kumar son of Hari Nandan Prasad, Hari Nandan Prasad son of Jhamman Lal, Mahendra Pratap son of Rajendra Prasad and Rajendra Prasad son of Jhamman Lal resident of Village Sakethu, Police Station Neemgaon, District Lakhimpur Khiri. Informant Investigting Officer found that Sunita alias Anita Devi daughter of Jayendra Singh, who was Complainant/Informant of FIR, registered as Case Crime No.35 of 1997 was admitted in Government Hospital, Sadar, Lakhimpur Khiri on 14.01.1997 for treatment of burn injuries. Dr. A.V.Singh of the Hospital sent a written memo through Ward Boy Shri Ram for recording statement of Smt. Sunita Devi, victim, which was entered by Constable No.33 Manmohan Dayal in G.D. No.5 dated 14.01.1997 at 1:15 A.M. As per opinion of Dr. A.V.Singh, victim was burnt at the level of Grade 1-C and Grade-III and at that time she was whispering something. Head Constable Manmohan Dayal informed the then Additional Tehsildar Sri Chhote Lal for recording her statement through Home Guard Shiv Kumar at 2:15 A.M., but, Chhotey Lal, Additional Tehsildar reached hospital with delay of almost 10 hours i.e. at 11.30 A.M. and at

that time, Dr. S.M.Malik was on duty. The aforesaid Additional Tehsildar recorded statement of victim without having medical certificate of condition of victim from aforesaid doctor and also did not record statement as spoken by her i.e. Smt. Sunita Devi (the victim) with an intention to help accused persons and recorded wrong dying declaration. FIR, therefore, was lodged against Sri Chhotey Lal, Tehsildar for committing offence under Sections 218, 201, 217 IPC. After investigation, charge sheet was submitted, against Chhotey Lal who, by that time, had retired, vide charge sheet no.135/98 under Sections 217, 218, 201 IPC and criminal case was registered as Sessions Trial No.610 of 2001.

4. In respect of Case Crime No.35 of 1997 also charge sheet was submitted against Anil Kumar and others under Section 304-B IPC and criminal case was registered as Sessions Trial No. 349 of 1998. At the relevant time Chhotey Lal was Additional Tehsildar, Lakhimpur Khiri and D.N.Bajpai was Tehsildar Sadar, Lakhimpur Khiri.

5. Trial Court found that information sent by Head Constable Manmohan Dayal Verma at 1.15 A.M. on 14.01.1997 was forwarded to Tehsildar Sadar, Lakhimpur Khiri, which was served upon him through Home Guard Shiv Kumar. After communicating information, his (Shiv Kumar) return was registered in Report No.5 at 2.15 a.m. on 14.01.1997. These documents were before Trial Court. Thus, information for recording dying declaration was received by the then Tehsildar Sadar, Lakhimpur Khiri between 1.15 to 2.15 A.M. on 14.01.1997 and at that time Sri D.N.Bajpai was Tehsildar Sadar, Lakhimpur Khiri. In these circumstances, Trial Court found that partisan stand was taken by authorities to help D.N.Bajpai and to implicate Chhotey Lal, Additional Tehsildar. Since Chhotey Lal also could not have escaped from culpability for the reason that he, when informed, was also responsible to reach hospital for recording statement at the earliest but he also delayed the matter and recorded a wrong statement. In the circumstances, Trial Court, on the basis of evidence on record, found D.N.Bajpai, the then Tehsildar Sadar, Lakhimpur Khiri and Dr. S.K.Malik also guilty of offence under Section 217 and 201 IPC hence summoned both of them vide impugned order dated 03.09.2004.

6. Learned counsel for applicant contended that when Investigating Officer found only Chhotey Lal, Additional Tehsildar guilty for offence under Sections 217, 218, 201 IPC, summoning of applicant for the offence under Section 217, 201 IPC is illegal and founded on no evidence whatsoever.

7. Learned counsel for parties, however, could not dispute that the question, whether during trial if Trial Court found any material, can summoned a person not named in charge sheet in exercise of power under Section 319 Cr.P.C., has been subject matter of consideration before a Constitution Bench in **Hardeep Singh Vs. State of Punjab and others 2014 (3) SCC 92**, in which Court examined following five questions:

"(i) What is the stage at which power under Section 319 Cr.P.C. can be exercised?

(ii) Whether the word "evidence" used in Section 319 (1) Cr.P.C. could only mean evidence tested by cross-

examination or the court can exercise the power under the said provision even on the basis of the statement made in the examination-in-chief of the witness concerned?

(iii) Whether the word "evidence" used in Section 319(1) Cr.P.C. has been used in a comprehensive sense and includes the evidence collected during investigation or the word "evidence" is limited to the evidence recorded during trial?

(iv) What is the nature of the satisfaction required to invoke the power under Section 319 Cr.P.C. to arraign an accused? Whether the power under Section 319(1) Cr.P.C. can be exercised only if the court is satisfied that the accused summoned will in all likelihood be convicted?

(v) Does the power under Section 319 Cr.P.C. extend to persons not named in the FIR or named in the FIR but not charged or who have been discharged?"

8. The aforesaid questions have been answered in para 117 of judgment as under:

"Question Nos. (i) and (iii)

A. In Dharam Pal and Ors. v. State of Haryana and Anr. 2004 (13) SCC 9, the Constitution Bench has already held that after committal, ***cognizance of an offence can be taken against a person not named as an accused but against whom materials are available from the papers filed by the police after completion of investigation.*** *Such cognizance can be taken under Section 193 Cr.P.C. and the Sessions Judge need not wait till 'evidence' under Section 319 Cr.P.C. becomes available for summoning an additional accused.*

Section 319 Cr.P.C., significantly, uses two expressions that have to be taken note of i.e. (1) Inquiry (2) Trial. As a trial commences after framing of charge, an inquiry can only be understood to be a pre-trial inquiry. Inquiries under Sections 200, 201, 202 Cr.P.C.; and under Section 398 Cr.P.C. are species of the inquiry contemplated by Section 319 Cr.P.C. ***Materials coming before the Court in course of such enquiries can be used for corroboration of the evidence recorded in the court after the trial commences, for the exercise of power under Section 319 Cr.P.C.****, and also to add an accused whose name has been shown in Column 2 of the charge-sheet.*

In view of the above position ***the word 'evidence' in Section 319 Cr.P.C. has to be broadly understood and not literally i.e. as evidence brought during a trial.***

Question No. (ii)

A. Considering the fact that under Section 319 Cr.P.C. a person against whom material is disclosed is only summoned to face the trial and in such an event under Section 319(4) Cr.P.C. the proceeding against such person is to commence from the stage of taking of cognizance, the ***Court need not wait for the evidence against the accused proposed to be summoned to be tested by cross-examination.***

Question No. (iv)

A. Though under Section 319(4)(b) Cr.P.C. the accused subsequently impleaded is to be treated as if he had been an accused when the Court initially took cognizance of the offence, the ***degree of satisfaction that will be required for summoning a person under Section 319 Cr.P.C. would be the same as for framing a charge. The difference in***

the degree of satisfaction for summoning the original accused and a subsequent accused is on account of the fact that the trial may have already commenced against the original accused and it is in the course of such trial that materials are disclosed against the newly summoned accused. *Fresh summoning of an accused will result in delay of the trial therefore the degree of satisfaction for summoning the accused (original and subsequent) has to be different.*

Question No. (v)

A. A person not named in the FIR or a person though named in the FIR but has not been charge-sheeted or a person who has been discharged can be summoned under Section 319 Cr.P.C. ***provided from the evidence it appears that such person can be tried along with the accused already facing trial.*** *However, insofar as an accused who has been discharged is concerned the requirement of Sections 300 and 398 Cr.P.C. has to be complied with before he can be summoned afresh."* (Emphasis added)

9. The aforesaid judgment in fact lays down very clearly that power under Section 319 Cr.P.C. can be exercised by Court against a person not named in First Information Report or no charge-sheet is filed by Police against him and the accused can be summoned only on the basis of examination-in-chief of witness and need not wait for cross-examination etc. With regard to degree of satisfaction of Court for summoning the accused under Section 319 Cr.P.C, Court has said that test are not only same as applicable for framing charge, but a little more in degree.

10. The above view was followed in **Brijendra Singh and others Vs. State of Rajasthan (2017) 7 SCC 706** holding:

" ... since it is a discretionary power given to the court Under Section 319 Code of Criminal Procedure and is also an extraordinary one, same has to be exercised sparingly and only in those cases where the circumstances of the case so warrant. The ***degree of satisfaction is more than the degree which is warranted at the time of framing of the charges against others in respect of whom charge-sheet was filed.*** *Only where strong and cogent evidence occurs against a person from the evidence led before the court that such power should be exercised. It is not to be exercised in a casual or a cavalier manner.* ***The prima facie opinion which is to be formed requires stronger evidence than mere probability of his complicity."*** (Emphasis added)

11. Recently in **Shiv Prakash Mishra Vs. State of Uttar Pradesh and others (2019) 7 SCC 806**, Court relying on the above authorities as also **Kailash Vs. State of Rajasthan and another (2008) 14 SCC 51** held as under:

"The ***standard of proof employed for summoning a person as an Accused person under Section 319 Code of Criminal Procedure is higher than the standard of proof employed for framing a charge against the Accused person.*** *The power Under Section 319 Code of Criminal Procedure should be exercised sparingly. As held in Kailash Vs. State of Rajasthan and another (2008) 14 SCC 51, "the power of summoning an additional Accused Under Section 319 Code of Criminal Procedure should be exercised sparingly. The key words in Section are "****it appears from the evidence"."any person"."has committed any offence". It is not, therefore, that merely because some witnesses have mentioned the name***

of such person *or that there is some material against that person, t****he discretion Under Section 319 Code of Criminal Procedure would be used by the court."*** (Emphasis added)

12. The exposition of law, discussed above, clearly shows that mere taking of name is not sufficient to exercise power under Section 319 Cr.P.C. but there must be something more i.e. evidence must be such wherefrom on judicious consideration, Court must be satisfied that such person can be tried alongwith accused already facing trial.

13. As I have already discussed, from the material available Trial Court has referred to reliable evidence, the fact that information was actually conveyed to the then Tehsildar Sadar Lakhimpur Khiri i.e. Sri D.N.Bajpai and evidence was sufficient to show that he did not exercise due care to reach hospital immediately and without wasting time that too in a serious matter where a married woman, sustained burn injuries, was admitted in hospital and considering her condition, doctor had already sent memo for recording her statement by Magistrate. Thus, it cannot be said that Trial Court, in the case in hand, has exercised jurisdiction casually or in a cavalier manner and there is no appropriate and reasonable evidence to summon applicant.

14. In view thereof, objection in challenge to summoning order, raised by learned Senior Counsel that there is no evidence whatsoever, has no force and rejected.

15. There is another aspect of the matter. Applicant's name is Rajendra Nath Bajpai, but, I find from record that it is D.N.Bajpai who was the then Tehsildar, Sadar and has been summoned by means of impugned order dated 03.9.2004 passed by Additional Sessions Judge/Fast Track Court-2, Lakhimpur Khiri. Certified copy of impugned order also mention the name of the then Tehsildar Sadar Lakhimpur Khiri as 'D.N.Bajpai'. I do not find any order of summoning passed on 03.9.2004 to Rajendra Nath Bajpai, who has filed this application. Therefore, this application, at the instance of Rajendra Nath Bajpai, in my view, even otherwise, is not sustainable.

16. Application is accordingly rejected.

(2020)02ILR A1156

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 03.12.2019

BEFORE
THE HON'BLE RAMESH SINHA, J.

Application U/S 482 Cr.P.C. No. 44382 of 2019

Shikher Bhandari ...Applicant
Versus
State of U.P. & Ors. ...Opposite Parties

Counsel for the Applicant:
Sri Arvind Srivastava

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

A. Criminal Law - Code of Criminal Procedure, 1973- Section 482 - Prayer for quashing F.I.R- Maintainability - Issue regarding the maintainability of quashing of FIR in exercise of powers under Section 482 Cr.P.C. by this Court was referred and decided by a Full Bench of this Court in the case of Ram Lal Yadav Vs. State of U.P. wherein it has been categorically held that unless there is a matter pending before the subordinate court, no

application under Section 482 Cr.P.C. can be entertained by the High Court. An application under Section 482 Cr.P.C. in the High Court for quashing of the first information report of the investigation is not maintainable in the High Court unless the charge-sheet has been filed and the Court had issued process on the basis of the charge-sheet.

The inherent power of the High Court, u/s 482 Cr.Pc, can be exercised only when the case is pending in some court and not before that and an application u/s 482 Cr.Pc will not be maintainable at that stage. Against an F.I.R or during the pendency of investigation only the Writ jurisdiction of the High Court under Article 226 of the Constitution of India can be invoked and that too only under exceptional circumstances.

Practice and Procedure- Binding Precedent- When certain question is neither raised nor argued that discussion by the Court even after pondering over the issue in depth would not be a binding precedent.The Apex Court did not categorically say anywhere that both the options were open in both types of cases, i.e., where investigation is pending and where the proceedings are pending in Criminal Courts.

Passing observations of the Supreme Court on a question neither in issue and nor decided would not become a binding precedent and would be Obiter Dicta.

Criminal application rejected.

Case Law discussed-

1. Asian Resurfacing of Road Agency Pvt. Ltd. & anr. Vs. C.B.I, (2018) 16 SCC 299

2. Ajay Mitra Vs. St. of M.P. & ors., (2003) 3 SCC 11

3. St. of Telangana Vs. Habi Abdullah Jeelani & ors., (2017) 2 SCC 779

4. Vaijnath Kondiba Khandke Vs. St. of Maha. & anr., AIR (2018) SC 2659

5. Naman Singh @ Naman Pratap Singh & anr Vs. St. of U.P. & ors., (2019) 2 SCC 344

6. Ram Lal Yadav Vs. St. of U.P., (1989) Cr.L.J 1013 (Alld. FB) (Relied)

7. Janta Dal Vs. H.S. Chauhan (1992) 4 SCC 305 (Relied)

8. Emperor Vs. Khwaza Nazir Ahmad, AIR, (1945) PC 18 (Relied)

9. S. N. Sharma Vs. Vipin Kumar Tiwari, (1970) 1 SCC 5653 (Relied)

10. St. of Haryana Vs. C. S. Bhajanlal, (1992) Suppl (1) SCC 335

11. A. S. Bindra Vs. Sen. Super. of Police, Dehradun & ors., (1998) Cr.L.J 3845 (Relied)

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

1. Heard Sri Arvind Srivastava, learned counsel for the applicant and Sri Irshad Hussain, learned AGA for the State and perused the record.

2. This application under Section 482 Cr.P.C. has been filed for quashing the impugned FIR dated 04.09.2019 registered as Case Crime No.0309 of 2019, under Sections 468, 471, 406, 506, 467, 420, 419 I.P.C., Police Station Kotwali, District Azamgarh.

3. Learned AGA raised preliminary objection regarding the maintainability of the prayer made in the present 482 Cr.P.C. Application by the applicant and has stated that as the applicant has prayed for quashing of the FIR in the present 482 Cr.P.C. Application, the same is not maintainable as the petitioner has a remedy of filing a writ petition under Article 226 of the Constitution of India for the aforesaid prayer.

4. Learned counsel for the applicant in reply to the preliminary objection raised by the learned AGA has submitted that through out the country a petition challenging a first information report and

the proceedings initiated by it is maintainable and can be entertained by this Court in 482 Cr.P.C. Application. He submitted that the scope of Section 482 Cr.P.C. is not confined to any proceedings of the Court only but it is also to secure the ends of justice and to protect the gross abuse of process of law. The power of High Court to exercise its jurisdiction is not limited to any provision of alternative forum and in this regard he has placed reliance of the Judgment of the Apex Court in the case of **Asian Resurfacing of Road Agency Private Ltd. and another Vs. Central Bureau of Investigation, 2018 (16) SCC 299** at page 332, the Apex Court observed in paras 52 and 54 which are as under:

"52. The question as to whether the inherent power of a High Court would be available to stay a trial under the Act necessarily leads us to an inquiry as to whether such inherent power sounds in constitutional, as opposed to statutory law. First and foremost, it must be appreciated that the High Courts are established by the Constitution and are courts of record which will have all powers of such courts, including the power to punish contempt of themselves (See Article 215). The High Court, being a superior court of record, is entitled to consider questions regarding its own jurisdiction when raised before it. In an instructive passage by a Constitution Bench of this Court in In re Special Reference 1 of 1964, (1965) 1 SCR 413 at 499, Gajendragadkar, C.J. held:

"Besides, in the case of a superior Court of Record, it is for the court to consider whether any matter falls within its jurisdiction or not. Unlike a Court of limited jurisdiction, the superior Court is entitled to determine for itself questions about its own jurisdiction. "Prima facie", says Halsbury, "no matter is deemed to be beyond the jurisdiction of a superior court unless it is expressly shown to be so, while nothing is within the jurisdiction of an inferior court unless it is expressly shown on the face of the proceedings that the particular matter is within the cognizance of the particular court" [Halsbury's Law of England, Vol. 9, p. 349].

54. It is thus clear that the inherent power of a Court set up by the Constitution is a power that inheres in such Court because it is a superior court of record, and not because it is conferred by the Code of Criminal Procedure. This is a power vested by the Constitution itself, inter alia, under Article 215 as aforestated. Also, as such High Courts have the power, nay, the duty to protect the fundamental rights of citizens under Article 226 of the Constitution, the inherent power to do justice in cases involving the liberty of the citizen would also sound in Article 21 of the Constitution. This being the constitutional position, it is clear that Section 19(3)(c) cannot be read as a ban on the maintainability of a petition filed before the High Court under Section 482 of the Code of Criminal Procedure, the non-obstante clause in Section 19(3) applying only to the Code of Criminal Procedure. The judgment of this Court in Satya Narayan Sharma v. State of Rajasthan, (2001) 8 SCC 607 at paragraphs 14 and 15 does not, therefore, lay down the correct position in law. Equally, in paragraph 17 of the said judgment, despite the clarification that proceedings can be "adapted" in appropriate cases, the Court went on to hold that there is a blanket ban of stay of trials and that, therefore, Section 482, even as adapted, cannot be used for the aforesaid purpose. This again is contrary to the position in law as laid down

hereinabove. This case, therefore, stands overruled. "

5. He further relied upon another case of the Apex Court wherein the Apex Court entertained a petition challenging a first information report under Section 482 Cr.P.C. and has drawn attention in the case of **Ajay Mitra Vs. State of M.P. and others, (2003) 3 SCC 11**. He also has relied upon a judgment of the Apex Court reported in the case of **State of Telangana Vs. Habi Abdullah Jeelani and others, (2017) 2 SCC 779** wherein the Apex Court has observed in paras 11 and 13, which are as under:-

"11. Once an FIR is registered, the accused persons can always approach the High Court under Section 482 CrPC or under Article 226 of the Constitution for quashing of the FIR. In Bhajan Lal (supra) the two-Judge Bench after referring to Hazari Lal Gupta v. Rameshwar Prasad[7], Jehan Singh v. Delhi Administration[8], Amar Nath v. State of Haryana[9], Kurukshetra University v. State of Haryana[10], State of Bihar v. J.A.C. Saldanha[11], State of West Bengal v. Swapan Kumar Guha[12], Smt. Nagawwa v. Veeranna Shivalingappa Konjalgi[13], Madhavrao Jiwajirao Scindia v. Sambhajirao Chandrojirao Angre[14], State of Bihar v. Murad Ali Khan[15] and some other authorities that had dealt with the contours of exercise of inherent powers of the High Court, thought it appropriate to mention certain category of cases by way of illustration wherein the extraordinary power under Article 226 of the Constitution or inherent power under Section 482 CrPC could be exercised either to prevent abuse of the process of any court or otherwise to secure the ends of justice. The Court also observed that it may not be possible to lay down any precise, clearly defined and sufficiently channelized and inflexible guidelines or rigid formulae and to give an exhaustive list of myriad cases wherein such power should be exercised.

13. There can be no dispute over the proposition that inherent power in a matter of quashment of FIR has to be exercised sparingly and with caution and when and only when such exercise is justified by the test specifically laid down in the provision itself. There is no denial of the fact that the power under Section 482 CrPC is very wide but it needs no special emphasis to state that conferment of wide power requires the court to be more cautious. It casts an onerous and more diligent duty on the Court."

6. He next has placed reliance of judgment of the Apex Court in the case of **Vaijnath Kondiba Khandke Vs. State of Maharashtra and another, AIR 2018 Supreme Court page 2659** wherein it has been held in para 4, which is as under:

"4. That the appellant as well as said Vidya Ghorpade filed Criminal Application Nos.4724 of 2017 and 5174 of 2017 respectively under Section 482 of Cr.P.C. seeking quashing of the aforesaid FIR. It was submitted that the allegations in the FIR were absurd and inherently improbable and did not make out any case against the applicants. Around this time, the applications preferred by the applicants for anticipatory bail were accepted with certain conditions.

The applications preferred under Section 482 Cr.P.C. were thereafter taken up for hearing. The High Court accepted the plea made by Vidya Ghorpade and quashed the proceedings against her. However, Criminal Application No.4724

of 2017 preferred by the appellant was dismissed by the High Court vide its judgment and order dated 23.01.2018 which is presently under appeal. It was observed: "The facts herein indicate that, there was no direct abetment and the applicants cannot have any intention that the deceased should commit suicide. Even when the accused persons have no such intention, if they create situation causing tremendous mental tension so as to drive the person to commit suicide, they can be said to be instigating the accused to commit suicide.…."

7. He also cited and relied upon the judgment of the Apex Court in the case of **Naman Singh alias Naman Pratap Singh and another Vs. State of U.P. and others, (2019) 2 SCC 344**, wherein the Apex Court has observed in para 9, which is as under:-

"9. In view of the scheme of the Code as discussed, we have purposely refrained from going into the merits of the case so as not to prejudice either parties and also keeping in mind the nature of the jurisdiction under Section 482 of the Code. Any application by respondent no.4 hitherto under the Code will therefore have to be considered by the appropriate authority or forum in accordance with law. For the reasons discussed, the impugned order is held to be unsustainable and is set aside. The First Information Report therefore also stands quashed for the reasons discussed, but with liberty as aforesaid."

8. Heard learned counsel for the petitioner and examined the rival submissions on the aforesaid issue and further perused the record.

9. The aforesaid issue regarding the maintainability of a quashing of FIR in exercise of powers under Section 482 Cr.P.C. by this Court was referred and decided by a Full Bench of this Court in the case of **Ram Lal Yadav Vs. State of U.P., reported in 1989 Criminal Law Journal page 1013** wherein it has been categorically held that unless there is a matter pending before the subordinate court, no application under Section 482 Cr.P.C. can be entertained by the High Court. In other words it means that till the stage of investigation of a criminal case, and thereafter till the filing of the charge-sheet and taking cognizance offence by the Court, no application can be made in the High Court for quashing of the first information report or investigation under Section 482 Cr.P.C., however, in very exceptional cases the writ jurisdiction of the High Court under Article 226 of the Constitution of India can be invoked either for quashing of the first information report or for staying the investigation. The Full Bench while considering the aforesaid point has further referred to the cases of the Apex Court which have been delivered after the judgment of the Full Bench in Ram Lal Yadav case (1989) Criminal Law Journal 1013 (supra) none of the Supreme Court Cases considered the question whether jurisdiction of the High Court could be invoked under Section 482 Cr.P.C. while a criminal case was still being investigated. Similarly, the case laws which have been cited by learned counsel for the petitioner referred above also not deciding this point in any of the judgments and any observation that either in its jurisdiction under Article 226 of the Constitution of India or under Section 482 Cr.P.C. in a suitable case the High Court could grant relief for just an observation of the Supreme Court to indicate that the High Court could exercise its inherent power under Section 482 Cr.P.C. or extra jurisdiction under Article 226 of the Constitution of India to interfere in a suitable matter pending

investigation. This observation only meant that the power under Section 482 Cr.P.C. could be exercised in some proceedings arising out of a complaint etc. when the matter is pending in some Court and the jurisdiction under Article 226 of the Constitution of India could be exercised when the matter had till then not reached the Court but was still under investigation by a Police Officer. The judgment and observations of the Supreme Court are not at all contrary to the judgment of the Full Bench in the case of **Ram Lal Yadav** (supra) and it cannot be said that the said observation of the Supreme Court permit any High Court to exercise its power under Section 482 Cr.P.C. when the matter still investigation. The Supreme Court as a matter of fact has quoted Ram Lal Yadav's judgment of the Full Bench of the Allahabad High Court in the case of **Janta Dal Vs. H.S. Chauhan (1992) 4 SCC 305**. This paragraph in the aforesaid case has been quoted only to indicate that the similar view which the Supreme Court was taking had already been taken by the High Court in the said Full Court. As such the case of Ram Lal Yadav's case (supra) has been given a seal of approval by the aforesaid judgment of the Supreme Court.

10. Thus, the conclusion is inevitable that an application under Section 482 Cr.P.C. in the High Court for quashing of the first information report of the investigation is not maintainable in the High Court unless the charge-sheet has been filed and the Court had issued process on the basis of the charge-sheet. Up to that stage only in a suitable case a petition under Article 226 of the Constitution of India alone can be filed in the High Court.

11. A similar view has been taken in a privy counsels' decision in **Emperor Vs. Khwaza Nazir Ahmad, AIR, 1945 PC 18** in the said decision the Privy Council has held that the police has a statutory right under Sections 154 and 156 Cr.P.C. to investigate the offense, that the High Court cannot interfere in exercise of inherent power under Section 561-A (now Section 482 Cr.P.C.) and that interference can be made only when the charges preferred before the Court and not before. It was observed that there is statutory right on the part of the police to investigate the circumstances of alleged cognizable crime without requiring any authority from the judicial authorities and it would be an unfortunate result if it should be held possible to interfere with those statutory rights by an exercise of the inherent jurisdiction of the Court under Section 561-A old Cr.P.C. (now Section 482 Cr.P.C.).

12. The decision of the Privy Council in **Emperor Vs. Khwaza Nazir Ahmad** (supra) was followed by the Apex Court in the case of **S. N. Sharma Vs. Vipin Kumar Tiwari, (1970) 1 SCC 5653** wherein it was held that though the Court of Criminal Procedure gives to the police unfettered power to investigate all cases where the suspect that the cognizable offense has been committed, in appropriate cases and aggrieved person can always seek a remedy by invoking the power of the High Court under Article 226 of the Constitution of India under which if the High Court could be convinced that the power of investigation has been exercised by the Police Officer, mala fide, the High Court can always issue a writ of mandamus restraining the police officer from misusing his legal powers. In the case of **State of Haryana Vs. C. S. Bhajanlal, 1992 Suppl (1) SCC 335** in this case the High Court of Punjab and Haryana had quashed the entire criminal proceedings inclusive of registration of the FIR on the basis of the complaint preferred

by Mr. Dharampal making certain allegations against Chaudhary Bhajanlal. The matter which were issued in Full Bench case of **Ram Lal Yadav** (supra) was not an issue before the Apex Court in **Chaudhary Bhajanlal's** case (supra) which was said in para 84 of the judgment at page 625:

"84. The nagging question that comes up for examination more often than not is under what circumstances and in what categories of cases, a criminal proceeding can be quashed either in exercise of the extraordinary powers of the High Court under Article 226 of the Constitution of India or in the exercise of inherent powers of the High Court under section 482 of the Code.…."

13. In other words, when certain question is neither raised nor argued that discussion by the Court even after pondering over the issue in depth would not be a binding precedent. The observations of the Apex Court in the case of **State of Haryana Vs. Chaudhary Bhajanlal** (supra) have been misinterpreted. Thus, also the case laws of the Apex Court relied upon by the learned counsel for the applicant cannot be of any help to the applicant as the Apex Court did not categorically say anywhere that both the options were open in both types of cases, i.e., where investigation is pending and where the proceedings are pending in Criminal Courts.

14. Thus, the submission advanced by learned counsel for the applicant regarding the preliminary objection raised by learned AGA regarding the maintainability of the present 482 Cr.P.C. Application for quashing of the FIR is not at all acceptable in view of the judgment of the Full Bench decision of this Court in the case of **Ram Lal Yadav** (supra) which has been followed by a Division Bench in the case of **A. S. Bindra Vs. Senior Superintendent of Police, Dehradun and others**, reported in 1998 Criminal Law Journal 3845 in which again an identical issue was raised and decided by following the judgment in the case of **Ram Lal Yadav's** case (supra).

15. Thus, the present 482 Cr.P.C. Application is not maintainable, accordingly, the same is **dismissed** at this ground alone.

(2020)02ILR A1162

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 20.01.2020

BEFORE

THE HON'BLE SURYA PRAKASH KESARWANI, J.

Writ-A No. 218 of 2020

C/M, Samaj Kalyan Parishad,Ghaziabad & Anr. ...Petitioners
Versus
The State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Sunil Kumar Gupta

Counsel for the Respondents:
C.S.C.

A. Appointment - U.P. Education Service Selection Commission Act, 2019 - provides for establishment of an Education Service Selection Commission in the State for selection of the teachers and non teaching employees - steps are being taken by the State government for enforcement the Act, 2019 and UP recognized Basic Schools (Junior High

Schools) (Recruitment and Conditions of Service of Teachers) (7th Amendment) Rules, 2019 which prescribes selection of teaching and non- teaching staffs

B. Institution - Section 2(f) - U.P. Education Service Selection Commission Act, 2019 - includes a school of Uttar Pradesh Basic Education Board, aided Junior High School and also include an aided attached Primary School, recognized by the Board established under the Uttar Pradesh Basic Education Act, 1972

Writ Petition Disposed of.

(Delivered by Hon'ble Surya Prakash Kesarwani, J.)

1. Heard learned counsel for the petitioner and the learned standing counsel for the respondents.

2. This writ petition has been filed praying for the following relief:-

"Issue a writ order or direction in nature of certiorari quashing the impugned order dated 16-8-2019 as well as 31-10-2019 passed by respondents ***(Annexure no. 6 and 8 to this writ petition)*** *issued by the respondents;*

issue a writ or direction in nature of Mandamus commanding/directing the respondents to permit the petitioners to fill up the vacancy of 05 Assistant teachers in Primary label to the petitioners institution forthwith under the command of this Hon'ble Court.

Issue a writ order of direction in nature of Mandamus commanding/directing the respondents to approve the duly selected Assistant Teachers after being giving permission for appointment and Accord admissible payment of salary to the selected and appointed Assistant Teachers in the petitioners institute in accordance with law."

3. Learned counsel for the petitioner submits that the impugned orders dated 16.08.2019 and 31.10.2019 are not applicable to the petitioner inasmuch as the applicant is claiming appointment in Primary Section of the Institution.

4. Learned standing counsel supports the impugned order.

5. I have carefully considered the submissions of learned counsels for the parties.

6. In paragraphs 3 and 4 of the writ petition the petitioner has stated that it is a Junior High School recognised by the U.P. Basic Education Board. By the impugned order dated 16.08.2019, passed by the District Basic Education, Ghaziabad, it was merely informed to the petitioner that a new arrangement regarding selection of Assistant Teacher in Basic Schools is being made and, therefore, it is not possible to grant the permission for appointment on the vacant posts. By the impugned order dated 31.10.2019. The State Government intimated the Director of Education (Basic), Uttar Pradesh, Lucknow, that some amendment for fixing standard of recruitment of Assistant Teachers and employees is under consideration and, therefore, the process of recruitment may not be started. Both these orders have now become irrelevant inasmuch as the **State legislature has legislated the Uttar Pradesh Education Service Selection Commission Act, 2019 (U.P. Act No.22 of 2019)** which has been notified and published in the Gazette on

27.12.2019. **The aforesaid U.P. Act No.22 of 2019 provides for establishment of an Education Service Selection Commission in the State for selection of the teachers and non teaching employees (i)** of non Government aided colleges affiliated and associated by an University governed by the Uttar Pradesh State University Act, 1973, **(ii)** non Government aided intermediate colleges, higher secondary schools, high schools and attached primary schools, basic and junior high schools recognised by the Uttar Pradesh Board of Secondary Education, Prayagraj, and established under the Intermediate Education Act, 1921, and the Uttar Pradesh Basic Education Board established under the Uttar Pradesh Basic Education Act, 1972, respectively. Since the aforesaid Act 2019 has been enacted, therefore, the challenge to the impugned orders by the petitioner is wholly misconceived.

7. **The Uttar Pradesh Recognised Basic Schools (Junior High Schools) (Recruitment and Conditions of Service of Teachers), Rules 1978 has also been exhaustively amended by the Uttar Pradesh recognished Basic Schools (Junior High Schools) (Recruitment and Conditions of Service of Teachers) (7th Amendment) Rules 2019.**

8. In view of the aforesaid amendment made in the Rules, 1978, the ***State Government has also nominated "Pariksha Niyamak Pradhikari, Uttar Pradesh, Prayagraj"*** for conducting examination for selection and accordingly the prohibition on appointment of Assistant Teachers in non government aided Junior High Schools have been cancelled. These facts are evident from letter no. 1755/अडसठ–3–2019, dated 01.01.2020, issued by State Government to the Director of Education (Basic) Uttar Pradesh, Lucknow, and the Secretary Examination Regulatory Authority, Uttar Pradesh, Prayagraj. A copy of this letter has been produced before me by Sri R.P. Dubey, learned Additional Chief Standing Counsel.

9. **It is stated by the learned Additional Chief Standing Counsel that all necessary steps are being taken by the State Government for starting selection of Assistant Teachers and employees as per provisions of the Act, 2019 and amended Rules, 1978 and the enforcement of the Act 2019 shall be notified very shortly.**

10. I have perused the provisions of Section 13 of the Act, 2019 which provides that every appointment of teaching and non teaching employee in an institution **shall be made by the appointing authority only on the recommendation of the Commission and any appointment, excluding the cases of dying-in-harness, made in contravention of the provisions of the Act shall be void.** The appointment under dying-in-harness shall be done as prescribed.

11. **The word *"institution"* has been defined in Section 2(f) of the Act, 2019** which includes a school of Uttar Pradesh Basic Education Board, aided Junior High School and also includes an aided attached Primary School, recognised by the Board established under the Uttar Pradesh Basic Education Act, 1972. Section 2(f) is reproduced below:-

(f) "institution" means any of the following, institutions other than an institution established and administered by a minority referred to in clause (1) of Article 30 of the Constitution:-

(1) an affiliated or associated non-government aided college to which the privilege of affiliation has been granted by a University established under the Uttar Pradesh State Universities Act, 1973;

(2) a non-government aided intermediate College or a Higher Secondary School or a High School and an attached primary school recognized by the Board established under the Intermediate Education Act, 1921;

(3) a school of the Uttar Pradesh Basic Education Board or an aided junior high school and includes an aided attached primary school recognized by the Board established under the Uttar Pradesh Basic Education Act, 1972.

12. In view of the facts and circumstances and the legislative amendments and enactment of the Act 2019, **no direction can be issued to the respondents to permit the petitioner to fill up vacancy of five Assistant Teachers in the institution in question and to approve the appointment of such Assistant Teachers as may be selected by the petitioner.**

13. **However, looking into the necessity of selection and appointment of teaching and non teaching employees in non Government aided institutions under the provisions of the Act, 2019 and the relevant Rules, it appears necessary that the State Government should expeditiously take steps for enforcement of the Act, 2019 to make functional the Commission for selection and recommendation for appointment of teaching and non teaching Employees. This Court hopes and trusts that the State Government shall complete the entire exercise and issue necessary notification for enforcement of the Act, 2019 very expeditiously preferably within 15 days, if not issued so far, and shall also make efforts for appointments as expeditiously as possible so that institutions in need may get teaching and non teaching staff.**

14. With the aforesaid observations, the writ petition is **disposed of**.

15. A copy of this order shall be given to the learned Chief Standing Counsel free of cost, for communication to the State Government for necessary compliance.

(2020)02ILR A1165

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 20.01.2020

BEFORE

THE HON'BLE SARAL SRIVASTAVA, J.

WRIT-A No. 468 of 2020

Tilak Singh & Ors. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Ashok Khare, Sri Siddharth Khare, Sri Rohit Upadhyay, Sri Shantanu Khare

Counsel for the Respondents:
C.S.C., Sri Gagan Mehta

A. Education - U.P. State Universities Act,1973: Section 67; First Statute of the Agra University: Statute 13.03 – The Court refused to interfere with the public notices calling upon the petitioners to submit information as required in the questionnaire, giving effect to the exercise undertaken by the University to

verify the marks sheet in order to find out the fake and tampered marks sheet.

B. Writ petition challenging a show cause notice is not maintainable, as at that stage the writ petition is premature. The Apex Court has deprecated the High Court for stalling enquiries as proposed and retarding investigative process to find actual facts with participation and in presence of parties. (Paras 15 to 18, 35)

C. No jurisdictional issue implying that the notice is *per se* illegal is involved. (Para 29)

University has the jurisdiction to issue the impugned notices - The University had full knowledge about the fact that a large-scale fraud has been committed in issuing fake and tampered marks sheet of B.Ed. Examination- 2005. The verification exercise should have been undertaken by the University voluntarily instead of waiting for any direction from the Court or authority. It would be incorrect to say that the exercise has been undertaken on the dictate of the State Government. (Para 24, 25)

Report of SIT is not being treated as a conclusive piece of evidence to hold degrees/marks sheets to be fake or tampered for the reason that the same have not yet been cancelled by the respondents. It only forms the basis of issuance of notices asking the candidates to furnish information, on which the genuineness of their degrees/marks sheets would be determined. (Para 26)

C. The Court is vested with the power u/s 67 to cancel the degree/marks sheet in cases where the University finds that the same has been tampered. The Court is not empowered to carry out any verification exercise. In the present case, only the Executive Council has such power. (Para 30, 31)

Writ petition dismissed. (E-4)

Precedent followed:

1. Shri Puran Prasad Gupta Memorial Degree College Vs. State of U.P. and others, Writ Petition No. 399 (MB) of 2007 (Para 11(iii), 28)

2. Special Director and another Vs. Mohd. Gulam Ghouse and another, AIR 2004 SC 1467 (Para 15, 35)

3. Union of India Vs. Kunisetty Satyanarayana, 2006 (12) SCC 28 (Para 16)

4. Secretary Ministry of Defence and Others Vs. Prabhash Chandra Mishra, AIR 2012 SC 2250 (Para 17)

5. Commissioner of Central Excise, Haldia Vs. Krishna Wax (P) Ltd., 2019 (368) ELT 769 (SC) (Para 18)

Precedent distinguished:

1. M.C. Mehta (Taj Corridor Scam) Vs. Union of India and others, 2007 (1) SCC 10 (Para 11(i))

2. Major Basil John Vs. State of Kerala and others, Crl. M.C. No. 1877 of 2015 decided on 22.06.2017 (Para 11(i))

Present petition challenges the decision dated 06.12.2019, taken by Executive Council, Dr. Bhim Rao Ambedkar University, Agra, notice dated 28.12.2019, issued by Dr. Bhim Rao Ambedkar University, Agra on website and notice dated 29.12.2019, published in the newspapers.

(Delivered by Hon'ble Saral Srivastava, J.)

1. Heard Sri Ashok Khare, learned Senior Counsel assisted by Sri Siddharth Khare, counsel for the petitioners, Sri Gagan Mehta, learned counsel for respondent nos.3 & 4 and learned Standing Counsel for respondent nos.1, 2 & 5.

2. The petitioners who are 496 in numbers have preferred the present

petition challenging the decision taken by the Executive Council, Dr. Bhim Rao Ambedkar University, Agra in its meeting held on 06.12.2019, notice dated 28.12.2019 issued by the respondent- Dr. Bhim Rao Ambedkar University, Agra (hereinafter referred as 'University') on its official website and notice published in the newspapers dated 29.12.2019.

3. All the petitioners claim that they had taken admission in Bachelor of Education Course (hereinafter referred to as 'B.Ed.') in the University or its affiliated colleges for the academic session 2004-05. After successfully completing the course, each of the petitioners was issued marks sheet showing them as passed in the B.Ed. course. They were also issued degree. On the basis of marks sheet & degree in B.Ed. , petitioners obtained appointment as Assistant Teachers in Junior High School/Senior Basic Schools run by Board of Basic Education in different districts of the State.

4. It transpires from the record that one Sunil Kumar has preferred a Writ Petition No.2906 of 2013 (Sunil Kumar Vs. Dr. Bhim Rao Ambedkar University and Others) praying for a direction to the University to correct marks sheet. In the said writ petition, this Court passed an order on 23.01.2014 directing the State Government to constitute Special Investigation Team as the Court found that fake mark-sheets were issued to the students with the connivance of the employees of the University and colleges affiliated to it.

5. Pursuant to the order passed by this Court in the aforesaid writ petition, a special investigation team (hereinafter referred to as 'SIT') was constituted to conduct an investigation as regards the malpractices committed in issuing the mark sheet to students who are alleged to have passed B.Ed. course in the session 2004-05 from the Universities and Colleges affiliated to the University. The said writ petition was later on converted into public interest litigation by orders of this Court dated 09.09.2015.

6. Upon investigation, the SIT team submitted report in August, 2017 which states that 3517 fake mark sheets and 1053 tampered mark sheets were distributed and these mark sheets have been adjusted in the tabulation chart. The SIT categorized the candidates in two list. One list of those candidates whose mark sheets are fake and the second list of those candidates whose marks sheet have been tampered. The Deputy Inspector General of Police, SIT by letter dated 11.07.2019 forwarded the aforesaid two list alongwith photo copy of tabulation chart to the University. He further requested the University by the said letter to verify the list of candidates from its record, and after identifying the candidates possessing fake and tampered degrees, it should proceed to cancel all such degrees as per procedure provided in the U.P. State Universities Act,1973 (hereinafter referred as 'Act, 1973'). The aforesaid letter was followed by the letter of Additional Chief Secretary dated 25.11.2019 addressed to the Vice Chancellor of the University making similar request to him.

7. Thereafter, the Executive Council of the University held an emergent meeting on 06.12.2019 and after considering the letter of the State Government dated 25.11.2019 took a decision to verify the list of fake/tampered candidates received from the Special

Investigation Team and to invite objection against the same. The relevant extract of decision of the Executive Council is extracted hereinbelow:-

"उक्त परीक्षा समिति दिनांक 06.08.2016 के निर्णय की संपुष्टि कार्य परिषद बैठक 28.08.2017 में हो चुकी है।

निर्णयः अपर मुख्य सचिव, राजस्व एवं बेसिक शिक्षा उ0 प्र0 शासन के पत्र संख्या–583/ ALUBRLS dw /19 दिनांक 25.11.2019 को परिषद के समक्ष पढकर सुनाया गया।

कार्य परिषद द्वारा सम्यक एवं गहन विचार किया गया। परिषद के माननीय सदस्यगण ने जानना चाहा कि एस0आई0टी0जांच में कौन कौन सी श्रेणी बनाकर कार्यवाही किय` जाने की अपेक्षा की गयी। कुलसचिव द्वारा अवगत कराया गया कि एस0आई0टी0 जांच रिपोर्ट म` थंम एवं ज्ंउचमतमक की दो सूची बनायी गयी। माननीय सदस्य डा0 सुकेश यादव जी ने जानना चाहा कि आवंटित सीटों के सापेक्ष अधिक संख्या अर्थात 100 सीटोक पर जो 135 प्रवेश/परीक्षा करायी गयी है उस सम्बन्ध मे ं एस0आई0टी0 की जांच आख्या बतायी जाय `। कुल सचिव ने मा0 सदस्य को अवगत कराया कि जांच तत्कालीन अधिकारी श्री पुतान सिंह एवं वर्तमान म ` ए0एस0पी0 एस0आई0टी0 श्रीमती अमृता मिश्रा द्वारा बताया गया कि एस0आई0टी0 ने विश्वविद्यालय द्वारा 85 सीटें एवं महाविद्यालय द्वारा 50 सीटों को जोडते हुय ` कुल 135 समस्त छात्र/छात्राओ ं के अंकतालिका, उपाधि सम्बन्धी चार्ट की जांच की गयी है। इस प्रकार प्रबन्धकीय कोटे मे ं प्रवेशित छात्रों को सम्मिलित किया गया। कुलसचिव द्वारा परिषद को बताया गया कि अग्रिम कार्यवाही एस0आई0टी0 मुख्यालय लखनऊ स ` जानकारी एवं मूल अभिल`ख लेकर की जाय`गी। चर्चा के दौरान मा0 सदस्य प्रो0 संजय चौधरी द्वारा धारा–49 (ए) एवं 67 से तथा सम्बन्धित परिनियम की जानकारी चाही गयी। कुलसचिव ने परिषद को सम्बन्धित प्रावधानों से अवगत कराया गया किः–

परिनियम-13-03 "Before taking any action under Section 67 for the withdrawal of any degree, diploma or certificate conferred or granted by the University, the person concerned shall be given and opportunity to explain the charge against him. The charge framed against shall be communicated by the Registrar by registered post and the person concerned shall be required to submit his explanation within a period of not less than fifteen days of the receipt of the charges".

के अन्तर्गत डिग्री, डिप्लोमा वापिस लेने के पहले रजिस्टर्ड डाक द्वारा 15 दिन सूचना के साथ सम्बन्धित से स्पष्टीकरण मागा जायेगा। सभी सम्बन्धित छात्र/छात्राओं के पता .....तो विश्वविद्यालय और नव एस0आई0टी0 के पास उपलब्ध है इस समस्या के समाधान हेतु सदस्यगणों ने सुझाव दिया कि एस0आई0टी0 से प्राप्त डाटा को विश्वविद्यालय की बेबसाइड पर अपलोड कराया जाये। परिषद ने यह भी निर्णय लिया कि एस0आई0टी0 से सम्बन्धित सूचना पी0डी0एफ0 प्रारूप में प्राप्त की जाये। जिससे अग्रिम कार्यवाही सुचारू रूप से संचालित हो सके। इसके लिये एस0आई0टी0 से अविलम्ब अनुरोध किया जाये । तदोपरान्त दैनिक समाचार पत्रों मे इस आशय का समाचार भी प्रकाशित कराया जाये। इस प्रस्ताव पर सदस्यगणों ने थंम एवं ज्ंउचमतमक की सूची को सार्वजनिक किये जाने पर सहमति प्रदान की। इस प्रकार सम्बन्धित व्यक्ति से प्राप्त स्पष्टीकरण के आधार पर नियमानुसार विधिक कार्यवाही की जाये तथा समय≤ पर परीक्षा समिति विश्वविद्यालय सभा तथा कार्य– परिषद को अवगत कराये जाने का निर्णय लिया गया। कृत कार्यवाही से सम्बन्धित विभाग एवं माननीय उच्च न्यायालय को आवश्यक रूप से सूचित किया जाये।

ब– कार्यपरिषद द्वारा विश्वविद्यालय अनुदान आयोग, विश्वविद्यालय और महाविद्यालयों में शिक्षकों और अन्य शैक्षिक कर्मचारियों की नियुक्ति हेतु न्यूनतम अर्हता तथा उच्चतर शिक्षा मे मानको के रख रखाव हेतु अन्य उपाय सम्बन्धी विनियम 2018 के सम्बन्ध मे उत्तर प्रदेश शासन उच्च शिक्षा अनुभाग–1 के पत्र संख्या–890/सत्तर–1–2019–16 (114) /2010 दिनांक 16 अगस्त–2019 को कार्यपरिषद के अनुमोदन की प्रत्याशा में कुलपति आदेश दिनांक 21.11.2019 के अन्तर्गत डा0 भीम राव अम्बेडकर विश्वविद्यालय, आगरा की परिनियमावली की धारा– 21.14 पर प्रख्यापित किये जाने से अवगत कराना।

निर्णय कार्य परिषद उक्त मद से अवगत हुई। परिषद ने कुलपति कृत कार्यवाही को अनुमोदन प्रदान किया।"

8. Pursuant to the decision of the Executive Council, the University proceeded to publish the notice in newspaper whereby all the candidates, who had passed the B.Ed. examination during the academic session 2004-05, have been intimated that three list namely list of fake candidates, list of tampered candidates and list of candidates appearing in the examination on the basis of roll number allotted to more than one candidate has been published on the official website of the University requiring such individual candidate to submit reply online as also offline by registered or speed post within a period of 15 days failing which exparte proceedings would be taken.

9. The Vice Chancellor on 28.12.2019 passed an order to upload the list of fake candidates, list of tampered candidates and list of candidates appearing in the examination on the basis of roll number allotted to more than one candidate for uploading on the official website of the University. Thereafter, a detailed public notice has been released on the official website of the University on 29.12.2019 and University proceeded to publish three separate list namely; list of fake candidates, list of tampered candidates and list of candidates as candidates from among more than one candidate, who have appeared in the examination with the same roll number alongwith said notice and questionnaire. The said notice alongwith questionnaire issued by the University is extracted hereinbelow:-

"एतद्द्वारा सर्व साधारण एवं सम्बन्धित को सूचित किया जाता है कि याचिका संख्या 2006/2013 सुनील कुमार बनाम डा0 भीमराव आंबेडकर विश्वविद्यालय आगरा में माननीय उच्च न्यायालय, इलाहाबाद द्वारा पारित आदेशों के अनुपालन में बी0 एड0 सत्र 2004–2005 के प्रकरणों में जांचोपरान्त एस0आई0टी0 मुख्यालय उत्तर प्रदेश लखनऊ में मु0अ0सं0 02/2015 धारा 409/420/467/468/471/204/201 सपठित 120 बी भा0द0वि0 व 13 (1) डी (2) (3) भ्र0नि0 अधिनियम बनाम हरीश कसाना आदि पंजीकृत किया गया है। उक्त मु0 अ0 सं0 मे प्रचलित विवेचना के क्रम मे एस0आई0टी0 द्वारा सम्बन्धित छात्रों की तीन सूचियॉ– फेंक, टेम्पर्ड व एक ही अनुक्रमांक पर परीक्षा देने वाले एक से अधिक छात्रों की सूची प्रेषित करते हुये विश्वविद्यालय से आवश्यक कार्यवाही करने की अपेक्षा की गई है।

इस विषय में विश्वविद्यालय की कार्य–परिषद की बैठक दिनांक 06.12.2019 में लिये गये निर्णय के अनुसार एस0आई0टी0 से प्राप्त तीनों श्रेणी के छात्रों मे से फेंक ;थंमद्ध व टेम्पर्ड शैक्षणिक प्रमाण पत्रों व एक ही अनुक्रमांक पर परीक्षा देने वाले एक से अधिक छात्रों का विवरण विश्वविद्यालय की अधिकृत वेबसाइड *www./dbrau. Org.in* पर प्रसारित है।

(अ) फेंक छात्रों की सूची।

(ब) टेम्पर्ड छात्रों की सूची।

(स) एक ही रोल नम्बर पर परीक्षा देने वाले एक से अधिक छात्रों की सूची।

फेंक *(Fake)* एवं टैम्पर्ड छात्रों एवं एक ही अनुक्रमांक पर परीक्षा देने वाले एक से अधिक छात्रों की सूची में नामित छात्रों को सूचित किया जाता है कि वे इस सूचना के प्रकाशन की तिथि से 15 दिवस के अन्दर कुलसचिव, डा0 भीमराव आंबेडकर विश्वविद्यालय, आगरा को ऑन लाईन एवं पंजीकृत/स्पीड पोस्ट द्वारा हार्ड कापी प्रेषित करते हुये अपना पक्ष एवं आपत्तियां प्रस्तुत करें जिससे उनके प्रकरणों में अग्रेतर विधि सम्मत कार्यवाही की जा सके। अन्यथा की स्थिति में उपरोक्त अंकित प्रकरणों में विश्वविद्यालय को एक पक्षीय कार्यवाही करने हेतु बाध्य होना पडेगा। टैम्पर्ड उपाधिपत्रों/अंकपत्रों वाले छात्रों की सूची पर विधिक कार्यवाही पृथक से प्रचलित की जायेगी।

उक्त कार्यवाही माननीय उच्च न्यायालय, इलाहाबाद द्वारा याचिका संख्या 2906/2013 सुनील कुमार बनाम डा0 भीमराव आंबेडकर विश्वविद्यालय आगरा के निर्णयाधीन होगी।

डॉ0 भीमराव आंबेडकर विश्वविद्यालय, आगरा

(पूर्ववर्ती आगरा विश्वविद्यालय, आगरा)

बी. एड. वर्ष 2005 (एस0 आई0 टी0 जांच से सम्बंधित) प्रवेश/परीक्षा सम्बंधित विवरण

नोटः– एस0 आई0 टी0 जांच से सम्बंधित निम्न सूचनाये विश्वविद्यालय वेबसाइट *www.dbrau.org.in* पर अपलोड कर शीर्षक– बी0 एड0 मुख्य परीक्षा 2005 सम्बन्धी प्रत्यावेदन सील्ड लिफाफे में केवल पंजीकृत/स्पीड पोस्ट के कुलसचिव, डॉ. भीमराव आंबेडकर विश्वविद्यालय, आगरा को प्रेषित करे।

1	*छात्र/छात्रा का नाम*	
2	*छात्र/छात्रा का स्थाई/पत्रव्यवहार का पता, मो0 नम्बर एवं आधार कार्ड नम्बर।*	
3	*छात्र/ छात्रा के पिता का नाम।*	
4	*प्रवेश परीक्षा का अनुक्रमांक।*	
5	*जिस महाविद्यालय में प्रवेश लिया उसका नाम*	
6	*प्रवेश काउन्सिलिंग अथवा प्रबन्धकीय कोटे में हुआ (स्पष्ट उल्लेख करें)*	
7	*काउन्सिलिंग संख्या/प्रबन्धकीय कोटे में प्रवेश सूची में स्थान (काउन्सिलिंग पत्र संलग्न करे।)*	
8	*महाविद्यालय में प्रवेश के समय प्रवेश शुल्क ड्राफ्ट/नकद जमा कराने का विवरण।*	*डाफ्ट/रसीद संख्या...../धनराशि.....दिनांक (प्रमाण सहित)*
9	*महाविद्यालय में स्कॉलरशिप प्राप्त की दशा में विवरण।*	*डाफ्ट/रसीद संख्या...../धनराशि.....दिनांक (प्रमाण सहित)*
10	*नमांकन संख्या (Enrollment No.)*	
11	*मुख्य परीक्षा बी0 एड0 05 का अनुक्रमांक*	
12	*बी0 एड0 वर्ष 2005 मुख्य परीक्षा के परीक्षा केन्द्र का नाम*	
13	*बी0 एड0 वर्ष 2005 परीक्षा में बैठने का प्रवेश पत्र की छाया प्रति।*	
14	*बी0 एड0 वर्ष 2005 की परीक्षा मे सम्मिलित होने के बाद*	

	अंकतालिका स्वयं प्रमाणित कर संलग्न करें।	
15	*यदि अस्थाई प्रमाण पत्र विश्वविद्यालय द्वारा निर्गत किया गया हो तो प्रमाण पत्रों की संख्या–समस्त अस्थाई प्रमाण पत्रों की छाया प्रति संलग्न करें।*	
16	*मूल उपाधि का विवरण क्रमांक संख्या*	
17	*अन्य कोई विवरण/सूचन I*	

नोट–उपरोक्त से सम्बन्धित सभी अभिलेखों की स्वप्रमाणित प्रतियॉ/प्रमाणक अनिवार्य रूप से संलग्न करे।

संलग्नों की संख्या अंको में .....(शब्दो में).....

सम्बन्धित महाविद्यालय के प्राचार्य द्वारा अग्रसारण– प्रमाणित किया जाता है कि श्री/श्रीमती/कुमारी .....पुत्र/पुत्री .....निवासी .....ने महाविद्यालय में वर्ष 2004–05 कांउसलिंग मेनजमेन्ट.....के अन्तर्गत विधि सम्मत प्रवेशित छात्र/छात्रा थे/थी। श्री .....को जो अंकतालिका विश्वविद्यालय द्वारा जारी की गयी थी उसके .....अंक प्राप्त हुये हो तथा सैद्धान्तिक में .....श्रेणी तथा प्रायोगिक में .....श्रेणी था।

छात्र/छात्रा के हस्ताक्षर.....
प्राचार्य

दिनांक .....
हस्ताक्षर एवं मुहर"

10. The hard copy of the questionnaire is to bear the signature of the candidate and also the seal and signature of the Principal of the College. The aforesaid public notice calling upon the petitioners to submit information as required in the questionnaire are impugned in the present petition.

11. Challenging the aforesaid notices, learned Senior Counsel has made following submissions;

(i) The decision of the Executive Counsel in its meeting dated 06.12.2019 to verify and identify the fake and tampered marks sheet of B.Ed. for the academic session 2004-05 is not an independent decision of the Executive Council rather the said exercise is being undertaken on the dictate of the letter of Additional Chief Secretary dated 25.11.2019 as well as letter of Deputy Inspector General of Police dated 11.07.2019

(ii) The investigation report of SIT has not yet been accepted either by this Court or by any other Court, and the said report cannot be treated to be a substantial and conclusive piece of evidence to arrive at a conclusion that marks sheet/degree obtained by the petitioners are fake or tampered. In support of his contentions, he has placed reliance upon the judgement of Apex Court in the case of ***M.C. Mehta (Taj Corridor Scam) Vs. Union of India and Others 2007(1) SCC 10*** & judgement of Kerala High Court at Ernakulam in the case of ***Major Basil John Vs. State of Kerala and Others Crl. M.C. No.1877 of 2015 decided on 22.06.2017***.

(iii) Controversy regarding the validity of marks sheet obtained by the petitioners is already concluded by the judgment of this Court in Writ Petition no.399 (MB) of 2007 (Shri Puran Prasad Gupta Memorial Degree College Vs. State of U.P. and Others) as this Court has validated the admission of petitioners and directed for declaration of result. Hence, the aforesaid exercise undertaken by the University to verify the marks sheet in order to find out the fake and tampered marks sheet is nothing but an abuse of process of law.

(iv) As per Section 67 of the Act, 1973, the Court may by a two-third majority of the members present and voting withdraw from any person any degree, or certificate conferred or granted by the University. In the present case, the decision to cancel the degree has not been taken by the Court but by the Executive Council, who is not competent to initiate such process as the Court and Executive Council are two different authorities under the Act, 1973. Thus, the verification exercise undertaken by the Executive Council is without jurisdiction. He further submits that statute 13.03 of the First Statutes of the Agra University provides the procedure and the manner which is to be followed before taking decision to cancel the degree, but the notices impugned are in complete violation of statute 13.03 inasmuch as the said notice does not communicate the charge against the petitioners so as to enable them to submit their explanation.

12. Per contra, Sri Gagan Mehta, learned counsel for the respondents submits that it is settled law that writ petition against a show cause notice is not maintainable. Further he submits that the petitioners may raise all contentions raised in the writ petition before the authority concerned and as the petitioners are not prejudiced, therefore, this court may not exercise power under Article 226 of the Constitution of India and interfere with the show cause notice.

13. I have considered the rival submissions of the parties and perused the record.

14. Before adverting the respective arguments of counsel for the parties, it would be apt to refer few judgements of the Apex Court wherein Apex Court has considered the question regarding the maintainability of writ petition against a show cause notice.

15. In ***Special Director and Another Vs. Mohd. Ghulam Ghouse and Another AIR 2004 SC 1467*** the respondent Mohd. Ghulam Ghouse preferred a writ petition before the High Court challenging the show cause notice for violating Foreign Exchange Regulation Act, 1973. The High Court passed an order of status quo which came to be challenged before the Apex Court in Special Leave Petition. The Apex Court while allowing the appeal held that writ petition challenging a show cause notice is not maintainable. The Apex Court has deprecated the High Court for stalling enquiries as proposed and retarding investigative process to find actual facts with participation and in presence of parties. Paragraph 5 of the judgement is extracted hereinbelow:-

"5. This Court in a large number of cases has deprecated the practice of the High Courts entertaining writ petitions questioning legality of the show cause notices stalling enquiries as proposed and retarding investigative process to find

actual facts with the participation and in the presence of the parties. Unless, the High Court is satisfied that the show cause notice was totally non est in the eye of law for absolute want of jurisdiction of the authority to even investigate into facts, writ petitions should not be entertained for the mere asking and as a matter of routine, and the writ petitioner should invariably be directed to respond to the show cause notice and take all stands highlighted in the writ petition. Whether the show cause notice was founded on any legal premises is a jurisdictional issue which can even be urged by the recipient of the notice and such issues also can be adjudicated by the authority issuing the very notice initially, before the aggrieved could approach the Court. Further, when the Court passes an interim order it should be careful to see that the statutory functionaries specially and specifically constituted for the purpose are not denuded of powers and authority to initially decide the matter and ensure that ultimate relief which may or may not be finally granted in the writ petition is accorded to the writ petitioner even at the threshold by the interim protection, granted."

16. In the case of ***Union of India and Another Vs. Kunisetty Satyanarayana, 2006 (12) SCC 28*** the Apex Court after considering various pronouncements of the Apex Court held that writ petition should not be entertained against a show cause notice as at that stage the writ petition is premature. Paragraph 13, 14 & 15 of the judgement are extracted hereinbelow:-

"13. It is well settled by a series of decisions of this Court that ordinarily no writ lies against a charge sheet or show-cause notice vide Executive Engineer, Bihar State Housing Board vs. Ramdesh Kumar Singh and others JT 1995 (8) SC 331, Special Director and another vs. Mohd. Ghulam Ghouse and another AIR 2004 SC 1467, Ulagappa and others vs. Divisional Commissioner, Mysore and others 2001(10) SCC 639, State of U.P. vs. Brahm Datt Sharma and another AIR 1987 SC 943 etc.

14. The reason why ordinarily a writ petition should not be entertained against a mere show-cause notice or charge-sheet is that at that stage the writ petition may be held to be premature. A mere charge-sheet or show-cause notice does not give rise to any cause of action, because it does not amount to an adverse order which affects the rights of any party unless the same has been issued by a person having no jurisdiction to do so. It is quite possible that after considering the reply to the show-cause notice or after holding an enquiry the authority concerned may drop the proceedings and/or hold that the charges are not established. It is well settled that a writ lies when some right of any party is infringed. A mere show-cause notice or charge-sheet does not infringe the right of any one. It is only when a final order imposing some punishment or otherwise adversely affecting a party is passed, that the said party can be said to have any grievance.

15. Writ jurisdiction is discretionary jurisdiction and hence such discretion under Article 226 should not ordinarily be exercised by quashing a show-cause notice or charge sheet."

17. The same view has been taken by the Apex Court in the case of ***Secretary Ministry of Defence and Others Vs. Prabhash Chandra Mishra AIR 2012 SC 2250***. Paragraph 13 of the judgement is extracted hereinbelow:-

"13. Thus, the law on the issue can be summarised to the effect that chargesheet cannot generally be a subject

matter of challenge as it does not adversely affect the rights of the delinquent unless it is established that the same has been issued by an authority not competent to initiate the disciplinary proceedings. Neither the disciplinary proceedings nor the chargesheet be quashed at an initial stage as it would be a premature stage to deal with the issues. Proceedings are not liable to be quashed on the grounds that proceedings had been initiated at a belated stage or could not be concluded in a reasonable period unless the delay creates prejudice to the delinquent employee. Gravity of alleged misconduct is a relevant factor to be taken into consideration while quashing the proceedings."

18. In the recent judgement of the Apex Court in the case of ***Commissioner of Central Excise, Haldia Vs. Krishna Wax (P) Ltd. 2019 (368) ELT 769 (SC)*** the Apex Court has again reiterated that a writ petition should normally not be entertained against mere issuance of show cause notice. Paragraph 12 of the judgement is extracted hereinbelow:-

"12. It has been laid down by this Court that the excise law is a complete code in itself and it would normally not be appropriate for a Writ Court to entertain a petition under Article 226 of the Constitution and that the concerned person must first raise all the objections before the authority who had issued a show cause notice and the redressal in terms of the existing provisions of the law could be taken resort to if an adverse order was passed against such person. For example in Union of India and another vs. Guwahati Carbon Limited5, it was concluded; "The Excise Law is a complete code in order to seek redress in excise matters and hence may not be appropriate for the writ court to entertain a petition under Article 226 of the Constitution", while in Malladi Drugs and Pharma Ltd. vs. Union of India6, it was observed:-

"...The High Court, has, by the impugned judgment held that the Appellant should first raise all the objections before the Authority who have issued the show cause notice and in case any adverse order is passed against the Appellant, then liberty has been granted to approach the High Court... ...in our view, the High Court was absolutely right in dismissing the writ petition against a mere show cause notice."

It is thus well settled that writ petition should normally not be entertained against mere issuance of show cause notice. In the present case no show cause notice was even issued when the High Court had initially entertained the petition and directed the Department to prima facie consider whether there was material to proceed with the matter."

19. The present case requires to be examined in the light of principles enunciated by the Apex Court regarding maintainability of writ petition against a show cause notice.

20. At this juncture, it would be relevant to refer the chain of events in which the present exercise to verify and cancel the fake, fabricated and tampered marks sheet and degrees have been undertaken. This Court while considering the Writ C No.2906 of 2013 (Sushil Kumar Vs. Dr. Bhimrao Ambedkar University and Another) found that the original cross list produced pertaining to B.Ed. examination 2005 does not bear signature of any of the authority concerned. The first order passed in the writ petition is extracted hereinbelow:-

"Vice-Chancellor of the University should file his personal affidavit after inspection of original

records in respect of B.Ed. examination 2005, by the next date.

Original cross list has been produced today pertaining to B.Ed. Examination 2005 before this Court. It is surprising that none of the pages of the register bear any signature of any officer. Such register appears to be, prima facie, a manufactured document. It is stated that cross list are required to be signed by duly authorized persons and it is only then that the cross list can be accepted as genuine. It is also stated that all cross list of other examinations are duly signed by the officers of the University.

List on 12.03.2013.

The cross list produced today is returned to the counsel for the University."

21. In the said writ petition, the Vice Chancellor had filed an affidavit contending therein that though, the First Information Report has been lodged with the police with regard to fake mark-sheets issued to the students but no investigation had taken place. In the aforesaid backdrop, the Court directed the State to be impleaded as a party by order dated 05.08.2013. On the direction of this Court, a preliminary investigation was carried out. The preliminary investigation report revealed the shocking state of affairs in the University. Consequently, this Court on 14.03.2014 issued a direction to the Secretary, Home, U.P. Lucknow, to assign the investigation to a Special Investigation Agency of the State other than C.B, C.I.D. Pursuant to the direction of this Court, a special investigation team was constituted by the orders of Deputy Director General of Police dated 06.05.2014. Subsequently, this Court on 09.09.2015 after noticing the previous orders directed the Registrar General to place the said matter before Hon'ble The Chief Justice requesting him that the writ petition be treated and dealt with as a Public Interest Ligation by the appropriate Bench.

22. In the aforesaid backdrop, the special investigating team constituted pursuant to the orders of this Court conducted the investigation and submitted report in August, 2017. The SIT on verification categorized candidates in two list namely; list of candidates whose marks sheet are fake and list of candidates whose marks sheet are tampered. Pursuant to the aforesaid report, the Director General of Police and Additional Chief Secretary asked the Vice Chancellor of the University to initiate the exercise to cancel the fake and tampered marks sheet and degrees of candidates after verifying it from the records of the University. In the aforesaid background, the Executive Council took a decision to verify the degree, and accordingly, in order to carryout the said verification, notice impugned alongwith questionnaire have been issued.

23. Now, the moot question which arises for consideration is as to whether the show cause notice impugned in the present petition have been issued by a person lacking inherent jurisdiction and the said show cause notice has any in way prejudiced the rights of the petitioners.

24. The first contention of Sri Khare that exercise undertaken by the Executive Council is not an independent exercise but has been done at the behest of the State Government is misconceived inasmuch as the University had full knowledge about the fact that the large scale fraud has been committed in issuing the fake and tampered marks sheet of B.Ed. Examination-2005, which fact is also

fortified from the personal affidavit of the Vice Chancellor of the University filed before this Court wherein he has made a categorical averment that as many as 6 FIR had been lodged to investigate the allegation of issuance of fake and tampered mark-sheets to the students in collusion with the University employee but no investigation was done by the Police and a request was made to the Court through the said affidavit to handover the investigation to any independent agency. In the aforesaid backdrop, this Court passed an order for constituting SIT to carryout the investigation.

25. The exercise of verification of fake as well as tampered degree should have been undertaken by the University voluntarily instead of waiting for any direction from the Court or authority more so when it was aware of the fact that the fake and tampered mark-sheets have been issued to the students in connivance with the employees of the University. Thus, to say that the verification exercise undertaken by the University is on the dictate of the State Government is not correct and misconceived. In this view of the fact, the first submission of the petitioner is not sustainable.

26. As far as the second contention of Sri Khare that report of SIT is not a conclusive piece of evidence and that cannot be considered and relied upon to hold that degree/marks sheet of the candidates mentioned in the list of candidates of fake marks sheet or tampered marks sheet also lacks substance for the reason that the respondents have not yet cancelled the marks sheet/degree of the candidates categorized in the three list; the list of candidates of fake mark-sheet, list of candidates of tampered mark-sheets and list of candidates appearing in the examination on the basis of roll number allotted to more than one candidate, rather the authority has issued a notice inviting details from each candidate in the form of questionnaire so as to verify the fact as to whether name of a candidate in the list of fake or tampered marks sheet has been correctly shown in the list submitted by the SIT. Had the authorities treated the report of SIT to be a conclusive piece of evidence, there was no occasion for the respondents to publish the notice impugned in the writ petition and asking the candidates to furnish information sought in the questionnaire. Further, the two letters dated 11.07.2019 & 25.11.2019 of the Deputy Inspector General of Police, SIT & Additional Chief Secretary also directs the University to follow the procedure as provided in the Act, 1973 for cancellation of a degree. Thus, this Court does not find any merit in the second submission of the counsel for the petitioner.

27. So far as the judgements relied upon by Sri Ashok Khare in support of second submission are concerned, the same are not applicable in the facts of the present case as they have been rendered in a different factual context.

28. As regards the third submission of Sri Khare that the controversy as regards the validity of admission and issuance of the mark-sheets of the petitioners have already been concluded by this Court in Writ Petition no.399 (MB) of 2007 (Shri Puran Prasad Gupta Memorial Degree College Vs. State of U.P. and Others) and other writ petitions, this Court without adverting upon the merits of the contention advanced by the learned Senior Counsel finds it appropriate

that the petitioners may raise the said contention before the authority concerned as each individual candidate has to demonstrate that his case is covered by the said judgement and this Court has validated his admission.

29. Thus, for the reasons given above, this Court finds that a show cause notice cannot be interfered with by this Court on any of the aforesaid three grounds as none of the issue involves jurisdictional issue or that the notice is *per-se* illegal.

30. Now, coming to the fourth contention of Sri Khare, it is relevant to mention that the Court is vested with the power under Section 67 of the Act, 1973 to cancel the degree/marks sheet. The Court under Act, 1973 is to exercise such power only in cases where the University finds that the marks sheet or degree has been issued by the University though, it has been tampered. The procedure contemplated under the Act, 1973 cannot be said to be applicable to cancel those degrees which according to the University have not been issued by it and have been procured by the candidates from outside with which the University has no concern.

31. In the case in hand, the Executive Council has undertaken the exercise to verify and sort out list of candidates whose degree or marks sheet are fake and list of candidates whose marks sheet are tampered and list of candidates who have appeared with the roll number allotted to many other candidates. The Court as defined in the Act, 1973 is not empowered to carryout any such exercise, and it is only Executive Council who has power to undertake such exercise. Therefore, the last submission of Sri Khare is also devoid of merit.

32. It has also been urged by Sri Ashok Khare, learned Senior Counsel that questionnaire issued by the respondents requires certain information which may not be available with the petitioners and further the said questionnaire requires that it shall bear the seal and signature of principal of the College which is wholly impossible inasmuch as the principal of the concerned college has refused to sign the form and petitioners are helpless to supply information as sought through the questionnaire.

33. A perusal of the questionnaire reveals that it has not sought any information which cannot be said to be available with the petitioners. The information sought through the aforesaid questionnaire are essential to find out and segregate fake and tampered marks sheet/degree. Thus, in the opinion of the Court, the said contention also does not stand to its merit.

34. This Court while exercising power under Article 226 of Constitution of India cannot shut its eyes about the entire chain of events which had led to unearth scam of such a magnitude where fake marks sheet have been procured by the candidates with impunity and on the basis of such fake or tampered marks sheet, they have obtained employment as Assistant Teacher.

35. Further, this is only a show cause notice and no prejudice is caused to the petitioners in supplying information as sought by the respondent. Therefore, in the opinion of the Court, no good ground has been made out by the petitioners calling for interference by this Court to quash the show cause notice impugned in the present petition, more so when fraud of such a large magnitude has been played in procuring fake marks sheet/degree. At this

juncture it would be apt to again refer the judgement of Apex Court in the case of ***Mohd. Ghulam Ghouse and Another (supra)*** wherein Apex Court has deprecated the practice of issuing interim orders against a show cause notice or interference with the show cause notice to stall the investigation or inquiry to find out the truth.

36. However, this Court cannot also loose sight of the fact that petitioners have obtained employment on the basis of marks sheet alleged to have been issued to them and have been working for more than a decade. Further, there may be cases where Principal of the concerned college may refuse to put signature on the questionnaire and the petitioners cannot force the Principal of the concerned college to put signature and seal on the questionnaire and petitioners may be rendered remedy less. Therefore, in the interest of justice and fairplay, this Court is of the opinion that University while carrying out the exercise to verify the mark-sheet/degree should follow the following observation of the Court:-

(i) The University while verifying the mark-sheet/degree of a candidate may not refuse to consider the questionnaire of a candidate if the same does not bear the signature & seal of the Principal of the college.

(ii). In case after verification, the University disowns the degree of a candidate being fake, the University is not required to follow the procedure contemplated under the Act, 1973 for cancellation of degree/marks sheet. However, it is desirable in the interest of justice and fairplay that the University in such cases should pass reasoned and speaking order giving the basis on which it has formed opinion that degree is fake and has not been issued by the University.

(iii). In case University finds that the degree/marks sheet have been issued by it though tampered, in such an event, the University is expected to follow the procedure provided in the Act, 1973 and give a show cause notice to such candidate and thereafter, pass appropriate orders.

37. For the reasons given above, this Court does not find any good ground to interfere with the notices impugned in the petition. Consequently, the writ petition lacks merit and is accordingly, ***dismissed*** subject to observations made above.

(2020)02ILR A1178

APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 26.02.2020

BEFORE

THE HON'BLE ABDUL MOIN, J.

Special Appeal Defective No. 619 of 2010

Director Indira Gandhi Rashtriya Udan Academy 5775(S/S)2000 ...Appellant
Versus
Sheo Narain Chaudhary ...Respondent

Counsel for the Appellant:
O.P. Srivastava, Virendra Kumar Dubey

Counsel for the Respondent:
N.N. Jaiswal, Anupam Verma, Rajan Singh

A. Limitation - Article 215 of the Indian Constitution & Section 20 of the Limitation Act, 1971 - the Court can invoke the jurisdiction vested in it under Article 215 but same has to be exercised subject to the limitation prescribed under Section 20 of the Act of 1971

The Special Appeal was filed on 27.08.2010 while the judgment was pronounced on 07.04.2015 and thus the present application, as per the averments contained therein of the special appeal having been filed by holders of

such posts which have neither been creator nor approved in the Academy whereby committing contempt, would clearly be hit by the limitation prescribed under Section 20 of the Act, 1971. (para 13)

Appeal Rejected. (E-10)

List of cases cited:-

1. Pritam Pal V. High Court of M.P. AIR 1992 SC 904

2. A. Mayilswami V. State of Kerala and ors 1995(2) KLJ 255 *(distinguished)*

3. Nallamala Venkateswara Rao and anr V. P. Pradhakar and anr 1998(1) ALD 370 *(distinguished)*

4. Pallav Sheth V. Custodian and ors (2001) 7 SCC 549 *(followed)*

5. Dr. L.P. Misra V. State of U.P. 1998(7) SCC 375 *(followed)*

(Delivered by Hon'ble Abdul Moin, J.)

C.M. Application No.8909 of 2020.

1. Heard.

2. This is an application filed by the applicant, inter alia, praying for initiation of proceedings under Article 215 of the Constitution of India against the respondents No.1, 2, 3 and 4 for having filed the special appeal by purporting to hold an authority and post which is non existent in the Indira Gandhi Rashtriya Udan Academy (hereinafter referred to as the Academy), whereby committing contempt.

3. Sri Anupam Verma, learned counsel for the applicant contends that Special Appeal Defective No.619 of 2010 had been allowed on 7.4.2015 whereby the order passed in the writ petition in favour of the applicant was set-aside. It is only now that the applicant has come to know of the aforesaid fact of the special appeal having been filed by persons alleging themselves to be holders of such posts which have neither been created nor approved in the Academy.

4. The present application has been filed on 22.1.2020 while the special appeal had been decided on 7.4.2015 i.e. the application is being filed after a period of more than four and half years. Upon a pointed query being put to the learned counsel for the applicant as to how the present application could be said to be within the limitation prescribed in Section 20 of the Contempt of Courts Act, 1971, reliance has been placed by the learned counsel for the applicant upon the judgment of the Apex Court in the case of ***Pritam Pal vs. High Court of M.P.*** reported in ***AIR 1992 SC 904,*** judgment of the Full Court of the Kerala High Court in the case of ***A. Mayilswami vs. State of Kerala and others*** reported in ***1995(2) KLJ 255*** and the judgment of Andhra Pradesh High Court in the case of ***Nallamala Venkateswara Rao and another vs. P. Pradhakar and another*** reported in ***1998(1) ALD 370*** to contend that the period of limitation prescribed under Section 20 of the Contempt of Courts Act, 1971 (hereinafter referred to as the Act, 1971) shall not be applicable on an application filed under Article 215 of the Constitution of India.

5. Having heard the learned counsel for the applicant and having perused the record what emerges is that the application under Article 215 of the Constitution of India has been filed by alleging that the special appeal had been filed by the persons alleging themselves to be holders

of such posts which have neither been created nor approved in the Academy and thus this Court has been mislead in entertaining the said special appeal. However, the fact of the matter remains that the present application under Article 215 of the Constitution of India is being filed after a period of more than four and half years of the final judgment and more than nine and a half years of the filing of the special appeal inasmuch as the judgment in the special appeal had been delivered on 7.4.2015, the special appeal was filed on 27.8.2010 while the application under Article 215 of the Constitution of India has been filed on 22.1.2020.

6. Section 20 of the Act, 1971, which is relevant for the purpose of deciding the controversy, reads as under:-

"20. Limitation for actions for contempt. *No court shall initiate any proceedings of contempt, either on its own motion or otherwise, after the expiry of a period of one year from the date on which the contempt is alleged to have been committed."*

7. A perusal of Section 20 of the Act, 1971 thus indicates that limitation for action of contempt has been specified as one year from the date on which the contempt is alleged to have been committed. The filing of special appeal by persons alleging themselves to be holders of such posts which have neither been created nor approved in the Academy is said to be a contempt for which the present application has been filed.

8. Whether the provisions of Section 20 of the Act, 1071 would be attracted in applications filed under Article 215 of the Constitution of India, would be next question to be considered by this Court.

9. The aforesaid question is no longer res-integra taking into consideration the three Judges judgment of the Apex Court in the case of ***Pallav Sheth v. Custodian and Others reported in (2001)7 SCC 549,*** wherein the following has been held:-

"The Contempt of Courts Act, 1971 was enacted, as per the Preamble, with a view "to define and limit the powers of certain Courts in punishing Contempts of Courts and to regulate their procedure in relation thereto". It provides for action being taken in relation to civil as well as criminal contempt. It is not necessary, for the purpose of this case, to analyse various Sections of the Act in any great detail except to notice that Sections 3 to 7 of the Contempt of Courts Act, 1971 provides for what is not to be regarded as contempt. Section 8 specifies that nothing contained in the Act shall be construed as implying that any other valid defence in any proceedings for Contempt of Court ceases to be available merely by reason of the provisions of the 1971 Act. Section 9 makes it clear that the Act will not to be implied as enlarging the scope of contempt. Section 10 contains the power of the High Court to punish contempts of subordinate Courts, while Section 12 specifies the punishment which can be imposed for Contempt of Court and other related matters. Procedure to be followed where contempt is in the face of the Supreme Court or a High Court is provided in Section 14, while cognizance of criminal contempt in other cases is dealt with by Section 15. Section 15 has to be read with Section 17 which provides for procedure after cognizance has been taken

under Section 15. A decision of the High Court to punish for contempt is made appealable under Section 19 of the Act.

Sections 20 and 22, with which we are concerned in the present case, read as follows:

"20. Limitation for actions for contempt.- No court shall initiate any proceedings for contempt, either on its own motion or otherwise, after the expiry of a period of one year from the date on which the contempt is alleged to have been committed.

22. Act to be in addition to, and not in derogation of, other laws relating to contempt.- The provisions of this Act shall be in addition to, and not in derogation of, the provisions of any other law relating to contempt of courts."

Learned counsel for the parties have drawn our attention to various decisions of this Court in support of their respective contentions. While the effort of both Mr. Venugopal and Mr. Bobde on behalf of the Appellant was that even in exercise of the power under Article 215 of the Constitution the provisions ofSection 20 of the Contempt of Courts Act, 1971 prohibited any action being taken for contempt if a period of one year had elapsed, as was contended in the present case, Mr. Rustomjee submitted that the constitutional power contained under Article 215 could not in any way be stultified or curtailed by any Act of Parliament including Section 20 of the 1971 Act.

It will be appropriate to refer to some of the decisions which have a bearing on the point in issue in the present case.

In Sukhdev Singh Sodhi vs. The Chief Justice and Judges of the Pepsu High Court this Court was concerned with the issue whether this Court could transfer contempt proceedings from Pepsu High Court to any other High Court. For transfer reliance had been placed on Section 527 of the Criminal Procedure Code. While holding that Section 527 did not apply in case where a High Court has initiated proceedings for contempt of itself, it was held that even the Contempt of Courts Act, 1952 recognised the existence of a right to punish for contempt in every High Court and this right is vested in it in the High Court by the Constitution. This Court referred to Article 215 of the Constitution and observed that so far as contempt of a High Court itself is concerned, the Constitution vests this right in every High Court and no Act of a legislature could take away that jurisdiction and confer it afresh by virtue of its own authority. It, accordingly, came to the conclusion that the Code of Criminal Procedure did not apply in matters of contempt triable by the High Court which could deal with it summarily and adopt its own procedure which had to be fair and that the contemner was to be made aware of the charge against him and given a fair and reasonable opportunity to defend himself. Reliance was placed by Mr. Venugopal on a decision in Baradakanta Mishra vs. Mr. Justice Gatikrushna Misra, Chief Justice of the Orissa High Court and it was contended that it was held in this case that Section 20 of the Contempt of Courts Act, 1971 provided a period of limitation by saying that no Court shall initiate any proceeding for contempt either on its own motion or otherwise, after the expiry of a period of one year from the date on which the contempt is alleged to have been committed. In Baradakanta Mishra's case (supra) the Appellant had filed an application before the High Court for initiating contempt proceedings against

the Chief Justice and other Judges in their personal capacity. A Full Bench of three Judges were of the opinion that no Contempt of Court had been committed and the application was rejected. The Appellant then purported to avail the right of appeal under Section 19(1) of the Act and filed an appeal in this Court. A preliminary objection was taken by the State against the maintainability of the appeal on the ground that where the High Court had not initiated proceedings and had refused to take action, no appeal as of right would lie under Section 19(1) . This was the only issue which arose for consideration of this Court in Baradakanta Mishra's case and this Court upheld the preliminary objection and held that no appeal under Section 19(1) was maintainable. It is no doubt true that during the course of discussion reference was made to Sections 15, 17 and 20 of the Contempt of Courts Act, 1971 but this Court was in that case not called upon to consider the effect of the provisions of the Contempt of Courts Act vis-à-vis inherent powers of the High Court to punish for contempt. No reference is made in the judgment to Article 129 or Article 215 of the Constitution. Furthermore interpretation of Section 20 was not an issue and no question of limitation arose therein. Under the circumstances, we hold that the observations made by this Court with reference to Section 20 were in the nature of obiter dicta and not binding on this Court in the present case. In any case, Baradakanta Mishra's case decision does not specifically deal with the question as to when or how proceedings for contempt are initiated for the purposes of Section 20 and nor has it considered the applicability of the provisions of the Limitation Act, to which we shall presently refer.

In Firm Ganpat Ram Rajkumar vs. Kalu Ram & Ors. where an Order of this Court ordering delivering of premises had not been complied with, an application was filed for initiation of contempt proceedings. A contention was raised on behalf of the alleged contemner based on Section 20 of the Contempt of Courts Act, 1971. Dealing with this contention, this Court observed as follows:

"Another point was taken about limitation of this application under section 20 of the Act. S.20 states that no court shall initiate any proceedings for contempt, either on its own motion or otherwise, after the expiry of a period of one year from the date on which the contempt is alleged to have been committed. In this case, the present application was filed on or about 3rd November, 1988 as appears from the affidavit in support of the application. The contempt considered, inter alia, of the act of not giving the possession by force of the order of the learned Sr. Sub-Judge, Narnaul dated 12th February, 1988. Therefore, the application was well within the period of one year. Failure to give possession, if it amounts to a contempt in a situation of this nature is a continuing wrong. There was no scope for application of s. 20 of the Act."

The abovementioned observations indicate that the contention based on Section 20 was not accepted for two reasons firstly that the application for initiating action for contempt was filed within one year of the date when the contempt was alleged to have been committed and secondly failure to give possession amounted to continuing wrong and, therefore, there was no scope for application of Section 20 of the Act. This case is important for the reason that the Court regarded the filing of the application for initiating contempt proceedings as the relevant date from the point of view of limitation.

The power of this Court and the High Court under the Constitution for taking action for contempt of subordinate court came up for consideration in Delhi Judicial Service Association, Tis Hazari

Court, Delhi vs. State of Gujarat and Others etc. It referred to Sukhdev Singh Sodhi's case (supra) and held that even after codification of the law of contempt in India the High Courts jurisdiction as the Court of Record to initiate proceedings and take seisin of the matter remained unaffected by the Contempt of Courts Act. It also referred to R.L.Kapur vs. State of Madras and by following the said decision observed as follows:

"... The Court further held that in view of Article 215 of the Constitution, no law made by a legislature could take away the jurisdiction conferred on the High Court nor it could confer it afresh by virtue of its own authority".

Referring to the Contempt of Courts Act, 1971 it observed with relation of the powers of the High Court as follows:

"...Inherent powers of a superior Court of Record have remained unaffected even after codification of Contempt Law. The Contempt of Courts Act, 1971 was enacted to define and limit the powers of courts in punishing contempts of courts and to regulate their procedure in relation thereto. Section 2 of the Act defines contempt of court including criminal contempt. Sections 5,6,7,8 and 9 specify matters which do not amount to contempt and the defence which may be taken. Section 10 relates to the power of High Court to punish for contempt of subordinate courts. Section 10 like Section 2 of 1926 Act and Section 3of 1952 Act reiterates and reaffirms the jurisdiction and power of a High Court in respect of its own contempt and of subordinate courts. The Act does not confer any new jurisdiction instead it reaffirms the High Court's power and jurisdiction for taking action for the contempt of itself as well as of its subordinate courts...."

The view in Delhi Judicial Service Association's case (supra) was reiterated and reaffirmed in the case of In re: Vinay Chandra Mishra and it was held that the amplitude and power of this Court to punish for contempt could not be curtailed by the law made by the Parliament or State Legislature. As observed in Income Tax Appellate Tribunal through President vs. V.K. Agarwal and Another at page 25 that the judgment in Vinay Chandra Mishra's case was partially set aside in Supreme Court Bar Association. vs. Union of India and Another on the question of power to suspend an advocate's licence under contempt jurisdiction, the observation in Vinay Chandra Mishra's case with regard to amplitude of the courts power under Article 129 not being curtailed by a law made by the Central or a State Legislature remained unaffected. It was in exercise of the powers under Article 129 that this Court held the respondent in V.K. Agarwal's case (supra) guilty of Contempt of Court as he had tried to influence or question the decision making process of the Income Tax Appellate Tribunal.

The applicability of the Limitation Act to Contempt of Courts Act, 1971 came up for consideration inState of West Bengal and Others vs. Kartick Chandra Das and Others . In that case against a notice of contempt which had been issued by the Single Judge a Letters Patent Appeal were filed under Section 19 of the Contempt of Courts Act which was dismissed on the ground that the delay was not condonable as Section 5 of the Limitation Act did not apply. While reversing this decision of the Calcutta High Court, this Court observed at page 344 as follows:

"7. In consequence, by operation of Section 29(2) read with Section 3 of the

Limitation Act, limitation stands prescribed as a special law under Section 19 of the Contempt of Courts Act and limitation in filing Letters Patent appeal stands attracted. In consequence, Sections 4 to 24 of the Limitation Act stands attracted to Letters Patent appeal insofar as and to the extent to which they are not expressly excluded either by special or local law. Since the rules made on the appellate side, either for entertaining the appeals under clause 15 of the Letters Patent or appeals arising under the contempt of courts, had not expressly excluded, Section 5 of the Limitation Act becomes applicable. We hold that Section 5 of the Limitation Act does apply to the appeals filed against the order of the learned Single Judge for the enforcement by way of a contempt. The High Court, therefore, was not right in holding that Section 5 of the Limitation Act does not apply. The delay stands condoned. Since the High Court had not dealt with the matter on merits, we decline to express any opinion on merits. The case stands remitted to the Division Bench for decision on merits."

A Constitution Bench in the case of Supreme Court Bar Association's case (supra) while considering this Court's power to punish for contempt at page 421 observed as follows:

"21. It is, thus, seen that the power of this Court in respect of investigation or punishment of any contempt including contempt of itself, is expressly made "subject to the provisions of any law made in this behalf by Parliament" by Article 142(2). However, the power to punish for contempt being inherent in a court of record, it follows that no act of Parliament can take away that inherent jurisdiction of the court of record to punish for contempt and Parliament's power of legislation on the subject cannot, therefore, be so exercised as to stultify the status and dignity of the Supreme Court and/or the High Courts, though such a legislation may serve as a guide for the determination of the nature of punishment which this Court may impose in the case of established contempt. Parliament has not enacted any law dealing with the powers of the Supreme Court with regard to investigation and punishment of contempt of itself, (we shall refer to Section 15 of the Contempt of Courts Act, 1971, later on) and this Court, therefore, exercises the power to investigate and punish for contempt of itself by virtue of the powers vested in it under Articles 129 and 142(2) of the Constitution of India. "

"24. Thus, under the existing legislation dealing with contempt of court, the High Courts and Chief Courts were vested with the power to try a person for committing contempt of court and to punish him for established contempt. The legislation itself prescribed the nature and type, as well as the extent of, punishment which could be imposed on a contemner by the High Courts or the Chief Courts. The second proviso to Section 4 of the 1952 Act (supra) expressly restricted the powers of the courts not to "impose any sentence in excess of what is specified in the section" for any contempt either of itself or of a court subordinate to it."

Referring to the powers of the High Court under Article 215 to impose punishment with reference to Contempt of Courts Act, 1971 at page 428, the Court held as follows:

"37. The nature and types of punishment which a court of record can impose in a case of established contempt under the common law have now been specifically incorporated in the Contempt

of Courts Act, 1971 insofar as the High Courts are concerned and therefore to the extent the Contempt of Courts Act, 1971 identifies the nature or types of punishments which can be awarded in the case of established contempt, it does not impinge upon the inherent powers of the High Court under Article 215 either. No new type of punishment can be created or assumed."

In Dr L.P. Misra vs. State of U.P. a contention was raised that while exercising powers under Article 215 in punishing the Appellant therein for Contempt of the High Court the procedure contemplated by Section 14 of the Contempt of Courts Act, 1971 had not been followed. This Court, dealing with this contention, observed as follows:

"12. After hearing learned counsel for the parties and after going through the materials placed on record, we are of the opinion that the Court while passing the impugned order had not followed the procedure prescribed by law. It is true that the High Court can invoke powers and jurisdiction vested in it under Article 215 of the Constitution of India but such a jurisdiction has to be exercised in accordance with the procedure prescribed by law. It is in these circumstances the impugned order cannot be sustained."

In the case of Om Prakash Jaiswal vs. D.K.Mittal and Another a Division Bench of this Court was called upon to interpret Section 20 of the Contempt of Courts Act, 1971. In that case an undertaking had been given before the High Court on 19th December, 1986 that the Municipal Corporation would not demolish or disturb a construction till disposal of the writ petition. Despite this undertaking, demolition took place on 11th January, 1987. Soon thereafter the Appellant filed an application before the High Court seeking the initiation of proceedings under Section 12 of the Contempt of Courts Act, 1971. On 15th January, 1987 the High Court issued a show-cause notice to the opposite party as to why contempt proceedings should not be initiated against him for defiance of the Court's order dated 19th December, 1986. On 6th January, 1988, on a concession being made by the Advocate-General the High Court ordered that notices be issued to show-cause why the opposite party be not punished for disobeying the order dated 19th December, 1986.

Subsequently, on 23rd November, 1989 the High Court came to the conclusion that issuing of a show-cause notice did not amount to initiation of proceedings and, therefore, the bar enacted by Section 20 of the Act was attracted and the application was liable to be rejected.

This Court had to consider whether the order of 6th January, 1988 amounted to initiation of proceedings for contempt. Dealing with the question of initiation of proceedings the relevant observations of the judgment are as follows:

"14. In order to appreciate the exact connotation of the expression "initiate any proceedings for contempt" we may notice several situations or stages which may arise before the court dealing with contempt proceedings. These are:

(i) (a) a private party may file or present an application or petition for initiating any proceedings for civil contempt; or

(b) the court may receive a motion or reference from the Advocate General or with his consent in writing from any other person or a specified law officer or a court subordinate to the High Court;

(ii) (a) the court may in routine issue notice to the person sought to be proceeded against;

or

(b) the court may issue notice to the respondent calling upon him to show cause why the proceedings for contempt be not initiated;

(iii) the court may issue notice to the person sought to be proceeded against calling upon him to show cause why he be not punished for contempt.

15. In the cases contemplated by (i) or (ii) above, it cannot be said that any proceedings for contempt have been initiated. Filing of an application or petition for initiating proceedings for contempt or a mere receipt of such reference by the court does not amount to initiation of the proceedings by court. On receiving any such document, it is usual with the courts to commence some proceedings by employing an expression such as "admit", "rule", "issue notice" or "issue notice to show cause why proceedings for contempt be not initiated". In all such cases the notice is issued either in routine or because the court has not yet felt satisfied that a case for initiating any proceedings for contempt has been made out and therefore the court calls upon the opposite party to admit or deny the allegations made or to collect more facts so as to satisfy itself if a case for initiating proceedings for contempt was made out. Such a notice is certainly anterior to initiation. The tenor of the notice is itself suggestive of the fact that in spite of having applied its mind to the allegations and the material placed before it the court was not satisfied of the need for initiating proceedings for contempt; it was still desirous of ascertaining facts or collecting further material whereon to formulate such opinion. It is only when the court has formed an opinion that a prima facie case for initiating proceedings for contempt is made out and that the respondents or the alleged contemners should be called upon to show cause why they should not be punished; then the court can be said to have initiated proceedings for contempt. It is the result of a conscious application of the mind of the court to the facts and the material before it. Such initiation of proceedings for contempt based on application of mind by the court to the facts of the case and the material before it must take place within a period of one year from the date on which the contempt is alleged to have been committed failing which the jurisdiction to initiate any proceedings for contempt is lost. The heading of Section 20 is "limitation for actions for contempt". Strictly speaking, this section does not provide limitation in the sense in which the term is understood in the Limitation Act. Section 5of the Limitation Act also does not, therefore, apply. Section 20 strikes at the jurisdiction of the court to initiate any proceedings for contempt."

It was contended by Mr. Venugopal that Section 20 was mandatory and it imposes a prohibition on the Court in taking action once a period of one year had elapsed. He submitted that Section 20 of the Act nowhere mentions the filing of an application for initiating proceedings of contempt and, therefore, the provisions of Section 29(2) of the Limitation Act would have no application. Relying upon Baradakanta Mishra's case, he submitted that an action of contempt was between the Court and the alleged contemner and hence the date of filing of the petition was not relevant. He submitted that the judgment in Om Prakash Jaiswal's case (supra) had not been correctly decided to the extent that the judgment held that mere

issuance of a show-cause notice was not the initiation of contempt proceedings by the Court. He, however, submitted that contempt proceedings are initiated within the meaning of Section 20when the Court, on the application of mind, issued even a show-cause notice within a period of one year of the committal of alleged contempt.

There can be no doubt that both this Court and High Courts are Courts of Record and the Constitution has given them the powers to punish for contempt. The decisions of this Court clearly show that this power cannot be abrogated or stultified. But if the power under Article 129 and Article 215 is absolute can there be any legislation indicating the manner and to the extent that the power can be exercised? If there is any provision of the law which stultifies or abrogates the power under Article 129 and/or Article 215 there can be little doubt that such law would not be regarded as having been validly enacted. It, however, appears to us that providing for the quantum of punishment or what may or may not be regarded as acts of contempt or even providing for a period of limitation for initiating proceedings for contempt cannot be taken to be a provision which abrogates or stultifies the contempt jurisdiction under Article 129 or Article 215 of the Constitution.

This Court has always frowned upon the grant or existence of absolute or unbridled power. Just as power or jurisdiction under Article 226 has to be exercised in accordance with law, if any, enacted by the legislature it would stand to reason that the power under Article 129 and/or Article 215 should be exercised in consonance with the provisions of a validly enacted law. In case of apparent or likelihood of conflict the provisions should be construed harmoniously.

The Contempt of Courts Act, 1971 inter alia provides for what is not to be regarded as contempt; it specifies in Section 12 the maximum punishment which can be imposed; procedure to be followed where contempt is in the face of the Supreme Court or in the High Court or cognizance of criminal contempt in other cases is provided by Sections 14 and 15; the procedure to be followed after taking cognizance is provided by Section 17; Section 18 provides that in every case of criminal contempt under Section 15 the same shall be heard and determined by a Bench of not less than two Judges;Section 19 gives the right of appeal from any order or decision of High Court in the exercise of its jurisdiction to punish for contempt. There is no challenge to the validity of any of the provisions of the Contempt of Courts Act as being violative or in conflict with any provisions of the Constitution. Barring observations of this Court in the Supreme Court Bar Association's case (supra), where it did not express any opinion on the question whether maximum punishment fixed by the 1971 Act was binding on the Court, no doubt has been expressed about the validity of any provision of the 1971 Act. In exercise of its constitutional power this Court has, on the other hand, applied the provisions of the Act while exercising jurisdiction under Article 129 or 125 of the Constitution. In Sukhdev Singh Sodhi's case (supra) it recognised that the 1926 Act placed a limitation on the amount of punishment which could be imposed. Baradakanta Mishra's case was decided on the interpretation of Section 19 of the 1971 Act, namely, there was no right of appeal if the Court did not take action or initiate contempt proceedings. In the case of Firm Ganpat Ram Rajkumar's case (supra) the Court did not hold that Section 20 of the 1971 Act was inapplicable. It came to the conclusion that the application for

initiating contempt proceedings (was within time and limitation had to be calculated) as for the purpose of limitation date of filing was relevant and furthermore that was a case of continuing wrong. In Kartick Chandra Das case (supra) the provisions of the Limitation Act were held to be applicable in dealing with application under Section 5 in connection with an appeal filed under Section 19 of the Limitation Act. A three-Judge Bench in Dr L.P.Misra's case (supra) observed that the procedure provided by the Contempt of Courts Act, 1971 had to be followed even in exercise of the jurisdiction under Article 215 of the Constitution. ***It would, therefore, follow that if Section 20 is so interpreted that it does not stultify the powers under Article 129 or Article 215 then, like other provisions of the Contempt of Courts Act relating to the extent of punishment which can be imposed, a reasonable period of limitation can also be provided."***

10. From the aforesaid judgment, it emerges that even for application filed under Article 215 of the Constitution of India, the procedure prescribed under the Act, 1971 has to be adhered to.

11. This would be amply clear from a perusal of the judgment of the Apex Court in the case in the case of ***Dr. L.P. Misra vs. State of U.P.*** reported in ***1998(7) SCC 375,*** wherein the Apex Court held as under:-

"6. Mr. Dwivedi, Learned Senior Counsel appearing for the appellant in Crl. Appeal No. 483 of 1994 assailed the impugned order principally on the ground that the court while passing the said order did not follow the procedure prescribed by law. Counsel urged that the court had failed to give a reasonable opportunity to the appellants of being heard. Assuming that the incident as recited in the impugned order had taken place, the court could not have passed the impugned order on the same day after it reassembled without issuing a show cause notice or giving an opportunity to the appellants to explain the alleged contemptuous conduct. The minimal requirement of following the procedure prescribed by law had been over looked by the Court. In support of his submission, Counsel drew our attention to Section 14 of the Contempt of Courts Act, 1971 as also to the provisions contained in Chapter XXXV-E of the Allahabad High Court Rules, 1952. Emphasis was laid on Rule 7 and 8 which read as under :-

"7. When it is alleged or appears to t he Court upon its own view that a person has been guilty of contempt committed in its presence or hearing, the Court may cause such person to be detained in custody, and at any time before the rising of the Court, on the same day or as early as possible thereafter, shall-

(a) cause him to be informed in writing of the contempt with which he is charged, and if such person pleads guilty to the charge, his plea shall be recorded and the Court may in its discretion, convict him thereon,

(b) if such person refuses to plead, or does not plead, or claims to be tried or the Court does not convict him, on his plea of guilt, afford him an opportunity to make his defence to the charge, in support of which he may file an affidavit on the date fiked for his appearance or on such other date as may be fiked by the court in that behalf.

(c) after taking such evidence as may be necessary or as may be offered by such person and after hearing him, proceed either forthwith or after the

adjournment, to determine the matter of the charge, and

(d) make such order for punishment of discharge of such person as may be just.

8. Notwithstanding anything contained in Rule 7, where a person charged with contempt under the rule applies, whether orally or in writing to have the charge against him tried by some Judge other than the Judge or Judges in whose presence or hearing the offence is alleged to have been committed, and the court if of opinion that it is practicable to do so and that in the interests of proper administration of justice the application should be allowed, it shall cause the matter to be placed together with a statement of the facts of the case, before the Chief Justice for such directions as he may think fit to issue as respects the trial thereof."

Counsel urged that the impugned order is totally opposed to the principles of natural justice and, therefore, unsustainable on this score alone. He, therefore, urged that the impugned order be quashed and set aside.

7. Learned Counsel appearing for the other appellants adopted the same arguments.

8. We heard Learned Solicitor General who was requested to appear and assist the Court.

9. After hearing learned counsel for the parties and after going the rough the materials placed on record, we are of the opinion that the Court while passing the impugned order had not followed the procedure prescribed by law. It is true that the High Court can invoke powers and jurisdiction vested in it under Article 215 of the Constitution of India but such a jurisdiction has to be exercised in accordance with the procedure prescribed by law. It is in these circumstances, the impugned order cannot be sustained."

12. From the judgment in the case of ***Dr. L.P. Misra*** (supra), it comes out that though this Court can invoke powers and jurisdiction vested in it under Article 215 of the Constitution of India but the same has to be exercised in accordance with the procedure prescribed under law. In view of the aforesaid judgments in the case of ***Pallav Seth*** and ***Dr. L.P. Misra*** (supra), even though this Court finds that it can exercise jurisdiction but the said jurisdiction can only be exercised in accordance with the procedure prescribed by law and consequently Section 20 of the Act, 1971 would be the limitation for entertaining an application under Article 215 of the Constitution of India.

13. Admittedly, the special appeal was filed on 27.8.2010 while the judgment in the special appeal was pronounced on 7.4.2015 and thus the present application, as per the averments contained therein of the special appeal having been filed by holders of such posts which have neither been created nor approved in the Academy whereby committing contempt, would clearly be hit by the limitation prescribed under Section 20 of the Act, 1971.

14. So far as the judgment in the case of ***Pritam Pal*** (supra), as relied on by the learned counsel by the applicant is concerned, suffice to state that the said judgment was delivered by two Judges while the judgments in ***Pallav Seth*** and ***Dr. L.P. Misra*** (supra) were both delivered by three Judges and were also of the subsequent dates.

15. Accordingly, taking into consideration the aforesaid judgments, the judgments in the case of ***A. Mayilswami***

and ***Mallamala Venkateswara Rao*** (supra) as relied by the learned counsel for the applicant, would also have no applicability in the present case.

16. Taking into consideration the aforesaid discussion, this Court clearly finds that the present application is hit by delay and is accordingly dismissed.

(2020)02ILR A1190

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 18.01.2020

BEFORE
THE HON'BLE RAJESH SINGH CHAUHAN, J.

Service Single No. 854 of 2020

Smt. Shasya Singh ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Mahendra Pratap Singh, Abhishek Dwivedi

Counsel for the Respondents:
C.S.C.

A. Service – Termination – It is a settled principle that the maternity leave shall be available to all female employees irrespective of her nature of appointment, be it temporary, permanent, casual, contractual etc. Therefore, the competent authority i.e. Mission Director in the present case, cannot indicate in his order that such leave is not admissible to the petitioner. (Para 7, 13)

B. If any punishment order is stigmatic or based on some allegations, the services of an employee may not be dispensed with without following the due procedure of law. (Para 6, 11)

C. The punishment order can only be passed by the disciplinary authority applying its judicious and independent mind appreciating the facts of eth issue and the legal provisions to that effect. (Para 9)

D. Discretion exercised under the direction or in compliance with some higher authority's instruction, will be a case of failure to exercise discretion altogether. (Para 10)

E. Constitution of India: Art. 14, 226 – The action of terminating the contractual services is not precluded from scrutiny and can be tested on the touchstone of Art. 14. (Para 12)

Writ Petition allowed.

Precedent followed:

1. Dr. Rachna Chaurasiya Vs. State of U.P. & others, [2017 (11) ADJ 399 (DB)] (Para 2, 7, 8, 13)

2. Nagraj Shivarao Karjagi Vs. Syndicate Bank, Head Officer, Manipal and another, (1991) 3 SCC 219 (Para 5, 10)

3. Anirudhsinhji Karansinhji Jadeja and another, (1995) 5 SCC 302 (Para 5, 10)

4. Commissioner of Income Tax, Shimla Vs. Greenworld Corporation Parwanoo, (2009) 7 SCC 69 (Para 5, 10)

5. Parshotam Lal Dhingra Vs. Union of India, 1958 AIR 36; 1958 SCR 828 (Para 11)

6. High Court of Gujarat Vs. Jayshree Chamanlal Budhhabhatt, (2013) 16 SCC 59 (Para 11)

7. SBI Vs. Palak Modi, (2013) 3 SCC 607 (Para 11)

8. Faraz Hameed Ansari Vs. Life Insurance Corporation of India Through Chairman & others, 2018 (36) LCD 2062 (Para 12)

9. GRIDCO Ltd. and another Vs. Sadananda Doloi and others, (2011) 15 SCC 16 (Para 12)

Precedent distinguished:

1. Rajesh Bhardwaj Vs. Union of India, (Writ-A No. 5484/2013) (Para 4, 5)

(Delivered by Hon'ble Rajesh Singh Chauhan, J.)

1. Heard learned counsel for the parties.

2. This Court has passed order dated 14.1.2020 as under :

"Heard Sri Mahendra Pratap Singh, learned counsel for the petitioner and Sri Ran Vijay Singh, learned Additional Chief Standing Counsel for the State-respondents.

The case set-forth by learned counsel for the petitioner is that the petitioner applied for the child care leave for three months with effect from 11.07.2019 as application dated 10.07.2019 to that effect has been preferred by the petitioner to her Appointing Authority i.e. the District Homeopathy Medical Officer, Sultanpur. On earlier occasion, the petitioner had proceeded for maternity leave with effect from 07.05.2018 to 13.12.2018 and the said leave has not been sanctioned.

The District Homeopathy Medical Officer, Sultanpur has called an explanation from the petitioner that was duly replied vide explanation dated 20.11.2019. In the said explanation, the petitioner has cited the decision of the Division Bench of this Court in re: Dr. Rachna Chaurasiya vs. State of U.P. & others reported in [2017 (11) ADJ 399 (DB)], which categorically provides that the maternity leave and child care leave are admissible to all the lady employees irrespective of her nature of appointment whether it be permanent, temporary and contractual. After receiving the aforesaid explanation of the petitioner dated 20.11.2019, the Appointing Authority has issued two letters, one letter dated 22.11.2019 to the petitioner and second one to the Mission Director, Uttar Pradesh Rajya Ayush Society, Lucknow. Letter dated 22.11.2019, which was addressed to the petitioner, says that her entire issue including her explanation has been forwarded to the Mission Director for necessary orders.

By means of the impugned order dated 17.12.2019, the Mission Director, Uttar Pradesh Rajya Ayush Society, Lucknow has directed the District Homeopathy Medical Officer, Sultanpur to terminate the services of the petitioner for the reason that she has absented again and again without permission and the leave i.e. the maternity and the child care leave are not admissible to the contract employees, therefore, the said leave may not be exceeded to the petitioner.

The maternity leave as well as the child care leave is admissible to the contract employees also in view of the decision of the Division Bench of this Court rendered in re: Dr. Rachna Chaurasiya vs. State of U.P. & others (supra), therefore, recital to that effect in the impugned order is prima facie unwarranted.

So far as recital to the effect that the petitioner has absented again and again without permission is concerned, the question would be as to whether the petitioner has absented without informing the Competent Authority by preferring an application and as to whether she has sought such relief which can not be granted to her. If any employee has sought such relief which may be granted strictly in accordance with law and the circumstances at that point of time compels the employee to proceed on leave otherwise she shall suffer irreparable loss, whether that conduct of an employee may be treated as misconduct.

Not only the above, whether in a given circumstances the services of an employee may be dispensed with without following the principles of natural justice inasmuch as in the present case the services of the petitioner have been dispensed with without affording an opportunity of hearing.

One more question crops up i.e. as to whether any punishment order against an employee can be passed at the behest of the Superior Authority inasmuch as in the present case admittedly Appointing Authority of the petitioner is District Homeopathy Medical Officer but the services of the petitioner have been dispensed with pursuant to the direction being issued by the Mission Director, Uttar Pradesh Rajya Ayush Society, Lucknow, however, the termination order has been passed by the Appointing Authority.

The law is settled on this point that the punishment order can only be passed by the Disciplinary Authority applying his judicious mind independently appreciating the legal provisions to that effect.

Therefore, the matter requires consideration.

List/ put up this case on 18.01.2020 in the additional cause list to enable the learned Additional Chief Standing Counsel to seek instructions in the matter.

Till the next date of listing, no third party interest shall be created."

3. In compliance of the aforesaid order Sri Ran Vijay Singh, learned Addl. C.S.C. has produced the copy of the instruction letter dated 17.1.2020 preferred by the Director, Homeopathy, U.P. addressing the C.S.C., High Court, Lucknow Bench, Lucknow enclosing therewith some correspondences and letters. Along with the instruction letter one letter dated 17.1.2020 has been enclosed which has been preferred by the District Medical Officer, Homeopathy, Sultanpur addressing to Director, Homeopathy, U.P. The perusal of the aforesaid letter dated 17.1.2020 of the District Medical Officer, Homeopathy, Sultanpur reveals that initially the petitioner absented for three days w.e.f. 7.5.2018 to 10.5.2018 without preferring any application to that effect and she further proceeded on leave in continuation of earlier authorized leave by preferring an application seeking maternity leave. It has further been indicated that after the aforesaid maternity leave which was not sanctioned by the competent authority till date the petitioner again proceeded on leave on 10.7.2019 for care of her child as Child Care Leave for three months i.e. w.e.f. 11.7.2019 to 10.10.2019. Admittedly, the petitioner has submitted her joining on 1.11.2019 but her joining was subject to the necessary orders being passed by the Mission Director, U.P. As per Sri Ran Vijay Singh the Mission Director considering the entire facts and circumstances relating to the petitioner directed the District Medical Officer, Homeopathy, Sultanpur to dispense with the services of the petitioner as she is habitual absentee and the leave sought by the petitioner are not admissible for the contract employees.

4. Besides, Sri Ran Vijay Singh has placed reliance on the judgment dated 20.11.2018 of Division Bench of this Court in re: ***Rajesh Bhardwaj vs. Union of India (Writ-A No. 5484/2013 along with one connected writ petition)*** by submitting that since the petitioner was appointed on the post 'Yog Assistant' on

contract basis, therefore, being a contract employee her writ petition may not be maintained before this Court.

5. It would be apt to indicate here that the petitioner is taking recourse of the various pronouncements of the Hon'ble Apex Court which provides that if the order of termination is stigmatic, irrespective of nature of appointment, be it ad-hoc, contractual or regular, a full fledged inquiry would be required to be conducted, therefore, in view of the fact that the facts and circumstances of in re: ***Rajesh Bhardwaj (supra)*** would not be applicable in the present case as the facts and circumstances of the present case are different. Further, the petitioner has also challenged the impugned order on the ground that the punishment order has not been passed by the appointing authority but the same has been passed at the dictate of superior authority, therefore, in view of the settled propositions of law by the Hon'ble Apex Court in re: ***(1991) 3 SCC 219, Nagraj Shivarao Karjagi vs. Syndicate Bank, Head Office, Manipal and another, (1995) 5 SCC 302, Anirudhsinhji Karansinhji Jadeja and another*** and ***(2009) 7 SCC 69, Commissioner of Income Tax, Shimla vs. Greenworld Corporation Parwanoo*** the punishment order is liable to be set aside. Therefore, the judgment in re: Rajesh Bhardwaj (supra) shall not be applicable in the present case inasmuch as the facts and circumstances of both the cases are different.

6. So far as the leave of the petitioner is concerned be that authorized or unauthorized the instructions have been received but so far as the two other questions framed in the order dated 14.1.2020 have not been received as those questions are as to whether the services of an employee can be dispensed with without following the due procedure of law or in violation of principles of natural justice and as to whether the punishment order can be passed other than the appointing authority. The law is trite on the point that if any punishment order is stigmatic or based on some allegations, the services of an employee may not be dispensed with without following the due procedure of law. Had the order impugned been simplicitor, such type of protection could have been avoided but in the present case the Mission Director vide order dated 17.12.2019 has levelled allegations against the petitioner that she is habitual absentee and the leave sought by her is not admissible, therefore, her services should be dispensed with.

7. Considering the tone and tenor of the letter dated 17.12.2019, I feel that an ample opportunity should have been provided to the petitioner, particularly for the reason that in her explanation dated 20.11.2019 the petitioner has cited the judgment of Division Bench of this Court in re: ***Dr. Rachna Chaurasiya (supra)*** wherein this Court has categorically provided that the maternity leave is admissible to all the employees irrespective of her nature of appointment, therefore, before passing the order dated 17.12.2019 the Mission Director must have considered such legal point as the explanation of the petitioner to that effect has been sent to him by the District Homoeopathy Medical Officer.

8. The Division Bench of this Court in re: ***Dr. Rachna Chaurasiya (supra)*** vide para 25 & 27 has held as under :

"25. Maternity benefit is a social insurance and the Maternity Leave is given for maternal and child health and family support. On a perusal of different provisions of the Act, 1961 as well as the policy of the Central Government to grant

Child Care Leave and the Government Orders issued by the State of U.P. adopting the same for its female employees, we do not find anything contained therein which may entitle only to women employees appointed on regular basis to the benefit of Maternity Leave or Child Care Leave and not those, who are engaged on casual basis or on muster roll on daily wage basis."

"27.We are of the considered opinion that the benefit under the Act as well as the Rules of the Government Orders providing for grant of Maternity benefits and Child Care leave are applicable to all female employees, irrespective of their nature of employment whether permanent, temporary or contractual."

9. So far as the second question regarding the competence of the authority to pass punishment order is concerned, the law is settled on this point that the punishment order can only be passed by the disciplinary authority applying its judicious and independent mind appreciating the facts of the issue and the legal provisions to that effect. In the present case the punishment order has, however, been passed by the appointing authority but the appointing authority has not applied his own judicious mind independently as he followed the direction being issued by the Mission Director vide letter dated 17.12.2019, therefore, in that count the punishment order dated 26.12.2019 is not sustainable in the eyes of law.

10. The Hon'ble Apex Court in re: ***Nagraj Shivarao Karjagi (supra), Anirudhsinhji Karansinhji Jadeja and another (supra) and Commissioner of Income Tax, Shimla (supra)*** it has been held that if the statutory authority has been vested with the jurisdiction, the authority has to exercise it according to its own discretion. If the discretion is exercised under the direction or in compliance with some higher authority's instruction, then it will be case of failure to exercise discretion altogether.

11. The Hon'ble Apex Court in re: ***Parshotam Lal Dhingra vs Union Of India reported in 1958 AIR 36, 1958 SCR 828*** has held the stigmatic termination order may not be passed without affording an opportunity of hearing to an employee if the order entails civil consequences could not have been passed without affording an opportunity of hearing to an employee. Apex Court in the case of ***High Court of Gujarat Vs. Jayshree Chamanlal Budhhabhatt, 2013 (16) SCC 59***, has taken the view that once any allegations are made against the incumbent concerned, which results in stigma, the minimum requirement is to inform the concern person, the charge against him, and to give him reasonable opportunity of being heard. Apex Court in the case of ***SBI Vs. Palak Modi, 2013 (3) SCC 607***, has considered the issue of termination simplicitor or punitive termination. Mention has been made that if misconduct/misdemeanor constitutes the basis of final decision taken by competent authority to dispense with the services of an incumbent albeit by a non-stigmatic order, the Court can lift the veil and declare that in the garb of termination simplicitor, the employer has punished the employee for misconduct.

12. This Court in re: ***Faraz Hameed Ansari vs. Life Insurance Corporation Of India Thru Chairmann & Others reported in 2018(36) LCD 2062*** has held

in para 15, while considering various decisions of the Hon'ble Apex Court, para 15 is as under :

"15. Thus, even if the impugned action terminating the services of the petitioners is in the realm of a contract, the same would not be precluded from scrutiny in exercise of its powers of judicial review by this Court available to it under Article 226 of the Constitution of India. I am of the considered opinion that every action of the Corporation, whether statutory or non-statutory or administrative in nature, has to be necessarily in consonance with the constitutional mandate and the impugned order, thus, can be tested on the touchstone of Article 14 of the Constitution of India. In case, the impugned action is found to be unreasonable, irrational, illegal, perverse or unfair, the same can be interfered with in view of the law laid down by Hon'ble Supreme Court in the case of GRIDCO1 Ltd. (supra).

13. If on account of the fact that the petitioner was habitual absentee and the leave sought by the petitioner was not admissible to her, the full-fledged departmental inquiry should have been conducted against the petitioner seeking her explanation to that effect and after providing her opportunity of hearing any appropriate order could have been passed by the disciplinary authority. It might be possible that the petitioner could have defended herself placing on record, some relevant case laws of this Court and Hon'ble Apex Court justifying her conduct and if she fails to justify her conduct the appropriate order could have been passed, but such exercise has not been carried out in the present case. If the Division Bench of this Court in re: ***Dr. Rachna Chaurasiya (supra)*** has observed that the maternity leave shall be available to all female employees irrespective of her nature of appointment, be it temporary, permanent, casual, contractual etc., then how the competent authority i.e. Mission Director has indicated in his order that such leave is not admissible to the petitioner, therefore, it appears that such observation is in derogation of the direction being issued by the Division Bench of this Court in re: ***Dr. Rachna Chaurasiya (supra)***. It might be possible that the authority concerned i.e. Mission Director was having some judgment of Hon'ble Supreme Court or having some relevant material that may authorise him to disagree with the direction of the Division Bench in re: Dr. Rachana Chaurasiya (supra) but such material must have been indicated in the order dated 17.12.2019 otherwise that order shall suffer from vice of perversity.

14. Be that as it may, since the appointing authority are not satisfied with the conduct of the petitioner as being reflected in the impugned orders and the instruction letter and the recital to that effect has also been given in the impugned order, therefore, a proper departmental inquiry strictly in accordance with law should have been conducted and concluded against the petitioner to that effect if it is so warranted and after providing an opportunity of hearing to the petitioner any appropriate order can be passed. Any appropriate order can be passed only by the disciplinary authority independently and such order may not be passed pursuant to the direction being passed by the superior authority.

15. In any case if the departmental inquiry is conducted against the petitioner,

the same can be conducted and concluded with promptness preferably within a period of three months and any appropriate order can be passed strictly in accordance with law within one month thereafter. It is needless to say that the petitioner shall cooperate with the departmental proceedings, if the same is initiated inasmuch as this is sole prerogative of the disciplinary authority to initiate the departmental inquiry against the petitioner. It is being clarified that this Court is not directing to conduct the departmental inquiry against the petitioner..

16. In view of the above, I am of the considered opinion that the impugned order dated 17.12.2019 and 26.12.2019 are not sustainable in the eyes of law, therefore, both the orders are hereby ***quashed.***

17. The disciplinary authority is directed to reinstate the petitioner in service and pay her regular salary and other emoluments as and when the same falls due.

18. It is also directed that the appropriate orders regarding earlier leave of the petitioner may be passed strictly in accordance with law.

19. In view of above, writ petition is ***allowed.***

(2020)02ILR A1196

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 13.02.2020

BEFORE
THE HON'BLE SAURABH LAVANIA, J.

Service Single No. 5994 of 2000

Ajai Kumar ...Petitioner

Versus

State of U.P. ...Respondent

Counsel for the Petitioner:
G.S.L. Varma, Kaushal Kishore

Counsel for the Respondent:
C.S.C.

A. Service Law– Application for Execution of decree for payment of salary – Allahabad High Court Rules, 1952: Rule 1(viii) of Chapter-II read with Rule 6 of Chapter VII; Limitation Act, 1963: Article 136, 137 – Maintainability – Application held to be not maintainable being barred by limitation.

Writ Petition rejected. (E-4)

Present application prays for decree for execution of judgment dated 01.04.2005, passed by this Court in the present writ petition.

(Delivered by Hon'ble Saurabh Lavania, J.)

C.M. Application No. 8686 of 2020 (Application for Execution).

1. Heard Sri G.S.L. Varma, learned counsel for the petitioner and Sri Manish Pandey, learned State counsel.

2. The present application has been filed under Rule 1 (viii) of Chapter-II read with Rule 6 of Chapter VII of the Allahabad High Court Rules, 1952. It is for preparation of decree for execution of the judgment dated 01.04.2005, passed by this Court in the present writ petition.

3. The application, under consideration, was presented in the Registry of this Court on 21.01.2020.

4. From the prayer made in the application, under consideration, which is quoted below, it is evident that the relief sought is for preparation of decree for execution of the judgment and order dated 01.04.2005, passed by this Court in the present writ petition.

*"**Wherefore,** it is most respectfully prayed, that this Hon'ble court of justice may graciously be pleased to direct the Registrar to prepare the decree on the basis of judgment dated 01.04.2005 and sent the same to the Civil court of the Competent Jurisdiction for the execution of the decree to make payment of the due salary to the petitioner w.e.f. 14.06.2000 till date, in exercise of powers conferred under Rule 1 (VIII) of Chapter II read with Rule 6 of Chapter VII of the Allahabad High Court Rules 1952, otherwise the applicant/petitioner will suffer irreparable loss and injury so that his life livelihood may not be further ruined."*

5. For the purposes of disposal of the present application, it would be proper to mention that as per Article 137 provided in the Schedule to Limitation Act, 1963 (in short "Act, 1963"), an application for which no period of limitation is provided under the Act, 1963 shall be filed within three years from the date when the right to apply accrues, the same reads as under:-

Description of application	*Period of limitation*	*Time from which period begins to run*
137. Any other application for which no period of limitation is provided elsewhere in this Division.	*Three years*	*When the right to apply accrues.*

6. In the present case, in my view, the right to prefer/move application for preparation of decree was accrued to the petitioner on 04.05.2005, the date of the judgment passed in the writ petition filed by the petitioner, and as such the application, under consideration, in my view, itself is not maintainable being highly barred by limitation.

7. For disposal of the present application, it is also relevant to mention that in view of the limitation provided under Article 136 of the Act, 1963 which is quoted below, an application for execution of any decree (other than a decree granting a mandatory injunction) or order of any Civil Court can be filed within 12 years from the date when the decree or order becomes enforceable or where the decree or any subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods when default in making the payment or delivery in respect of which execution is sought, takes place.

8. Proviso to it says that an application for the enforcement or execution of a decree granting a perpetual injunction shall not be subject to any period of limitation.

Description of application	*Period of limitation*	*Time from which period begins to run*
136. For the execution of any decree	*Twelve years*	*[When] the decree or order becomes*

(other than a decree granting a mandatory injunction) or order of any civil court.		*enforceable or where the decree or any subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods when default in making the payment or delivery in respect of which execution is sought, takes place: Provided that an application for the enforcement or execution of a decree granting a perpetual injunction shall not be subject to any period of limitation.*

9. It appears from the judgment and order dated 01.04.2005 and the relief sought in the present application, quoted above, that the petitioner for his money claim has approached this Court by means of the present application, filed in the Registry of this Court on 21.01.2020.

10. Keeping in view the aforesaid facts of the case and the provision as envisaged in Article 136 provided in the Schedule to the Act, 1963, in my view, the application of the petitioner for execution of the judgment for money claim would also be not maintainable being barred by limitation.

11. In addition to the above, with regard to compliance of the order dated 01.04.2005, passed by the writ Court, earlier the petitioner filed the Contempt Petition No. 2280 of 2009, which was dismissed on 18.02.2010. The order dated 18.02.2010 reads as under:-

"This Court in Writ Petition No.5994 (S/S) of 2000 has passed an order on 01.04.2005, whereby the order was made for making the payment of salary.

This contempt petition was filed on 21.10.2009 which is time barred as per section 20 of the Contempt of Court Act 1971 read with proviso of Rule 5 of the Contempt of Court Allahabad High Court, Rules 1977.

The contempt petition is not maintainable being time barred. The same is accordingly dismissed as not maintainable."

12. Aggrieved by the order dated 18.02.2010, the petitioner filed the Special Appeal Defective No. 146 of 2010, which was also dismissed vide judgment and order dated 15.05.2018, after condoning the delay in filing the appeal. The order dated 15.05.2018 reads as under:-

"Heard learned counsel for the appellant and learned Standing Counsel.

This special appeal has been preferred by the appellant against the order dated 18.02.2010 passed by the learned Single Judge by means of which learned Single Judge has proceeded to reject the contempt petition preferred by the appellant as the same was time barred

as contemplated under Section 20 of the Contempt of the court Act,1971(hereinafter referred to as, 'the Act of 1971') holding that the contempt petition was preferred at a belated stage.

Learned counsel for the appellant submits that petition was moved under Article 215 of the Constitution of India as there is no limitation provided under Article 215 of the Constitution of India.

It is to be noted that an application can be moved only under Section 12 of the Act of 1971. No other provision is existing on the basis of which the appellant can claim benefits in respect of the period of limitation. If the appellant was well advised, then, the application ought to have been moved under Article 215 of the Constitution of India in the pending writ petition but that was never done. Further, appellant has to proceed before this Court under Section 12 of the Act of 1971 as the said powers are vested with this Court but the same was never invoked by the appellant.

Therefore, in the aforesaid circumstances, this special appeal is liable to be dismissed and is hereby dismissed as the same has no merit."

13. After the order dated 15.05.2018 passed in the Special Appeal Defective No. 246 of 2010, the petitioner moved the application for review of the judgment and order dated 15.05.2018. The same was rejected by the Division Bench of this Court vide judgment and order dated 20.11.2019, which reads as under:-

"Heard Mr. G.S.L. Verma, learned counsel for appellant-applicant as well as Mr. Arun Kumar, learned counsel for respondents no. 2 and 3 on the application for review and condonation of delay application.

This review application has been filed against the order dated 15.5.2018 whereby the special appeal has been dismissed on merit.

Learned counsel for review-applicant submits that the findings recorded by the appellate Court are perverse and not sustainable in law.

We are of the considered view that we in the coordinate Bench cannot look into the findings recorded by another coordinate Bench. The scope of review is very limited. The review application as such deserves to be dismissed.

In view of above, we do not find any reason to condone the delay. The application for condonation of delay (CMA No. 27063 of 2019) and application for review (CMA No. 82290 of 2018) are rejected."

14. Keeping in view the aforesaid facts and circumstances of the case as well as the findings recorded by this Court with regard to limitation provided for moving an application for preparation of decree and for execution of the order, this Court finds that the present application has no merit.

15. Accordingly, the application, in issue, is ***rejected***.

16. The matter is ***consigned*** to record.

(2020)02ILR A1199

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 06.01.2020

BEFORE
THE HON'BLE SIDDHARTHA VARMA, J.

Service Single No. 14092 of 2018

Chandra Kumar Misra ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Mohd. Ali, Lalla Ji Maurya

Counsel for the Respondents:
C.S.C.

A. Service Law– Suspension – Enquiry – Civil Services (Classification, Control and Appeal) Rules: Rule 55 – Petitioner posted as a Lekhpal was suspended on the basis of an extremely vague charge sheet. The Court allowed the petition on the following principles. (Para 11)

B. One of the fundamental principles of natural justice is that no man shall be a judge in his own cause – In the present case, Sub Divisional Magistrate, Biswan when stated to be a witness of the facts which formed the basis of the charges then he would be considered to be a judge in his own cause. There should have been a change of the enquiry officer specially when he had himself lodged a FIR against the petitioner. (Para 4, 7 IV, 12)

C. A decision must be arrived at on some evidence, which is legally admissible. The provisions of the Evidence Act may not be applicable in a departmental proceeding but the principles of natural justice are - The function of an Enquiry Officer is to examine the evidence, even in the absence of the delinquent official to see as to whether the unrebutted evidence is sufficient to hold that the charges are proved. (Para 5, 7, 7 V, 13)

D. It is the basic requirement of rules of natural justice that an employee be given a reasonable opportunity of being heard in any proceeding which may culminate in punishment being imposed on the employee - Denial of enquiry report to the petitioner amounted to the denial of a reasonable opportunity to object to the quantum of punishment. (Para 5, 7 VI, 14)

Writ petition allowed. (E-4)

Precedent followed:

1. Union of India and others Vs. Ram Lakhan Sharma, 2018 (7) SCC 670 (Para 4)

2. State of Uttar Pradesh and Others Vs. Saroj Kumar Sinha, 2010 (2) SCC 772 (Para 5)

3. State of U.P. and another Vs. C.S. Sharma, AIR 1968 SC 158 (Para 7)

4. Chamoli District Cooperative Bank Limited and another Vs. Raghunath Singh Rana and others, 2016 (12) SCC 204 (Para 7 III)

5. The State of Uttar Pradesh Vs. Mohammad Nooh, 1958 AIR 86 (Para 7 IV)

6. Room Singh Negi Vs. Punjab National Bank, 2009 (2) SCC 570 (Para 7 V)

7. Union of India and Ors. Vs. Mohd. Ramzan Khan, 1991 (1) SCC 588 (Para 7 VI)

8. Managing Director Ecil Hyderabad Vs. B. Karunakar Etc., 1994 LIC 762 (Para 7 VI)

9. Deepali Gundu Surwase Vs. Kranti Junior Adhyapak Mahavidyalaya (D.ED.) and Others, 2013 (10) SCC 324 (Para 8)

Present petition assails the orders dated 23.05.1992, passed by the Sub Divisional Officer, Biswan, Dist. Sitapur and Appellate order dated 31.03.2018.

(Delivered by Hon'ble Siddhartha Varma, J.)

1. The petitioner who was posted as a Lekhpal in Kshetra - Nakela, Tehsil - Biswan, District - Sitapur was suspended on 26.11.1991. A charge sheet issued by the Sub Divisional Magistrate, Biswan District - Sitapur was served upon him on 31.12.1991. Upon receiving the charge sheet on 2.1.1992, the petitioner prayed for time for submitting his reply on 16.1.1992. When in the meantime on 10.2.1992, the enquiry office who was appointed by the Sub Divisional Officer, namely, the Naib Tehsildar Biswan, Sri Virendra Bahadur had lodged a First Information Report against the petitioner, he submitted an application to the Sub Divisional

Magistrate Biswan with a request that the enquiry officer, namely, Sri Virendra Bahadur be changed. This application was filed by the petitioner on 17.2.1992. However, on 18.2.1992 Sri Virendra Bahadur, who was sought to be changed, in pursuance of the earlier application filed by the petitioner for the extension of time, extended the time to file the reply to the charge sheet up to 25.2.1992. However, this letter never reached the petitioner and, therefore, while the petitioner was still waiting for the extension of time to submit his reply and also for the change of the enquiry officer, the enquiry officer completed the enquiry and on 24.3.1992 submitted his report. Based on the enquiry report, the punishing authority, that is, the Sub Divisional Magistrate, Biswan, in his turn passed an order of dismissal on 23.5.1992. Thereafter, the petitioner approached the High Court by means of a writ petition being Service Bench No. 239 of 1992 which was disposed of by an order dated 14.12.2017 with a direction that the Appellate Authority was to decide the appeal within a period of one month from the passing of the order of the High Court. When the Appellate Court on 31.3.2018 dismissed the appeal, the instant writ petition was filed.

2. Learned counsel for the petitioner has assailed the orders dated 23.5.1992 passed by the Sub Divisional Officer Biswan and the Appellate order dated 31.3.2018 essentially on the following grounds:-

I. If the charges which were levelled against the petitioner were perused it was evident that they were absolutely vague. The charge no. 1 had implicated the petitioner with a charge that he had violated a certain code of conduct. It had stated that as per the Rules, the petitioner could not have participated in the activities of any political party but no rule has been cited. By the charge no. 2 it was stated that on 25.11.1991, in a rally held in Ramleela Maindan, Kasba, Biswan, District Sitapur wherein some political leaders, namely, Rewati Raman Singh, Ram Poojan Patel, Ramnaresh Kushwaha, Kaushal Kishore and Shiv Sewak Dixit etc. were present, the petitioner was also sitting on the dais. It has been further stated that the petitioner had read a certain demand letter from the dais. The charges no. 1 and 2, therefore, stated that the petitioner was involved in certain political activities. The charge no. 3 was to the effect that the petitioner had not done any work connected with his area and that there was no contribution of the petitioner towards the family welfare schemes. By charge no. 4 it was alleged that some allotment of land was also not done by the petitioner. The charge no. 5 was a reiteration of charge no. 2.

3. Learned counsel for the petitioner submits that none of the charges indicated as to which particular Rule or Law, the petitioner had violated by participating in the political activity. Learned counsel for the petitioner submitted that even though the petitioner had never participated in any political activity yet it was not clear from the charges that which Rule was violated by the petitioner. Learned counsel for the petitioner further submitted that a perusal of the charges no. 3 and 4 also did not indicate as to where was the shortcoming in his performance so far as the various schemes were concerned. He submits that the charges did not make it clear as to which land was not allotted by the petitioner. Therefore, learned counsel for the petitioner submitted that the enquiry

was vitiated on account of the fact that the charges were not clear.

II. When the petitioner had asked for time and the enquiry officer had not responded and in fact the enquiry officer on 10.2.1992 had lodged a first information report against the petitioner then upon the prayer of the petitioner, the enquiry officer should have got himself changed. Learned counsel for the petitioner submits that a person who was himself implicating the petitioner in a criminal case should not have been trusted with the enquiry which was being conducted by him. When the first information report was lodged by the enquiry officer himself against the petitioner and when the petitioner had objected to the same then the petitioner could not have trusted his life with the enquiry officer who had himself lodged the first information report against the petitioner.

4. Learned counsel for the petitioner, therefore, submits that the Enquiry Officer should always be like an independent adjudicator and one who was always obliged to act fairly and impartially. He has to act in good faith without any bias. He submits that when the enquiry officer was virtually the representative of the punishing authority and he was all set to punish the petitioner then the Enquiry Report should have been rejected. Learned counsel for the petitioner relied upon **2018 (7) SCC 670 (Union of India and others v. Ram Lakhan Sharma)** and since the petitioner's counsel relied upon on the paragraph 24, 28, 31, 33 and 34 they are being reproduced here as under:-

"24.The disciplinary proceedings are quasi-judicial proceedings and Enquiry Officer is in the position of an independent adjudicator and is obliged to act fairly, impartially. The authority exercising quasi-judicial power has to act in good faith without bias, in a fair and impartial manner.

28. When the statutory rule does not contemplate appointment of Presenting Officer whether non-appointment of Presenting Officer ipso facto vitiates the inquiry? We have noticed the statutory provision of Rule 27 which does not indicate that there is any statutory requirement of appointment of Presenting Officer in the disciplinary inquiry. It is thus clear that statutory provision does not mandate appointment of Presenting Officer. When the statutory provision does not require appointment of Presenting Officer whether there can be any circumstances where principles of natural justice can be held to be violated is the broad question which needs to be answered in this case. We have noticed above that the High Court found breach of principles of natural justice in Enquiry Officer acting as the prosecutor against the respondents. The Enquiry Officer who has to be independent and not representative of the disciplinary authority if starts acting in any other capacity and proceed to act in a manner as if he is interested in eliciting evidence to punish an employee, the principle of bias comes into place.

31.A Division Bench of the Madhya Pradesh High Court speaking through Justice R.V. Raveendran, CJ (as he then was) had occasion to consider the question of vitiation of the inquiry when the Inquiry Officer starts himself acting as prosecutor in Union of India and ors. vs. Mohd. Naseem Siddiqui, ILR (2004) MP 821. In the above case the Court considered Rule 9(9) (c) of the Railway Servants (Discipline & Appeal) Rules,

1968. The Division Bench while elaborating fundamental principles of natural justice enumerated the seven well recognised facets in paragraph 7 of the judgment which is to the following effect:

"7. One of the fundamental principles of natural justice is that no man shall be a judge in his own cause. This principle consists of seven well recognised facets:

(i) The adjudicator shall be impartial and free from bias,

(ii) The adjudicator shall not be the prosecutor,

(iii) The complainant shall not be an adjudicator,

(iv) A witness cannot be the Adjudicator,

(v) The Adjudicator must not import his personal knowledge of the facts of the case while inquiring into charges,

(vi) The Adjudicator shall not decide on the dictates of his Superiors or others,

(vii) The Adjudicator shall decide the issue with reference to material on record and not reference to extraneous material or on extraneous considerations.

If any one of these fundamental rules is breached, the inquiry will be vitiated."

33. The Division Bench after elaborately considering the issue summarised the principles in paragraph 16 which is to the following effect:

"16. We may summarise the principles thus:

(i) The Enquiry Officer, who is in the position of a Judge shall not act as a Presenting Officer, who is in the position of a prosecutor.

(ii) It is not necessary for the Disciplinary Authority to appoint a Presenting Officer in each and every inquiry. Non- appointment of a Presenting Officer, by itself will not vitiate the inquiry.

(iii) The Enquiry Officer, with a view to arrive at the truth or to obtain clarifications, can put questions to the prosecution witnesses as also the defence witnesses. In the absence of a Presenting Officer, if the Inquiry Officer puts any questions to the prosecution witnesses to elicit the facts, he should thereafter permit the delinquent employee to cross-examine such witnesses on those clarifications.

(iv) If the Inquiry Officer conducts a regular examination-in-chief by leading the prosecution witnesses through the prosecution case, or puts leading questions to the departmental witnesses pregnant with answers, or cross-examines the defence witnesses or puts suggestive questions to establish the prosecution case employee, the Enquiry Officer acts as prosecutor thereby vitiating the inquiry.

(v) As absence of a Presenting Officer by itself will not vitiate the inquiry and it is recognised that the Inquiry Officer can put questions to any or all witnesses to elicit the truth, the question whether an Inquiry Officer acted as a Presenting Officer, will have to be decided with reference to the manner in which the evidence is let in and recorded in the inquiry.

Whether an Enquiry Officer has merely acted only as an Enquiry Officer or has also acted as a Presenting Officer depends on the facts of each case. To avoid any allegations of bias and running the risk of inquiry being declared as illegal and vitiated, the present trend appears to be to invariably appoint Presenting Officers, except in simple cases. Be that as it may."

34. We fully endorse the principles as enumerated above, however, the principles have to be carefully applied

in facts situation of a particular case. There is no requirement of appointment of Presenting Officer in each and every case, whether statutory rules enable the authorities to make an appointment or are silent. When the statutory rules are silent with regard to the applicability of any facet of principles of natural justice the applicability of principles of natural justice which are not specifically excluded in the statutory scheme are not prohibited. When there is no express exclusion of particular principle of natural justice, the said principle shall be applicable in a given case to advance the cause of justice. In this context reference is made of a case of this Court in Punjab National Bank and others vs. Kunj Behari Misra, 1998 (7) SCC 84. In the above case, this Court had occasion to consider the provisions of Punjab National Bank Officer Employees' (Discipline and Appeal) Regulations, 1977. Regulation 7 provides for action on the enquiry report. Regulation 7 as extracted in paragraph 10 of the judgment is as follows:

10. ....."7. Action on the enquiry report.--(1) The disciplinary authority, if it is not itself the enquiring authority, may, for reasons to be recorded by it in writing, remit the case to the enquiring authority for fresh or further enquiry and report and the enquiring authority shall thereupon proceed to hold the further enquiry according to the provisions of Regulation 6 as far as may be.

(2) The disciplinary authority shall, if it disagrees with the findings of the enquiring authority on any article of charge, record its reasons for such disagreement and record its own findings on such charge, if the evidence on record is sufficient for the purpose.

(3) If the disciplinary authority, having regard to its findings on all or any of the articles of charge, is of the opinion that any of the penalties specified in Regulation 4 should be imposed on the officer employee, it shall, notwithstanding anything contained in Regulation 8, make an order imposing such penalty.

(4) If the disciplinary authority having regard to its findings on all or any of the articles of charge, is of the opinion that no penalty is called for, it may pass an order exonerating the officer employee concerned." "

5. Learned counsel for the petitioner also relied upon **2010 (2) SCC 772 (State of Uttar Pradesh and Others vs. Saroj Kumar Sinha)** and submitted that an employee should be treated fairly in any proceeding which may culminate in a major punishment. Learned counsel for the petitioner submitted that an enquiry officer should not act both as a prosecutor and as a judge. His function was to examine facts and evidence which which were presented by the delinquent and the department. This, he submits, the enquiry officer had to do objectively even if the delinquent official is absent. The enquiry officer had to in the absence of the delinquent officer assess the evidence produced by the department and had to see if the unrebutted evidence was sufficient to prove that the charges were proved. Since the learned counsel for the petitioner relied upon paragraphs 28, 29 and 30 of the judgement they are being reproduced here as under:-

"28. An Inquiry officer acting in a quasi judicial authority is in the position of an independent adjudicator. He is not supposed to be a representative of the department/disciplinary authority/Government. **His function is to examine the evidence presented by the department, even in the absence of the delinquent official to see as to whether the unrebutted evidence is sufficient to hold that the charges are proved.** In the present case the aforesaid procedure has

not been observed. Since no oral evidence has been examined the documents have not been proved, and could not have been taken into consideration to conclude that the charges have been proved against the respondents.

29. Apart from the above by virtue of Article 311(2) of the Constitution of India the departmental inquiry had to be conducted in accordance with rules of natural justice. It is a basic requirement of rules of natural justice that an employee be given a reasonable opportunity of being heard in any proceeding which may culminate in punishment being imposed on the employee.

30. When a departmental enquiry is conducted against the Government servant it cannot be treated as a casual exercise. The enquiry proceedings also cannot be conducted with a closed mind. The enquiry officer has to be wholly unbiased. The rules of natural justice are required to be observed to ensure not only that justice is done but is manifestly seen to be done. The object of rules of natural justice is to ensure that a government servant is treated fairly in proceedings which may culminate in imposition of punishment including dismissal/removal from service."

6. In the instant case, learned counsel submitted that when the petitioner could not be present and when the enquiry officer himself appeared to be on inimical terms, he having have lodged a first information report against the petitioner, the enquiry should not have been allowed to continue.

7. Learned counsel for the petitioner further submitted that in the enquiry neither any place, date or time was fixed for the appearance of the petitioner or for the production of any evidence. Witnesses could not be produced by either sides and, therefore, learned counsel for the petitioner submitted that the enquiry was absolutely vitiated. Learned counsel for the petitioner submitted that as per Rule 55 of the C.C.A Rules which provide for a full fledged enquiry no enquiry took place. He relied upon a decision reported in **AIR 1968 SC 158 (State of U.P. and another vs. C.S. Sharma)**. Since he specifically relied upon paragraphs 6 and 10 of the judgement they are being reproduced here as under:-

"6. The first question is whether this inquiry was made under sub-rule (1) or (3) of r. 55 of the Civil Services (Classification, Control and Appeal) Rules. It is an admitted fact that Sharma was a temporary employee and therefore his case would fall to be governed by sub-rule (3) of r. 55 if it could be said that the enquiry which was being made was for a specific fault or on account of his unsuitability for service. Sub-rule 1) of r. 55 is a general rule for enquiries where the conduct of a person is inquired into for misconduct but sub-rule (3) says that subrule shall not apply where it is proposed to terminate the employement of a probationer, or to dismiss, remove or reduce in rank a temporary government servant for any specific fault or on account of his unsuitability for the service. Sub-rule (3) says that in such cases, the probationer or temporary government servant concerned shall be apprised of the grounds of such proposal, given an opportunity to show cause against the action to be taken against him, and his explanation in this behalf, if any. shall be duly considered before orders are passed by the competent authority. If the third sub-rule applied, it is obvious that the kind

of enquiry made complied with its requirements. The first sub-rule, however,- provides for a full-blooded enquiry which is the counter-part of a regular trial : witnesses have to be examined in support of the allegations, opportunity has to be given to the delinquent, officer to cross-examine them and to lead evidence in his defence. In our judgment the present case was governed by the first sub-rule and not the third sub-rule. The third sub-rule deals with the unsuitability of an officer for the service or with a charge for any specific fault. This fault means a fault in the execution of his duties and not a misconduct such as taking bribe etc. which are charges of a more serious nature, affecting the character of the individual concerned. The collocation of the words "any specific fault" or "on account of unsuitability for service" give the clue of the distinction between the third sub-rule and the first sub- rule. An officer who is, for example, habitually lazy or makes mistakes frequently or is not polite or decorous may be considered unsuitable for the service. Another officer who makes a grievous default in the execution of his work may be charged for the specific individual fault, that is a dereliction or defect in the execution of that duty. Where there is an allegation that an officer is guilty of a misconduct such as accepting bribe or showing favours, the matter is not one of specific fault in the execution of his work but something more. That matter will fall to be governed by the first sub-rule because you cannot charge a man with criminal conduct without affording him adequate opportunity to clear his character. Mr. Aggarwal fairly pointed out that the Government had appointed the enquiring officer to take action under r. 55(1) and it is thus quite clear that Government viewed the matter also in this light.

10. We may not omit to state that there was an allegation against the Commissioner that he was biased against Sharma. It does appear that the Commissioner, in one of his letters, stated that he had heard witnesses and satisfied himself that Sharma was definitely corrupt. This statement of the Commissioner showed that :he approached the case with a feeling that Sharma was guilty although the State Government cannot be said to share this bias of the Commissioner. We would have said something more about this, if the occasion had demanded this, but as we are upholding the order of the High Court on the ground that no reasonable 8 54 opportunity was afforded to Sharma to lead his evidence, it is not necessary to say whether an officer in the position of the Commissioner, who on the basis of secret enquiries behind the 'back of ,delinquent officer has reached the conclusion that there are good grounds for holding that the officer is corrupt, should himself ,conduct the enquiry. That matter may be left for consideration in another case."

III. Learned counsel for the petitioner further submitted that domestic enquiries ought to be conducted honestly, bonafidely and with a view to determine whether charges are proved. Care has to be taken to see that the enquiry does not become an empty formality. Learned counsel for the petitioner relied upon **2016 (12) SCC 204 (Chamoli District Cooperative Bank Limited and another v. Raghunath Singh Rana and others)**.

IV. Learned counsel for the petitioner further submitted that the disciplinary authority, namely, the Sub Divisional Magistrate Biswan when was stated to be a witness of the facts which formed the basis of the charges then he would be considered to be a judge in his

own cause. In this regard, learned counsel relied upon **1958 AIR 86 (The State Of Uttar Pradesh vs Mohammad Nooh)**.

V. Learned counsel for the petitioner submitted that when the charge itself stated that the meeting at the Ramlila Maidan was held on 25.11.1991 then when the enquiry report which dealt with an incident on 1.3.1992, it could safely be said that the enquiry report was based on conjectures and surmises and learned counsel for the petitioner to substantiate his argument relied upon **2009 (2) SCC 570 (Room Singh Negi vs. Punjab National Bank)**. The paragraph 23 of the judgement upon which learned counsel heavily relied upon is being reproduced here as under:-

"Furthermore, the order of the disciplinary authority as also the appellate authority are not supported by any reason. As the orders passed by them have severe civil consequences, appropriate reasons should have been assigned. If the enquiry officer had relied upon the confession made by the appellant, there was no reason as to why the order of discharge passed by the Criminal Court on the basis of self-same evidence should not have been taken into consideration. The materials brought on record pointing out the guilt are required to be proved. A decision must be arrived at on some evidence, which is legally admissible. The provisions of the Evidence Act may not be applicable in a departmental proceeding but the principles of natural justice are. **As the report of the Enquiry Officer was based on merely ipse dixit as also surmises and conjectures, the same could not have been sustained.** The inferences drawn by the Enquiry Officer apparently were not supported by any evidence. Suspicion, as is well known, however high may be, can under no circumstances be held to be a substitute for legal proof.

VI. The counsel for the petitioner submitted that there was also a technical flaw in the enquiry inasmuch as the petitioner was not served with the enquiry report and was also not required to show cause with regard to the punishment. He submitted that denial of the enquiry report to the petitioner amounted to the denial of a reasonable opportunity to object to the quantum of punishment. In this regard, the learned counsel for the petitioner relied upon **1991 (1) SCC 588 (Union of India and Ors. vs. Mohd. Ramzan Khan) and 1994 LIC 762 (Managing Director Ecil Hyderabad ... vs B. Karunakar Etc. Etc)**.

VII. Learned counsel for the petitioner submitted that the Appellate Authority also did not act in accordance with law and only dittoed the findings as were arrived at by the punishing authority.

VIII. Learned counsel for the petitioner, therefore, submitted that the enquiry itself was a slip shod one and no findings of it could be relied upon and, therefore, the orders 23.5.1992 and 31.3.2018 be quashed and the writ petition be allowed.

8. The petitioner for having been kept out of service illegally prayed that he be compensated by giving him full back wages. In this regard, the learned counsel relied upon **2013 (10) SCC 324 (Deepali Gundu Surwase v. Kranti Junior Adhyapak Mahavidyalaya (D.ED.) and Others).**

9. Learned Standing Counsel, however, in reply submitted that the charges were evident from the charge sheet itself. There was nothing vague about it. He further submitted that when the petitioner was asked to submit his reply then he should have submitted the same and the lodging of the first information report did not mean that the enquiry officer would be biased against the petitioner. He further submitted that the enquiry could not be said to be vitiated on account of the fact that the petitioner was

also found to be participating in a political meeting on 1.3.1992. He submitted that it mattered little that though the petitioner was charged for allegedly attending the meeting held on 25.11.1991 but the fact that he had attended meeting on 1.3.1992 was taken into account. He submits that the enquiry officer had, after a broad assessment of the evidence present, concluded that the petitioner was inclined towards politics and had the protection of various politically active leaders and, therefore, no fault could be found with the enquiry report. The order of the punishing authority and the Appellate authority were, therefore, he submitted absolutely correct.

10. Having heard the learned counsel for the parties, this Court is of the view that the order dated 23.5.1992 passed by the Sub Divisional Magistrate, Biswan, dismissing the petitioner from service and the Appellate Court's order dated 31.3.2018 by which the punishment was confirmed could not be sustained in the eyes of law.

11. Firstly, the Court finds that the charge sheet was extremely vague. No Rule had been mentioned which had been relied upon to punish the petitioner. The only allegation in the charge sheet appears to be that since the petitioner was a politically active person he was to be punished.

12. Secondly, when the charges did not show as to which land was not allotted by the petitioner and as to which welfare programme was not followed properly by the petitioner there could not have been any definite reply. Still further when the petitioner was throughout asking for a change of the enquiry officer specially when he had himself lodged a first information report against the petitioner then the enquiry officer should not have been trusted with the life of the petitioner.

13. Thirdly, if the petitioner did not appear then it was the duty of the enquiry officer to have come to a definite conclusion as to whether the petitioner was guilty and was liable to be punished. The enquiry officer should have found out as to whether the unrebutted evidence was also conclusively proved or not. He should have seen whether the charges on the basis of unrebutted charges were proved sufficiently or not, to punish the petitioner.

14. Fourth, I find that the enquiry report and the show cause regarding punishment were also not served upon the petitioner.

15. In the end, since the Court finds that the petitioner was illegally kept out of service on account of wrong orders having been passed, the petitioner be given the benefit of continuity of service and he be also given his full back wages.

16. The orders dated 23.5.1992 passed by the S.D.M. District Sitapur and 31.3.2018 passed by the District Magistrate, Sitapur, are quashed..

17. The writ petition is allowed.

(2020)02ILR A1208

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 29.01.2020

BEFORE
THE HON'BLE RAJESH SINGH CHAUHAN, J.

Service Single No. 20021 of 2018

Lal Pradeep Singh & Anr. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Rajendra Pratap Singh, Surendra Pratap Singh

Counsel for the Respondents:
C.S.C.

A. Service Law– Reservation - The U.P. Public Services (Reservation For Physically Handicapped, Dependents of Freedom Fighters and Ex-Servicemen) Act, 1993: Section 3 – The candidates belonging to special category of the socially reserved or unreserved category shall be given the horizontal reservation and shall be adjusted from their specific category so that the said reservation would not exceed 50% ceiling. (Para 9, 10, 13)
Writ petition allowed. (E-4)

Precedent followed:

1. Pawan Kumar Vs. State of U.P. and another reported in (2018) 3 UPLBEC 2298 (Para 9)

2. Indra Sawhney Vs. Union of India, 1992 Supp (3) SCC 217; AIR 1993 SC 477 (Para 9)

3. Union of India and Anr. Vs. National Federation of the Blind and Ors., 2013 (10) SCC 772 (Para 9)

Present petition assails the order dated 23.06.2018, passed by District Magistrate, Pratapgarh.

(Delivered by Hon'ble Rajesh Singh Chauhan, J.)

1. Heard learned counsel for the parties.

2. By means of this petition the petitioners have assailed the order dated 23.6.2018 passed by the District Magistrate, Pratapgarh rejecting the representation of the petitioner which was preferred seeking benefit of reservation admissible for the dependants of freedom-fighters.

3. Since there is no dispute that the petitioners are dependants of freedom-fighters, therefore, the relevant facts to that effect are not being dealt with.

4. The precise dispute is that the reservation provided for the dependants of freedom-fighters is 2% of the vacancies in view of section 3 (1) of The U.P. Public Services (Reservation For Physically Handicapped, Dependants of Freedom Fighters and Ex-Servicemen) Act, 1993 (hereinafter referred to as Act, 1993 in short).

5. As per impugned order such reservation would be admissible vertically as the vertical reservation shall be given to such candidates from horizontal reservation, therefore, out of total 182 posts of Lekhpal the unreserved posts are 92 and if 2% reservation is applied on 92 posts it will come out as 1.84 and in view of the Government Order dated 28.8.2015 which provides that the number, if it does not come in clear number then no rounding of shall be provided in that case, therefore, only one post shall be reserved for the dependants of freedom-fighters and on that post the appointment has already been provided.

6. Learned counsel for the petitioner has referred Rule 3 of the Act, 1993 is being reproduced herein below:

*"**3. Reservation of vacancies in favour of physically handicapped etc.** - [(1) There shall be reserved at the stage of direct recruitment],-*

[(i) in public services and posts two percent of vacancies for dependents of freedom fighters;

(i-a) in public services and posts other than Group 'A' posts or Group 'B' posts, on and from May 21, 1999 two per cent of vacancies, and on and from the date on which the Uttar Pradesh Public Services (Reservation for Physically Handicapped, Dependents of Freedom Fighters and Ex-servicemen) (Amendment) Act, 1999 is published in the Gazette, five per cent of vacancies for Ex-servicemen.]

[((ii) In such public services and posts as the State Government may, by notification, identify not less than four per cent, of the total number of vacancies in the cadre strength in each group of posts meant to be filled with persons with benchmark disabilities of which, one per cent each shall be reserved for persons with benchmark disabilities under clauses (a), (b) and (c) and one per cent for persons with benchmark disabilities under clauses (d) and (e), namely-

(a) blindness and low vision;

(b) deaf and hard of hearing;

(c) locomotor disability including cerebral palsy, leprosy cured, dwarfism, acid attack victims and muscular dystrophy;

(d) autism, intellectual disability, specific learning disability and mental illness;

(e) multiple disabilities from amongst persons under clauses (a) to (d) including deaf blindness in the posts identified for each disabilities.]

(2)[* *]*

(3) The persons selected against the vacancies reserved under subsection (1) shall be placed in the appropriate categories to which they belong. For example, if a selected person belongs to Scheduled Castes category he will be placed in that quota by making necessary adjustments; if he belongs to Scheduled Tribes category, he will be placed in that quota by making necessary adjustments; if he belongs to[Other Backward Classes of Citizens], category, he will be placed in that quota by making necessary adjustments. Similarly if he belongs to open competition category, he will be placed in that category by making necessary adjustments.

4. [* *]*

[(5) Where due to non-availability of suitable candidates any of the vacancies reserved under sub-section (1) remains unfilled it shall be carried forward for further two selection years, whereafter it may be treated to be lapsed.]

7. As per learned counsel for the petitioner sub-rule 3 of the Rule 3 provides the modality as to how the persons who have been provided reservation under Rule 3 shall be adjusted. It categorically provides that if a selected person belonging to particular category he / she shall be placed in that quota by making necessary adjustments. Perhaps, this modality has been given to adjust the reserved category candidates within a ceiling of 50% of reservation.

8. It has been informed by the learned counsel for the petitioner that the petitioners no. 1 and 2 are in the waiting list at serial no. 1 and 2 of the category of dependant of freedom-fighters.

9. Learned counsel for the petitioner has drawn attention of this Court towards the decision of this Court in re: **Pawan Kumar vs. State of U.P. & another reported in (2018) 3 UPLBEC 2298** whereby the identical issue relating to the disabled persons have been considered and the legal analogy of this judgment may be applied in the present case. By means of aforesaid judgment not only the

Government Order dated 28.8.2015 has been considered but it has also been considered as to what reservation should be provided to these candidates of special category as per special category e.g. dependants of freedom-fighters and physically handicapped persons. It has also been considered as to whether they should be provided horizontal reservation from vertical or vertical reservation from horizontal. Para 11, 12 and 13 of the aforesaid judgment are being reproduced herein below:

11. The directions issued vide Government Order dated 28.8.2015 cannot be applied in the matter of horizontal reservation, inasmuch as, a careful reading thereof indicates that the directions have been issued not to apply the "rounding off principle" as a caution so that the total percentage of reservation may not exceed more than 50%.

12. In the matter of horizontal reservation, as per the procedure, it is settled position that the horizontal reservation always cut across the vertical reservation i.e. the candidate who seek benefit of any of the category of horizontal reservation has to be considered by adjusting him against the appropriate category of General, OBC, SC & ST i.e. the category to which he belongs. The adjustment has to be made as per the principles laid down by the Apex Court in the case of ***Indra Sawhney v. Union of India reported in 1992 Supp (3) SCC 217, AIR 1993 SC 477****. The process for adjustment of horizontal category candidate of "persons with disabilities" has been further clarified in* ***Union of India & Anr. v. National Federation of the Blind & Ors. reported in 2013 (10) SCC 772****, following the law laid down in Indra Sawhney (supra), as under:-*

"42. A perusal of Indra Sawhney (supra) would reveal that the ceiling of 50% reservation applies only to reservation in favour of other Backward classes under Article 16(4) of the Constitution of India whereas the reservation in favour of persons with disabilities is horizontal, which is under Article 16(1) of the Constitution. In fact, this Court in the said pronouncement has used the example of 3% reservation in favour of persons with disabilities while dealing with the rule of 50% ceiling. Para 95 of the judgment clearly brings out that after selection and appointment of candidates under reservation for persons with disabilities they will be placed in the respective rosters of reserved category or open category respectively on the basis of the category to which they belong and, thus, the reservation for persons with disabilities per se has nothing to do with the ceiling of 50%. Para 812 is reproduced as follows:-

"812. .....all reservations are not of the same nature. There are two types of reservations, which may, for the sake of convenience, be referred to as 'vertical reservations' and 'horizontal reservations'. The reservations in favour of Scheduled Castes, Scheduled Tribes and other backward classes [under Article 16(4)] may be called vertical reservations whereas reservations in favour of physically handicapped [under Clause (1) of Article 16] can be referred to as horizontal reservations. Horizontal reservations cut across the vertical reservations - what is called inter-locking reservations. To be more precise, suppose 3% of the vacancies are reserved in favour of physically handicapped persons; this would be a reservation relatable to Clause (1) of Article 16. The persons selected against this quota will be placed in the appropriate category; if he belongs to S.C.

category he will be placed in that quota by making necessary adjustments; similarly, if he belongs to open competition (O.C.) category, he will

be placed in that category by making necessary adjustments. Even after providing for these horizontal reservations, the percentage of reservations in favour of backward class of citizens remains - and should remain - the same....."

13. Thus, as per the approved method of computation of reservation at the time of preparation of the merit list of General and socially reserved Category, the last candidate selected in the appropriate category has to be removed so as to adjust the candidate belonging to the special/horizontal category of the said socially reserved or unreserved category. For example, if the candidate seeking benefit of special category of physically disabled, belongs to the General Category, he will be placed in the merit list of the said category by making necessary adjustment. The result is that the last candidate from the merit list of General category will be replaced by the candidate belonging to the special (horizontal category). The same process has to be adopted with reference to the candidates belonging to socially reserved category of OBC, SC & ST. Thus, if adjustment is made in such a manner, the total percentage of reservation, in any case, would not exceed 50%." ***[Emphasis supplied]***

10. This Court in re: Pawan Kumar (supra) has considered the dictum of Hon'ble Apex Court in re: Indra Sawhney (supra) and National Federation of Blinds and others (supra) and considering the ratio of aforesaid judgment of Hon'ble Apex Court it has held that the candidates belonging to the special category of the said socially reserved or unreserved category shall be given the horizontal reservation and they shall be adjusted from their specific category so that said reservation would not exceed 50% ceiling.

11. Sri Vishal Verma has tried to justify the impugned order dated 23.6.2018 but in view of the decision of this Court in re: Pawan Kumar (supra) wherein the dictum of Hon'ble Apex Court in re: Indra Sawhney (supra) and National Federation of Blinds and others (supra) he could not properly justify the said order.

12. Having heard learned counsel for the parties and perused the material available on record and considering the dictum of this Court in in re: Pawan Kumar (supra) wherein the dictum of Hon'ble Apex Court in re: Indra Sawhney (supra) and National Federation of Blinds and others (supra) have been relied upon, I am of the considered opinion that the order dated 23.6.2018 passed by opposite party no. 3, Annexure no. 3 to the writ petition is not sustainable in the eyes of law, therefore, the said order is hereby ***quashed.***

13. In view of dictum of Hon'ble Apex Court in re: in re: Pawan Kumar (supra) as well as the dictum of Hon'ble Apex Court in re: Indra Sawhney (supra) and National Federation of Blinds and others (supra) the 2% reservation for the total 182 vacancies relating to the dependants of freedom-fighters would come out as 3.64 which shall not be rounded of and the same shall be read as 3 in view of the Government Order dated 28.8.2015. Since 1 person in such category has already been appointed, therefore, the opposite parties should provide two vacancies in this quota of dependants of freedom fighters for which the petitioners who are in the waiting list at serial no. 1 and 2 may be appointed.

14. A writ in the nature of mandamus is issued commanding the opposite parties to consider the candidature of the petitioner and appointing him on the post of Lekhpal under the 2% reservation for the category of dependant of freedom-fighters in view of the decision of this Court in re: Pawan Kumar (supra).

15. The compliance of the aforesaid order shall be made within two months from the date of production of the certified copy of the order of this Court.

16. Writ petition is allowed.

17. No order as to costs.

(2020)02ILR A1213

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 20.12.2019

BEFORE

THE HON'BLE DR. YOGENDRA KUMAR SRIVASTAVA, J.

Writ-A No. 20451 of 2019

Keshav Prasad Dubey ...Petitioner
Versus
The State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Preetpal Singh Rathore, Sri Shravan Kumar

Counsel for the Respondents:
C.S.C.

A. Suspension - Rule 17(1) (a) - The Uttar Pradesh Police Officers of the Subordinate Ranks (Punishment and Appeal) Rules, 1991 - the exercise of power of suspension by any other authority not below the rank of Superintendent of Police who has been authorized by the appointing authority in this behalf, and in view thereof the exercise of the power by the authority who has been granted authorization by the appointing authority would also be a valid exercise of power

The power of authorization contemplated under Rule 17(1)(a) having duly been exercised by the appointing authority i.e., the Deputy Inspector General of Police and the necessary authorization having been issued to the Superintendent of Police for exercising the aforesaid power, the order of suspension which has been passed by the Superintendent of Police, Chitrakoot cannot be said to suffer from want of authority. (para 24)

B. Delegation of a discretionary administrative power - Scope - *delegatus non potest delegare* - delegation of an administrative power is permissible when the relevant law permits the same and statutes frequently make a provision enabling the authority on which powers are conferred in the first instance to delegate the same to subordinate officers

The lawful exercise of power is that it should be exercised by the authority upon whom it is conferred and by no one else. The exception to this principle of the inalienable discretion is the exercise of a statutory power would be in a case where the authority on whom the power is originally conferred by a statute is expressly authorized in terms thereof to delegate the said power by grant of authorization to some other authority. This principle applies to delegation of all forms of power, including administrative powers, conferred in terms of a statutory provision.

Writ Petition Disposed of.

List of cases cited

1. Barium Chemicals Ltd. & anr. V. Company Law Board & ors AIR 1967 SC 295

2. Sahni Silk Mills (P.) Ltd. & anr V. Employees' State Insurance Corporation (1994) 5 SCC 346

3. Marathwada University V. Seshrao Balwant Rao Chavan (1989) 3 SCC 132

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

1. Heard Sri Preet Pal Singh Rathore, learned counsel for the petitioner and Sri Mata Prasad, learned Standing Counsel appearing for the State-respondents.

2. The present petition has been filed seeking to raise a challenge to the order dated 24.11.2019 passed by the fourth respondent in terms of which the petitioner has been placed under suspension pending initiation of departmental proceedings.

3. The principal contention sought to be raised is that the appointing authority of the petitioner, who is presently working on the post of Inspector, is the Deputy Inspector General of Police and in view thereof the authority competent to pass the order of suspension would be the appointing authority i.e. the Deputy Inspector General of Police and not the Superintendent of Police who has passed the order impugned. Reliance is sought to be placed upon Rule 17(1)(a) of The Uttar Pradesh Police Officers of the Subordinate Ranks (Punishment and Appeal) Rules, 1991 (in short 'the Rules, 1991') in support of the aforesaid contention.

4. *Per contra*, learned Standing Counsel, on the basis of instructions received, submits that in the instant case the appointing authority i.e. the Deputy Inspector General of Police, Chitrakoot Dham, Range Banda in terms of an order dated 22.11.2019, exercising powers under Rule 17(1)(a) of the Rules, 1991, has authorised the Superintendent of Police, Chitrakoot to exercise the powers of suspension in respect of his sub-ordinate officers including Inspectors and Sub-Inspectors, in cases where departmental proceedings were contemplated against them.

5. It is submitted that the Superintendent of Police, Chitrakoot having been duly authorised by the appointing authority i.e. the Deputy Inspector General of Police by exercising powers under Rule 17(1)(a) the order of suspension cannot be stated to have been passed without authority and the contention raised by the petitioner in this regard is without basis.

6. The question which thus falls for consideration is as to whether the Superintendent of Police could have passed the order of suspension in contemplation of departmental proceedings against an officer of the rank of an Inspector whose appointing authority is the Deputy Inspector General of Police.

7. In order to appreciate the controversy involved the provisions of The Uttar Pradesh Police Officers of the Subordinate Ranks (Punishment and Appeal) Rules, 1991 may be adverted to.

8. The aforementioned Rules, 1991 were made by the Governor in exercise of powers under sub-sections (2) and (3) of Section 46 read with Sections 2 and 7 of the Police Act, 1861 (Act No.V of 1861) and all other powers enabling him in this behalf and in supersession of all existing rules issued in this behalf, for regulating the departmental proceedings, punishment and appeals and Police Officers of the subordinate ranks of the Uttar Pradesh Force.

9. In terms of Section 2 of the Act No.V of 1861, the Rules, 1991 are applicable to all the Police Officers of the

subordinate ranks below the rank of Deputy Superintendent of Police. Rule 3(a) defines the appointing authority, as meaning the authority empowered to make appointments to the post which a Police Officer for the time being holds. Under Rule 3(g) the term "Police Officer" is defined to mean a Police Officer of the subordinate rank below the rank of Deputy Superintendent of Police.

10. The power to place under suspension a Police Officer of the subordinate rank against whose conduct an enquiry is contemplated, or is pending, is provided for under Rule 17 of the Rules, 1991. For ease of reference, Rule 17(1)(a) referred to above, is being extracted below:-

"**17. Suspension.**--(1)(a) A Police Officer against whose conduct an enquiry is contemplated, or is proceeding, may be placed under suspension pending the conclusion of the enquiry in the discretion of the appointing authority or by any other authority not below the rank of Superintendent of Police, authorised by him in this behalf."

11. A plain reading of the aforementioned Rule 17(1)(a) shows that a Police Officer against whose conduct an enquiry is contemplated, or is proceeding, may be placed under suspension pending conclusion of enquiry in the discretion of the appointing authority or by any other authority not below the rank of Superintendent of Police, authorised by him in this behalf.

12. It therefore follows that the power to place a Police Officer of a subordinate rank under suspension in a case where an enquiry is contemplated, or is proceeding against his conduct, is to be exercised by the appointing authority in his discretion. The Rule further makes a provision that the aforementioned power of suspension which is to be exercised by the appointing authority may also be exercised by any other authority not below the rank of Superintendent of Police who is authorised by the appointing authority in this behalf.

13. It is thus clear that Rule 17(1)(a), apart from conferring the power of suspension, in the case of a Police Officer of a subordinate rank against whose conduct an enquiry is contemplated or is pending, upon the appointing authority, also empowers the appointing authority to grant authorisation for exercising the aforesaid power of suspension by any other authority not below the rank of Superintendent of Police.

14. The scope of delegation of a discretionary administrative power entrusted by a statute came up for consideration in the case of **Barium Chemicals Ltd. & Anr. Vs. Company Law Board & Ors.**1 and it was held that a discretion conferred by a statute on any authority is *prima facie* intended to be exercised by the authority on which the statute has conferred it and by no other authority, but this intention may be negatived by any contrary indications found in the language, scope or object of the statute. Referring to **Crawford on The Construction of Statutes**2, the observations made in the judgment are as follows:-

"36. As a general rule, whatever a person has power to do himself, he may do by means of an agent. This broad rule is limited by the operation of the principle

that a delegated authority cannot be re-delegate, *delegatus non potest delegare*. The naming of a delegate to do an act involving a discretion indicates that the delegate was selected because of his peculiar skill and the confidence reposed in him, and there is a presumption that he is required to do the act himself and cannot re-delegate his authority. As a general rule, "if the statute directs that certain acts shall be done in a specified manner or by certain persons, their performance in any other manner than that specified or by any other person than one of those name is impliedly prohibited". See Crawford on statutory Construction, 1940 Edn., Art. 195, p. 335. Normally, a discretion entrusted by Parliament to an administrative organ must be exercised by that organ itself. If a statute entrusts an administrative function involving the exercise of a discretion to a Board consisting of two or more persons it is to be presumed that each member of the Board should exercise his individual judgment on the matter and all the members of the Board should act together and arrive at a joint decision. Prima facie, the Board must act as a whole and cannot delegate its function to one of its members.

x x x x x

38. But the maxim *"delegatus non potest delegare"* must not be pushed too far. The maxim does not embody a rule of law. It indicates a rule of construction of a statute or other instrument conferring an authority. Prima facie, a discretion conferred by a statute, on any authority is intended to be exercised by that authority, and. by no other. But the intention may be negatived by any contrary indications in the language, scope or object of the statute. The construction that would best achieve the purpose and object of the statute should be adopted."

15. The principle that the maxim *delegatus non potest delegare*, may be subject to any contrary indications provided in the language of the statute has been stated in **De Smith's Judicial Review of Administrative Action**3, wherein referring to the article ***"Delegatus non potest delegare"*** by **John Willis**4, it was stated as follows:-

"The maxim *delegatus non potest delegare* does not enunciate a rule that knows no exception; it is a rule of construction to the effect that "a discretion conferred by statute is prima facie intended to be exercised by the authority on which the statute has conferred it and by no other authority, but this intention may be negatived by any contrary indications found in the language, scope or object of the statute"."

16. The applicability of the principle that a discretionary administrative power should be exercised by the authority upon whom it is conferred in the present day administrative set up which has seen an enormous rise in the nature of administrative activities was considered in the case of **Sahni Silk Mills (P.) Ltd. & Anr. Vs. Employees' State Insurance Corporation**5 and it was held that delegation is authorised either expressly or impliedly in many statutes granting liberty to a public authority to employ agents to exercise its powers. It has been stated in the judgment as follows:-

"5. The courts are normally rigorous in requiring the power to be exercised by the persons or the bodies authorised by the statutes. It is essential that the delegated power should be exercised by the authority upon whom it is conferred and by no one else. At the same

time, in the present administrative set-up extreme judicial aversion to delegation cannot be carried to an extreme. A public authority is at liberty to employ agents to exercise its powers. That is why in many statutes, delegation is authorised either expressly or impliedly. Due to the enormous rise in the nature of the activities to be handled by statutory authorities, the maxim *delegatus non potest delegare* is not being applied specially when there is question of exercise of administrative discretionary power.

6. By now it is almost settled that the legislature can permit any statutory authority to delegate its power to any other authority, of course, after the policy has been indicated in the statute itself within the framework of which such delegatee is to exercise the power…"

17. The aforementioned proposition that where a statute prescribes a particular body to exercise a power it must be exercised by that body alone and no other unless it is delegated was reiterated in the judgment in the case of **Marathwada University Vs. Seshrao Balwant Rao Chavan**6 wherein referring to **Halsbury's Laws of England, 4th Edn., Vol.1, para 32**7, it was stated as follows:-

"20. ...It is a settled principle that when the Act prescribes a particular body to exercise a power, it must be exercised only by that body. It cannot be exercised by others unless it is delegated. The law must also provide for such delegation. Halsbury's Laws of England (Vol.I, 4th Edn. para 32) summarises these principles as follows:

"32. Sub-delegation of powers.-- In accordance with the maxim *delegatus non potest delegare*, a statutory power must be exercised only by the body or officer in whom it has been confided, unless sub-delegation of the power is authorised by express words or necessary implication. There is a strong presumption against construing a grant of legislative, judicial or disciplinary power as impliedly authorising sub-delegation; and the same may be said of any power to the exercise of which the designated body should address its own mind."

18. It is thus an accepted principle of law that a discretionary power must, in general, be exercised only by the authority upon which it has been conferred. The power having been conferred under a statutory provision upon an authority to be exercised upon his individual judgment and discretion the same must be wielded only by the said authority upon whom the power has been conferred and the discretion should be retained unhampered.

19. An element which is essential to the lawful exercise of power is that it should be exercised by the authority upon whom it is conferred and by no one else. The requirement of exercise of the power by the authority upon whom the power is conferred is, in general, insisted rigorously by the courts and any action taken by any agent or delegate would not be permissible.

20. The exception to the aforementioned principle of the inalienable discretion in the exercise of a statutory power would be in a case where the authority on whom the power is originally conferred by a statute is expressly authorised in terms thereof to delegate the said power by grant of authorisation to some other authority. This principle applies to delegation of all forms of

powers, including administrative powers, conferred in terms of a statutory provision.

21. Delegation of an administrative power is permissible when the relevant law permits the same and statutes frequently make a provision enabling the authority on which powers are conferred in the first instance to delegate the same to subordinate officers.

22. An order of delegate, when delegation is made as authorised by the statute, is to be treated for all intents and purposes as an order of the authority itself.

23. The Rules, 1991 are of a statutory nature, and as per the provisions under Rule 17(1)(a) thereof the power to place under suspension a Police Officer of a subordinate rank against whose conduct an enquiry is contemplated, or is pending, having been conferred on the appointing authority, in his discretion, the same is normally to be exercised by the said authority itself. However, the Rule expressly permits the exercise of the aforementioned power of suspension by any other authority not below the rank of Superintendent of Police who has been authorised by the appointing authority in this behalf, and in view thereof the exercise of the power by the authority who has been granted authorisation by the appointing authority would also be a valid exercise of power conferred under the Rules, 1991.

24. In the instant case the power of authorisation contemplated under Rule 17(1)(a) having duly been exercised by the appointing authority i.e. the Deputy Inspector General of Police and the necessary authorisation having been issued to the Superintendent of Police for exercising the aforesaid power, the order of suspension which has been passed by the Superintendent of Police, Chitrakoot cannot be said to suffer from want of authority and therefore cannot be assailed on this ground.

25. Counsel for the petitioner, at this stage, confines his prayer to a direction to the respondent authorities that the departmental proceedings which are contemplated pursuant to the order of suspension may be concluded expeditiously. He further undertakes that the petitioner would cooperate with the departmental proceedings.

26. Learned Standing Counsel appearing for the State-respondents, on the basis of his instructions, states that the departmental proceedings in accordance with the procedure under Rule 14(1) have already been initiated and the same would be completed as per the Rules, 1991.

27. Having regard to the facts of the case the writ petition is disposed of with an observation that the respondent authorities would proceed with the matter and endeavour to conclude the departmental proceedings expeditiously, preferably within a period of six months from the date of presentation of a certified copy of this order, provided that the petitioner cooperates with proceedings.

(2020)02ILR A1218

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 09.01.2020

BEFORE

THE HON'BLE J.J. MUNIR, J.

Writ-A No. 21525 of 2019

Avanesh Kumar ...Petitioner
Versus
The State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Devesh Mishra, Sri Vijay Gautam, Sri Atipriya Gautam, Sri Vinod Kumar Mishra

Counsel for the Respondents:
C.S.C.

A. Compassionate Appointment - posthumous child right's does not qualify for a minor and a member of the deceased government servant's family under the Rules of 1974 - not entitle for compassionate appointment on attainment of majority

Sub-rule (3) of Rule 5 of the Rules of 1974 further clarifies that the appointment by way of concession under the Rules shall be granted to that person of the family who shall maintain other members of the family of the deceased Government servant, as were dependent on the deceased Government servant immediately before his death and are unable to maintain themselves. The definition of a son under sub-rule (c) of Rule 2 ex facie does not lend itself to a construction that son would also include a child posthumously born. It is intended to take care of those members of the family who were dependent on the Government servant, when he/she passed away in harness. (para 9)the welfare measure under the Rules of 1974, though construed liberally in case of members of the deceased's family who have not been able to tide over the financial crisis till a minor attains majority and applies under the Rules, in the opinion of this Court, cannot be stretched to a limit where an unborn child is also to be granted a right to apply under the Rules of 1974. The right if granted would be too remote. Also, a compassionate appointment under the Rules of 1974 is in the nature of a concession, and while full effect is to be given to its provisions by extending the concession to those who are eligible under the provisions, its benefits cannot be extended, founded on doctrines of property laws, that essentially govern rights to matters, like inheritance, disposition in the sphere of private law. (para 10)

Writ Petition Rejected.

List of cases cited

1. State of U.P. and ors V. Antariksha Singh 2019 (7) ADJ 685(DB)

2. Sudhir Kumar Mishra V. State of U.P. and ors 2016 (8) ADJ 639(DB) (LB)

3. Vimla Srivastava and ors V. State of U.P. and ors 2016 (1) ADJ 21

4. Priyesh Vasudevan V. Shameena P. & ors. 2005 SCC OnLine Ker 718 : 2006 Lab IC 303

5. State of Kerala & ors V. Priyesh Vashudevan Civil ppeal No. 5203 of 2010 *(followed)*

(Delivered by Hon'ble J.J. Munir, J.)

1. The petitioner claims compassionate appointment under the Uttar Pradesh Recruitment of Dependents of Government Servants Dying in Harness Rules, 1974 (hereinafter referred to as the "Rules of 1974"). The petitioner's father died on 26.03.1987 in a road accident while on duty. The petitioner is a posthumous child, who was in his mother's womb at the time when his father passed away. He has come up with a claim seeking compassionate appointment through an application that his mother has made under the Rules of 1974 in the year 2003. This claim of the petitioner has been

rejected by the impugned order dated 11.10.2018 passed by the State Government on ground that it has been preferred with a delay of 11 years, 10 months and 03 days, reckoning the delay after giving benefit of relaxation of five years provided under the Rules of 1974.

2. Heard Sri Devesh Mishra, learned counsel for the petitioner, and Sri Sharad Chandra Upadhyay, learned State Law Officer on behalf of all the respondents.

3. Learned counsel for the petitioner has submitted that the delay is not an absolutely disabling feature in case of minors and has placed reliance upon a decision of a Division Bench of this Court in **State of U.P. and others v. Antariksha Singh, 2019 (7) ADJ 685 (DB)**. He has referred to Paragraphs- 10, 11 and 12 of the report in **State of U.P. and others v. Antariksha Singh** *(supra)* which read as under:

"10. In the instant matters, if no claim is made by the respondent-petitioner for invoking relaxation clause by satisfying requirements of second proviso, then there is no need to forward the same to the State Government to consider the case in light of first proviso to Rule 5 of the Rules of 1974.

11. At this juncture, it would also be appropriate to state that while considering the case of undue hardship several factors are required to be kept in mind including economic status of the family, the term of relaxation desired and the stage on which relaxation is claimed.

12. As already stated, learned single Bench has directed to forward the case of the respondent-petitioner to examine undue hardship without arriving at the conclusion that whether any relaxation is claimed by her or not by pleading the undue hardship."

4. Further reliance has been placed on another Division Bench decision of this Court in **Sudhir Kumar Mishra v. State of U.P. and others, 2016 (8) ADJ 639 (DB) (LB)**. On the principles laid down in this case, the learned counsel for the petitioner has laid particular emphasis, inasmuch as it deals with right of a minor in the context of a belated claim. He has referred to Paragraph nos. 21 and 22 of the report in **Sudhir Kumar Mishra** *(supra)*, which read thus:

"21. In the instant case, the petitioner submitted that when his father died he was only 4 years old and his mother informed the department that she would make application in prescribed from only when he attained majority. The department negatived the representation in this matter taking stand that the application was not made within prescribed period. However, the petitioner's request for compassionate appointment was made soon after appellant attained majority. Under Rule 5 the time limit within which the dependant of the deceased employee is to be accommodated is fixed as five year. This period can be extended under proviso to Rule 5 where burden of proving the fact that compassionate circumstances continued to exist even till date was on the petitioner himself which he has successfully discharged in this case. There is sufficient evidence of the petitioner having aged and ailing mother, two unmarried sisters, the family having pension as the only source of livelihood, the agricultural land being barren causing nugatory income of about 9000/- per year, which appeared quite insufficient to

enable the family to get over the financial crisis which is being faced by the family after the death of his father.

22. On the basis of objective considerations founded on the disclosures made by the petitioner in this case for compassionate appointment and having considered the reasons for the delay, we are of the opinion that undue hardship within the meaning of the first proviso to Rule 5 of the Rules would be caused to the petitioner and his family by the application of the time limit of five years. The expression 'undue hardship' has not been defined in the Rules. Undue hardship would necessarily postulate a consideration of relevant facts and circumstances of the case. In view the income of the family, its financial condition, the extent of dependency and marital status of its members, its liabilities, the terminal benefits received by the family; the age, together with the nugatory income from any other sources in this case, we are of the view that the family continues to suffer financial distress and hardship occasioned by the death of the bread winner. Considering the penurious condition of the family, it appears to be one of the rarest of rare cases where due to exceptional circumstances the family needs the extraordinary remedy to elate the condition of family. It would be appropriate to deal with the case of the petitioner in a just and equitable manner."

5. It is urged that in the case of a minor a liberal approach should be adopted in construing delay and the period of limitation under the proviso to Rule 5 of the Rules of 1974, where relevant circumstances continue to exist on the date the petitioner moves for compassionate appointment. It must be remarked that in **Sudhir Kumar Mishra** *(supra)*, there were facts to show that the applicant for compassionate appointment had an aged and ailing mother and two unmarried sisters, pension was the only source of livelihood and the agricultural land was non productive. It was concluded that these features showed that the family had not tided over the financial crisis that they had thrown into on account of sudden loss of the bread winner.

6. Sri Sharad Chandra Upadhyay, learned Counsel appearing for the State has opposed the motion to admit this petition to hearing. He submits that a bare perusal of the definition of 'family' in sub-Rule (c) of Rule 2 of the Rules of 1974, talks of dependents of a Government servant under dying-in-harness. It does not expressly or by necessary intendment, refers to an unborn child to be included in the definition of 'family'.

7. This Court has given a thoughtful consideration to the matter. Here, a very different issue arises under the Rules of 1974. Rule 5 of the Rules of 1974, as is material for the present case, is extracted below:

*"**5. Recruitment of a member of the family of the deceased**--(1) In case a Government servant dies in harness after the commencement of these rules, and the spouse of the deceased Government servant is not already employed under the Central Government or a State Government or a Corporation owned or controlled by the Central Government or a State Government, <u>one member of his family</u>, who is not already employed under the Central Government or a State Government or a Corporation owned or controlled by the Central Government or a State Government shall on making an*

application for the purpose, be given a suitable employment in Government service on a post except the post which is within the purview of the Uttar Pradesh Public Service Commission, in relaxation of the normal recruitment rules if such person--

(i) ... .
(ii) ... .
(iii) ... .
*(2) *** *** ****

(3) Every appointment under sub-rule (1) shall be subject to the condition that the person appointed under sub-rule (1) shall maintain other members of the family of deceased Government servant, who were dependent on the deceased Government servant immediately before his death and are unable to maintain themselves.

*(4) *** *** ***"*

(Emphasis by Court)

8. Likewise, under Rule 2(c) the term 'family' has been defined as follows:

*"**2. Definitions.**--In these rules, unless the context otherwise requires--*

*(a) *** *** ****
*(b) *** *** ****

(c) "family" shall include the following relations of the deceased Government servant:

(i) wife or husband;

(ii) sons/adopted sons;

(iii) unmarried daughters, unmarried adopted daughters, widowed daughters and widowed daughter-in-law;

(iv) unmarried brothers, unmarried sisters and widowed mother dependant on the deceased Government servant, if the deceased Government servant was unmarried;

(v) aforementioned relations of such missing Government servant who has been declared as "dead" by the Competent Court:

Provided that if a person belonging to any of the abovementioned relations of the deceased Government servant is not available or is found to be physically and mentally unfit and thus ineligible for employment in Government service, then only in such situation the word "family" shall also include the grandsons and the unmarried grand daughters of the deceased Government servant dependent on him."

9. A perusal of the right, which a member of the family of the deceased to compassionate appointment has been given by Rule 5 of the Rules of 1974, makes it clear that it is a member of his family who is entitled to claim compassionate appointment when the deceased, who is in harness and a Government employee, suddenly passes away. Sub-rule (3) of Rule 5 of the Rules of 1974 further clarifies that the appointment by way of concession under the Rules shall be granted to that person of the family who shall maintain other members of the family of the deceased Government servant, as were dependent on the deceased Government servant immediately before his death and are unable to maintain themselves. The 'family' has been defined under sub-rule (c) of Rule 2 of the Rules of 1974 to mean wife or husband, sons including adopted sons, unmarried daughters, unmarried adopted daughters, widowed daughters and widowed daughter-in-law. Now, married daughters and married adopted daughters would also be included within the definition of 'family' in view of the decision of this Court in **Vimla Srivastava**

and others vs. State of U.P. and others, 2016(1)ADJ21. In the said decision, this Court has held the qualification about daughters or adopted daughters being 'unmarried' is discriminatory and violative of Articles 14 and 15 of the Constitution. Now, in the Rule, therefore, daughters and adopted daughters are members of the family, irrespective of their marital status. Also included are unmarried brothers, unmarried sisters and widowed mother dependent on the deceased Government servant, if the deceased Government servant was unmarried. There is no one else who has been held entitled. The definition of a son under sub-rule (c) of Rule 2 *ex facie* does not lend itself to a construction that son would also include a child posthumously born. It is intended to take care of those members of the family who were dependent on the Government servant, when he/she passed away in harness.

10. An unborn child does have rights under laws relating to property because it is said that an unborn child is *en venture sa mere*; but, to extend to an unborn child the right to compassionate appointment would be contrary to the plain intendment of the Rules of 1974. Even otherwise, the welfare measure under the Rules of 1974, though construed liberally in case of members of the deceased's family who have not been able to tide over the financial crisis till a minor attains majority and applies under the Rules, in the opinion of this Court, cannot be stretched to a limit where an unborn child is also to be granted a right to apply under the Rules of 1974. The right if granted would be too remote. Also, a compassionate appointment under the Rules of 1974 is in the nature of a concession, and while full effect is to be given to its provisions by extending the concession to those who are eligible under the provisions, its benefits cannot be extended, founded on doctrines of property laws, that essentially govern rights to matters, like inheritance, disposition in the sphere of private law. The principles would have little application in laws governing employment under the State, that are essentially public law matters, always to be guarded against a violation of the equality clause enshrined under Articles 14 and 16 of the Constitutiion.

11. In the opinion of this Court, an extension of the welfare approach under the Rules of 1974 to that limit would do more harm than good to the rights of citizen, who otherwise have a right to consideration for appointment to posts under the State in accordance with the recruitment rules, postulating equality of opportunity but no concession.

12. This question arose before a Division Bench of the Kerala High Court in **Priyesh Vasudevan vs. Shameena P. & ors., 2005 SCC OnLine Ker 718 : 2006 Lab IC 303**, where a contrary view was taken regarding the rights of a posthumous child to compassionate appointment under the Dying in Harness Scheme in the State of Kerala, that was extended to teachers of aided Schools under Rule 51-B of Chapter XIV A of the Kerala Education Rules. In the context of the rights of a posthumous child to compassionate appointment, it was held in **Priyesh Vasudevan** *(supra):*

"31. The Compassionate Employment Scheme recognizes the rights of a minor to get employment assistance. A minor is treated as a dependent under the scheme. A child born one day before the death of the Government servant would

also be treated as a dependent. The scheme would apply in favour of the family of the deceased Govern ment Servant if the annual income of the family does not exceed Rs. 1,50,000/-. De pendency is determined mainly with refer ence to the income of the family. No enquiry is contemplated whether the minor was being looked after by deceased Government servant. The minor need not prove that he was depending on his deceased father for his livelihood. Instances of father neglecting to maintain his minor children are many. If we were to hold that such a child is not dependent, it would be disastrous and it would be against the scheme itself. If so, how could we hold that a child in the womb is not a dependent? The rights of the child in the womb, in the matter of succession, are well protected by laws of the land. If so, how could it justifiably be held that a subsequent born child should suffer because of the calamity of his father's death having taken place before he was born? Is there any difference, in the matter of dependency, between a child born one day before and a child born one day after the death of his father or mother? The only answer would be in the negative. It will not be altogether out of context to note that in the matter of dependency a Division Bench of this Court in St. Ignatius High School v. State of Kerala, I.L.R. (2005) 3 Kerala 666, has held that a married daughter is also entitled to be considered for being appointed under the dying-in-harness scheme.

32. With respect, we do not agree with the view taken in AIR 1939 Lahore 290 and we accept the view taken by the Calcutta High Court relied on the decisions of the Madras, Bombay and Allahabad High Courts. It is to be noted that a provision similar to the "Explanation' in Section 6 of the Limitation Act, 1963 was not available in the Indian Limitation Act, 1908.

33. Therefore, we are of the view that a child in the womb would be a "dependent' under the Scheme and that a posthumous child is entitled to the benefit of the Compassionate Employment Scheme on his attaining majority, provided, the application is filed within the period provided in clause 19 of the scheme."

13. In Appeal by Special Leave from the aforesaid decision of the Kerala High Court, their Lordships of the Supreme Court reversed the decision in **Civil Appeal No.5203 of 2010, State of Kerala & ors. vs. Priyesh Vasudevan, decided on 09.07.2010**, holding thus:

"3. The subject matter of the writ petition before the learned Single Judge was whether an unborn child had a right to be considered for appointment under the Compassionate Employment Scheme which was then applicable to teachers of aided schools under Rule 51B of Chapter XIVA of the Kerala Education Rules.

4. The Division Bench of the High Court has gone on a tangent with regard to the issue involved in the writ appeal and has, on the other hand, proceeded to lay emphasis on the question of a right of an unborn child to succeed to rights of property forgetting that the case involved the question of appointment on compassionate ground which is meant for helping a immediate financial crisis. The High Court has decided the matter on the basis of the provisions of the Limitation Act, the Hindu Succession Act and also the Indian Succession Act, 1925, relating to minors and unborn children.

5. Having regard to the accepted principles relating to appointment on

compassionate grounds, we are unable to sustain the approach of the Division Bench of the Kerala High Court and the judgment of the Division Bench is, therefore, set aside."(Emphasis by Court)

14. This Court is, thus, of opinion that a posthumous child does not qualify for a minor and a member of the deceased Government servant's family under the Rules of 1974, entitling him to be considered for compassionate appointment, once he attains majority.

15. In the result, this petition fails and is **dismissed**. There shall be no order as to costs.

(2020)02ILR A1225

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 07.02.2020

BEFORE

THE HON'BLE YASHWANT VARMA, J.

WRIT-A No. 26584 of 2011

Ravi Raj & Ors. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Ashok Khare, Sri Siddharth Khare, Sri A.K. Rai, Sri Sanjeev Kumar

Counsel for the Respondents:
C.S.C.

A. Service Law– Pension - U.P. Retirement Benefits Rules, 1961: Rule 2(3); General Provident Fund (U.P.) Rules, 1985 – Petitioners who were initially selected in 2001, came to be appointed only in October 2006, on account of ensuing litigation, would not be entitled to the benefits of Old Pension Scheme which held the field till 01 April 2005.

B. The orders of appointment clearly provided that they would come into effect from the date when the petitioners join their respective posts. Once the petitioners had accepted this stipulation in the appointment order without demur or protest, it was not open for them to thereafter and belatedly seek to claim benefits of the Old Pension Scheme. (Para 11, 28)

C. A person who was not in service on a particular day, cannot be treated in service and seniority cannot be accorded to him. - Petitioners could not claim any retrospective conferral of benefits commencing from a period even before they had entered service. The same analogy is applied to their claim for coverage under the Old Pension Scheme. (Para 14, 16)

D. The expression "entering services or posts…" cannot be understood as referring to or hinging upon something inchoate or nebulous such as, selection or empanelment of an incumbent to government service. The Rule 2(3) clearly refers to entry into service as being determinative factor. The mere fact that the process of recruitment was initiated prior thereto can be of no assistance to the cause of being governed by the Old Pension Scheme. (Para 21, 27)

Writ petition dismissed. (E-4)

Precedent followed:

1. Sevandra Singh and others Vs. State of U.P. and others, Civil Misc. Writ Petition No. 21069 of 2003 (Para 4, 14)

2. Satyesh Kumar Mishra and others Vs. State of U.P. and others, 2016 (6) ADJ 808 {LB} (Para 13, 17, 18, 19, 20, 22, 25, 26)

3. Ram Nakul Vs. State of U.P. and others, Writ A No. 15392 of 2012 decided on 03.09.2019 (Para 12, 13, 18, 19, 21, 25, 26)

4. Bharat Yadav Vs. State of U.P. and 3 others, Writ A No. 16838 of 2019 decided on 23.10.2019 (Para 18, 19, 21, 25, 26)

5. Union of India Through Secretary Ministry of Defence and others Vs. Roop Chandra and others, Writ A No. 58724 of 2011 decided on 11.12.2019 (Para 11, 28)

6. Rajiv Singh and others Vs. State of U.P. and others, Writ A No. 18297 of 2010 decided on 06.04.2010 (Para 14)

Precedent distinguished:

1. Mahesh Narayan and others Vs. State of U.P. and others, Writ A No. 55606 of 2008 decided on 19.12.2019 (Para 9, 19, 20, 21, 22, 25, 26)

2. Firangi Prasad Vs. State of U.P. and others, (2011) 2 UPLBEC 987 (Para 20, 22, 23, 25)

3. Naveen Kumar Jha Vs. Union of India and others, 2012 SCC Online Delhi 5606 (Para 24)

Precedent mentioned:

1. Ashutosh Joshi and others Vs. State of Uttarakhand and others, Writ Petition (S/S) No. 1170 of 2010 decided on 26.06.2014 (Para 20)

2. Inspector Rajendra Singh and others Vs. Union of India and others, W.P. (C) 2810/2016 decided on 27.03.2017 (Para 20)

(Delivered by Hon'ble Yashwant Varma, J.)

1. Heard learned counsel for the petitioners and Sri Vishal Tandon learned Standing Counsel for the State respondents.

2. The petition has been preferred principally seeking the following reliefs: -

"a writ order or direction in the nature of certiorari quashing the notice dated 20.04.11 issued by the Additional District Magistrate (Finance & Revenue) Jyotiba Phulenagar (Annexure 14 to the writ petition).

A writ order or direction of a suitable nature restraining any action on the basis of the impugned notice.

A writ, order or direction of a suitable nature commanding the respondents to treat the petitioners as covered by the Old Pension Scheme applicable prior to 01.04.05 and to extend all benefit thereof to the petitioners."

3. The principal question which falls for determination is whether the petitioners who were initially selected in 2001 and on account of ensuing litigation came to be appointed only in October 2006 would be entitled to the benefits of the Old Pension Scheme which held the field till 01 April 2005. Undisputedly on 01 April 2005 a New Pension Scheme was promulgated and according to the petitioners since the provisions made in the erstwhile Scheme were more beneficial, they would be entitled to claim coverage under that Scheme notwithstanding the fact that they ultimately came to be appointed only in 2006. For the purposes of answering the question that is raised, the following skeletal facts may be noticed.

4. In August 2001 the Government of U.P. initiated a selection process for appointment of persons on Group-C posts in different Departments of the State. The petitioners applied and participated in that recruitment exercise. They are also stated to have cleared the typing test and declared as qualified. On 24 December 2001 the District Magistrate cancelled the select list and a decision was taken to hold fresh tests. Aggrieved by that decision various writ petitions came to be preferred before this Court including one filed by **Sevandra Singh And Others v. State of U.P. And Others**1. The said petition along with connected matters ultimately came to be

decided on 04 September 2003 in the following terms.

"For the aforesaid reason, the writ petition are allowed, the order dated 24.12.2001 of District Magistrate concealing the selections and for holding a fresh type test can not be sustained and is set aside. The respondents are directed to give appointments to the selected candidates, from but of the select list in pursuance of type test held on 23.11.2001 and 7.12.2001. The test held on 2.5.2003 is declared to be illegal and quashed. All the selectees as aforesaid including petitioners shall be given appointments within a period of one month. There shall be no order as to costs."

5. As is evident from the operative directions, the order of the District Magistrate was set aside and a further mandamus issued commanding the respondents to give appointments to selected candidates who formed part of the lists which had been prepared pursuant to the tests held on 03 November 2001 and 07 December 2001. The petitioners admittedly were included in those lists. The judgment of the learned Judge was subjected to an appeal at the behest of some of the candidates who had qualified the subsequent test that had been held on 02 May 2003. One of those Special Appeals was numbered as Special Appeal No. 967 of 2003. On 29 September 2003 while entertaining the appeal, the Division Bench provided that the judgment of the learned Judge impugned therein would remain stayed for a period of three months. When the Appeal was taken up again on 27 January 2004 the Division Bench extended the original interim order for a period of one month with liberty to parties to apply for extension, vacation, modification and/or variation of that order. The aforesaid Appeal remained pending on the board of this Court but the interim order, which was to operate only for a period of 1 month from 27 January 2004 was not extended thereafter.

6. On 25 May 2016 the Appeal and other connected matters were again taken up for consideration by a Division Bench when the following order came to be passed: -

"Three appeals are connected with each other, namely, the present appeal, Special Appeal No. 1641 of 2009 and Special Appeal (Def.) No. 983 of 2004 that has been printed in today's cause list of our determination. The other two appeals have not been printed in the cause list, namely, Special Appeal No. 967 of 2003 and Special Appeal No. 1641 of 2009. It is therefore, appropriate that all the three appeals are shown in the cause list correctly alongwith their complete particulars as well as the names of the respective counsel appearing in all the three appeals.

It is also relevant to record that in this appeal no. 967 of 2005, an interim order was passed on 29th September, 2003 that is recorded on the memo of the appeal and the order-sheet indicates the extension of the interim order upto 27th January, 2004. The order-sheet thereafter does not indicate any order except the matter being listed and being passed over on one ground or the other. Special appeal no. 967 of 2003 was after five years listed in 2015 and has now been placed before us without its particulars having been mentioned in cause list alongwith the other appeal.

In this background, learned Standing Counsel who is present for the State in Special Appeal (Def.) No. 983 of

2004 and Special Appeal No. 1641 of 2009 shall collect all appropriate information from the District Magistrate, Jyotiba Phule Nagar about the status of the employment of the candidates in whose favour the learned Single Judge has delivered the judgment dated 4.9.2003 and file an appropriate affidavit in that regard immediately upon reopening of the High Court in the 1st week of July, 2016.

List this case on 4th July, 2016 with all the connected appeals alongwith their correct particulars as well as names of the respective counsel appearing in all the three appeals "

7. The Appeal ultimately came to be dismissed for want of prosecution on 30 January 2017. It would not be out of place to note here that the State had also preferred a Special Appeal2 against the judgment of 04 September 2003 albeit with delay. The delay in the preferment of that appeal was never condoned and the Special Appeal remained defective and pending on the board of the Court.

8. In the meanwhile and since the original judgment was not being implemented, the petitioners here instituted proceedings in contempt. It was upon notices being issued on the contempt petition that they were ultimately granted letters of appointment. By the time that the letters of appointment came to be issued in favour of the petitioners in October 2006, the New Pension Scheme had come into force with effect from 01 April 2005. It is in that context that when the petitioners were required to exercise their options and complete documentation to be governed by the New Pension Scheme that the instant writ petition came to be preferred.

9. Learned counsel for the petitioners has contended that the petitioners had been duly selected in 2001 itself. It was submitted that the final judgment rendered inter partes on 4 September 2003 was never implemented by the State causing grave detriment to the petitioners. It was submitted that the interim orders which operated on the Special Appeal preferred by certain subsequently selected individuals also did not operate after February 2004 and consequently it must be held that there was no impediment operating upon the State from implementing the judgment of the learned Judge rendered on 04 September 2003. It was submitted that the petitioners cannot be placed in a disadvantageous position on account of the inaction and inexplicable delay on the part of the State to implement the judgment rendered inter partes. The sheet anchor of the submissions addressed rests upon a judgment rendered by a learned Judge of the Court in the matter of **Mahesh Narayan And Others v. State of U.P. And Others**3. According to the learned counsel **Mahesh Narayan** is a binding authority on the proposition that where the delay is caused by the State, the selectees who have merely come to be appointed post 01 April 2005 cannot be denied the benefits of the Old Pension Scheme.

10. Learned counsel then refers to the pleadings taken in paragraph-25 and 26 of the writ petition to submit that certain persons who had scored marks lower than the petitioners were in fact appointed prior to the New Pension Scheme coming into force and thus the petitioners have been clearly discriminated against. It was contended that the disclosures made in paragraph-25 and 26 of the writ petition have not been denied by the State respondents. The Court however notes that the petitioners never challenged the appointment of candidates who are alluded to in the writ petition at any stage. It is also not disputed that they came to be appointed prior to 1 April 2005. In that

view of the matter, the Court finds no justification to either countenance or deal with this issue.

11. Sri Tandon learned Standing Counsel on the other hand submits that the orders of appointment clearly provided that they would come into effect from the date when the petitioners join their respective posts. He submits that once the petitioners had accepted this stipulation in the appointment order without demur or protest, it was not open for them to thereafter and belatedly seek to claim benefits of the Old Pension Scheme. Sri Tandon in this connection places reliance upon the judgment rendered by a Division Bench of the Court in **Union of India Through Secretary Ministry of Defence and Others v. Roop Chandra And Others**4 where dealing with an identical controversy the Division Bench observed thus: -

"5. Once applicant-respondent have not challenged their appointment from particular date, applicant-respondent cannot subsequently claim that their appointment be treated prior to date of appointment as same will enable them benefit of old pension scheme.

…

7. In our view appointment begins with the issue of appointment letters. terms of appointment are governed by appointment letter. Once appointment letter so issued to applicant respondent was accepted without any protest, applicant respondents could not have turned around and claim appointment prior to the date mentioned in appointment letters. Tribunal erred in granting the relief prayed for. Both the writ petitions are consequently allowed. Impugned judgements and orders dated 20.5.2011 and 27.4.2012, passed by Tribunal, are set aside."

12. Sri Tandon learned Standing Counsel then drew the attention of the Court to yet another judgment rendered in **Ram Nakul v. State of U.P. And Others**5 wherein dealing with a similar question, a learned Judge held as follows: -

"6. I have considered the submissions made on behalf of the rival parties and perused the record. It would be relevant to consider the object of the New Pension Scheme which is specificily mentioned in the notification dated 28.03.2015 issued by the State Government which states as follows;

"State Government on 28.03.2005 has disclosed the object of new pension scheme as follows:-

The State Government, in consideration of its long-term fiscal interest and following broadly the pattern adopted by the Central Government has approved the following proposal of introducing a new defined contribution pension system in place of the existing defined benefit pension scheme for new entrances to the service of the State Government and of all State controlled autonomous institutions and State- aided private educational institutions where the existing pension scheme is patterned on the scheme or Government Employees and is funded by the consolidated fund of the State Government.

(i) From 1st of April, 2005, the new defined contribution pension system would mandatorily apply to all new recruits to the service of the State Government and of all State controlled autonomous State aided private educational institutions referred to above. However, employees covered by the

existing pension scheme whose service would be of less than ten years on 1st April, 2005, may also voluntarily opt for the new pension system in place of the existing pension scheme.

(ii) Under the new defined contribution pension system, the employee would make a monthly contributor equal to 10 per cent of the salary and dearness allowance. A matching employer's contribution would be made by the State Government or by the concerned autonomous institution/ private educational institution. However, the State Government would provide grant to the concern autonomous institution/ private educational institution for making employer/s contribution until the institution is in a position to make the contribution itself. The contribution and investment returns would be deposited in an account to be known as pension tier-I account. No withdrawal would be allowed from this account during the service period. The existing provisions of defined benefit pension and GPF would not be available to the new recruits covered by the new defined contribution pension system.

(iii) Since new recruits would not be able to subscribe to GPF, they may also have a voluntary tier-II account, in addition to the pension tier-I account. However, employer would make no contribution to tier-II account. The assets in tier-II account; would be invested/managed through exactly the same procedure of for pensioner-I account. However, the employee would be free to withdraw part or all the " second tier" of his money anytime.

(iv) Employee can normally exist tier-I of the pension system at the time of retirement. At exist the employee would be mandatorily required to invest 40 per cent of pension wealth to purchase an annuity from a recognized Insurance company so as to provide for pension for the lifetimes of the employee and his dependent parent and his spouse o at the time of retirement. The remaining pension wealth would, however, be received by the employee as a lump-sum which he would be free to utilize in any manner . In case of employee existing the pension tier-I before retirement, the mandatory annuitisation would be 80 per cent of the pension wealth.

(v) There would be several pension fund manners who would offer mainly three categories of investment options. The pension fund manners and the record keeper would jointly give our easily understood information about past performance to that the employee is able to make informed choices of the investment options.

2. The effective date for operationalisation of the new pension system shall be 1st of April, 2005."

7. From the above, it is clear that the New Pension Scheme was enforced w.e.f. 01.04.2005 and it would mandatorily made applicable to all the new recruits who join the services after 01.04.2005 with only one exception that the candidates whose service would be less than 10 years on 01.04.2005 an option had been given to them for the New Pension Scheme in place of the existing Pension Scheme.

…

9. In the present matter it is undisputed that petitioner joined the service on 19.04.2005, after the New Pension Scheme came into force i.e. on 01.04.2005. For the purpose of granting any benefit to the employee of the State the relevant date is only the date of actual joining as at the time of joining of service

the selected candidate has accepted the terms and conditions of the appointment letter. Learned counsel for the petitioner is not able to substantiate his argument from the record that the petitioner was intentionally denied by the respondents to join service before 01.04.2005."

13. It becomes relevant to note that the decision in **Ram Nakul** principally follows the judgment rendered by a learned Judge of the Court sitting at Lucknow in **Satyesh Kumar Mishra And Others v. State of U.P. And Others**6 where while dealing with the question of applicability of the Old and New Pension Schemes and upon noticing the provisions made in the **U.P. Retirement Benefits Rules, 1961**7 in that respect it was held as follows: -

"22. Pursuant to the aforesaid Notification dated 28.3.2005, amendment has been introduced in U.P. Retirement Benefit Rules 1961 known as "U.P. Retirement Benefits (Amendment) Rules, 2005", by the Governor in exercise of power conferred by the proviso to Article 309 of Constitution of India. The said Rules have been made applicable w.e.f. 1.4.2005, and it has been clarified therein that Rules shall not apply to employees whether temporary or permanent entering into services on or after 1st April, 2005 in relation to the affairs of State pensionable establishment,. Not only this, General Provident Fund (U.P.) Rules 1985 has also been amended by the Governor, in exercise of power conferred by the proviso to Article 309 of the Constitution of India, by means of General Provident Fund (U.P.) (Amendment) Rules, 2005, and these Rules have also been made applicable w.e.f. 1.4.2005. While dealing with conditions of eligibility in Rule-4, a proviso has been appended mentioning therein that no government servant entering into on or after 1st April, 2005 shall subscribe to the fund from the date of joining of service.

23. Once a policy decision has been taken to enforce new pension scheme, contribution pension system w.e.f. 1st April, 2005 with no exception accorded to new entrants to service and the only exception that has been carved out is in reference of candidates whose service would be of less than ten years on 1st of April, 2005, then option has been given to them to voluntarily opt for the new pension system in place of the existing pension scheme. Thus, it is imminently clear that new entrants in service have necessarily opt for new pension scheme, and have no escape route.

24. Once appointment of the petitioners have been made on 16.4.2015, 13.5.2005, 4.5.2005, 16.7.2005, 14.8.2006, 16.4.2005, respectively, then, admittedly entry in service has been made after enforcement of new pension scheme. In this view of the matter, petitioners cannot insist that they should be governed under old pension scheme on account of the fact that when the advertisement has been issued, old pension scheme has been in existence.

25. "Recruitment", "Advertisement", "Selection" and "Appointment" are different concepts under the service jurisprudence. "Recruitment" is the process of generating a pool of capable people to apply for employment in organization. Selection forms integral part of recruitment process, wherein from amongst eligible candidates, choice is made of person or persons capable to do the job as per the requirement. The process of selection begins with the issuance of advertisement

and ends with the preparation of select list for appointment. "Appointment" is made, after selection process is over, issuance of letter in favour of selected candidates, is an offer to selected candidate to accept the office or position to which he has been selected. On acceptance of the terms and conditions of appointment, the selected candidates on joining has to be accepted as appointed, and he /she would be a new entrant and based on recruitment process, petitioner can not claim that she be brought within the scope and ambit of old pension rules in place of new pension rules. There is no dispute to the fact that process of selection was never altered and the entire selection was undertaken in accordance with the criterion which was laid down at the time of recruitment process. Therefore, assertion of the petitioner that the applicability of New Pension Scheme would amount to change in the terms and conditions of recruitment is untenable.

26. The Apex Court, in the case of Sudhir Kumar Kansal Vs. Allahabad Bank : 2011 (2) ESC 243 held, in the matter of grant of pension, either under the old rule or the new rule, proceeded to mention that in society governed by rule of law sympathies cannot override the Rules and Regulations, and in the said case view has been taken accordingly that appellant was not eligible to claim any benefit under Old Pension Scheme.

27. Inevitable conclusion thus is, that once New Pension Scheme has been introduced and it has been provided that such incumbents entering into service on or after 1st April, 2005 would be governed under the New Scheme, then, said category of incumbents, as matter of right, cannot claim legally to be governed under the old scheme, and their claim of pension will fall within the ambit of Rules as has been introduced w.e.f. 01.04.2005."

14. Sri Tandon then submitted that in 2010 itself the petitioners had raised a contention that their seniority must be counted not from the date of their actual appointment but from the time when they were originally selected or at least when their claim came to be upheld in **Sevandra Singh**. Sri Tandon draws the attention of the Court to the order passed by a learned Judge on **Rajiv Singh And Others v. State of U.P. And Others**8 when that claim came to be rejected in the following terms: -

"Heard learned counsel for the petitioners and learned Standing Counsel.

The relief sought in the present writ petition is that the judgment which was passed in 2003 in favour of the petitioners in Writ Petition No.18789 of 2003 may be complied with in true spirit. Petitioners were considered and appointed in pursuance of the judgment passed by this Court in 2006. The claim of the petitioners is that as the judgment in favour of the petitioners was of 2003, therefore, they are entitled to get the seniority and other financial benefits from that date in spite of the fact that they have been given appointment in 2006.

In my opinion, it is not permissible in law. A persons who was not in service on a particular day, cannot be treated in service and seniority cannot be accorded to him."

15. A Division Bench affirming that decision in Special Appeal observed thus:-

"We have gone through the order impugned and found that the court clearly held that the appointments were given in 2006. Therefore, a person who was not in service on a particular date, cannot be

treated in service and seniority cannot be accorded to him. The petitioner has taken a plea that two persons were given appointments pursuant to the direction of the writ court in 2003 but the petitioner was excluded.

.....

In the instant case appointment was given only in 2006. If there is any delay on the part of the State between 2003 and 2006, it was open to proceed before the court of contempt. Why the petitioner has invoked the jurisdiction of this Court a second time for giving an interpretation with regard to seniority by filing the writ petition is not known. The learned Single Judge has rightly held that since the vacancy was not available earlier to 2006, how the seniority can be given prior thereto. Hence we do not find any infirmity in the order itself. "

16. Sri Tandon learned Standing Counsel seeks to draw sustenance from the findings as returned in that round of litigation to contend that it was duly noted that the petitioners here could not claim any retrospective conferral of benefits commencing from a period even before they had entered service. In his submission the same analogy must also apply when it comes to their claim for coverage under the Old Pension Scheme.

17. Having noticed the rival submissions, the Court firstly takes note of the judgment in **Satyesh Kumar Mishra** where the learned Judge noticed the seminal amendments that came to be introduced pursuant to the adoption of the New Pension Scheme. The learned Judge in **Satyesh Kumar Mishra** taking note of the underlying policy infusing the New Pension Scheme and as embodied in the Government Order of 28 March 2005, took note of significant provisions made by way of amendment in the 1961 Rules as well as the General Provident Fund (U.P.) Rules 1985. It was noted that the 1961 Rules as amended in unequivocal terms provided that they would not apply to employees entering service on or after 01 April 2005 irrespective of whether their engagement in relation to the affairs of the State was on a pensionable or non-pensionable establishment. The learned Judge in light of those amendments proceeded to observe that once a policy decision had been taken to enforce a New Pension Scheme, entrants into service after the dates specified thereunder could not claim benefits of the erstwhile Scheme. It was noted that the statutory regime as introduced did not envisage an option being exercised by entrants. The learned Judge then also took note of the meaning liable to be ascribed to the expressions "Recruitment", "Advertisement", Selection" and "Appointment" to hold that once incumbents had accepted the terms and conditions specified in the appointment, they were bound by the same and could not seek to alter those terms at a subsequent stage.

18. In **Bharat Yadav v. State of U.P. And 3 Others**9 a learned Judge of the Court again noticing the significant provisions made in Rule 2(3) of the 1961 Rules, the validity of which as was noted in that decision as having been upheld arrived at the same conclusion. The learned Judge while dealing with an identical question held: -

"So far as payment of pension under the old pension scheme is concerned, the same is regulated by the provisions of Rules of 1961. An amendment in the Rules of 1961 was

introduced in the year 2005 as per which anyone who joins services of the State after 1.4.2005 would not be entitled to any pension under the Rules of 1961. Rule 2(3) of the Rules of 1961, as amended, reads as under: -

"2(3) These Rules shall not apply to employees entering services and posts on or after April 1, 2005 in connection with the affairs of the State, borne on pensionable establishment, whether temporary or permanent."

The validity of the aforesaid rules were questioned in series of litigations instituted before this Court and a Division Bench of this Court in State of U.P. and others vs. Dukh Haran Singh reported in 2010 (2) AWC1882 (All) has been pleased to affirm the validity of the amendment incorporated in the Rules of 1961. The matter has travelled upto the Apex court and the view taken by the Division Bench of this Court has been affirmed. In that view of the matter, anyone who joins in the service of the State of U.P. after 1.4.2005 would not be entitled to benefit of old pension scheme under the Rules of 1961. Since the petitioner's appointment is after the cut-off date i.e. 1.4.2005 and he never questioned his appointment offered on 27.12.2005, it would not be open for the petitioner to contend now that the benefit of services in the employment of State ought to be granted from a date prior to 1.4.2005. The contention in that regard, based upon the observations of the Division Bench judgment of the Uttrakhand High Court, is not liable to be accepted in view of the fact that Division Bench of this Court has already taken a different view and such view has otherwise been affirmed by the Apex Court. This Court, moreover, finds that the Rules of 1961 consequent upon its amendment, referred to above, did not fall for consideration before the Uttarkhand High Court. In view of the fact that distinct set of rules exist in respect of employees of the State of Uttar Pradesh, the judgment of the Uttrakhand High court would not be of any avail to petitioner's cause. The plea that the pension Rules as it stood when the vacancy was advertised in 2001 be made applicable upon the petitioner, therefore, is rejected.

Bharat Yadav thus and as is manifest treads the same line as the decisions rendered in **Satyesh Kumar Mishra** and **Ram Nakul**.

19. This Court is of the considered view that the key to answer the question posed lies in the language employed by Section 2(3) of the 1961 Rules. The decisions noticed above in light of the plain language employed in Rule 2(3) hold that it is only the date on which the incumbent joins service which is relevant for the purposes of adjudging his eligibility to the benefits of the Old or the New Pension Scheme. They also lay stress on the issue of joining and hold that it is that facet which would be determinative. It becomes pertinent to note that **Satyesh Kumar Mishra, Ram Nakul** and **Bharat Yadav** were all rendered prior to the judgment in **Mahesh Narayan**. However of these three decisions only **Satyesh Kumar Mishra** has been noted with the learned Judge observing that it was liable to be viewed as having been rendered per incuriam. Since **Mahesh Narayan** clearly proceeds to lay down a principle, which runs contrary to that enunciated in the three previous decisions rendered on the subject, it would be apposite to analyze that decision in some detail.

20. In **Mahesh Narayan** the learned Judge placing reliance upon a decision rendered by a Division Bench of the Court in **Firangi Prasad v. State of U.P. And Others**10 has proceeded to hold that that

where the delay is on account of inaction on the part of the State, the selectees and individuals cannot be deprived of rights which may have accrued or crystallized. In **Mahesh Narayan** the learned Judge held that since the decision in **Firangi Prasad** had not been noticed in **Satyesh Kumar Mishra** that decision was liable to be viewed as *per incuriam*. **Mahesh Narayan** again was a decision which dealt with a selection process which had been initiated and ultimately came to be quagmired in litigation leading to delay in issuance of appointment orders. The learned Judge placing reliance on **Firangi Prasad** held that in such a situation inaction on the part of the State cannot deprive a candidate of his legitimate right to claim benefits that may have existed when selection commenced. It was noted that although the selection process had been initiated in 2001, it was conferred finality only once legal challenges failed in 2005. It also took note of the fact that the final select list was ultimately published on 12 March 2006 where after appointment letters were issued. In the aforesaid factual backdrop and following **Firangi Prasad** the learned Judge held that the candidates could not be denied benefits on account of the delay that occurred in the issuance of the appointment orders and consequently they must be held to be eligible to the benefits as provided under the Pension Scheme which prevailed prior to 01 April 2005. While holding thus, the learned Judge also placed reliance upon the decision rendered by the Uttarakhand High Court in **Ashutosh Joshi And Others v. State of Uttarakhand And others**11 as well as the Delhi High Court in **Inspector Rajendra Singh And Others v. Union of India and Others**12. It would be pertinent to extract the ultimate conclusions recorded by the Learned Judge in **Mahesh Narain** which read thus: -

From the perusal of judgments of Satyesh Kumar Mishra (Supra) and Firangi Prasad (Supra), there is no doubt on the point that similar dispute was before this Court in the matter of Satyesh Kumar Mishra (Supra), which was dismissed by this Court against which Special Appeal Defective No. 480 of 2016 is pending. It is also not disputed that legal issue involved in the matter of Satyesh Kumar Mishra (Supra) was also before Division Bench of this Court in the matter of Firangi Prasad (Supra) where the Court has clearly held that on the fault of appointing authority in issuing appointment letter, petitioners cannot be put any type of disadvantage. It appears that at the time of deciding the matter of Satyesh Kumar Mishra (Supra), judgement of Firangi Prasad (Supra) was not placed before this Court, therefore, without considering the same, decision was given in the matter of Satyesh Kumar Mishra (Supra). Under such facts and circumstances, judgement of Satyesh Kumar Mishra (Supra) is per incuriam and cannot be treated as precedent in the present case and will not come in the rescue of respondents.

The controversy and question of law involved in the present case is squarely covered with the judgement of Firangi Prasad (Supra) as well as other judgments relied upon by learned counsel for the petitioners and Courts have taken consistent view that respondents cannot by their inaction deprive a candidate to his legitimate right.

So far as facts of the case are concerned, there is no dispute on the point that pursuant to advertisement No. A-3/E-1/2000, advertisement was issued in news paper on 22.12.2000 and as per order of this Court dated 29.12.2001 passed in Special Appeal No. 485 (S/B) of 2001 (supra), there was no legal impediment in completion of recruitment process, but due

to inaction on the part of respondents, it was completed only after dismissal of writ petition on 05.07.2005. Final selected list of selected candidate was published in daily newspaper 'Dainik Jagran' dated 12.03.2006 and thereafter appointment letters were issued. It is also not disputed that in between again in subsequent advertisement No. A-3/E-1/2002, recruitment was completed and candidates had been granted appointment prior to 01.04.2005 and getting the benefit of 'Old Pension Scheme'.

Therefore, considering the facts and circumstances of the case and legal position discussed herein above, writ petition is partly allowed and petitioners are excluded from the effect and operation of Notification dated 28.03.2005 and 07.04.2005 as it is in violation of Article 14 of Constitution of India as well as law laid down by the Courts."

21. Having conferred thoughtful consideration on the various decisions that have come to be rendered on the subject, the Court firstly notes that **Mahesh Narayan** fails to notice **Ram Nakul** and **Bharat Yadav**. Both these decisions directly dealt with the issue of applicability of the Old and New Pension Schemes depending upon the date of entry into service of a particular candidate. These decisions clearly bound the learned Judge while proceeding to decide **Mahesh Narayan**. However they do not appear to have been brought to the attention of the Court. Both **Ram Nakul** and **Bharat Yadav** fundamentally rest and pivot on the statutory amendments as introduced in 2005 in the 1961 Rules. As noted above, Rule 2(3) introduces and constructs a specific injunction in respect of its applicability to employees ***"entering"*** services or posts on or after April 01, 2005. Guided by the plain language as used in that Rule, it is manifest that it does not connect the applicability of the Rules to either a selection process commenced or pending or for that matter to any event prior to actual entry into service. In the considered view of this Court the expression *"entering services..."* cannot be equated to the selection or empanelment of an incumbent to government service. It is manifest that the applicability of the 1961 Rules is made dependent upon an incumbent actually being recognised as having become a member of the service on or before 1 April 2005. Viewed on its plain language it must be held, as this Court does, that entry into service alone would be determinative and since that event would occur only upon the issuance of an actual appointment letter and consequential joining it is these twin facets alone which would govern the issue of applicability of the Old or New Pension Scheme. Unless an incumbent is formally inducted into service, he cannot be viewed as having become a member thereof or a holder of a post. The expression *"entering services or posts..."* cannot be understood as referring to or hinging upon something inchoate or nebulous. Till such time as the incumbent accepts the offer of appointment and joins on the post, his position remains that of someone waiting at the threshold. It is only once he accepts the appointment, the terms and conditions stipulated therein and joins that he is ordained in service. In view of the aforesaid exposition the Court comes to conclude that the expression *"entering"* cannot be accorded any other interpretation.

22. That then takes the Court to consider whether **Satyesh Kumar Mishra** could be said to have been rendered *per*

incuriam. While **Mahesh Narayan** does so observe on the premise that it fails to notice **Firangi Prasad**, that would really depend upon whether the Court can on a holistic and careful examination come to the irresistible conclusion that the factual backdrop in which that decision came to be entered and the issue which essentially fell for determination were identical or at least analogous. It must at the outset be noted that **Firangi Prasad** was not a decision rendered in the backdrop of the 1961 Rules at all. That decision was dealing with a right of an individual to seek regularisation under the provisions of Section 33C of the **U.P. Secondary Education Service Selection Board Act, 1982**13. The Division Bench in **Firangi Prasad** observed: -

15. The second contention needs to be examined in the light of the facts that have emerged from the record, namely that the appellant for no fault on his part was kept out of the Institution by the inaction of the Management in spite of the District Inspector of Schools having dispatched the selection order on 18.01.1993. From the facts on record, it is evident that the Manager of the Institution had to perform the ministerial act of issuing a letter of appointment to the appellant in terms of the selection order dated 18.01.1993. The Management admittedly complied with it after much persuasion on 25.08.1993, for which the appellant is nowhere at fault. On the contrary, the appellant had been continuously approaching the Management time and again expressing his willingness to join the Institution.

16. In these circumstances, teachers like the appellant fall within an altogether different class of candidates, who have been wrongfully prevented by the inaction of the Management in joining the Institution. The Management has to perform only a ministerial act and by its inaction, it cannot defeat the legitimate claim of a teacher like appellant.

.....…

19. The respondents cannot by their inaction, therefore, deprive a candidate of his or her legitimate right to claim continuance in service. It is, therefore, clear that there was a deliberate delay on the part of the Management in issuing the letter of appointment in the present case and accordingly, the right of the appellant to claim continuance under the selection order dated 18.01.1993 cannot be denied. The appellant will, therefore, be entitled to the benefits flowing out of the order dated 18.01.1993 and in such a situation, the letter of appointment will relate back prior to the cut-off date i.e. 06.08.1993.

23. Section 33C, it may be noted, does not engraft any threshold precondition which may be recognised as controlling access to the benefits enshrined in that provision except to the extent where it prescribes the class of teachers who would be entitled to be considered for regularisation. Secondly, unlike Rule 2(3) of the 1961 Rules, the provision also does not commence with a negative stipulation couched in imperative terms, which may be recognised as a legislative injunct against extension of its benefits. Rule 2(3) in no uncertain terms restricts its applicability and in unequivocal terms debars incumbents entering service after 1 April 2005 from the benefits of those Rules. The structure of Section 33C, in this sense, is clearly distinct and dissimilar. Thirdly, the statutory scheme underlying the 1982 Act must also be appreciated under which the management is to perform only a ministerial act of

issuing an appointment letter upon receiving intimation of selection of the incumbent by the Board. In fact and as is evident from Rule 13 of the **U.P. Secondary Education Services Selection Board Rules, 1998**, a structured time frame for issuance of an appointment order is put in place coupled with an obligation upon the Management to report compliance. The decision rendered in **Firangi Prasad** has to consequently be understood and appreciated in light of what has been noted above. To put it differently, the ratio of **Firangi Prasad** cannot be appreciated without bearing in mind the distinguishable statutory scheme of the 1982 Act and the Rules framed thereunder.

24. Similarly the reliance placed by the learned Judge on **Naveen Kumar Jha v. Union of India and Others**14 also appears to be inapposite since that too dealt with a selection for Para Military Forces and does not appear to deal with a provision akin to Rule 2(3).

25. However these pivotal and crucial aspects appear to have been ignored in **Mahesh Narayan**. The ex facie distinction between Rule 2(3) and Section 33C has clearly not been borne in mind. This perhaps because Rule 2(3) has not even been independently noticed by the learned Judge. The judgment in **Firangi Prasad** dealing as it did with the right of regularisation as conferred by Section 33C and the observations made in its backdrop cannot consequently be recognised as laying down a proposition on the basis of which **Satyesh Kumar Mishra, Ram Nakul** and **Bharat Yadav** may be said to have been incorrectly decided or be *per incuriam*.

26. The decision in **Mahesh Narayan** insofar as it seeks to draw sustenance from the judgments rendered by the Uttarakhand and Delhi High Courts also does not commend acceptance in light of the aspect which is noticed by the learned Judge in **Bharat Yadav**, namely, that in none of the decisions rendered by the two High Courts were provisions *pari materia* to Rule 2(3) shown to apply. On an overall conspectus of the aforesaid, the Court is of the considered view that insofar as the question that arises in this petition is concerned, it must be answered in light of the provisions made in the 1961 Rules and the decisions rendered in **Satyesh Kumar Mishra, Ram Nakul** and **Bharat Yadav** have rightly answered the issue by holding that incumbents appointed after 1 April 2005 cannot be recognised as being eligible to claim benefits of the Old Pension Scheme.

27. The Court additionally notes that the provisions of Rule 2(3) of the 1961 Rules are not assailed. The judgment therefore must necessarily proceed on the basis of that it is that provision alone which governs and must dictate the answer to the question posited. That Rule, as noted above, clearly refers to entry into service as being the determinative factor. None of the petitioners here are shown to have entered into service prior to 01 April 2005. The mere fact that the process of recruitment was initiated prior thereto can be of no assistance to their cause of being governed by the Old Pension Scheme.

28. The Court also bears in mind the decision of the Division Bench of this Court in **Roop Chandra** where it was held that a stipulation contained in an appointment order cannot be assailed or questioned after its acceptance. As noticed in the earlier part of this judgment the appointment letter of the petitioners had clearly stipulated that their appointment was to come into force upon their joining.

It did not stipulate the appointment coming into effect from some retroactive date. That prescription in the order of appointment was duly accepted without demur or protest. It is not permissible for the petitioners to now and at this point of time to renege from that concession.

29. Insofar as the issue of the interim orders passed on the Special Appeals preferred by certain other selected candidates are concerned, suffice it to note that the State to some extent appears to be justified in submitting that it could not proceed on the assumption that the order of restraint had come to an end or had expired by efflux of time. In any case the justification or otherwise for the delay that occurred in implementation of the judgment of 4 September 2003 is not an issue on which this Court is called upon to rule. As is manifest from the reliefs which are framed, the sole question which this Court is called upon to decide is the entitlement of the petitioners to seek coverage of the Old Pension Scheme. Viewed in that context it really does not fall for this Court to rule on the justifiability or otherwise of the delay which was allegedly caused in the ultimate implementation of the judgment of 04 September 2003. The claim in any case must fall in light of Rule 2(3) of the 1961 Rules. The Court finds no legally justifiable basis to either ignore its unambiguous command or dilute its rigor by virtue of the alleged delay in conferment of appointment to the petitioners for reasons aforenoted. In view of the aforesaid, the challenge to the impugned order fails.

30. The writ petition is **dismissed**.

(2020)02ILR A1239

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 10.02.2020

BEFORE

THE HON'BLE SUDHIR AGARWAL, J.

Writ-A No. 50149 of 2005

Mukesh Kumar ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Lallan Prasad Pal

Counsel for the Respondents:
C.S.C.

A. Regularization of appointment - regularization is not a source of recruitment and if initial appointment was made without complying with the requirement of Article 16(1) of the Constitution, regularization is not permissible particularly in absence of any statutory provision

Writ Petition Rejected.

List of cases cited:

1. Secretary, State of Karnataka V. Uma Devi (2006) 4 SCC 1 *(followed)*

2. Surinder Prasad Tiwari V. U.P. Rajya Krishi Utpadan Mandi Parishad & ors, 2006 (7) SCC 684*(followed)*

3. Union Public Service Commission V. Girish Jayanti Lal Vaghela 2006 (2) SCC 482*(followed)*

4. State of Karnataka & ors V. G.V. Chandashekhar JT 2009(4) SC 367*(followed)*

5. Man Singh V. Commissioner, Garhwal Mandal, Pauri & ors JT 2009 (3) SC 289*(followed)*

6. State of Bihar V. Upendra Narayan Singh & ors (2009) 5 SCC 65*(followed)*

7. Pinaki Chaterjee & ors V. UOI & ors 2009 (5) SCC 193*(followed)*

8. State of Rajasthan and ors V. Daya Lal & ors 2011(2) SCC 429*(followed)*

9. State of U.P. and ors V. Rekha Rani JT 2011(4) SC 6*(followed)*

10. Brij Mohan Lal V. UOI (2012) 6 SCC 502*(followed)*

11. University of Rajasthan and ors V. Prem Lata Agarwal and ors (2013) 3 SCC 705*(followed)*

12. Secretary to Government, School Education Department, Chennai and ors V. Thiru R. Govindaswamy and ors (2014) 4 SCC 769*(followed)*

13. Upendra Singh V. State of Bihar and ors (2018) 3 SCC 680*(followed)*

(Delivered by Hon'ble Sudhir Agarwal, J.)

1. Herard Sri Lallan Prasad Rai, Advocate, for petitioner and learned Standing Counsel for respondents.

2. The only relief sought in the writ petition is that respondents be directed to regularize the petitioner.

3. It is clear that petitioner is discharging duties as operator since 11.11.1995. He was appointed by Executive Officer, Nagar Panchayat, Pahasu, District Bulandshahar. It is contended that petitioner is entitled to be considered for regularization in accordance with U.P. Regularisation of Persons Working on Daily Wages or On Work Charge or On Contract in Government Departments on Ground "C" and Group "D" Posts (Outside the Purview of the Uttar Pradesh Public Service Commission) Rules, 2016 (hereinafter referred to as "Rules, 2016") but when questioned that the aforesaid Rules are applicable to Government Servants having been framed under proviso to Article 309 and not applicable to Local Bodies, like, Nagar Panchayat etc., learned counsel for petitioner could not show any provision which are applicable to Nagar Panchayat so as to entitle petitioner to claim consideration for regularization. In absence of any such provision, no direction for regularization can be issued in view of law laid down by Constitution Bench of Apex Court in **Secretary, State of Karnataka Vs. Uma Devi (2006) 4 SCC 1** wherein the question was considered as to whether regularization can be allowed to a person simply because he has worked for a long time. While considering the said question, fundamental right of equal opportunity of employment enshrined under Article 16 of the Constitution has been held to be a basic feature of Constitution. The Apex Court in **Uma Devi (supra)**, therefore, very categorically cautioned the High Courts as under :

"The High Courts acting under Article 226 of the Constitution, should not ordinarily issue directions for absorption, regularization or permanent continuance unless the recruitment itself was made regularly and in terms of the Constitutional Scheme."

4. The above question in the light of decision in **Uma Devi (supra)** has been considered in a catena of decisions and following **Uma Devi (supra)**, Court has held that regularisation is not a source of recruitment and if initial appointment was made without complying with the

requirement of Article 16 (1) of the Constitution, regularisation is not permissible particularly in absence of any statutory provision. I do not propose to give the exhaustive list of all such cases, but it would be appropriate to place on record as to how the matter, of late, has been treated by the Apex Court in the light of the law laid down by the Constitution Bench in **Uma Devi (supra)**.

5. Following **Uma Devi (supra)**, in **Surinder Prasad Tiwari Vs. U.P. Rajya Krishi Utpadan Mandi Parishad & others, 2006 (7) SCC 684**, it was held:

"Equal opportunity is the basic feature of our Constitution. ...Our constitutional scheme clearly envisages equality of opportunity in public employment. .... This part of the constitutional scheme clearly reflects strong desire and constitutional philosophy to implement the principle of equality in the true sense in the matter of public employment.

In view of the clear and unambiguous constitutional scheme, the courts cannot countenance appointments to public office which have been made against the constitutional scheme. In the backdrop of constitutional philosophy, it would be improper for the courts to give directions for regularization of services of the person who is working either as daily-wager, ad employee, probationer, temporary or contractual employee, not appointed following the procedure laid down under Articles 14, 16 and 309 of the Constitution."

6. Elaborating the procedure of regular appointment, in **Union Public Service Commission Vs. Girish Jayanti Lal Vaghela 2006 (2) SCC 482**, the Court observed that regular appointment to a post under the State or Union cannot be made without issuing advertisement in the prescribed manner, which would include inviting of applications from the employment exchange where eligible candidates get their names registered. Any regular appointment made on a post under the State or Union without issuing advertisement inviting applications from eligible candidates and without holding a proper selection where all eligible candidates get a fair chance to compete would violate the guarantee enshrined under Article 16 of the Constitution.

7. Deprecating the practice of the State to make appointment in ad hoc manner without caring to the recruitment in accordance with rules, the Apex Court in **State of Karnataka & others Vs. G.V. Chandrashekhar JT 2009 (4) SC 367** said that the State Government should not allow to depart from the normal rule and indulge in temporary employment in permanent posts. Court is bound to insist upon the State to make regular and proper recruitments. The Court is also bound not to encourage or shut its eyes to the persistence transgression of the rules of regular recruitment. Any direction to the State to consider the persons for regularisation even though they have not been recruited in accordance with rules would only encourage the State to flout its rules and to confer undue benefits on a selected few at the cost of many waiting to complete. Adherence to the rule of equality in public employment is a basic feature of our Constitution and since the rule of law is the core of our Constitution, a Court of law and even a Court of equity would certainly be disabled to pass an order upholding violation of Article 14 or directing the State to overlook the need of

compliance of Article 14 read with 16 of Constitution of India and thereby give certain advantage to a person who is beneficiary of such violation. Considering the scheme of public employment in the context of fundamental rights and in particular the right of equal opportunity of employment, this Court would insist upon appointment to be made in terms of the relevant rules and after a proper competition amongst qualified persons instead of conferring a right on non selected appointees who have come from a channel not recognised in law. Such appointees cannot be conferred a valid entry being in breach of Article 14 and 16 of the Constitution. In **G.V. Chandrashekhar (supra)**, the Apex Court also said:

"If it is a contractual appointment, the appointment comes to an end at the end of the contract, if it were an engagement or appointment on daily wages or casual basis, the same would come to an end when it is discontinued. Similarly, a temporary employee could not claim to be made permanent on the expiry of his term of appointment. It has also to be clarified that merely because a temporary employee or a casual wage worker is continued for a time beyond the term of his appointment, he would not be entitled to be absorbed in regular service or made permanent, merely on the strength of such continuance, if the original appointment was not made by following a due process of selection as envisaged by the relevant rules. It is not open to the court to prevent regular recruitment at the instance of temporary employees whose period of employment has come to an end or of ad hoc employees who by the very nature of their appointment, do not acquire any right. The High Courts acting under Article 226 of the Constitution, should not ordinarily issue directions for absorption, regularisation, or permanent continuance unless the recruitment itself was made regularly and in terms of the constitutional scheme. Merely because an employee had continued under cover of an order of the court, which we have described as "litigious employment" in the earlier part of the judgment, he would not be entitled to any right to be absorbed or made permanent in the service."

8. The same view has been reiterated in **Man Singh Vs. Commissioner, Garhwal Mandal, Pauri & others JT 2009 (3) SC 289.**

9. In **State of Bihar Vs. Upendra Narayan Singh & others (2009) 5 SCC 65**, Court held that any regular appointment made on a post under the State or Union without issuing advertisement, inviting applications from eligible candidates and without holding a proper selection where all eligible persons get a fair chance to complete is in violation of guarantee enshrined under Article 226 of the Constitution. Ad hoc/ temporary/ daily wage employees are not entitled to claim regularisation in service as a matter of right. If an illegality or irregularity has been committed in favour of any individual or a group of individuals or a wrong order has been passed by a judicial forum, others cannot invoke the jurisdiction of the higher of superior Court for repeating or multiplying the same irregularity or illegality or for passing wrong order.

10. In **Pinaki Chatterjee & others Vs. Union of India & others 2009 (5) SCC 193**, the Court observed that it is no

doubt true that the respondents under certain circumstances had been appointed directly as casual mates and they continued as such and further by virtue of their continuance they acquired temporary status but that by itself does not entitle them to be regularised as mates since that would be contrary to the rules in force. The Court further held that the respondents did not acquire a right for regularisation as mates from the mere fact of their continuance as casual mates for a considerable period.

11. In **State of Rajasthan and others Vs. Daya Lal & others, 2011(2) SCC 429** Court following the decision in Uma Devi (supra) held as under:

"The High Courts, in exercising power under Article 226 of the Constitution will not issue directions for regularization, absorption or permanent continuance, unless the employees claiming regularization had been appointed in pursuance of a regular recruitment in accordance with relevant rules in an open competitive process, against sanctioned vacant posts. The equality clause contained in Articles 14 and 16 should be scrupulously followed and Courts should not issue a direction for regularization of services of an employee which would be violative of constitutional scheme."

12. In **State of U. P. and others vs. Rekha Rani, JT 2011 (4) SC 6**, Court referring to its decision in **Daya Lal (supra)**, in para 12 of the judgment, said :

*"12. It has been held in a recent decision of this Court in **State of Rajasthan vs. Daya Lal, 2011 (2) SCC 429** following the Constitution Bench decision of this Court in **State of Karnataka vs. Umadevi (2006) 4 SCC 1** that the High Court in exercise of its power under Article 226 cannot regularize an employee."*

13. In **Brij Mohan Lal vs. Union of India (2012) 6 SCC 502**, referring to **Uma Devi (supra)** Court said :

"A Constitution Bench of this Court has clearly stated the principle that in matters of public employment, absorption, regularization or permanent continuance of temporary, contractual or casual daily wage or ad hoc employees appointed and continued for long in such public employment would be de hors the constitutional scheme of public employment and would be improper. It would also not be proper to stay the regular recruitment process for the concerned posts."

14. In **University of Rajasthan and others vs. Prem Lata Agarwal and others, (2013) 3 SCC 705** referring to Constitution Bench judgment in **Uma Devi (supra)** said :

".....the Constitution Bench, after survey of all the decisions in the field relating to recruitment process and the claim for regularization, in paragraph 43, has held that consistent with the scheme for public employment, it is the duty of the court to necessarily hold that unless the appointment is in terms of the relevant rules, the same would not confer any right on the appointee. The Bench further proceeded to state that merely because a temporary employee or a casual wage worker is continued for a time beyond the term of his appointment, he would not be entitled to be absorbed in regular service

or made permanent, merely on the strength of such continuance, if the original appointment was not made by following a due process of selection as envisaged by the relevant rules."

15. In **Secretary to Government, School Education Department, Chennai and others Vs. Thiru R. Govindaswamy and others (2014) 4 SCC 769**, referring to **Uma Devi (supra)** Court said that there is no fundamental right in those who have been employed on daily wages or temporarily or on contractual basis, to claim that they have a right to be absorbed in service. As has been held by this Court, they cannot be said to be holders of a post, since, a regular appointment could be made only by making appointments consistent with the requirements of Articles 14 and 16 of the Constitution.

16. In **Upendra Singh Vs. State of Bihar and others, (2018) 3 SCC 680** referring to **Uma Devi (supra)**, Court said :

"Law pertaining to regularisation has now been authoritatively determined by a Constitution Bench judgment of this Court in ***Secretary, State of Karnataka and Ors. vs. Umadevi and Ors. (2006) 4 SCC 1****. On the application of law laid down in that case, it is clear that the question of regularisation of daily wager appointed contrary to law does not arise. This ration of the judgment could not be disputed by the learned Counsel for the Appellant as well."*

17. In view of above authorities and binding precedent of Supreme Court, prayer for regularization de hors the rules, cannot be considered and any direction issued by this Court otherwise, which is contrary to the Statute, would be impermissible.

18. In view of discussion made hereinabove, I do not find the petitioner entitled for relief sought for. The writ petition lacks merits. Dismissed.

(2020)02ILR A1244

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 10.01.2020

BEFORE

THE HON'BLE PIYUSH AGRAWAL, J.

Writ-A No. 52369 of 2016

Babundar Chaubey @ Babundar Prasad Chaubey ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Dharmendra Kumar Tripathi

Counsel for the Respondents:

A. Service Law– Regularization - U.P. Collection Amins Service Rules, 1974; U.P. Seasonal Collection Amin Rules, 1974: Rules 5, 17, 17-A – Petitioner has not been considered for regularization even after achieving the target prescribed u/Rule 5.

The Court reiterating the principle that 'last four fasals' would mean all fasals in which Seasonal Collection Amin has worked and does not mean the four immediately preceding fasals, has given liberty to the petitioner to move a detailed representation before the Collector (authority concerned) with the direction to decide the same expeditiously and in accordance with law. (Para 7, 10)

Writ petition disposed of. (E-4)

Precedent followed:
1. State of U.P. and others Vs. Pankaj Srivastava, 2013 (11) ADJ 473 (Para 7, 9)

2. Suresh Chand Mishra Vs. State of U.P. and others, 2016 (11) ADJ 315 (Para 8)

3. Rajesh Kumar Tripathi Vs. State of U.P., Writ A No. 16121 of 2017, decided on 27.03.2019 (Para 9)

(Delivered by Hon'ble Piyush Agrawal, J.)

1. By means of the present writ petition, the petitioner has prayed the following amongst other relief:

"Issue a writ, order or direction in the nature of mandamus, directing the respondent No.3 to consider the regularization of the petitioner on the post of Collection Amin under Rule 5 of U.P. Seasonal Collection Amin Rules, 1974 as amended from time to time, within stipulated period, specified by this Hon'ble Court."

2. It has been averred that the petitioner is working as Seasonal Collection Amin in Tehsil Robertsgang, district Sonbhadra and has completed the target as given to him by the respondent authorities without any complaint. It has been further averred that regularization of the petitioner on the post of Collection Amin under 35% quota in terms of the U.P. Collection Amins Service Rules, 1974 has not been considered till date pursuant to Rule 5 of U.P. Seasonal Collection Amin Rules, 1974 (hereinafter referred to as the Rules) through the petitioner has achieved the target of 74.62% in 4 fasals in the year 2016. His name finds place at serial no. 29 of the seniority list dated 28.6.2016 prepared as per Rules 17 and 17-A of the Rules. Hence the present writ petition has been filed seeking mandamus for issuing a direction to the respondents to consider regularization of the petitioner on the post of Collection Amin.

3. Learned counsel for the petitioner submits that as per Rule 5 of the Rules the work of the petitioner is not only satisfactory but has also achieved his target of more than 70% as prescribed therein and his age being less than 45 years is fit for consideration for regularization on the said post.

4. Rebutting the submission of the learned counsel for the petitioner, learned standing counsel states that the petitioner has not achieved the target of 70% for the 4 fasals and, therefore, his claim for regularization on the post of Collection Amin has not been considered.

5. The Court has perused the records.

6. The records reveal that for regularization of service of the petitioner on the post of Collection Amin as per Rule 5 of the Rules the work of the petitioner should be satisfactory in the last 4 fasals and collection should be attained recovery within the prescribed norms, i.e. at least 70% whereas in the case in hand the petitioner has attained recovery of 74.62% as well as his work is also satisfactory.

7. A Division Bench of this Court in the case of **State of U.P. and others vs. Pankaj Srivastava** (2013 (11) ADJ 473 has an occasion to consider the similar controversy and came to the conclusion that 'last four fasals' would mean all fasals in which a Seasonal Collection Amin has worked and does not mean merely the four immediately preceding fasals. The relevant part of the said judgment is quoted below:

"In assessing the submission, which is urged on behalf of the State, Rule 5 of the Rules, 1974, as it held the field at the material time, has to be interpreted. As noted earlier, the Rule contemplates regularization of the Seasonal Collection Amins against 35% of the vacancies. The Rule prescribes the following conditions, namely, (i) the Seasonal Collection Amins

must have rendered satisfactory work in at least four fasals; and (ii) the Seasonal Collection Amins should not have attained the age of 45 years by the 1st July of the relevant year. The explanation states that 'satisfactory service' would mean that in the last four fasals, the Seasonal Collection Amins should have attained the recovery in accordance with the prescribed norms of at least 70%. Now the explanation has to be harmoniously construed with the main provision which is made in the Rules of 1974. The requirement of the Rules is that the Seasonal Collection Amins should have worked for at least four fasals. Where a Seasonal Collection Amin has worked for more than four fasals, in assessing whether he has rendered satisfactory performance within the meaning of the explanation, the extent of recovery has to be assessed with reference to the last four fasals during which he has worked. In a situation where the Seasonal Collection Amin has worked for only four fasals, obviously the recovery has to be assessed with reference to those four fasals. Hence, the expression 'last four fasals' would mean the last four fasals out of the total number of fasals in which the Seasonal Collection Amin has worked. The last four fasals does not mean that the Seasonal Collection Amin must be actually working on the date on which the Selection Committee applies its mind to the claim for regularization. Such a condition is not found in the Rules and to introduce such a condition, would amount to a modification or amendment of the statutory rule, which is impermissible for this Court. The Rule has to be read as it stands. The learned Single Judge was, in our opinion, correct in holding that the ground which has weighed with the Selection Committee was extraneous to the Rules. ".

8. This Court in the case of Suresh Chand Mishra vs. State of U.P. and others reported in 2016 (11) ADJ 315; has held as follows:

"7. It is contended on behalf of the petitioner that the only ground in the impugned order is that the petitioner has failed to achieve 70% target hence his regularization has been rejected. It is stated that the said view taken by the authority concerned is contrary to the law laid down by this Court. He has placed reliance on the following judgments:

1. State of U.P. & others v. Pankaj Srivastava, Special Appeal Defective No. 845 of 2013, decided on 03.12.2013;

2. Pankaj Srivastava v. State of U.P. and others, 2016(34) LCD 691;

3. Molhey Ram v. State of U.P. and others, 2013(31) LCD 2367.

8. Learned counsel for the petitioner has further urged that in the year 1997 some of the juniors of the petitioner were regularized. At that point of time the average of recovery percentage of the petitioner was 79%. My attention has been drawn by the learned counsel for the petitioner to a chart prepared in 2004 for regularisation of Seasonal Collection Amins, wherein the average recovery of Seasonal Collection Amins is recorded. In the said chart the petitioner's average recovery is 79%. This fact is also stated by the petitioner in paragraph-12 of the petition. He has also drawn my attention to paragraph-9 of the writ petition wherein it is stated that some juniors, namely Suresh Kumar and Santosh Kumar Srivastava, who had only 35% recovery, were regularized without considering the case of the petitioner. In support of the said averment the petitioner has brought on record a document as annexure-10 to

the writ petition. It is also stated that Santosh Kumar Srivastava, who is junior to the petitioner, has been illegally regularized. He did not fulfill the norms of four fasli and he had completed only three fasli even then he has been regularized.

9. Learned counsel for the petitioner has further invited attention of the Court to the reply of the statement of fact made in paragraph 9 & 12 of the writ petition, in paragraph-11 of the counter affidavit, the said fact has not been specifically denied, only a general and evasive reply is given therein.

10. Learned Standing Counsel submits that the petitioner's writ petition is not maintainable as his earlier writ petition was dismissed and in the review petition only liberty was granted to file a representation. No other submission has been made.

11. I have heard learned counsel for the parties, considered their submissions and perused the record.

12. Concededly, the petitioner is working since 1989. The Rule-5 of the Uttar Pradesh Collection Amins' Service Rules, 1974 provides that 35% appointment on the post of Collection Amins shall be made from the Seasonal Collection Amins. The petitioner has brought on record his previous recovery percentage which indicates that in the year 2004 when the list was prepared his name was at Sl. No. 20 and his average recovery percentage was above 77%. There is no reason in the impugned order or in the counter affidavit why the petitioner was not considered at that point of time. The Rule-5 of the Rules, 1974 is in the following terms:

''प्रतिबन्ध यह है कि पैंतीस प्रतिशत रिक्तियॉ ऐसे सीजनल कलेक्शन अमीनों में से चयन द्वारा भरी जायेंगी–

क– जिन्होंने कम से कम चार फसलों तक सन्तोषजनक रूप से कार्य किया होय

ख– जिनकी आयु उस वर्ष की पहली जुलाई को, जिस वर्ष चयन किया जाय, 45 वर्ष से अधिक न हो:

प्रतिबन्ध यह भी है कि यदि उपयुक्त अभ्यर्थी उपलब्ध न हों तो शेष रिक्तियॉ सीधी भर्ती के माध्यम से सामान्य अभ्यर्थियों द्वारा भरी जायेंगी

स्पष्टीकरण– सन्तोषजनक कार्य का तात्पर्य होगा शुरू से अन्त तक अच्छे आचरण को सम्मिलित करते हुए अन्तिम चार फसलों के दौरान विहित स्तर के अनुसार कम से कम सत्तर प्रतिशत वसूली।''

13. The aforesaid Rule provides the regularization of seasonal collection amins against 35% of vacancies. It contemplates following conditions:

(i) The seasonal collection amin must have rendered services in at least four fasli;

(ii) He should not be above 45 years by the first July of the relevant year.

14. It is true that the explanation of the Rule-5 of the Rules, 1974 refers the satisfactory services in the last four fasli with the prescribed norms of at least seventy percent. The prescribed percentage of the target of the recovery came to be considered in several cases before this Court, way back in the year 2001. A similar issue fell for consideration in the case of Dinesh Kumar Asthana v. Collector, Azamgarh and others, (2001) 1 UPLBEC 867. In the said case the Court held that there may be various factors and reasons when total extent of recovery in a seasonal amin's area may not be achieved, such as Government itself kept the recovery in abeyance due to natural calamity. Relevant part of the judgement reads as under:

"Necessary pleadings on this aspect are wanting. Even the Counter Affidavit does not disclose that no person

in the list prepared in the year 1993 has been regularised whose recovery was below the prescribed limit or that all persons above such regularized persons were inefficient and or had poor efficiency on comparison. This Court has no means to find out whether the recovery in a particular year with respect to the petitioner was low for reason other than this own efficiency. It is very relevant circumstance while considering the efficiency of Seasonal Collection Amin. For example, recovery is not possible beyond a certain limit for various factors and reasons like-orders from Court, the total extent of recovery to be made in one's area and/or whether Government itself kept recovery in abeyance due to famine, flood, drought etc. These will be relevant consideration to be taken into account and a Seasonal Collection Amin, being put to sufferance for reasons beyond his control, cannot be non-suited for low recovery as it does not reflect at all upon his efficiency."

15. The judgment in Dinesh Kumar Asthana (supra) has been consistently followed by this Court in the case of Brijesh Kumar v. Collector/ District Magistrate, Mainpuri and others, 2001(3) ESC 1325; Suresh Chandra Sharma v. State of U.P. and others, Civil Misc. Writ Petition No. 56124 of 2009; Molhey Ram v. State of U.P. and others, 2013(31) LCD 2367; Ramveer Singh v. State of U.P. and others, Writ-A No. 27358 of 2004.

16. In the case of State of U.P. Throu. Prin. Secy. Deptt. Of Revenue Lko. & Ors. v. Pankaj Srivastava, Special Appeal Defective No. 845 of 2013 also the similar issue was raised. In the said case the claim of seasonal collection amin for regularization was rejected on the ground that he failed to achieve 70% prescribed norms for recovery. The Court held that the explanation of the said Rule-5 has to be harmoniously construed with the main provision which is made in the Rules, 1974. The principal requirement under the Rules was that a seasonal collection amin should have worked for at least four fasli and the extent of recovery needs to be assessed with reference to last four fasli during the period when he worked. The relevant part of the order reads as under:

"...However, the norms of 70% recovery, as clarified, must relate to the demand which was actually entrusted to the employee. The satisfactory performance has to be read with reference to the work, which is actually entrusted to the Seasonal Collection Amin.

Learned counsel appearing on behalf of the appellants has submitted that in the memo of appeal, the State has taken a ground that the respondent would not meet the norms of 70% with reference to the work which was entrusted to him."

17. The principle of law emanates from the above decision is that the recovery depends upon various factors and only recovery cannot be made sole criterion. It has to be considered along with other requirements mentioned in the Rules.

18. The explanation of Rule-5 of the Rules, 1974 has been harmoniously interpreted by this Court in a large number of cases. Reference of some of such cases has already been given hereinabove. The authorities have not paid due attention to the law laid down by this Court and they are rejecting the claim repeatedly on the same ground which has been held to be untenable by this Court long back in the year 2001.

19. I find that most of the claims of regularization of seasonal collection amins are primarily rejected on the ground of less recovery thus it is clear that

the authorities do not consider the entire Rules and they have laid emphasis only on the explanation of Rule-5 of the Rules, 1974 and not on the main provision.

20. The Collector is a senior and experienced official and he must be presumed to know that the orders of the High Court have to be obeyed, such is our constitutional scheme. Ignoring the consistent view taken by this Court in the last more than 15 years, cannot be appreciated. If a law has been settled by a superior Court, the good governance requires that the officials must respect the law. The Rule of Law is foundation of a democratic society, and the judiciary is undoubtedly guardian of the Rule of Law.

21. The Supreme Court in the case of M/s East India Commercial Co. Ltd. Calcutta and another v. Collector of Customs, Calcutta, AIR 1962 SC 1893 has held that the law laid down by the High Court is binding on all authorities. The Supreme Court has also held that although there is no provision for the High Court in the constitution like Article 141 which provides that the judgements of the Supreme Court are binding on all authorities whether they are party or not. The Supreme Court has extended principles of Article 141 of the Constitution to the High Court also. Relevant part of the judgement of the Supreme Court in M/s East India Commercial (supra) is extracted herein below:

"29...We, therefore, hold that the law declared by the highest court in the State is binding on authorities or tribunals under its superintendence, and that they cannot ignore it either in initiating a proceeding or deciding on the rights involved in such a proceeding. If that be so, the notice issued by the authority signifying the launching of proceedings contrary to the law laid down by the High Court would be invalid and the proceedings themselves would be without jurisdiction."

22. In view of the above, it is clear that if the law has been laid down by the Court, the authority is bound by it whether he is party in the said writ petition or not. Since the law laid down by this Court in the aforementioned case has not been followed by the authority concerned and neither the judgements have been referred, the said order, as I find, needs to be set aside. Accordingly, the impugned order dated 04.03.2014 is set aside. "

9. Further this Court in Writ A No. 16121 of 2017 (Rajesh Kumar Tripathi vs. State of U.P.) decided on 27.3.2019 had an occasion to allow the writ petition in terms of **Pankaj Srivastava** (supra), which reads as under:

"In light of these principles as enunciated by the Division Bench, the Court finds itself unable to sustain the order impugned. It was incumbent upon the District Magistrate in terms of the relevant rules to evaluate and consider the working of the petitioner in all previous fasals and not merely the four immediately preceding fasals.

Accordingly, this writ petition shall stand allowed. The impugned order dated 31 January 2017 shall hereby stand quashed. The matter shall in consequence stand remitted to be District Magistrate for reevaluation of the claim of the petitioner in accordance with law and the observations made hereinabove. The District Magistrate shall endeavour to conclude the exercise of consideration with expedition and communicate a final decision to the petitioner in respect of his claim for absorption preferably within a

period of three months from the date of presentation of a certified copy of this order. "

10. Be that as it may, considering the facts and circumstances of the case the Court grant liberty to the petitioner to move a detailed representation along with a certified copy of this order for redressal of his grievances taking all possible grounds with supported documents before the respondent no.3, who shall decide the same in accordance with law by a reasoned and speaking order after affording an opportunity of hearing to the petitioner, expeditiously preferably within a period of three months from the date of its receipt.

11. It is made clear that the Court has not adjudicated the claim of the petitioner on merits and the respondent no.3 is at liberty to take a decision on the representation of the petitioner in accordance with law.

12. With the aforesaid observation, the writ petition is disposed of.

(2020)02ILR A1250

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 05.02.2020

BEFORE

THE HON'BLE RAJNISH KUMAR, J.

Consolidation No. 301 of 1999

Bajrangi ...Petitioner
Versus
Joint Director Cons. Raebareli ...Respondent

Counsel for the Petitioner:
S.C. Padney, Ashok Kr. Mishra, Maneesh Kumar Singh, Miss Navita Sharma, Navita Sharma, V.D. Sharma

Counsel for the Respondent:
C.S.C., Vimal K. Verma

A . U.P. C & H Act, 1953-Sec-9A(2)-petitioners objection-alleging-land in dispute-ancestral property-hence filed application for partition-o.p nos. 4 & 5-alleging to have bought the said land-vide regd. sale deed-as disputed land-self acquired property of petitioners grand father-not a joint hindu family property-petitioners failed to discharge their initial burden of proving-that it was acquired from the joint nucleus of the joint hindu family-for the welfare of the family-impugned orders-rightly passed-no illegality-Petition Dismissed.

B. It is well settled proposition that even in the Joint Hindu Family a member of said family can acquire land for himself and unless it is proved that the land was acquired by him in the representative capacity out of joint family funds for the benefit of the family it cannot be held to be joint family land merely because it was acquired by him when he formed joint family with other members.

C. Held, since the petitioners were claiming that land in dispute was acquired by the Joint Hindu Family, therefore initial burden was upon the petitioners to prove that it was acquired from the joint nucleus of the Joint Hindu Family. But the burden could not be discharged by the petitioners and they could not prove that it was purchased from the joint nucleus for the welfare of the family, therefore, the plea of the petitioners that the opposite parties no.4 and 5 were required to prove that the jointness of the family has come to an end is misconceived and not sustainable in the eyes of law. In view the aforesaid discussions this Court is of the considered opinion that the judgment and order dated 22.06.1987 passed by the Consolidation Officer and dated 11.03.1999 passed by the Joint Director Consolidation have rightly been passed in accordance with law after considering the material and evidence on record. This Court does not find any illegality or error in the

orders. The writ petition has been filed on misconceived grounds having no substance which is devoid of any merit and is liable to be dismissed.

Writ Petition dismissed. (E-8)

List of cases cited: -

1. (Smt.) Dharmawati Tiwari and Others Vs. Prem Shanker Tiwari and Others; 1999 (17) LCD 81.

2. Sheo Nath Vs. Deputy Direction of Consolidation and Others, 2010 (109) RD 679;

3. Sonu & Rahul Vs. Board of Revenue and Others, 2014 (123) RD 323

4. Shiva Nath Vs. Deputy Director of Consolidation, Varanasi and Others and 2007 (25) LCD 1420;

5. Ruchha and Others Vs. Deputy Director of Consolidation, Gorakhpur and Others.

6. Shrinivas Krishnarao Kango Vs. Narayan Devji Kango; AIR 1954 SC 379

7. Appasaheb Peerappa Chamdgade v. Devendra Peerappa Chamdgade;(2007) 1 SCC 521

8. K.V. Narayanaswami Iyer Vs. K.V. Ramakrishna Iyer;AIR 1965 SC 289

9. Rukhmabai Vs. Lala Laxminarayn; AIR 1960 SC 335

10. Achuthan Nair vs Chinnamu Amma; AIR 1966 SC 411

11. Surendra Kumar vs Phoolchand (Dead) Through Lrs.; (1996) 2 SCC 491.

12. D.S. Lakshmaiah & Another Vs. L. Balasubramanyam & Another; AIR 2003 SC 3800

13. Makhan Singh (D) By Lrs vs Kulwant Singh; (2007) 10 SCC 602.

(Delivered by Hon'ble Rajnish Kumar, J.)

1. Heard, Ms. Navita Sharma, learned counsel for the petitioner, learned Standing Counsel and Shri Vimal Kishore Verma, learned counsel for the opposite parties no.4 and
5.

2. This writ petition has been filed challenging the judgment and order dated 11.03.1999 and 22.06.1987 passed by the opposite parties no.1 and 2 respectively.

3. The brief facts of the case for adjudication of the case in hand are that the petitioners had filed the objections under Section 9-A (2) of the U.P. Consolidation of Holdings Act, 1953 (here-in-after referred as the Act of 1953) on 16.09.1985 alleging therein that the land of the alleged Khata No.414 is their ancestral property. It was earned jointly by three real brothers namely Lachhiman, Bhagwati and Raj Bahadur. Lachhiman was the eldest and Karta of the family therefore his name was recorded. It was submitted that they have 1/3rd share, upon which they are in possession and are cultivating the same. They are co-sharers in the aforesaid Khata No.414 having numbers 1389 and 1045 situated at Gram Chilauli, Pargana Mohandganj, District-Raebareli. The opposite parties no.4 and 5 had also filed their objections under Section 9-A (2) of the Act of 1953 alleging therein that the disputed land was self acquired by Lachhiman from his own income after separation. His brothers have no share in the said land. They have received the said land through a sale deed from Lachhiman and they are in possession after the sale deed and mutation and are Bhumidhar. Accordingly, they denied the rights and title of the petitioners and others and prayed for the rejection of the request for partition and to continue the entry in the name of the opposite parties no.4 and 5.

4. The statement of witnesses examined on behalf of the petitioners Lal Pratap Singh as PW-1 on 24.12.1995, Ram Baran Singh as PW-2 on 27.01.1986 and Bajrangi as PW-3 on 23.04.1986 were recorded. On behalf of the opposite parties no.4 and 5 also three witnesses were examined namely Devi as DW-1 on 27.05.1986, Kodau as DW-2 on 01.07.1986 and Satya Narain as DW-3 on 23.02.1987. The consolidation officer after hearing the parties and considering the evidence and records rejected the objections of the petitioners and provided that it shall remain entered in the name of Satya Narain etc. by means of the order dated 22.06.1987. The petitioners preferred an appeal number 1558/893/616/378 under Section 11 (1) of the Act of 1953 before the Settlement Officer Consolidation, Raebareli. He, after hearing the learned counsel for the parties and examining the evidence available on record, allowed the appeal and set-aside the order dated 22.06.1987 by means of the judgment and order dated 08.03.1990. It was further provided that in Khata No.414 the names of the petitioners be also recorded alongwith the opposite parties no.4 & 5.

5. Being aggrieved the opposite parties no.4 and 5 preferred a Revision No.930/301 under Section 48 of the Act of 1953 before the Joint Director Consolidation. The Joint Director Consolidation, after hearing the learned counsel for the parties and considering the material available on record, allowed the revision and set-aside the order passed by the Settlement Officer Consolidation dated 08.03.1990 and maintained the order dated 22.06.1987 passed by the Consolidation Officer with observation of correction of records by means of the judgment and order dated 11.03.1999. Hence the present writ petition has been filed under Article 226 of the Constitution of India challenging the orders dated 11.03.1999 and 22.06.1987.

6. Submission of learned counsel for the petitioners was that the grandfather of the petitioners nos.2 and 3 and great grandfather of the petitioners nos.1/2 and 1/3 namely Lala had three sons; Lachhiman, Bhagwati and Raj Bahadur. After death of Lala, all the three sons of Lala inherited the property jointly however Lachhiman was the karta of the family. He, with the intention that all property may not be divided among his brothers, executed a registered will of plot Nos.1389 and 1405 in favour of their grand sons i.e the opposite parties no.4 and 5 while the said land was allotted to him as karta of the Joint Hindu Family being eldest brother. Since the said property was allotted to him as karta of the Joint Hindu Family, therefore the same was also liable to be divided equally. But all the properties were divided and recorded in their names according to their shares except the aforesaid property in despute. Since the shares of the petitioners in the said land was not recorded in their names therefore, the petitioners had filed objections under Section 9-A (2) of the Act of 1953 in regard to the land Nos.1389 and 1405 having Khata No.414. Lal Pratap Singh, who was examined as PW-1 on 24.12.1985, had stated in his evidence that the partition had taken place before 24-25 years while the said land was allotted in the name of Lachhiman prior to that, therefore it was a property of the Joint Hindu Family and was liable to be partitioned equally.

7. She had further stated that the opposite party no.4 has also stated in his evidence that Lachhiman had died in 1980 and he had no knowledge that how he had acquired the said property but it was a self acquired property. He has stated this on the basis information given by villagers.

The witnesses have also stated that Lachhiman was residing in the village while Bhagwati and Raj Bahadur lives out and they used to send money to Lachhiman, out of which he had acquired the property. She had further stated that since the opposite parties no.4 and 5 are claiming that it was the self acquired property of Lachhiman, therefore the burden was on them to proof that it is a self acquired property of Lachhiman and he had some other source of income but their burden has not been discharged. She had also submitted that the opposite party no.5 was minor at the time of sale deed and the proof of the payment of the consideration has also not been submitted. Therefore the circumstances also indicate that the sale deed was executed by late Lachhiman just to save the land in dispute from being partitioned. The learned Consolidation Officer and Joint Director Consolidation failed to consider the evidence and the material on record in its correct perspective and wrongly rejected the objection and the revision. The learned Settlement Officer Consolidation had rightly considered the evidence of Lal Pratap Singh, PW-1 and considering that the opposite parties no.4 and 5 are the legal successor of late Lachhiman, therefore there was no occasion for executing the sale deed even then the sale deed has been executed in regard to the land in dispute with cleverness to remove his doubt that it may not be divided among all treating it to be ancestral properly.

8. On the basis of above, learned counsel for the petitioners has submitted that the judgment and orders dated 11.03.1999 and 22.06.1987 passed by the opposite parties no.1 and 3 respectively are liable to be quashed and the names of the petitioners are also liable to be recorded in Khata No.414 (Supra) alongwith opposite parties no.4 and 5. She had relied on a judgment of this Court passed in the case of ***(Smt.) Dharmawati Tiwari and Others Vs. Prem Shanker Tiwari and Others; 1999 (17) LCD 81.***

9. Per contra, learned counsel for the opposite parties no.4 and 5 does not dispute the pedigree given by the learned counsel for the petitioners. However he had submitted that the land in dispute was a self acquired property of late Lachhiman. He had acquired the land in dispute from the Zamindar and one of the receipt dated 10.12.1948 has been filed as CA-1.

10. Subsequently, the said land was allotted to late Lachhiman as is apparent from the allotment order of old Gata No.2006-2007. During consolidation operations the land in dispute were changed and new Gata Nos.1389 and 1405 respectively were allotted which is apparent from CH form 41 of the land in dispute. Late Lachhiman had deposited 20 times of rent on 19.08.1976 and became Bhumidhar of land in dispute with transferable rights. Thereafter, late Lachhiman had executed a registered sale deed in favour of the opposite parties no.4 and 5 on 24.08.1976 and the mutation was also made in their favour. He also submitted that it is also apparent from the perusal of the Khatauni of the 1382 to 1384 that the names of the opposite parties no.4 and 5 were recorded in the year 1976. As such the opposite parties no.4 and 5 had rightly filed objection under Section 9-A (2) of the Act of 1953. He had also invited the attention of the Court towards CA-7 and CA-8 Khasra barasala of 1372 to 1883 fasli and 1378 to 1389 Fasli to show that the late Lachhiman and thereafter the opposite parties no.4 and 5

are in possession of the land in dispute. The opposite parties no.4 and 5 have also deposited the rent of the land in dispute in regard to which the rent receipt and the Kisanbahi have also been filed.

11. On the basis of the above, the learned counsel for the opposite parties no.4 and 5 submitted that they have filed ample evidence to show that it was self acquired property of late Lachhiman and after the registered sale deed executed by him the names of opposite parties no.4 and 5 are recorded and they are in possession and cultivating. But the petitioners have failed to file any documentary evidence such as khasra and the receipts etc. of the land in dispute to show that it was a joint family property and as claimed by them they are in possession of the part of the land. While as per the evidence adduced by the petitioners the two brothers of late Lachhiman namely Bhagwati was residing in Pakistan and thereafter in Bombay and Raj Bahadur was residing in Bombay, therefore there was no question of their being entered into possession.

12. Lastly he submitted that it was not a property owned by a Joint Hindu Family and purchased from a joint nucleus of the joint family because it was a self acquired property of late Lachhiman. Therefore he has rightly executed sale deed of the property in favour of the opposite parties no.4 and 5. The opposite parties no.1 and 3 have rightly decided the objections in favour of the opposite parties no.4 and 5 but the opposite party no.2 has wrongly and in an illegal manner, merely on the basis of presumption had allowed the objections filed by the petitioners. The writ petition has been filed on misconceived and baseless grounds which is not tenable in the eyes of law and is liable to be dismissed with costs.

13. Learned counsel for the opposite parties had relied on ***1983 RD page 107; Sheo Nath Vs. Deputy Direction of Consolidation and Others, 2010 (109) RD 679; Sonu & Rahul Vs. Board of Revenue and Others, 2014 (123) RD 323 Shiva Nath Vs. Deputy Director of Consolidation, Varanasi and Others and 2007 (25) LCD 1420; Ruchha and Others Vs. Deputy Director of Consolidation, Gorakhpur and Others.***

14. I have considered the submissions of learned counsel for the parties and perused the records.

15. The pedigree as given by the Deputy Director of Consolidation in his judgment and order dated 11.03.1999 passed in Revision No.9301/301 (Satya Narain and Another Vs. Bajrangi & Others) under Section 48 of the Consolidation of Holdings Act and the Consolidation Officer in his order dated 22.06.1987 is not disputed to the parties. As per pedigree Lala had three sons namely Lachhiman, Bhagwati and Raj Bahadur. As stated in the evidence by the witnesses of the petitioners Bhagwati was residing in Pakistan and Raj Bahadur in Bombay. Subsequently Bhagwati came back to India and was residing in Bombay. But the Lachhiman, undisputedly was residing in the village where the land in dispute being Gata No.1389 and 1405 is situated and recorded in his name and thereafter in the names of the opposite parties no.4 and 5 in the Khatauni of basic year. The old Gata number of the aforesaid land was 2006 and 2007 which is apparent from the CH form 41 of village Chiluli, Pargana- Mohandganj, Tehsil Salon, District- Raebareli contained in Annexure No. CA-3 to the counter affidavit. Undisputedly the said land was allotted to late Lachhiman by the Zamindar.

Subsequently the same was allotted to him which is apparent from annexure No.CA-2 which has also not been disputed by the petitioners. It is also not in dispute that late Lachhiman had got the land in dispute converted into Bhumidhari with transferable rights after depositing 20 times rent on 19.08.1976, a copy of the receipt has been filed as annexure No.CA-4.

16. The dispute which has been raised is that the land in dispute was acquired by late Lachhiman being karta of a Joint Hindu Family as he was eldest among three sons of Lala therefore it should also be divided. But the petitioners, though filed objections during the Consolidation Operations on 16.09.1985 with a prayer for recording their names as co-sharers, but failed to produce any evidence that there was Joint Hindu Family and any joint nucleus from which the land in dispute was acquired.

17. One of the witnesses produced by the petitioners namely Lal Pratap Singh has stated that whatever evidence he is giving it is on the basis of information gathered from others in the village. But he had not clarified as to whether all the three brothers were living together as a Joint Hindu Family and the land in dispute was acquired from any joint nucleus. He had also stated that he has no knowledge of being any patta in favour of Lachhiman etc. He had also stated that Bhagwati was earlier residing in Karanchi, Pakistan thereafter he came to Bombay and Raj Bahadur was residing in Bombay. The learned Consolidation Officer had rightly recorded that this witness had no knowledge about acquiring the land in dispute and his evidence is not reliable. Other witness Bajrangi had also stated that the separation of the three brothers had not taken place before him. He also could not prove that the land in dispute was acquired by the joint family from any joint nucleus for the benefit of the family. He had also stated that Bhagwati and Raj Bahadur were living out and they used to send money to late Lachhiman but no proof thereof has been filed.

18. One of the arguments was that the family was a joint Hindu family and the said property was acquired by Lachhiman as karta of family. For treating a property to be a Joint Hindu Family property it was required to be proved that there was a Joint Hindu Family and some joint nucleus from which the land in dispute was acquired for welfare of the family but no such evidence was adduced or pointed out during argument before this court. All the three brothers were also living separately when the property was acquired by Lachhiman as the two brothers were living out. No proof or reliable evidence has also been adduced that they used to send money. A plea was also raised that the petitioners are in possession on their part of land in dispute and paying land revenue but no evidence in proof thereof has also been filed.

19. On the other hand, from the evidence and material on record it is apparent that the land revenue of the land in dispute was paid by the Lachhiman to Zamindar. Subsequently the same was allotted to him by means of the allotment order. The land in dispute was got converted by late Lachhiman after depositing 20 times of rent on 19.08.1976 and he had become Bhumidhar with transferable rights of the land in dispute. Thereafter, he had executed a registered sale deed on 24.08.1976 in favour of the

opposite parties no.4 and 5 for a consideration of Rs.5000. In pursuance thereof the names of the opposite parties no.4 and 5 were also recorded in the revenue records which is apparent from Khatauni of 1832 to 1834 contained in annexure No.CA-6. It is also apparent from the documents of 12 years filed by the opposite parties no.4 and 5 that earlier the name of Lachhiman was recorded and subsequently the names of opposite parties no.4 and 5 has been recorded and they are paying the land revenue. No objection was raised in the first consolidation operations and the sale deed was also not challenged as admitted by the learned counsel for the petitioners .

20. It was submitted that even if the objection was not raised in the first consolidation that can be raised subsequently. But for that it was required to be proved by cogent evidence that the land in dispute was acquired living in the Joint Hindu Family and from joint fund and for the welfare of the joint family but no such evidence could be adduced by the petitioners. They also could not adduce any evidence in regard to their alleged possession on the part of the land in dispute. One thing is also very material that admittedly Raj Bahadur was alive at the time of filing of objections and PW-1; Lal Pratap Singh had admitted in his evidence on 24.12.1985 that he is alive but Raj Bahadur had neither filed any such objection before the Consolidation Officer nor he was produced in evidence by the petitioners to prove that it was a Joint Hindu Family and the property in dispute was acquired from any such joint fund for the welfare of the family. He could be a material witness for proving the contention of the petitioners but he was not produced.

21. The Consolidation Officer, after considering the pleadings and the evidence, had rejected the objections of the petitioners in regard to Khata No.414 as the petitioners had failed to prove their case. But the learned Settlement Officer Consolidation, wrongly interpreting the evidence of Lal Pratap Singh PW-1 and merely on presumption, that since the opposite parties no.4 and 5 would have acquired land in dispute otherwise also being legal heirs of Lachhiman therefore there was no need of executing sale deed in their favour and it has been executed on the apprehension that the land in dispute may also not be divided, treated it to be an ancestral property and directed to record the names of the petitioners alongwith opposite parties no.4 and 5. But failed to consider that if it was a property of the Joint Hindu Family then the name of Raj Bahadur should also have been recorded and if he was not alive it should have been recorded and his share should have been divided among others.

22. On challenge being made to the order passed on appeal by the Settlement Officer Consolidation the Deputy Direction of Consolidation after considering the evidence and material on record has rightly recorded that if the petitioners were claiming to be a joint Hindu property then the burden was on them to prove that there was any joint fund of family from which the land in dispute was acquired for the interest of the joint family and rightly allowed the revision in accordance with law and set-aside the judgment and order passed by the Settlement Officer Consolidation dated 08.03.1990 and maintained the order dated 22.06.1986 passed by the Consolidation Officer. Learned revisional court has also

recorded that the copies of the Khasra etc. filed by the respondents are in their favour.

23. This court in the case of ***Sheo Nath Vs. Deputy Director Consolidation and Others (Supra)*** has held that if a holding is entered in the name of one or more members of the family and another member claims a share in the holding the burden of proving that the holding was joint family property and the name of recorded person or persons was in the representative capacity lies heavily on the claimant. It has further been held that the law is fairly settled that the member of the joint family or even a Karta of the joint family can acquire property himself and own his name and the other members of the family would have no interest or share in it if he has acquired it from his own fund.

24. This Court in the case of ***Sonu & Rahul Vs. Board of Revenue and Others (Supra)*** has held that rights of a Bhumidhar are transferable and this power of transfer is only subject to the provisions of the Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950 and under the said act the principles of coparcenary property are not applicable to Bhumidhari rights. It has also been held that in absence of any material it could not be shown that the family had any nucleus or Joint Hindu Family fund. The relevant paragraphs 3, 4, 5 are reproduced as under:-

"(3) The only point urged by the learned counsel for the petitioners is that the land in dispute was purchased by Chandra Shekhar out of Joint Hindu Family fund and as such the petitioners were not even born on the date of the sale deed. There is no material on record to show that the said family had any nucleus or Joint Hindu Family fund. The sale deed stands in the name of Sri Chandra Shekhar alone.

(4) A Division Bench of this Court in the case of Mahendra Singh Vs. Attar Singh and Others, has held that the Bhumidhari rights are special rights created by Act I of 1951 and these new rights are solely to be governed by the provisions of the Act. The notions of Hindu Law or Mohammedan Law which would be applicable to other property not governed by any special law can not be imported into the rights created by this Act.

(5) By Section 152 of the U.P. Zamindari Abolition and Land Reforms Act, rights of a Bhumidhar are transferable and this power of transfer is only subject to the provisions of this Act, Under the Act the principles coparcenary property are not applicable to Bhumidhari rights."

25. This Court in the case of of ***Shiva Nath Vs. Deputy Director of Consolidation, Varanasi and Others (Supra)*** after considering the judgments of the Hon'ble Apex Court has held that the initial burden is on the person who claims that it was joint family property but after initial discharge of the burden it shifts to the party who claims that the property has been acquited by him through his own source without the aid of the joint family property and there can be no presumption in law that a property purchased in the name of a member of a family had ipso facto the character of Joint Hindu Family property unless it could be shown that the family possessed a nucleus for the purchase of the same.

26. The Hon'ble Apex Court in the case of ***Shrinivas Krishnarao Kango Vs.***

Narayan Devji Kango; AIR 1954 SC 379 has held that so far as the proposition of law is concerned, the initial burden is on the person who claims that it was joint family property but after initial discharge of the burden, it shifts to the party who claims that the property has been purchased by him through his own source and not from the joint family nucleus.

27. The Hon'ble Apex Court in the case of ***Appasaheb Peerappa Chamdgade v. Devendra Peerappa Chamdgade;(2007) 1 SCC 521*** after considering other decisions has held that on survey of the aforesaid decisions what emerges is that there is no presumption of a Joint Hindu Family but on the evidence if it is established that the property was Joint Hindu Family property and the other properties were acquired out of that nucleus and if the initial burden is discharged by the person who claims Joint Hindu Family, then the burden shifts to the party alleging self-acquisition to establish affirmatively that the property was acquired without the aid of the joint family property by cogent and necessary evidence.

28. The Hon'ble Apex Court in the case of ***K.V. Narayanaswami Iyer Vs. K.V. Ramakrishna Iyer;AIR 1965 SC 289*** has held that it is well settled that in case on the date of acquisition of a particular property the joint family had sufficient nucleus for acquiring it, the property in the name of any family member of the joint family should be presumed to be acquired from out of family funds and so form part of the joint family property.

29. The Hon'ble Apex Court in the case of ***Rukhmabai Vs. Lala Laxminarayn; AIR 1960 SC 335*** has held that there is a presumption in Hindu law of jointness of family but there is no presumption that any property whether movable or immovable held by a member of a Joint Hindu Family is joint family property. The burden lies upon the person who asserts that a particular property is joint family property to establish that fact and if he proves that there was sufficient joint family nucleus from and out of which the said property could have been acquired, the burden shifts to the member of the family who is claiming to have acquired without any assistance of the joint family property. The same view has been taken by the Hon'ble Apex Court in the case of ***Achuthan Nair vs Chinnamu Amma; AIR 1966 SC 411 and Surendra Kumar vs Phoolchand (Dead) Through Lrs.; (1996) 2 SCC 491.***

30. The Hon'ble Apex Court in the case of ***D.S. Lakshmaiah & Another Vs. L. Balasubramanyam & Another; AIR 2003 SC 3800*** has observed that a property could not be presumed to be Joint Hindu Family merely because of the existence of a Joint Hindu Family and raised an ancillary question in paragraph-7 and answered the same in paragraph-18. The same are extracted below:-

"7. The question to be determined in the present case is as to who is required to prove the nature of property whether it is joint Hindu family property or self-acquired property of the first appellant.

18. The legal principle, therefore, is that there is no presumption of a property being joint family property only on account of existence of a joint Hindu family. The one who asserts has to prove that the property is a joint family property. If, however, the person so

asserting proves that there was nucleus with which the joint family property could be acquired, there would be presumption of the property being joint and the onus would shift on the person who claims it to be self-acquired property to prove that he purchased the property with his own funds and not out of joint family nucleus that was available."

The same has also been followed by the Hon'ble Apex Court in the case of ***Makhan Singh (D) By Lrs vs Kulwant Singh; (2007) 10 SCC 602.***

31. This Court in the case of ***Ruchha and Others Vs. Deputy Director of Consolidation, Gorakhpur and Others (Supra)*** has held that it is well settled proposition that even in the Joint Hindu Family a member of said family can acquire land for himself and unless it is proved that the land was acquired by him in the representative capacity out of joint family funds for the benefit of the family it can not be held to be joint family land merely because it was acquired by him when he formed joint family with other members.

32. In the present case since the petitioners were claiming that land in dispute was acquired by the Joint Hindu Family, therefore initial burden was upon the petitioners to prove that it was acquired from the joint nucleus of the Joint Hindu Family. But the burden could not be discharged by the petitioners and they could not prove that it was purchased from the joint nucleus for the welfare of the family.

33. The judgment relied by the learned counsel for the petitioners in the case of ***(Smt.) Dharmawati Tiwari and Others Vs. Prem Shanker Tiwari and Others (Supra)*** is not of any assistance to the case of the petitioners because in that case also the trial court after considering all relevant aspect of the controversy viz. continuity of jointness till the house in dispute is acquired, availability of nucleus of the joint family for purchase of the house in dispute, treatment and conduct of the parties with respect to the property in dispute while raising a presumption of jointness of the family had placed the burden upon the shoulder of the contesting respondents to prove that jointness of the family came to an end from the property in dispute as it was alleged to have been self acquired. But in the present case the petitioners have failed to discharge their initial burden,therefore, the plea of the petitioners that the opposite parties no.4 and 5 were required to prove that the jointness of the family has come to an end is misconceived and not sustainable in the eyes of law.

34. In view the aforesaid discussions this Court is of the considered opinion that the judgment and order dated 22.06.1987 passed by the Consolidation Officer and dated 11.03.1999 passed by the Joint Director Consolidation have rightly been passed in accordance with law after considering the material and evidence on record. This Court does not find any illegality or error in the orders. The writ petition has been filed on misconceived grounds having no substance which is devoid of any merit and is liable to be dismissed.

35. The writ petition is accordingly **dismissed**. No order as to costs.

(2020)02ILR A1260

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 24.01.2020

BEFORE
THE HON'BLE JASPREET SINGH, J.

Arbitration Application No. 20 of 2014

M/S Garg Gas Service ...Applicant
Versus
Hindustan Petroleum Corp. Ltd.
..Opposite Party

Counsel for the Applicant:
Amarjeet Singh Rakhra

Counsel for the Opposite Party:
Anand Shanker Asthana

A. Arbitration and Conciliation Act, 1996- Section 11(6)- challenge to-appointment of arbitrator-petitoner is the distributor of L.P.G. Gas Cylinders in pursuance of the distributorship agreement with Hindustan Petroleum Corporation-respondent issued show cause notice and inspections were conducted-respondent threatened the petitioner-being tired of the attitude of the respondent, petitioner requested to appoint arbitrator- after a lapse of 30 days, petitioner approached the court to invoke arbitration clause-while respondent appointed one arbitrator in the meantime in excess of jurisdiction-he did not possess the authority to appoint the arbitrator-his appointment is contrary to the settled legal provisions and principles-hence, all his actions would be rendered null and void including the sittings held by him-objections of the respondent rejected-hence, a new arbitrator is appointed as powers conferred u/s 11(6) of the Act.(Para 31 to 38)

The application is allowed. (E-6)

List of Cases Cited:-

1. Datar Switchgears Vs. Tata Finance Ltd.& Another (2000) 8 SCC 151

2. TRF Ltd. Vs. Energo Engineering Projects Ltd. (2017) 8 SCC 377

3. Perkins Eastman Architects DPC & Ors Vs. HSCC (India) Ltd.,AIR 2020 SC 59

4. Walter Bau AG (2015) 3 SCC 100

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

1. An interesting question is involved in this petition under Section 11(6) of the Arbitration & Conciliation Act, 1996 shown of unecessary facts, the case setup by the petitioner is that he is the distributor for L.P.G. Gas cylinders and engaged in the aforesaid business in pursuance of the distributorship agreement with Hindustan Petroleum Corporation dated 16.05.2008. The petitioner is stated to be the distributor of L.P.G. since last 31 years and the distributorship agreement have been renewed from time to time and lastly it was renewed on 15.05.2013, a copy of which has been annexed as Annexure No. 1 with the petition. The aforesaid distribution agreement contains an arbitration clause which reads as under:-

39. Any dispute of difference of any nature whatsoever or regarding any rights, liability, act, omission, or account of any of the parties, here to arising out of or in relation to this agreement (other than those in respect of which the decision ofany person, is by the Agreement expressed to be final and binding) shall be referred to the sole Arbitration of the Chairman and Managing Director of the Corporation or of retired officer of oher PSUs or retired Senior Central Govt. Officer who may be nominated by the Chairman and Managing Director. The

dealer will not be entitled to raise any objection to any such Arbitrator on the ground that the Arbitrator is or was an officer and/or share holder of the Corporation or that in the course of his duties as an officer of the Corporation he had expressed views on all or any of the matter in dispute of difference. In the event of the Arbitrator to whom the matter is originally referred vacating his office or being unable to act for any reasons the Chairman and Managing Director as aforesaid at the time of such vacation of office or inability to act, shall designate person who shall be entitled to proceed with the reference from the point at which it was left by his predecessor. It is also a term to this contract that on person other than the Chairman and Managing Director or person nominaed by such Chairman and Managing Director of the Corporation as aforesaid shall act as Arbitrator hereunder, the cost of the arbitration shall be shared equally by the parties. The award of the Arbitrator so appointed shall be final, conclusive and binding on all parties to the Agreement, subject to the provisions of the Arbitration and Conciliation Act, 1996 or any statutory modification or of re-enactment there of and the rules made thereunder and for the time being in force shall apply to the Arbitration proceeding under this Clause. The award shall be made in writing and published by the Arbitrator "within six month after entering upon the reference or within such extended time not exceeding further four months as the sole arbitrator shall by a writing under his own hands appoint.

The arbitrator shall have power to order and direct either of the parties to abide by, observe and perform all such difference i.e. dispute before him. The arbitrator shall have all summary powers and may take such evidence, oral and/or documentary as the arbitrator in his obsolute discretion thinks it and shall be entitled toercise all power under the Indian Arbitration Act, 1940 including admission of any affidavit as evidence of the matter in difference i.e. dispute before him. The arbitrator shall be at liberty to appoint, if necessary any accountant or engineering or other technical person to assist him, and to act by the opinion so taken.

The arbitrator shall have power to make one or more awards, whether interim or otherwise in respect of the dispute and difference and in particular will be entitled to make separate awards in respect of claims or cross claims of the parties.

The parties hereby agree that the courts in the city of LUCKNOW alone shall have jurisdiction to entertain any application or other proceeding in respect of any thing arising under this agreement and any award or awards made by the sole arbitrator hereunder shall be filed in the concerned courts if the city of LUCKNOW only."

2. It is stated by the petitioner that the respondent-Corporation had been issuing show cause notices at the drop of a hat and various inspections were conducted on the distributorship of the peitioner. Though the petitioner had replied to the show cause notices which were issued from time to time yet the attitude of the respondent was threatening and being tired of being victimized at the behest of the respondent, the petitioner is said to have invoked the arbitration clause by means of its letter dated 03.05.2014.

3. This letter dated 03.05.2014 invoking the arbitration clause is in the eye

of the storm and is of which much significance as it is only on the aforesaid notice and its service, the result of this petition balances.

4. The petitioner again sent a reminder for appointment of the arbitrator by means of its letter dated 13.05.2014 and after having waited for the statutory period of 30 days, the petitioner insituted the instant petitioner before the High Court on 03.06.2014.

5. The respondent through counsel appeared before the High Court on the first date and made a statement that it had not received the notice as stated by the petitioner dated 03.05.2014. In light of the statement so made, a coordinate Bench of this Court passed the following order dated 05.06.2014 which reads as under:-

Sri K.S. Pawar, Advocate has filed Vakalatnama on behalf of respondent. The same is taken on record.

Heard Sri A.S. Rakhra, learned counsel for the applicant and Sri K.S. Pawar for respondent.

By means of the present writ petition, the petitioner has prayed for an appointment of Arbitrator so that the present dispute may be resolved.

Learned counsel for the applicant states that the distributorship agreement dated 16.05.2008 as well as 15.05.2013 there was a categorical provision for arbitration in the matter and as per Clause-39 of the distributorship agreement dated 15.05.2013, he is entitle for referring the dispute to the arbitrator. The applicant has already moved an application before the opposite party for appointment of an arbitrator and till today nothing has happened and till today.

Aggrieved with the non action of the respondent, the present writ petition has been filed. However, learned counsel for the opposite party on the basis of instruction submits that till today, the said application has not been received in the office of opposite party and the moment, it would received, the same shall be properly replied forthwith.

Therefore, in the interest of justice, I hereby direct the opposite party to take suitable action in the matter, meanwhile.

List in the second week of July, 2014 as fresh.

6. The respondent by means of its letter dated 09.07.2014 appointed one Sri A.K. Reddy as the sole arbitrator. The petitioner on 20.08.2014 filed a supplementary affidavt in the instant case appraising the Court that the respondent has appointed Sri A.K. Reddy as the sole arbitrator and the appointment of the said Arbitrator is contrary to the settled legal position, inasmuch as, the same has been done after the petitioner had approached this Court for appointing the arbitrator while the respondent had forefeited its right to appoint the arbitrator. The petitioner once again filed another supplementary affidavit dated 20.03.2015 appraising the Court that the alleged arbitrator Sri A.K. Reddy is proceeding in the matter and that despite the petitioner informing him that his appointment is not valid and the matter is alreaday engaging the attention of the High Court but the sole arbitrator was adament in asking the petitioner to submit to his jurisdiction. The petitioner also filed an application for early hearing bringing on record the extract of proceedings which were transpiring before the arbitrator who was moving ahead with the arbitration while the petitioner had been contending that his appointment was illegal and he should not proceed and should wait until the petition is decided by this Court.

7. On the other hand, the respondent filed its counter affidavit on 12.03.2018 and raised a plea that it had not received the letter dated 03.05.2014. It was stated by the respondent that the petitioner had sent a different letter by which he had sought the report regarding some CBI inspection. Since the postal receipt annexed with the letter dated 03.05.20104 was in respect of the inquiry report and not in respect of the request seeking appointment of arbitrator, hence the petitioner was not maintainable.

8. It is also the case of the respondent that it had appointed the arbitrator in pursuance fo the order pased by this Court dated 05.06.2014 which has been reproduced above. The respondent thereafter filed a supplementary affidavit and it has brought on record the letters by which the petitioner had sought the report of the CBI inquiry and it has further taken a stand that it did not even receive the reminder dated 13th of May 2014. It was also stated that the petitioner had filed a statement of claim before the arbitrator and thus has submitted to the jurisdiction of the arbitrator and as such is not entitled to raise this dispute before this Court.

9. The petitioner filed a rejoinder affidavit denying the contentions of the respondent and reiterating its stand and additionally submitted that during the pendency of the above petition the arbitrator has passed an order dated 27.06.2017 terminating the proceedings in terms of Section 25 as the claimant failed to submit/communicate its statement of claim.

10. It is in this backdrop, that the controversy, to be adjudicated by this Court is two fold.

(i) Whether the appointment of the arbitrator by the respondent by means of its lette dated 09.07.2014 is valid and (ii) whether what is the effect of the proceedings which transpired before the said sole arbitrator Sri A.K. Reddy who terminated the proceedings by means of its order dated 27.06.2017.

11. The Court has heard Sri A.K. Rakhra, learned counsel for the appellant and Sri A.S. Asthana for the respondent-Corporation.

12. As far as the facts are concerned, the same are not disputed between the parties, inasmuch as, both the parties agree that there is a distributionship agreement which contains an arbritation clause and both are bound by it. The contention of learned counsel for the petitioner is that once it had invoked the arbitration clause by means of the letter dated 03.05.2014 and the respondent did not cooperate in appointment of an arbitrator. In the meantime, the petitioner had approached this Court by means of the instant petition in the month of June, 2014, thereafter, the respondent forefeited its right to appoint an arbitrator, consequently, the alleged appointment of Sri A.K. Reddy by the respondent on 09.07.2014 is illegal and all subsequen actions and proceedings underaken by the said arbitrator are also void and it is now for this Court to appoint an arbitrator in exercise of the powers conferred under Section 11 (6) of the Arbitration and Conciliation Act, 1996.

13. Per contra, Sri Asthana has submitted that the alleged letter dated 03.05.2014 which is the source of invocation of the arbitration clause was not recieved by the respondent-Corporation. It is also submitted that once they did not

receive the intial notice dated 03.05.2014 then even assuming the petitioner had sent another reminder on 13.05.2014 that will be of no consequence since a reminder cannot be treated to be the notice invoking arbitration. Moreover, if the reminder is taken as the notice invoking the arbitration then the instant petition filed before the High Court on 05.06.2014 would be premature, inasmuch as, 30 days would not have lapsed since sending of the said reminder notice.

14. It has been submitted that for the said reason, the petition is bad and has also additionally argued that the arbitrator was appointed by the respondent in pursuance of the order passed by this Court 05.06.2014. Once the petitioner participated and the order dated 27.06.2017 terminating the proceedings under Section 25 was passed, the same partkakes the nature of an award for which the petitioner ought to have taken recourse under Section 34 of the Arbitration and Conciliation Act, 1996 and the same is not open to be assailed in proceedings under Section 4 (6).

15. In order to decide the controversy its it is important to ascertain whether the notice dated 03.05.2014 was served on the respondent and what would be its outcome in case if despite service the respondent did not appoint an arbitrator and as borne out from the record and admitted to the parties, the arbitrator was appointed only on 09.07.2014 after the petitioner had already knocked the door of this Court by filing the instant petition on 05.06.2014.

16. Before proceeding further, it will be worthwhile to examine the relevant law on the aforesaid subject. This issue was considered by the Apex Court for the first time in the case of ***Datar Switchgears Vs. Tata Finance Ltd. and Another reported 2000 (8) SCC 151***. Thereafter there has been a consistent view taken by the Apex Court which has been followed even as late as in the year 2017 wherein a large Bench of the Apex Court in the case of ***TRF Ltd. Vs. Energo Enginerring Projects Ltd. reported in 2017 (8) SCC 377.*** The relevant portion reads as under:-

24. In Deep Trading Co. v. Indian Oil Corpn. [Deep Trading Co. v. Indian Oil Corpn., (2013) 4 SCC 35 : (2013) 2 SCC (Civ) 449] , the three-Judge Bench referred to Clause 29 of the agreement, analysed sub-sections (1), (2), (6) and (8) of Section 11 of the Act, referred to the authorities in Datar Switchgears [Datar Switchgears Ltd. v. Tata Finance Ltd., (2000) 8 SCC 151] and Punj Lloyd Ltd. v. Petronet MHB Ltd. [Punj Lloyd Ltd. v. Petronet MHB Ltd., (2006) 2 SCC 638] and came to hold that: (Deep Trading case [Deep Trading Co. v. Indian Oil Corpn., (2013) 4 SCC 35 : (2013) 2 SCC (Civ) 449] , SCC p. 42, paras 19-20)

"19. If we apply the legal position exposited by this Court in Datar Switchgears [Datar Switchgears Ltd. v. Tata Finance Ltd., (2000) 8 SCC 151] to the admitted facts, it will be seen that the Corporation has forfeited its right to appoint the arbitrator. It is so for the reason that on 9-8-2004, the dealer called upon the Corporation to appoint the arbitrator in accordance with the terms of Clause 29 of the agreement but that was not done till the dealer had made application under Section 11(6) to the Chief Justice of the Allahabad High Court for appointment of the arbitrator. The appointment was made by the Corporation only during the pendency of the

proceedings under Section 11(6). Such appointment by the Corporation after forfeiture of its right is of no consequence and has not disentitled the dealer to seek appointment of the arbitrator by the Chief Justice under Section 11(6). We answer the above questions accordingly.

20. Section 11(8) does not help the Corporation at all in the fact situation. Firstly, there is no qualification for the arbitrator prescribed in the agreement. Secondly, to secure the appointment of an independent and impartial arbitrator, it is rather necessary that someone other than an officer of the Corporation is appointed as arbitrator once the Corporation has forfeited its right to appoint the arbitrator under Clause 29 of the agreement."

25. The Court accepted the legal position laid down in Newton Engg. [Newton Engg. and Chemicals Ltd. v. Indian Oil Corpn. Ltd., (2013) 4 SCC 44 : (2013) 2 SCC (Civ) 457] and referred to Deep Trading Co. [Deep Trading Co. v. Indian Oil Corpn., (2013) 4 SCC 35 : (2013) 2 SCC (Civ) 449] and opined that as the Corporation had failed to act as required under the procedure agreed upon and did not make the appointment until the application was made under Section 11(6) of the Act, it had forfeited its right of appointment of an arbitrator. In such a circumstance, the Chief Justice or his designate ought to have exercised his jurisdiction to appoint an arbitrator under Section 11(6) of the Act. Be it noted, the three-Judge Bench also expressly stated its full agreement with the legal position that has been laid down in Datar Switchgears Ltd. [Datar Switchgears Ltd. v. Tata Finance Ltd., (2000) 8 SCC 151]

17. From the above extraction of the principle and the consistent view taken by the Apex Court, it is no more res-integra that the right of the respondent to appoint an arbitrator commences from the time a request is made by the petitioner and within 30 days of the receiving of such request and in any case not beyond the date when the petitioner approached this Court by filing the instant petition.

18. Thus, the cut-off date for the respondent to appoint an arbitrator was 05.06.2014. Having said that, the question still arises as to whether the respondent received the letter invoking the arbitration clause dated 03.05.2014. In case if the answer to the aforesaid issue is "No" then the petitioner cannot press, that the respondent lost the right to appoint the arbitrator upon filing of the petition before this Court, however, in case if it is found that the letter dated 03.05.2014 was served then the submission of the petitioner holds good.

19. The learned counsel for the respondents has urged vehemently and has taken the Court through the record to indicate that the postal receipt which has been annexed by the petitioner with the letter dated 03.05.2014 actually relates to the other letter by which the petitioner had sought the inquiry report from the respondents. Thus, the submission is that the petitioner while sending the letter for seeking inquiry repor is using the said postal receipt to state that it was the lette dated 03.05.2014 which was sent under the said registered cover.

20. Though, initially the respondent had taken a stand that it did not receive the letter dated 03.05.2014 and thus even assuming that the notice dated 13.05.2014 (reminder) was served it would be of no consequence.

21. However, subsequently, it even denied the receiving of the reminder dated 13.05.2014 and in respect thereto it again took the stand that by the postal receipt dated 13.05.2014, the petitioner had sought the inquiry report and it did not relate to the reminder letter as alleged.

22. The learned counsel for the petitioner has streneously urged that the respondents have been playing a mischief, inasmuch as, they have been shifting their stand from time to time. However, the learned counsel for the petitioner has drawn the attention of the Court to the letter dated 09.07.2014 by which the respondent had appointed the arbitrator.

23. Upon the perusal of the said letter dated 09.07.2014 it would be interesting to note that the said letter is written by the Chairman and the Managing Director informing the petitioner that Sri A.K. Reddy has been appointed as the sole arbitrator. What is more interesting is that while referring to the documents, its specifically refers to the letter dated 03.05.2014 & 13.05.2014 and it is quoted hereinbelow as under:-

"Dear Sirs,

I refer to (i) Copy of H.P. Gas (Liquefied Petroleum Gas) Dealership (Domestic & Commercial) Agreement dated 15.05.2013 entered into by and between M/s Hindustan Petroleum Corporation Limited (Respondent) and Shri Rajesh Kumar Garg, who is carrying on business in the firm name/style of M/s. Garg Gas Service, Fazalganj, Kanpur (Claimant) (ii) Copy of Show Cause Notice dated 14.11.2013 issued by the Respondent to the Claimant (iii) Copy of reply dated 16.12.2013 of the Claimant to the Show Cause Notice dated 14.11.2013 ***(iv) Copies of letters dated 03.05.2014 and 13.05.2014 of the Claimant requesting for appointment of an arbitrator as per Clause No. 39 of the Dealership Agreement*** *(v) copy of order dated 05.06.2014 passed by the Hon'ble Lucknow Bench of Allahabad High Court in Arbitration Application No. 20 of 2014 (vi) and all other related correspondence/documents.*

By virtue of the order dated 05.06.2014 passed by the Hon'ble Lucknow Bench of Allahabad High Court in Arbitration Application No. 20 of 2014, as per request made by the Claimant vide his letters dated 03.05.2014 and in terms of Clause 39 of the Dealership Agreement, I hereby appoint Shri K.A. Reddy, an officer of the Corporation, as Sole Arbitrator ot adjudicate the disputes and differences between the parties.

24. From the perusal of the aforesaid quoted paragraphs it would indicate that it refers to the copies of the letter dated 03.05.2014 and 13.05.2014 as sent by the claimant requesting appointment of an arbitrator and it further provides that as per the request made by the claimant vide his letters dated 03.05.2014 and 13.05.2014 in terms of Clause 39 of the Dealership Agreement.

25. In light of the aforesaid lettter the stand taken by the respondent that it did not receive the aforesaid letter dated 03.05.2014 and 13.05.2014 is diluted. In furtherance of the letter dated 09.07.2014, the arbitrator also sent a notice dated 04.08.2014 addressed to the parties informing them of his appointment as the sole arbitrator and he also refers to the letter for the Chairman and Managing Direcotr of the respondent-Corporation dated 09.07.2014 which also makes a

mention of the letters dated 03.05.2014 and 13.05.2014 sent by the claimant.

26. Once a senior and resposible Authority of the respondent-Corporation writes a letter appointing an arbitrator wherein there is a clear reference to the letters dated 03.05.2014 and 13.05.2014, this Court is of the view that the stand taken by the respondent stating that it did not receive the letter pales into insignificance. Admission of a party is the best piece of evidence.

27. Sri Asthana, learned counsel appearing for the respondent-Corporation could not give any plausible explanation as to why the reference of the letters were given in the appointment order of Sri A.K. Reddy when the respondent-Corporation did not receive the aforesaid letters. Moreover, from the perusal of the language written in the letter dated 09.07.2014 it is clear that while appointing the sole arbitrator, the aforementioned documents/letters were present since the CMD specifically refers to the said documents while taking its decision.

28. In light of the aforesaid, this Court is clearly of the view that the stand taken by the respondent that it did not receive the aforesaid letters cannot be countenanced.

29. Once it is so held, now it is to be examined that whether despite the fact, the petitioner had approached this Court on 05.06.2014 could the respondent appoint the arbitrator on the 09.07.2014 and whether this Court by means of the order dated 05.06.2014 directed the respondent to appoint an arbitrator. The order dated 05.06.2014 has already been reproduced hereinabove.

30. From the perusal of the order dated 05.06.2014 passed by this Court, it transpires that the Court had recorded the submissions of the learned counsel for the parties and thereafter its stated as under:-

" Therefore, in the interest of justice, I hereby direct the opposite party to take suitable action in the matter, meanwhile."

31. This above quoted extract from the order dated 05.06.2014 is to be read in context with the submission of the parties which is mentioned in the paragraph preceding the said order dated 05.06.201. The Court had noted the submission of the learned counsel for the responent that till date i.e. 05.06.2014 it did not receive the request for appointment of an arbitrator and the moment it would receive, it shall be properly reply forthwith. Thus, at best, what can be culled out is that the respondent by then had not received the letter requesting for an appointment of an arbitrator and the learned counsel for the respondents submitted that the moment they did receive they would reply to it forthwith and this is what the Court held directing the opposite party to take suitable action in the matter. As far as the legal position as extracted hereinabove is concerned, it is clear that the moment upon making a request and after a lapse of 30 days, the party approaches the Court under Section 11 then the right of the other party to appoint an arbitrator ceases.

32. This legal position which is settled cannot be ignored and thus, upon the perusal of the material on record, this Court finds that this Court had not directed or granted jurisdiction to the respondent to appoint an arbitrator. Thus, what can be deduced out is that the petitioner had made

the request for appointment of an arbitrator by means of the letter dated 03.05.2014, the same was not responded by the opposite party, thereafter, the petitioner approached this Court by filing a petition after 30 days from invoking the arbitration clause. The arbitrator Sri A.K. Reddy was appointed on 09.07.2014 which in light of the decision as referred to hereinabove **TRF (Supra)** is not justified nor valid, accordingly, it is so held and the first question framed by the Cour is answered accordingly.

33. Once it is found that the respondent did not possess the jurisdiction or the authority to appoint the arbitrator, and the petitioner had invoked the jurisdiction of this Court by filing the instant petition, however, in the meantime, many subsequent developments occurred including the insistence of the said arbitrator, requiring the petitioner to participate, the reluctance of the petitioner to submit to his jurisdiction and ultimately termination of the proceedings by the said arbitrator by means of its order dated 27.06.2017.

34. Considering the fact that the appointment of Sri A.K. Reddy in the first place was in excess of jurisdiction and contrary to the settled legal provisions and principles, this Court is of the view that no jurisdiction could be conferred on the said arbitrator and any proceedings undertaken by him cannot be legitimatized. Once his appointment is found to be bad in the eyes of law, all his actions would be rendered null and void including the sittings held by him and passing of the order dated 27.06.2017 terminating the proceedings.

35. This Court is fortified in its view and draw strength from the decision of the Apex Court in the case of ***Perkins Eastman Achitects DPC and Others Vs. HSCC (India) Ltd.*** reported in ***AIR 2020 SC 59*** wherein the question before the Apex Court, was what is the power that can be exercised by a court under Section 11 (6) when the appointment of the arbitrator is made by the respondent and whether a party is to be left to raise the challenge at an appropriate stage in terms of the remedies available in law. The Apex Court relying upon another decision in the case of ***Walter Bau AG*** reported in ***2015 (3) SCC 100*** framed the question and thereafter noticing the legal position has held as under. The relevant portion is being reproduced hereinafter:-

21. The further question that arises is whether the power can be exercised by this Court under Section 11 of the Act when the appointment of an arbitrator has already been made by the respondent and whether the appellant should be left to raise challenge at an appropriate stage in terms of remedies available in law. Similar controversy was gone into by a Designated Judge of this Court in Walter Bau AG MANU SC/0053/2015 : (2015) 3 SCC 800 and the discussion on the point was as under:-

"9. While it is correct that in Antrix MANU/SC/0514/2013 : (2014) 11 SCC 560 and Pricol Ltd. MANU/SC/1165/2014 : (2015) 4 SCC 177, it was opined by this Court that after appointment of an arbitrator is made, the remedy of the aggrieved party is not under Section 11 (6) but such remedy lies elsewhere and under different provisions of the Arbitration Act (Sections 12 and 13), the context in which the aforesaid view was expressed cannot be lost sight of. In Antrix MANU/SC/0514/2013 : (2014) 11 SCC 560, appointment of the

arbitrator, as per the ICC Rules, was as per the alternative procedure agreed upon, whereas in Pricol Ltd. MANU/SC/1165/2014 : (2015) 4 SCC 177, 17., the party which had filed the application under Section 11 (6) of the Arbitration Act had already submitted to the jurisdiction of the arbitrator. In the present case, the situation is otherwise.

10. Unless the appointment of the arbitrator is ex facie valid and such appointment satisfies the Court exercising jurisdiction under Section 11 (6) of the Arbitration Act, acceptance of such appointment as a fait accompli to debar the jurisdiction under Section 11 (6) cannot be countenanced in law. In the present case, the agreed upon procedure between the parties contemplated the appointment of the arbitrator by the second party within 30 days of receipt of a notice from the first party. While the decision in Datar Switchgears Ltd. MANU/SC/0651/200 : (2000) 8 SCC 151 may have introduced some flexibility in the time frame agreed upon by the parties by extending it till a point of time anterior to the filing of the application under Section 11 (6) of the Arbitration Act, it cannot be lost sight of that in the present case the appointment of Shri Justice A.D. Mane is clearly contrary to the provisions of the Rules governing the appointment of arbitrators by ICADR, which the parties had agreed to abide by in the matter of such appointment. The option given to the respondent Corporation to go beyond the panel submitted by ICADR and to appoint any person of its choice was clearly not in the contemplation of the parties. If that be so, obviously, the appointment of Shri Justice A.D. Mane is non est in law. Such an appointment, therefore, will not inhibit the exercise of jurisdiction by this Court under Section 11 (6) of the Arbitration Act. It cannot, therefore, be held that the present proceeding is not maintainable in law. The appointment of Shri Justice A.D. Mane made beyond 30 days of the receipt of notice by the petitioner, though may appear to be in conformity with the law laid down in Datar Switchgears Ltd. MANU/SC/0651/2000 : (2000) 8 SCC 151, is clearly contrary to the agreed procedure which required the appointment made by the respondent Corporation to be from the panel submitted by ICADR. The said appointment, therefore, is clearly invalid in law."

22. It may be noted here that the aforesaid view of the Designated Judge in ***Walter Bau AG*** *MANU/ SC/0053/2015 : (2015) 3 SCC 800 was pressed into service on behalf of the appellant in* ***TRF Limited*** *MANU/SC/0755/2017 : (2017) 8 SCC 377 and the opinion expressed by the Designated Judge was found to be in consonance with the binding authorities of this Court. It was observed:-*

"32. Mr Sundaram, learned Senior Counsel for the appellant has also drawn inspiration from the judgment passed by the Designated Judge of this Court in Walter Bau AG MANU/SC/0053/2015 : (2015) 3 SCC 800, where the learned Judge, after referring to Antrix Corpn. Ltd. MANU/SC/0514/2013 : (2014) 11 SCC 560, distinguished the same and also distinguished the authority in Pricol Ltd. V. Johnson Controls Enterprise Ltd. MANU/SC/1165/2014 ; (2015) 4 SCC 177 and came to hold that: (Walter Bau AG case MANU/SC/0053/2015 : (2015) 3 SCC 800 SCC p. 806, para 10)

"10. Unless the appointment of the arbitrator is ex facie valid and such appointment satisfies the Court exercising jurisdiction under Section 11 (6) of the Arbitration Act, acceptance of such

appointment as a fait accompli to debar the jurisdiction under Section 11 (6) cannot be countenanced in law. ..."

33. We may immediately state that the opinion expressed in the aforesaid case is in consonance with the binding authorities we have referred to hereinbefore."

25. In the aforesaid circumstances, in our view a case is made out to entertain the instant application preferred by the Applicants. We, therefore, accept the application, annul the effect of the letter dated 30.07.2019 issued by the respondent and of the appointment of the arbitrator. In exercise of the power conferred by section 11 (6) of the Act, we appoint Dr. Justice A.K. Sikri, former Judge of this Court as the sole arbitrator to decide all the disputes arising out of the Agreement dated 22.05.2017, between the parties, subject to the mandatory declaration made under the amended Section 12 of the Act with respect to independence and impartiality and the ability to devote sufficient time to complete the arbitration within the period as per Section 29A of the Act. A copy of the Order be dispatched to Dr. Justice A. K. Sikri at 144, Sundar Nagar, New Delhi - 110003 (Tel. No.:- 011 - 41802321). The arbitrator shall be entitled to charge fees in terms of the Fourth Schedule to the Act. The fees and other expenses shall be shared by the parties equally.

36. Thus, in light of what has been held above, this Court finds that the appointment of Sri A.K. Reddy was against the provision of law and thus it conferred no jurisdiction on him and all proceedings held by him were rendered null and void. Thus in light of the above discussions the objections of the respondent are rejected. Since there is no dispute in between the parties regarding the arbitration clause and that there are live disputes between the parties, accordingly, this Court in exercise of the powers conferred under Section 11 (6) of the Arbitration and Conciliation Act, 1996 proposes the name of Hon'ble Justice Anirudh Singh (Rtd. Judge) of this Court who is residing at 1108 I Block, Ganga Apartment, Sector 4, Gomti Nagar Vistar, Lucknow, Pin Code No. 226010, Mob. 9454412315 to appoint as a sole arbitrator.

37. The learned counsel for the petitioner shall provide a complete set of paper book with the office to be forwarded to the proposed arbitrator for seeking his consent in terms of Section 12 (3) of the Act of 1996.

38. Accordingly, list this matter on 19.02.2020.

(2020)02ILR A1270

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 31.01.2020

BEFORE
THE HON'BLE ABDUL MOIN, J.

Contempt No. 249 of 2020

Lalsar ...Applicant

Versus

Rohit Kumar Maurya, Tehsildar, Balrampur ...Opposite Party

Counsel for the Applicant:
Alok Kumar Tripathi, Anurakt Singh, Deepak Kumar Pandey

Counsel for the Opposite Parties:

A Contempt of Courts Act, 1971 - section 2(b) – civil contempt - an act of contempt to be made out against the contemnor - there has to be a deliberate and willful disobedience and defiance of

the order passed by a Court of law - the directions which are alleged to have been violated should be unambiguous and passing of an order in purported compliance of the order passed by a Court of law would give rise to a fresh cause of action. (Para-9)

The writ Court had directed the Court concerned for expediting the proceedings of impleadment application and also the proceeding of case under Section 34 of the U.P Land Revenue Act and to decide the same within a specified time in case there is no legal impediment - despite lapse of more than a year and despite lapse of the time framed by the writ Court neither the impleadment application has been decided nor the said case has been decided .(Para-2)

HELD:- No work having taken place invariably on account of lawyer's strike it cannot be said that there is any deliberate and willful disobedience and defiance of the order passed by the writ Court . (Para-3)

Contempt petition is dismissed. (E-7)

LIST OF CASES CITED:-

1. Debabrata Bandopadbyay and others Vs. State of West Bengal and another , AIR 1969 SC 189

2. B.K. Kar Vs.The Hon'ble the Chief Justice and his companion Justices of the Orissa High Court and others , 1961 SC 1367

3. Niaz Mohammad and others Vs. State of Haryana and others , 1994 (6) SCC 332

4. Mrityunjoy Das and another Vs. Sayed Hasibur Rahaman and others , 2002 (3) SCC 739

(Delivered by Hon'ble Abdul Moin, J.)

1. Heard.

2. The present contempt petition has been filed alleging non compliance of the judgment and order dated 18.12.2018 passed by writ Court in Writ Petition No. 36399 (MS) of 2018 Inre; Lalsar and Anr Vs. Tehsildar (Judicial), District Balrampur and ors, a copy of which is annexure 1 to the petition. By the said order, the writ Court had directed the Court concerned for expediting the proceedings of impleadment application dated 14.11.2017 and also the proceeding of case under Section 34 of the U.P Land Revenue Act and to decide the same within a specified time in case there is no legal impediment. It is contended that the copy of the said order was served upon in the Court of officer concerned on 28.12.2018 and since then despite lapse of more than a year and despite lapse of the time framed by the writ Court neither the impleadment application has been decided nor the said case has been decided and, consequently the officer concerned runs in contempt of the order of writ Court dated 18.12.2018.

3. Having heard the learned counsel for the applicant and having perused the records including the order sheet of the said case which has been filed as annexure 3 to the petition it comes out that invariably the lawyers have been abstaining from work. On a few occasion the officer has also been busy in administrative work apart from the fact that the officer concerned has also been transferred. Once this Court had directed for deciding of the case within a period of four months provided there is no legal impediment yet taking into consideration the aforesaid circumstances of no work having taken place invariably on account of lawyer's strike it cannot be said that there is any deliberate and willful disobedience and defiance of the order passed by the writ Court dated 18.12.2018.

4. Taking into consideration the repeated strikes of lawyers, learned counsel for the applicant was asked as to whether he would like to implead the Bar Association as a party inasmuch as it is the Advocates who are standing as an impediment in compliance of the judgment and order 18.12.2018 passed by this Court as the matter pending before the Tehsildar concerned could not proceed on account of repeated strikes. However, learned counsel for the applicant outrightly refused to implead the Bar Association as party.

4. In this view of the matter, the Court may peruse the law laid down by the Hon'ble Supreme Court per which there has to be deliberate and wilful disobedience by the contemnor in order to to make out a case for contempt.

5. In this regard, the Hon'ble Supreme Court in the case of **Debabrata Bandopadbyay and others versus State of West Bengal and another** reported in **AIR 1969 SC 189** has held as under :-

"9. A question whether there is contempt of court or not is a serious one. The court is both the accuser as well as the judge of the accusation. It behoves the court to act with as great circumspection as possible making all allowances for errors of judgment and difficulties arising from inveterate practices in courts and tribunals. It is only when a clear case of contumacious conduct not explainable otherwise, arises that the contemner must be punished. It must be realised that our system of courts often results in delay of one kind or another. The remedy for it is reform and punishment departmentally. Punishment under the law of contempt is called for when the lapse is deliberate and in disregard of one's duty and in defiance of authority. To take action in an unclear case is to make the law of contempt do duty for other measures and is not to be encouraged."

6. The Hon'ble Supreme Court in the case of **B.K. Kar versus The Hon'ble the Chief Justice and his companion Justices of the Orissa High Court and others** reported in **AIR 1961 SC 1367** has held as under :-

"7. Before a subordinate court can be found guilty of disobeying the order of the superior court and thus to have committed contempt of court, it is necessary to show that the disobedience was intentional. ..... There may perhaps be a case where an order disobeyed could be reasonably construed in two ways and the subordinate court construed it in one of those ways but in a way different from that intended by the superior court. Surely, it cannot be said that disobedience of the order by the subordinate court was contempt of the superior court."

7. The Hon'ble Supreme Court in the case of **Niaz Mohammad and others versus State of Haryana and others** reported in **1994 (6) SCC 332** has held as under :-

"9 . Section 2(b) of the Contempt of Court Act, 1971 (hereinafter referred to as 'the Act') defines "Civil Contempt" to mean "willful disobedience to any judgment, decree, direction, order, writ, or other process of a court...". Where the contempt consists in failure to comply with or carry out an order of the court made in favour of the party, it is a civil contempt. The person or persons in whose favour such order or direction has been made can

move the Court for initiating proceeding for contempt against the alleged contemner, with a view to enforce the right flowing from the order or direction in question. But such a proceeding is not like an execution proceeding under CPC. The party in whose favour an order has been passed, is entitled to the benefit of such order. The Court while considering the issue as to whether the alleged contemner should be punished for not having complied and carried out the direction of the Court, has to take into consideration all facts and circumstances of a particular case. That is why the framers of the Act while defining civil contempt, have said that it must be willful disobedience to any judgment, decree, direction, order, writ or other process of a court. Before a contemner is punished for non compliance of the direction of a court the Court must not only be satisfied about the disobedience of any judgment, decree, direction or writ but should also be satisfied that such disobedience was willful and intentional. The Civil Court while executing a decree against the judgment debtor is not concerned and bothered whether the disobedience to any judgment, or decree, was willful. Once a decree has been passed it is the duty of the court to execute the decree whatever may be consequences thereof. But wile examining the grievance of the person who has invoked the jurisdiction of the Court to initiate the proceeding for contempt for disobedience of its order, before any such contemner is held guilty and punished, the Court has to record a finding that such disobedience was willful and intentional."

8. The Hon'ble Supreme Court in the case of **Mrityunjoy Das and another versus Sayed Hasibur Rahaman and others** reported in **2002 (3) SCC 739** has held as under :-

"13. Before however, proceeding with the matter any further, be it noted that exercise of powers under the Contempt of Courts Act shall have to be rather cautious and use of it rather sparingly after addressing itself to the true effect of the contemptuous conduct. The Court must otherwise come to a conclusion that the conduct complained of tentamounts to obstruction of justice which if allowed, would even permeate in our society (vide Murray & Co. v. Ashok Kr. Newatia & Anr.). This is a special jurisdiction conferred on to the law courts to punish an offender for his contemptuous conduct or obstruction to the majesty of law. It is in this context that the observations of the this Court in Murray's case (supra) in which one of us (Banerjee, J.) was party needs to be noticed.

"The purpose of contempt jurisdiction is to uphold the majesty and dignity of the Courts of law since the image of such a majesty in the minds of the people cannot be led to be distorted. The respect and authority commanded by Courts of Law are the greatest guarantee to an ordinary citizen and the entire democratic fabric of the society will crumble down if the respect for the judiciary is undermined. It is true that the judiciary will be judged by the people for what the judiciary does, but in the event of any indulgence which even can remotely be termed to affect the majesty of law, the society is bound to lose confidence and faith in the judiciary

and the law courts thus, would forfeit the trust and confidence of the people in general."

14. The other aspect of the matter ought also to be noticed at this juncture viz., the burden and standard of proof. The common English phrase "he who asserts must prove" has its due application in the matter of proof of the allegations said to be constituting the act of contempt. As regards the 'standard of proof', be it noted that a proceeding under the extra-ordinary jurisdiction of the Court in terms of the provisions of the Contempt of Court Act is quasi criminal, and as such, the standard of proof required is that of a criminal proceeding and the breach shall have to be established beyond reasonable doubt. The observations of Lord Denning in Re Bramblevale 1969 3 All ER 1062 lend support to the aforesaid. Lord Denning in Re Bramblevale stated:

"A contempt of court is an offence of a criminal character. A man may be sent to prison for it,. It must be satisfactorily proved. To use the timehonoured phrase, it must be proved beyond all reasonable doubt. It is not proved by showing that, when the man was asked about it, he told lies. There must be some further evidence to incriminate him. Once some evidence is given, then his lies can be thrown into the scale against him. But there must be some other evidence.... Where there are two equally consistent possibilities open to the Court, it is not right to hold that the offence is proved beyond reasonable doubt."

15. In this context, the observations of the Calcutta High Court in Archana Guha v. Ranjit Guha Neogi 1989 (II) CHN 252 in which one of us was a party (Banerjee, J.) seem to be rather apposite and we do lend credence to the same and thus record our concurrence therewith.

16. In The Aligarh Municipal Board and Others v. Ekka Tonga Mazdoor Union and Others MANU/SC/0075/1970 : 1970CriL J1520 , this Court in no uncertain term stated that in order to bring home a charge of contempt of court for disobeying orders of Courts, those who assert that the alleged contemners had knowledge of the order must prove this fact beyond reasonable doubt. This Court went on to observe that in case of doubt, the benefit ought to go to the person charged.

17. In a similar vein in V.G. Nigam and others v. Kedar Nath Gupta and another MANU/SC/0419/1992 : 1992CriL J3576 , this Court stated that it would be rather hazardous to impose sentence for contempt on the authorities in exercise of contempt jurisdiction on mere probabilities.

18. Having discussed the law on the subject, let us thus at this juncture analyse as to whether in fact, the contempt alleged to have been committed by the alleged contemners, can said to have been established firmly without there being any element of doubt involved in the matter and that the Court would not be acting on mere probabilities having however, due regard to the nature of jurisdiction being quasi criminal conferred on to the law courts. Admittedly, this Court directed maintenance of status quo with the following words - "the members of the petitioner-Sangha who were before the High Court in the writ petition out of which the present proceedings arise". And it is on this score the applicant contended categorically that the intent of the Court to include all the members presenting the Petition before this Court whereas for the Respondent Mr. Ray contended that the same is restricted to the members who filed the writ petition before the High Court which culminated in the initiation of proceeding before this Court. The Counter affidavit filed by the Respondents also

record the same. The issue thus arises as to whether the order stands categorical to lend credence to the answers of the respondent or the same supports the contention as raised by the applicants herein - Incidentally, since the appeal is pending in this Court for adjudication, and since the matter under consideration have no bearing on such adjudication so far as the merits of the dispute are concerned, we are not expressing any opinion in the matter neither we are required to express opinion thereon, excepting however, recording that probabilities of the situation may also warrant a finding, in favour of the interpretation of the applicant. The doubt persists and as such in any event the respondents being the alleged contemners are entitled to have the benefit or advantage of such a doubt having regard to the nature of the proceeding as noticed herein before more fully."

9. What comes out from a perusal of the aforesaid judgements is that for an act of contempt to be made out against the contemnor, there has to be a deliberate and wilfull disobedience and defiance of the order passed by a Court of law, the directions which are alleged to have been violated should be unambiguous and passing of an order in purported compliance of the order passed by a Court of law would give rise to a fresh cause of action.

10. Keeping in view the aforesaid discussions and the law in this regard, it cannot be said that there is any deliberate or wilful disobedience of the judgement and order dated 18.12.2018 passed by the writ Court.

11. Accordingly, the contempt petition is dismissed.

(2020)02ILR A1275

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 04.02.2020

BEFORE
THE HON'BLE ABDUL MOIN, J.

Contempt No. 1064 of 2019

Suresh Tiwari ...Applicant
Versus
T. Venkatesh, Principal Secretary, Irrigation Department, Lucknow & Anr. ...Opposite Parties

Counsel for the Applicant:
Apoorva Tewari, Paavan Awasthi

Counsel for the Opposite Parties:

A. Contempt of Courts Act, 1971 - section 2(b) – civil contempt - an act of contempt to be made out against the contemnor - there has to be a deliberate and willful disobedience and defiance of the order passed by a Court of law - the directions which are alleged to have been violated should be unambiguous. (Para-15)

The writ Court directed the respondents to consider the applicant for notional promotion under service rules with all consequential benefits strictly in accordance with the directions issued by this Court in Writ Petition. (Para-2)

HELD:- Once admittedly the respondents, to the best of their ability have considered the case of the applicant and have passed an order and the said order is not to the liking of the applicant, it cannot be said that the respondents run in contempt to the order passed by the writ Court - There is no deliberate or wilful disobedience of the judgement and order passed by the writ Court. (Para-9,16)

Contempt petition is dismissed. (E-7)

List of cases cited:-

1. Debabrata Bandopadbyay and others Vs. State of West Bengal and another , AIR 1969 SC 189

2. B.K. Kar Vs.The Hon'ble the Chief Justice and his companion Justices of the Orissa High Court and others , 1961 SC 1367

3. Niaz Mohammad and others Vs. State of Haryana and others , 1994 (6) SCC 332

4. Mrityunjoy Das and another Vs. Sayed Hasibur Rahaman and others , 2002 (3) SCC 739

(Delivered by Hon'ble Abdul Moin, J.)

1. Heard Sri Apoorva Tewari, learned counsel appearing for the applicant and Sri Manjeev Shukla, learned Additional Chief Standing counsel appearing for the respondent-contemnor.

2. The present contempt petition has been filed alleging non compliance of the judgment and order dated 16.02.2018 passed by the writ Court in Writ Petition No. 731 (SB) of 2013 Inre; Suresh Tiwari Vs. State of U.P and Ors. The writ Court while allowing the petition had quashed two orders dated 19.02.2013 and 08.09.2016 and the respondents were directed to consider the applicant for notional promotion under service rules with all consequential benefits strictly in accordance with the directions issued by this Court in Writ Petition No. 1502 (SB) of 2010 vide judgment and order dated 24.01.2011. Incidentally, the judgment and order dated 24.1.2011 has been reproduced in the judgment of the writ Court dated 16.02.2018 itself.

3. In purported compliance to the judgment of this Court, the respondents have proceeded to pass the order dated 29.03.2019, a copy of which is annexure 2 to the petition whereby the case of the applicant has been rejected. Being aggrieved with the said order instead of filing a fresh petition, the present contempt petition has been filed.

4. This Court had issued notice to the respondents on 09.05.2019. Thereafter, the respondents have filed the short counter affidavit on behalf of respondent no. 1 to which a rejoinder affidavit has also been filed.

5. Sri Apoorva Tiwari, learned counsel for the applicant contends that the order passed by the writ Court was categoric i.e of considering the case of the applicant for notional promotion under service rules strictly in accordance with the earlier direction of this Court dated 24.01.2011. It is contended that the respondents while proceeding to reject the claim of the applicant for promotion as Engineer-In-Chief have patently erred in law and have gone beyond the judgment of the writ Court inasmuch as they have also considered the Government order dated 23.08.1997 which had also been placed before this Court while filing the counter affidavit in the earlier petition and thus it would be deemed that the writ Court has considered all aspects of the matter and thereafter issued a positive direction for consideration of the case for notional promotion in accordance with service rules and as such, the respondents could not have rejected the claim of the applicant rather should have promoted the applicant as Engineer-In-Chief and in not doing so and rejecting the case of the applicant through the order dated 29.03.2019, the

respondents run in contempt of the order passed by the writ Court. It is also contended that once the said grounds as find place in the order dated 29.03.2019 had already been taken by the respondents while rejecting the case of the applicant through the orders dated 19.02.2013 and 08.09.2016 and both the said orders have been quashed by the writ Court, as such it was no longer for the respondents to reiterate the said grounds in the order dated 29.03.2019.

6. On the other hand, Sri Manjeev Shukla, learned Additional Chief Standing counsel on the basis of averments contained in the counter affidavit submits that in purported compliance to the directions issued by the writ Court, the respondents have proceeded to consider the case of the applicant for promotion as Engineer-In-Chief but taking into consideration the Government order dated 23.08.1997 and certain other grounds, the case of the applicant has been rejected. It is contended that writ Court has categorically directed the respondents to consider the applicant for notional promotion under service rules. It is said that the direction of the writ Court was for "Consideration" in accordance with the service rules and once the Government order dated 23.08.1997 which had been considered in the order of rejection of the claim of the applicant, has been considered which does not provide for any such notional promotion more particularly when no junior to the applicant has been promoted to the said post, consequently the order dated 29.03.2019 cannot be said to be in contempt of the judgment of this Court.

7. Heard learned counsel appearing for the contesting parties and perused the records.

8. The writ Court vide judgment and order dated 16.02.2018 had allowed the petition after quashing the rejection orders dated 19.02.2013 and 08.09.2016 and the respondents were directed to **consider the applicant for notional promotion under the service rules.** Admittedly, the respondents have **considered** the applicant for promotion but finding that the Government order dated 23.08.1997 which provides that in the case of notional promotions, the same can only be granted where any junior to the said person who is being considered for notional promotion has been promoted and it was found that no person junior to the applicant had been promoted, consequently the claim of the applicant has been rejected. Once the order of the writ Court was only for consideration in accordance with the service rules and admittedly the Government order dated 23.08.1997 places a condition for promotion on notional basis i.e a junior to the person, whose case for promotion is to be considered, having been promoted and admittedly no junior to the applicant having been promoted, consequently it cannot be said that because the applicant has not been promoted as Engineer-In-Chief, as such the respondents run in contempt of the order passed by the writ Court.

9. Another aspect of the matter would be that the respondents in compliance to the order passed by the writ Court have considered the case of the applicant and have rejected the same. In order to make out the case of contempt there has to be deliberate and willful disobedience of the order passed by the writ Court. Once admittedly the respondents, to the best of their ability have considered the case of the applicant and have passed an order and the said order is not to the liking of the applicant, it cannot be said that the respondents run in

contempt to the order passed by the writ Court.

10. In this regard, the Court may consider the law laid down by the Hon'ble Supreme Court per which there has to be deliberate and wilful disobedience by the contemnor in order to make out a case for contempt.

11. The Hon'ble Supreme Court in the case of **Debabrata Bandopadbyay and others versus State of West Bengal and another** reported in **AIR 1969 SC 189** has held as under :-

"9. A question whether there is contempt of court or not is a serious one. The court is both the accuser as well as the judge of the accusation. It behoves the court to act with as great circumspection as possible making all allowances for errors of judgment and difficulties arising from inveterate practices in courts and tribunals. It is only when a clear case of contumacious conduct not explainable otherwise, arises that the contemner must be punished. It must be realised that our system of courts often results in delay of one kind or another. The remedy for it is reform and punishment departmentally. Punishment under the law of contempt is called for when the lapse is deliberate and in disregard of one's duty and in defiance of authority. To take action in an unclear case is to make the law of contempt do duty for other measures and is not to be encouraged."

12. The Hon'ble Supreme Court in the case of **B.K. Kar versus The Hon'ble the Chief Justice and his companion Justices of the Orissa High Court and others** reported in **AIR 1961 SC 1367** has held as under :-

"7. Before a subordinate court can be found guilty of disobeying the order of the superior court and thus to have committed contempt of court, it is necessary to show that the disobedience was intentional. ..... There may perhaps be a case where an order disobeyed could be reasonably construed in two ways and the subordinate court construed it in one of those ways but in a way different from that intended by the superior court. Surely, it cannot be said that disobedience of the order by the subordinate court was contempt of the superior court."

13. The Hon'ble Supreme Court in the case of **Niaz Mohammad and others versus State of Haryana and others** reported in **1994 (6) SCC 332** has held as under :-

"9 . Section 2(b) of the Contempt of Court Act, 1971 (hereinafter referred to as 'the Act') defines "Civil Contempt" to mean "willful disobedience to any judgment, decree, direction, order, writ, or other process of a court...". Where the contempt consists in failure to comply with or carry out an order of the court made in favour of the party, it is a civil contempt. The person or persons in whose favour such order or direction has been made can move the Court for initiating proceeding for contempt against the alleged contemner, with a view to enforce the right flowing from the order or direction in question. But such a proceeding is not like an execution proceeding under CPC. The party in whose favour an order has been passed, is entitled to the benefit of such order. The Court while considering the issue as to whether the alleged contemner should be punished for not having complied and carried out the direction of

the Court, has to take into consideration all facts and circumstances of a particular case. That is why the framers of the Act while defining civil contempt, have said that it must be willful disobedience to any judgment, decree, direction, order, writ or other process of a court. Before a contemner is punished for non compliance of the direction of a court the Court must not only be satisfied about the disobedience of any judgment, decree, direction or writ but should also be satisfied that such disobedience was willful and intentional. The Civil Court while executing a decree against the judgment debtor is not concerned and bothered whether the disobedience to any judgment, or decree, was willful. Once a decree has been passed it is the duty of the court to execute the decree whatever may be consequences thereof. But wile examining the grievance of the person who has invoked the jurisdiction of the Court to initiate the proceeding for contempt for disobedience of its order, before any such contemner is held guilty and punished, the Court has to record a finding that such disobedience was willful and intentional."

14. The Hon'ble Supreme Court in the case of **Mrityunjoy Das and another versus Sayed Hasibur Rahaman and others** reported in **2002 (3) SCC 739** has held as under :-

"13. Before however, proceeding with the matter any further, be it noted that exercise of powers under the Contempt of Courts Act shall have to be rather cautious and use of it rather sparingly after addressing itself to the true effect of the contemptuous conduct. The Court must otherwise come to a conclusion that the conduct complained of tentamounts to obstruction of justice which if allowed, would even permeate in our society (vide Murray & Co. v. Ashok Kr. Newatia & Anr.). This is a special jurisdiction conferred on to the law courts to punish an offender for his contemptuous conduct or obstruction to the majesty of law. It is in this context that the observations of the this Court in Murray's case (supra) in which one of us (Banerjee, J.) was party needs to be noticed.

"The purpose of contempt jurisdiction is to uphold the majesty and dignity of the Courts of law since the image of such a majesty in the minds of the people cannot be led to be distorted. The respect and authority commanded by Courts of Law are the greatest guarantee to an ordinary citizen and the entire democratic fabric of the society will crumble down if the respect for the judiciary is undermined. It is true that the judiciary will be judged by the people for what the judiciary does, but in the event of any indulgence which even can remotely be termed to affect the majesty of law, the society is bound to lose confidence and faith in the judiciary and the law courts thus, would forfeit the trust and confidence of the people in general."

14. The other aspect of the matter ought also to be noticed at this juncture viz., the burden and standard of proof. The common English phrase "he who asserts must prove" has its due application in the matter of proof of the allegations said to be constituting the act of contempt. As regards the 'standard of proof', be it noted that a proceeding under the extra-ordinary jurisdiction of the Court in terms of the provisions of the Contempt of Court Act is quasi criminal, and as such, the standard of proof required is that of a criminal proceeding and the breach shall have to be established beyond reasonable doubt. The observations of

Lord Denning in Re Bramblevale 1969 3 All ER 1062 lend support to the aforesaid. Lord Denning in Re Bramblevale stated:

"A contempt of court is an offence of a criminal character. A man may be sent to prison for it,. It must be satisfactorily proved. To use the timehonoured phrase, it must be proved beyond all reasonable doubt. It is not proved by showing that, when the man was asked about it, he told lies. There must be some further evidence to incriminate him. Once some evidence is given, then his lies can be thrown into the scale against him. But there must be some other evidence.... Where there are two equally consistent possibilities open to the Court, it is not right to hold that the offence is proved beyond reasonable doubt."

15. In this context, the observations of the Calcutta High Court in Archana Guha v. Ranjit Guha Neogi 1989 (II) CHN 252 in which one of us was a party (Banerjee, J.) seem to be rather apposite and we do lend credence to the same and thus record our concurrence therewith.

16. In The Aligarh Municipal Board and Others v. Ekka Tonga Mazdoor Union and Others MANU/SC/0075/1970 : 1970CriL J1520 , this Court in no uncertain term stated that in order to bring home a charge of contempt of court for disobeying orders of Courts, those who assert that the alleged contemners had knowledge of the order must prove this fact beyond reasonable doubt. This Court went on to observe that in case of doubt, the benefit ought to go to the person charged.

17. In a similar vein in V.G. Nigam and others v. Kedar Nath Gupta and another MANU/SC/0419/1992 : 1992CriL J3576 , this Court stated that it would be rather hazardous to impose sentence for contempt on the authorities in exercise of contempt jurisdiction on mere probabilities.

18. Having discussed the law on the subject, let us thus at this juncture analyse as to whether in fact, the contempt alleged to have been committed by the alleged contemners, can said to have been established firmly without there being any element of doubt involved in the matter and that the Court would not be acting on mere probabilities having however, due regard to the nature of jurisdiction being quasi criminal conferred on to the law courts. Admittedly, this Court directed maintenance of status quo with the following words - "the members of the petitioner-Sangha who were before the High Court in the writ petition out of which the present proceedings arise". And it is on this score the applicant contended categorically that the intent of the Court to include all the members presenting the Petition before this Court whereas for the Respondent Mr. Ray contended that the same is restricted to the members who filed the writ petition before the High Court which culminated in the initiation of proceeding before this Court. The Counter affidavit filed by the Respondents also record the same. The issue thus arises as to whether the order stands categorical to lend credence to the answers of the respondent or the same supports the contention as raised by the applicants herein - Incidentally, since the appeal is pending in this Court for adjudication, and since the matter under consideration have no bearing on such adjudication so far as the merits of the dispute are concerned, we are not expressing any opinion in the matter neither we are required to express opinion thereon, excepting however, recording that probabilities of the situation may also warrant a finding, in favour of

the interpretation of the applicant. The doubt persists and as such in any event the respondents being the alleged contemners are entitled to have the benefit or advantage of such a doubt having regard to the nature of the proceeding as noticed herein before more fully."

15. What comes out from a perusal of the aforesaid judgements is that for an act of contempt to be made out against the contemnor, there has to be a deliberate and wilfull disobedience and defiance of the order passed by a Court of law and that the directions which are alleged to have been violated should be unambiguous.

16. Keeping in view the aforesaid discussion and the law in this regard, it cannot be said that there is any deliberate or wilful disobedience of the judgement and order dated 16.2.2018 passed by the writ Court.

17. Accordingly, the contempt petition is dismissed.

18. However, it would be open to the applicant to challenge the order dated 29.03.2019, in case he is so aggrieved, before the appropriate Court in the appropriate proceedings.

(2020)02ILR A1281

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 17.01.2020

BEFORE
THE HON'BLE SUNEET KUMAR, J.

Contempt Application (Civil) No. 5162 of 2019

Mayur Farm Pvt. Ltd. ...Applicant
Versus
Alok Tandon, Chairman N.O.I.D.A. & Ors ...Opposite Parties

Counsel for the Applicant:
Sri Arvind Srivastava, Sri Arvind Srivastava, Sri Sarveshwari Prasad, Sri Rishabh Kumar, Sri Yanendra Pandey, Sri K.N. Tripathi

Counsel for the Opposite Parties:
Sri Kaushalendra Nath Singh, Sri M.C. Chaturvedi

A. Contempt of Courts Act, 1971 – section 2(b) – civil contempt - contempt jurisdiction - limited to punish the contemnor, not for disobedience of the order, but upon returning a finding that the disobedience is wilful - Mere disobedience is not sufficient unless it is shown and proved that the disobedience is wilful, deliberate and intentional - casual, accidental or unintentional acts of disobedience under the circumstances which negate any suggestions of contumacy - may amount to a contempt in theory only - that does not render the contemnor liable to punishment - To hold somebody guilty of contempt of Court, the concerned person must have wilfully disobeyed judgment, decree etc. or should have wilfully committed breach of an undertaking given to a Court – Petition not maintainable.(Para-13,18)

Contempt petition filed under the Contempt of Courts Act, 1971, for punishing the opposite parties, including, the Chairman/Chief Executive Officer, New Okhala Industrial Development Authority (Noida), for flouting the order passed in First Appeal. (Para-2)

HELD:- NOIDA satisfied the decree, though not to the satisfaction of the applicant - NOIDA authorities cannot be punished - disobedience, if any, not intentional and wilful - matter relates to infringement of a decree or decretal order, it is not expedient to invoke and exercise contempt jurisdiction, in essence, as a mode for executing the decree - remedy available to the applicant is to take recourse in execution

proceedings and not in contempt proceedings - Punishment for disobedience/infringement of a decree is not akin to execution of the decree - jurisdiction of Contempt Court distinct and different than that of executing Court.(Para26)

Contempt petition dismissed. (E-7)

LIST OF CASES CITED:-

1. Ashok Paper Kamgar Union vs. Dharam Dhoda and others , (2003) 11 SCC 1

2. Dinesh Kumar Gupta vs. United India Insurance Company Ltd. , (2010) 12 SCC 770

3. B.K. Kar vs. High Court of Orissa , AIR 1961 SC 1367

4. State of Bihar vs. Rani Sonabati Kumari , AIR 1954 Pat 513

5. N. Baksi vs. O.K. Ghosh8, AIR 1957 Pat 528 , AIR 1957 Pat 528

6. Jiwani Kumari Parikh vs. Satyabrata Chakravorty , (1990) 4 SCC 737

7. Gyani Chandra vs. State of Andhra Pradesh , (2016) 15 SCC 164

8. Niaz Mohammad and others vs. State of Haryana and others , (1994) 6 SCC 332

9. Dushyant Somal vs. Sushma Somal , (1981) 2 SCC 277

10. Kanwar Singh Saini vs. High Court of Delhi , (2012) 4 SCC 307

11. Bank of Baroda vs. Sadruddin Hassan Daya , (2004) 1 SCC 360

12. Sakharan Ganesh Aaravandekar & Anr. v. Mahadeo Vinayak Mathkar & Ors. , (2008) 10 SCC 186

13. Mahender Kumar Gandhi v. Mohammad Tajer Ali & Ors. , (2008) 10 SCC 795

14. Niaz Mohammad and others vs. State of Haryana and others , (1994) 6 SCC 332

15. Rama Narang vs. Ramesh Narang and anothers , AIR 2006 SC 1883

16. Debabrata Bandopadhyay and others vs. The State of West Bengal and another , AIR 1969 SC 189

(Delivered by Hon'ble Suneet Kumar, J.)

1. Heard Shri K.N. Tripathi, learned Senior Advocate, assisted by Shri Arvind Srivastava and Shri Rishabh Kumar, learned counsels for the applicant and Shri M.C. Chaturvedi, learned Senior Advocate, assisted by Shri Kaushalendra Nath Singh, learned counsels for the opposite party.

2. The instant contempt petition has been filed under the Contempt of Courts Act, 1971, for punishing the opposite parties, including, the Chairman/Chief Executive Officer, New Okhala Industrial Development Authority (Noida), for flouting the order dated 14 December 2007, passed in First Appeal: Jagdish Chandra and others vs. New Okhala Industrial Development Authority, Noida1 (First Appeal No. 412 of 2007).

3. The Stamp Reporter has reported that the judgment and decree of the Appellate Court was brought to the notice of the opposite parties on 7 February 2014, accordingly, the contempt petition has been filed after a lapse of 6 years 65 days. The opposite party no. 1 has put in appearance and filed affidavit, *inter alia*, stating that the petition apart from being barred by laches and delay, the judgment and decree of the Appellate Court is not executable under the Contempt of Courts Act, 19712. The contempt petition is not maintainable, remedy available to the applicant/appellant is before the civil court by resorting to execution proceedings.

4. The facts, briefly stated, for the purposes of the instant petition, is that the plot of the applicant came to be acquired in proceedings under the Land Acquisition Act, 18943, pursuant to a notification issued on 30 October 1987. The award came to be passed by the Special Land Acquisition Officer determining the compensation at Rs. 46.64 per sq. yard. The award/compensation was subjected to challenge in reference, the learned District Judge enhanced the compensation to Rs. 148.75 paise per sq. yard vide judgment dated 28 August 2000. The Reference Court, however, directed deduction of 50% of the development charge from the compensation amount. Aggrieved, appellant/applicant herein, along with other aggrieved persons, filed separate First Appeals which came to be decided by a common judgment and order by this Court. The Appellate Court vide judgment and order dated 14 December 2007, enhanced the compensation to Rs. 297.50 paise per sq. yard and set aside the order of the Reference Court to the extent directing deduction of 50% of development charge. The operative portion of the order reads thus:

"Accordingly, the impugned reference and the award to the extent of deduction made from the correct market value for arriving at the amount of compensation to be paid to the petitioners is concerned is hereby quashed and the respondents are directed to recalculate the amount of compensation without deducting any amount towards development charges and pay the same to the petitioners within three months from today alongwith interest @ 10% per annum to be calculated on the same from the date the amount of compensation was to be paid till the date of payment.

With these observations the first appeals and/or cross-objections of the respective parties are disposed of. No order is passed as to costs."

5. The judgment was subjected to challenge by NOIDA in Special Leave Petition No. 5276 of 2009, which came to be dismissed on 29 October 2014. NOIDA paid the compensation determined by the Appellate Court on 29 October 2014, immediately after the dismissal of the appeal.

6. The learned Senior Counsel appearing for the applicant submits that the Appellate Court had directed payment of interest @ 10% per annum, which according to him, is interest over and above the compensation and the statutory interest contemplated under Section 34 of the Land Acquisition Act. It is further urged that NOIDA by not paying the interest over and above the compensation amount, which includes the statutory interest, the opposite parties have willfully and deliberately flouted the order of this Court. It is further contended that by not paying the interest as directed by this Court, it is a continuing cause of action, therefore, the petition is not barred by delay and latches. However, by abundant caution an application under Section 5 of the Limitation Act, 1963, for condoning the delay has been filed.

7. In rebuttal, the learned counsel appearing for the NOIDA would urge that the judgment and decree has been duly satisfied, the amount towards compensation along with statutory interest payable @ 9%/15% was paid forthwith. The applicants are not entitled to any further interest. It is further urged that the Appellate Court had merely directed 10% interest, whereas, NOIDA has paid interest @

15% which is in excess and is liable to be recovered from the applicants. It is further contended that almost fifty First Appeals came to be decided by a common order, but none of the appellants, have approached this Court or initiated execution proceedings claiming 10% interest, over and above the statutory interest already paid by NOIDA. The applicant is the only appellant that has approached this Court after lapse of more than 6 years. NOIDA is not required to pay any further amount towards interest.

8. The learned counsel would further submit that there is no wilful and deliberate disobedience of the order and decree. The decree stands satisfied. In any case the decree cannot be executed in contempt jurisdiction bypassing the civil remedy.

9. Rival submissions fall for consideration.

10. The question that primarily arises is, as to whether, a decree of a civil court can be executed in contempt proceedings or in the alternative whether there is wilful disobedience of the order of the Appellate Court to invoke the jurisdiction under the Contempt Act.

11. The facts, inter-se parties, are not in dispute. It would be apposite to briefly scan the authorities on the proposition of law and the meaning of the expression "wilful disobedience'.

12. Section 2(b) of the Contempt Act, is relevant for adjudication, which reads thus:

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

(a). .....

(b). "civil contempt" means **wilful disobedience** to any judgment, decree, direction, order, writ or other process of a court or wilful breach of an undertaking given to a court;

(c). .....

(i). xxxxx

(ii). xxxxx

(iii). xxxxx

(d). ....."

13. The contempt jurisdiction is limited to punish the contemnor, not for disobedience of the order, but upon returning a finding that the disobedience is wilful. Mere disobedience is not sufficient unless it is shown and proved that the disobedience is wilful, deliberate and intentional.

14. In **Ashok Paper Kamgar Union vs. Dharam Dhoda and others4,** Supreme Court while explaining the expression "wilful' and Section 2 of the Contempt Act, held, that it means an act or omission done voluntarily and intentionally with the specific intent not to do something that the law requires to be done. In order to constitute contempt, the order of the court must be of such nature which is capable of execution in normal circumstances.

"17. ..... "Wilful" means an act or omission which is done voluntarily and intentionally and with the specific intent to do something the law forbids or with the specific intent to fail to do something the law requires to be done, that is to say, with bad purpose either to disobey or to disregard the law. It signifies a deliberate action done with evil intent or with a bad motive or purpose. Therefore, in order to constitute contempt the order of the court must be of such a nature which is capable of execution by the person charged in normal circumstances. It should not require any extraordinary effort nor should

be dependent, either wholly or in part, upon any act or omission of a third party for its compliance. This has to be judged having regard to the facts and circumstances of each case....."

15. The Court must not only be satisfied about the disobedience, but should also be satisfied that such disobedience was wilful and intentional. If from the circumstances of a particular case, the Court is satisfied that although there has been a disobedience but the disobedience is the result of some compelling circumstances under which it is not possible for the contemnor to comply the order, the court would not punish the alleged contemnor.

16. Supreme Court in **Dinesh Kumar Gupta vs. United India Insurance Company Ltd.5,** while analysing the scope of Section 2(b) of the Contempt Act observed as under:

"17. This now leads us to the next question and a more relevant one, as to whether a proceeding for contempt initiated against the appellant can be held to be sustainable merely on speculation, assumption and inference drawn from facts and circumstances of the instant case. **In our considered opinion, the answer clearly has to be in the negative in view of the well-settled legal position reflected in a catena of decisions of this Court that contempt of a civil nature can be held to have been made out only if there has been a wilful disobedience of the order and even though there may be disobedience, yet if the same does not reflect that it has been a conscious and wilful disobedience, a case for contempt cannot be held to have been made out.** In fact, if an order is capable of more than one interpretation giving rise to variety of consequences, non-compliance with the same cannot be held to be wilful disobedience of the order so as to make out a case of contempt entailing the serious consequence including imposition of punishment. **However, when the courts are confronted with a question as to whether a given situation could be treated to be a case of wilful disobedience, or a case of alame excuse, in order to subvert its compliance, howsoever articulate it may be, will obviously depend on the facts and circumstances of a particular case;** but while deciding so, it would not be legally correct to be too speculative based on assumption as the Contempt of Courts Act, 1971 clearly postulates and emphasises that the ingredient of wilful disobedience must be there before anyone can be hauled up for the charge of contempt of a civil nature."

17. It thus follows that the Court would not overlook or ignore the statutory ingredients of contempt of a civil nature under Section 2(b), that the disobedience to the order alleging contempt has to satisfy the test that it is a wilful disobedience. In other words Section 2(b) could be invoked only when there is wilful disobedience and the Section provides scope for reasonable or rational interpretation of an order or the facts and circumstances arising therein. Mere unintentional disobedience is not enough to hold anyone guilty of contempt although disobedience might have been established. Absence of wilful disobedience on part of the contemnor will not hold guilty unless contempt involves a degree of fault or misconduct. Thus, the unintentional disobedience is not sufficient to justify for holding one guilty of contempt.

18. It is settled law that casual, accidental or unintentional acts of

disobedience under the circumstances which negate any suggestions of contumacy, may amount to a contempt in theory only but that does not render the contemnor liable to punishment. To hold somebody guilty of contempt of Court, the concerned person must have wilfully disobeyed judgment, decree etc. or should have wilfully committed breach of an undertaking given to a Court. (Refer: **B.K. Kar vs. High Court of Orissa6; State of Bihar vs. Rani Sonabati Kumari7 and N. Baksi vs. O.K. Ghosh8,** the principle was reiterated in **Jiwani Kumari Parikh vs. Satyabrata Chakravorty9 and Gyani Chandra vs. State of Andhra Pradesh10).**

19. In **Niaz Mohammad and others vs. State of Haryana and others11,** wherein, the contemnors had not obeyed the judgment and released the salary, disobedience was held, in the given facts not wilful so as to tantamount to civil contempt. The Supreme Court drew a distinction between a court executing an order and punishing for contempt. Reliance was placed on **Dushyant Somal vs. Sushma Somal12,** to hold that where the contemnor is able to place before the court sufficient material to conclude that it is impossible to obey the order, the court will not be justified in punishing the alleged contemnor.

20. In Kanwar Singh Saini vs. High Court of Delhi13, the question posed before the Supreme Court was as to whether, the statement/undertaking given by a party culminating into a decree of a civil court, an application under Order 39 Rule 2A C.P.C. or under the Contempt Act could be entertained by the civil court and/or whether the matter could be referred by the civil court to the High Court at all. The Court held that in case grievance of non-compliance with the terms of the decree passed in the civil suit, the remedy available to the aggrieved person is to approach the execution court under Order 21 Rule 32 CPC.

"10. In case there is a grievance of non-compliance of the terms of the decree passed in the civil suit, the remedy available to the aggrieved person is to approach the execution court under Order XXI Rule 32 CPC which provides for elaborate proceedings in which the parties can adduce their evidence and can examine and cross-examine the witnesses as opposed to the proceedings in contempt which are summary in nature. Application under Order XXXIX Rule 2A CPC is not maintainable once the suit stood decreed. Law does not permit to skip the remedies available under Order XXI Rule 32 CPC and resort to the contempt proceedings for the reason that the court has to exercise its discretion under the Act 1971 when an effective and alternative remedy is not available to the person concerned. **Thus, when the matter relates to the infringement of a decree or decretal order embodies rights, as between the parties, it is not expedient to invoke and exercise contempt jurisdiction, in essence, as a mode of executing the decree or merely because other remedies may take time or are more circumlocutory in character. Thus, the violation of permanent injunction can be set right in executing the proceedings and not the contempt proceedings."**

21. The violation or breach of the undertaking which became part of the decree of the Court, amounts to contempt of Court, irrespective of the fact that it is open to the decree-holder to execute the

decree. In other words, for breach of an undertaking the person can be punished for contempt, but the decree has to be got executed in accordance with the prescribed procedure before the contempt civil court. The Supreme Court in **Bank of Baroda vs. Sadruddin Hassan Daya14** held as follows:

"14. The respondents had filed consent terms in this Court but the same contained an undertaking that they would not alienate, encumber or charge the properties to anyone until the decree was satisfied. Acting upon this undertaking and the consent terms, this Court passed the decree....., This Court, therefore, put its imprimatur upon the consent terms and made it a decree of the Court. **The violation or breach of the undertaking which became part of the decree of the Court certainly amounts to contempt of Court, irrespective of the fact that it is open to the decree holder to execute the decree. Contempt is a matter between the Court and the alleged contemner and is not affected in any manner by the rights or obligations of the parties to the litigation inter se.....**

15..... **In the present proceedings we are basically concerned with the violation or breach of the undertaking given by the respondents. Shri C.A. Sundaram, learned senior counsel, has submitted that the Respondent No. 2 was not personally present and the undertaking was given by him through a power of attorney. In our opinion, the mere fact that the respondent No. 2 was personally not present and the undertaking and the consent terms were given through a power of attorney will make no difference as he also got benefit under the consent decree passed by this Court."**

22. In a given case if the court grants time to a tenant to vacate the tenanted premises and the tenant files an undertaking to vacate the same after expiry of the said time, but does not vacate the same, the breach of the undertaking would amount to contempt. (See: **Sakharan Ganesh Aaravandekar & Anr. v. Mahadeo Vinayak Mathkar & Ors.15 and Mahender Kumar Gandhi v. Mohammad Tajer Ali & Ors.16.**

23. In an appropriate case where exceptional circumstances exist, the Court may also resort to the provisions applicable in case of civil contempt, for violation/breach of undertaking/judgment/order or decree. However, before passing any final order on such application, the Court must satisfy itself that there is violation of such judgment, decree, direction or order and such disobedience is wilful and intentional. Though in a case of execution of a decree, the executing Court may not be bothered whether the disobedience of the decree is wilful or not and the Court is bound to execute a decree whatever may be the consequence thereof. In a contempt proceeding, the alleged contemnor may satisfy the Court that disobedience has been under some compelling circumstances, and in that situation, no punishment can be awarded to him. (See: **Niaz Mohammad and others vs. State of Haryana and others17, Bank of Baroda** (supra); and **Rama Narang vs. Ramesh Narang and anothers18.**

24. The contempt proceedings being quasi-criminal in nature, the standard of proof required is the same as in other criminal cases. The alleged contemnor is entitled to the protection of all

safeguards/rights which are provided in Criminal Jurisprudence, including, the benefit of doubt. There must be a clear-cut case of obstruction of administration of justice by a party intentionally to bring the matter within the ambit of the said provision. The case should not rest only on surmises and conjectures. In **Debabrata Bandopadhyay and others vs. The State of West Bengal and another19,** Supreme Court observed as under:

"A question whether there is contempt of court or not is a serious one. The court is both the accuser as well as the judge of the accusation. It behoves the court to act with as great circumspection as possible making all allowances for errors of judgment and difficulties arising from inveterate practices in courts and tribunals. **It is only when a clear case of contumacious conduct not explainable otherwise, arises that the contemnor must be punished..... Punishment under the law of Contempt is called for when the lapse is deliberate and in disregard of one's duty and in defiance of authority. To take action in an unclear case is to make the law of contempt do duty for other measures and is not to be encouraged."**

25. In the facts of the instant case, it is not being disputed by the applicants that the compensation at the rate determined by the Court and the interest, thereon, has been paid by NOIDA. The issue between the parties is whether applicant is entitled to interest @ 10% over and above the statutory interest provided under the Land Acquisition Act. The categorical stand of NOIDA authority is that they have satisfied the decree and no further amount is required to be paid. Rather, it is urged that they have paid excess amount towards interest.

26. In the given facts the question that arises is as to whether the alleged disobedience by NOIDA is wilful and deliberate inviting punishment. Having regard to the fact that NOIDA satisfied the decree, though not to the satisfaction of the applicant, NOIDA authorities cannot be punished. The disobedience, if any, is not intentional and wilful. The matter relates to infringement of a decree or decretal order, it is not expedient to invoke and exercise contempt jurisdiction, in essence, as a mode for executing the decree. The remedy available to the applicant is to take recourse in execution proceedings and not in contempt proceedings. Punishment for disobedience/infringement of a decree is not akin to execution of the decree. The jurisdiction of a Contempt Court is distinct and different than that of the executing Court.

27. For the reasons and law stated herein above, the petition fails, accordingly dismissed.

28. This order and the observations made therein would not prejudice the cause of the applicant in the event the applicant takes remedy of execution of the decree.

(2020)02ILR A1288

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 03.02.2020

BEFORE

THE HON'BLE PANKAJ MITHAL, J.
THE HON'BLE PRADEEP KUMAR SRIVASTAVA, J.

Criminal Misc. Writ Petition No. 1077 of 2020

Ranpal Pradhan ...Petitioner
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Petitioner:
Smt. Swati Agrawal Srivastava

Counsel for the Respondents:

A.G.A.

A. Criminal Law-Uttar Pradesh Gangsters and Anti Social Activities (Prevention) Act,1986-Sections 2(b)(i) ,2(b)(iii),2(b)(iv), 2(b)(vii), 2(b)(viii), 2(b)(xi), 2(b)(xii) and 3(1)-Quashing of FIR-challenge to- FIR is bad for want of gang-chart-Government Orders provide for the preparation of gang-chart and its approval-However, no specific terms mentioned regarding gang-chart ought to be part of the FIR-Since report of District Magistrate reveals that most of the members of the gang are already facing large number of cases and they are operating from jail-investigation of organized criminal activities is necessary in the interest of society-cognizable case made out from the allegations made in the FIR-Hence, dismissed.(Para 3 to 12)

Crl. Misc. writ petition dismissed. (E-6)

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

1. Heard Smt. Swati Agrawal Srivastava, learned counsel for the petitioner and learned A.G.A. for the respondents.

2. The petitioner has preferred this petition for quashing of the F.I.R. dated 30.12.2019 registered as Case Crime No. 0457 of 2019 under Sections 2(b)(i), 2(b)(iii), 2(b)(iv), 2(b)(vii), 2(b)(viii), 2(b)(xi), 2(b)(xii) and 3(1) of Uttar Pradesh Gangsters and Anti Social Activities (Prevention) Act, 1986, Police Station Badalpur, District Gautam Buddh Nagar.

3. The first argument of learned counsel for the petitioner is that as the gang-chart is not enclosed with the F.I.R., it is bad in law.

4. We had given time to the counsel to show us the provision of law which mandates enclosure of the gang-chart with the F.I.R.

5. In that connection, she has produced two Government Orders dated 30.06.2014 and 25.06.2018.

6. The aforesaid Government Orders provide for the preparation of the gang-chart and for its approval, but none of them in any specific terms mentions that the gang-chart ought to be part of the F.I.R.

7. In view of the above, the said Government Orders are of no help to the petitioner and the argument that the F.I.R. is bad for want of gang-chart with the F.I.R. is without any substance.

8. Learned counsel for the petitioner next submitted that the F.I.R. has been lodged without preparing the gang-chart and getting its approval but we find no pleadings in this regard in the petition or in the supplementary affidavit. On the contrary, the F.I.R. mentions that the gang-chart was prepared and approved. The averments to the said effect contained in the F.I.R. cannot be ignored and said to be false.

9. The F.I.R. mentions that D.M., Gautam Buddh Nagar has submitted a report strongly recommended for invoking the provisions of the Uttar Pradesh Gangsters and Anti Social Activities (Prevention) Act, 1986 and that the report of the D.M. in this regard is quite revealing. The relevant part of the said report as referred to in the F.I.R. reads as under-:

"It shows a very dangerous trend of serious crime by the gang and its members. It appears that the gang has become too large. There is an urgent need to bring these unlawful activities within the provisions of law. Else the economic and social life of district Gautam Buddh

Nagar, which is a show window of U.P. and has very high financial interest will significantly get affected adversely. The report clearly suggest that there cannot be a better case under the U.P. Gangsters and Anti Social Activities (Prevention) Act, 1986 than this. On perusal of the history sheet shows that though some cases have been registered under the U.P. Gangsters and Anti Social Activities (Prevention) Act, 1986 but they are against the few gang members only and for particular crime. Such pattern of structure and function of organized criminals working hand in glove together was never taken cognizance of earlier and therefore this report and proposed action under the U.P. Gangsters and Anti Social Activities (Prevention) Act, 1986 by Gautam Buddh Nagar police will prove to be a landmark case in the investigation of such organized criminal activities in the district."

11. The F.I.R. reveals that most of the members of the gang are already facing large number of criminal cases and that they are operating from jail.

12. In view of the aforesaid facts and circumstances, as the allegations made in the F.I.R. make out a cognizable offence against the petitioner and the matter requires investigation, it is not a fit case for quashing the F.I.R. in exercise of writ jurisdiction.

13. Accordingly, we decline to exercise our discretionary jurisdiction in the matter and the writ petition is **dismissed.**

(2020)02ILR A1290

REVISIONAL JURISDICTION
CRIMINAL SIDE

DATED: ALLAHABAD 19.12.2019

BEFORE
THE HON'BLE MANISH KUMAR, J.

Criminal Revision No. 2038 of 2002

Smt. Kamla Devi ...Revisionist
Versus
State of U.P. & Ors. ...Opposite Parties

Counsel for the Revisionist:
Sri Dhirendra Singh Rajput

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

A. Criminal Law-Code of Criminal Procedure,1973-section 397/401 & Indian Penal Code,1860-section 498A-maintainibility of-application for revision made under the erroneous belief that no appeal lies thereto in case of acquittal-while preferring appeal against acquittal u/s 378 Cr.P.C. revisionist preferred Criminal revision which is not maintainable as per statutory provision-hence,dismissed.(Para 3 to 7)

B. Criminal Law-As per Sub-section 5 of Section 401 of Cr.P.C. "where under this code an appeal lies but an application for revision has been made to the High Court by any person and the High court is satisfied that such application was made under the erroneous belief that no appeal lies thereto and that it is necessary in the interest of justice so to do, the High Court may treat the application for revision as a petition of appeal and deal with the same accordingly."(Para 5)

Criminal Revision dismissed.(E-6)

(Delivered by Hon'ble Manish Kumar, J.)

1. The present criminal revision has been preferred against the acquittal order dated 21.09.2002 passed by the Chief Judicial Magistrate Orai District Jalun in

complaint case no. 1487 of 2002 under Section 498 A of Indian Penal Code.

2. From the perusal of the order passed by this Court on 10.12.2002 wherein counsel for the revisionist prays for and is allowed one week time, thereafter nothing has been brought on record.

3. The present proceedings arise out of the complaint case preferred by Smt. Kamla Devi against her husband, Jaith, Jaithani, Father-in-law, Mother-in-law, Sister-in-law and Mamya Sasur. In the complaint case all these persons have been acquitted, against the said order of acquittal, the present criminal revision has been preferred. In case of acquittal appeal lies under Section 378 is quoted below:-

*"**Appeal in case of acquittal** - (1) Save as otherwise provided in sub-Section (2) and subject to the provisions of sub-section (3) and (5):-*

(a) the District Magistrate may, in any case, direct the Public Prosecutor to present an appeal to the Court of Session from an order or acquittal passed by a Magistrate in respect of a cognizable and non-bailable offence;

(b) the State Government may, in any case, direct the Public Prosecutor to present an appeal to the High Court from an original or appellate order of an acquittal passed by any Court other than a High Court (not being an order under Clause (a)} or an order of acquittal passed by the Court of Session in revision.]

(2) If such an order of acquittal is passed in any case in which the offence has been investigated by the Delhi Special Police Establishment constituted under the Delhi Special Police Establishment Act, 1946 (25 of 1946) or by any other agency empowered to make investigation into an offence under any Central Act other than this Code, [the Central Government may, subject to the provisions of sub-section (3), also direct the Public Prosecutor to present an appeal-

(a) to the Court of Session, from an order of acquittal passed by a Magistrate in respect of a cognizable and non-bailable offence;

(b) to the High Court from an original or appellate order of an acquittal passed by any Court other than a High Court [not being an order under clause (a)] or an order of acquittal passed by the Court of Session in revision.]

(3) No appeal under sub-Section (1) or sub-Section (2) shall be entertained except with the leave of the High Court.

(4) If such an order of acquittal is passed in any case instituted upon complaint and the High Court, on an application made to it by the complaint in this behalf, grants special leave to appeal from the order of acquittal, the complaint may present such an appeal to the High Court."

4. At the same time learned A.G.A. has also drawn the attention of this Court to sub-Section 5 of Section 401 of Cr.P.C. which is quoted below:-

" Where under this Code an appeal lies but an application for revision has been made to the High Court by any person and the High Court is satisfied that such application was made under the erroneous belief that no appeal lies thereto and that it is necessary in the interest of justice so to do, the High Court may treat the application for revision as a petition of appeal and deal with the same accordingly."

5. The perusal of sub section 5 of Section 401 of Cr.P.C. wherein it has been provided that where under this Court an appeal lies but an application for revision has been made and the High Court is satisfied that such application was made under the erroneous belief that no appeal lies thereto and in the interest of justice so to do, the High Court may treat the application for revision as a petition of appeal.

6. From the perusal of the record it comes out that no such application was ever made by the revisionist despite a long period of about 17 years have elapsed, saying that the revision was filed under the erroneous belief that no appeal lies thereto.

7. As per the statuary provision the present criminal revision is not maintainable and hence dismissed.

(2020)02ILR A1292

APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 25.02.2020

BEFORE

THE HON'BLE RAJNISH KUMAR, J.

First Appeal From Order No. 152 of 2004

Manju Chauhan ...Appellant
Versus
Smt. Guddi Devi & Ors. ...Respondents

Counsel for the Appellant:
S.R. Rizvi, Manju Gupta, R.M. Dubey, Sanjay Saxena, Uma Gupta, Vina Gupta

Counsel for the Respondents:
Arun Kumar Shukla, Arun Kumar Shukla, M.K. Dixit, Prashant Kumar Mishra

A. Civil Law-Workmen's Compensation Act (8 of 1923) - S. 22 - Compensation - it must be established that the workman was under the employment of the employer and that he agreed to serve the employer subject to his control and supervision - that the workman should be actually working at the time of injury / accident - injury must be caused in the course of & out of the employment
(Para 15)

Appellant called mechanic Om Prakash for repairing engine (pumpset) - Om Prakash told that wheel was cracked - In the meantime deceased (Shyam Narain) of the village came & started the engine despite being stopped - deceased suffered serious injuries and subsequently died - Commissioner held that the deceased was in casual employment of the appellant and died during employment - Held - respondent-claimants failed to prove that the deceased was a mechanic of engine/workman and in employment of the appellant or there was any contract of employment with him - there was no relation of employer and employee between the appellant and the
(Para 30)

First Appeal From Order allowed. (E-5)

List of cases cited :

1. Shri Chintaman Rao & Anr Vs The State of Madhya Pradesh; AIR 1958 SC 388

2. Valli, Minor Sengottaiyan, Minor Neelambal & Periyathayee Vs Sidhan & Ors

3. Kottayan Vs Zacharia Kurien @ Babu

4. Smt. T.S. Shylaja Vs Oriental Insurance Company & Another; AIR 2014 SC 893

(Delivered by Hon'ble Rajnish Kumar, J.)

1. Heard, Ms. Vina Gupta, learned counsel for the appellant and Shri M.K. Dixit, learned counsel for the respondents.

2. The instant First Appeal From Order under Section 30 of The Workmen's

Compensation Act, 1923 (here-in-after referred as the Act of 1923) has emanated from the judgment and award dated 22.01.2004 passed in Case No.13/5/3/3/3/1/25 under Section 22 of the Act of 1923 by the Workmen's Compensation Commissioner / Collector, Kheri (here-in-after referred as the Commissioner).

3. As borne out from the pleadings the deceased Shyam Narain, husband of the respondent no.1 and father of the respondents no.2 to 5 had suffered serious injuries in an accident by the engine and died. An application for compensation was filed by the respondent-claimants under Section 22 of the Act of 1923 being legal heirs of the deceased Shyam Narain alleging therein that the deceased Shyam Narain S/o Sambharu was a mechanic of engine and used to do the repairing of engines. The appellant Manju Chauhan came to the deceased Shyam Narain on 15.06.1996 and requested to him for repairing of his engine. So, the deceased went to his place for working in his employment and as he started the engine after repairing, one wheel of the engine was broken in three parts due to manufacturing defect from which the deceased got serious injuries. The appellant got him admitted in the district hospital and after primary treatment he was advised for treatment in Lucknow. So, he was taken to Gandhi Memorial Associated Hospital, Lucknow where Shyam Narain died on 17.06.1996 at 09:40 in the morning.

4. The appellant was present at the time of accident on spot and got the deceased admitted in the district hospital so there was no need of giving any legal notice to him. The deceased was over 15 years of age at the time of death and his income was Rs.2,000/- per month. The respondent-claimants tried to settle the matter with compromise but the appellant-respondents did not agree. Since the only source of income for livelihood of the family i.e. the deceased Shyam Narain had died therefore they prayed for compensation to the tune of Rs.2,00,000/-.

5. The appellant filed the written statement denying the averments made in the application and stated that the respondent-claimants are not entitled for any compensation. It has further been stated that the deceased neither knew the repairing of engine nor he used to work as mechanic. He used to earn his livelihood by doing tenancy. It has also been stated that the appellant had never called the deceased for repairing of the engine and he had no technical knowledge in regard to engine.

6. It has further been stated that despite prohibiting, the deceased had started the engine of the appellant on 15.06.1996 and excessively enhanced the speed and before the speed could be reduced the wheel of the engine had broken due to negligence of the deceased. Therefore, besides the deceased, Om Prakash and Shri Pal were also injured. The appellant was at a distance from the engine. The deceased was neither an employee of the appellant nor he was called for work. An information in regard to the accident was given by the appellant to the Police on the same day and an application was also submitted on 22.07.1996. It has also been stated that the respondent-claimants had admitted that there was manufacturing defect but the manufacturing company was not impleaded who was a necessary party.

7. On the basis of pleadings eight issues were framed. Thereafter, Guddi Devi as PW-1, Ram Asrey as PW-2 and Nandu Ram as PW-3 were got examined on behalf of the respondent-claimants. On behalf of the appellant, Manju Chauhan the appellant himself as DW-1 and Om Prakash as DW-2 were got examined. After considering the pleadings and evidence the learned Commissioner allowed the claim of the respondent-claimants and awarded an amount of Rs.1,18,236/- alongwith interest @ 9% per annum from the date of accident to be paid to the respondent-claimants as per the apportionment given in the award. Hence the present appeal has been filed challenging the same.

8. Submission of learned counsel for the appellant was that the deceased Shyam Narain was neither called for repairing the engine nor he was in the employment of the appellant. The accident had occurred due to fault of the deceased as despite prohibing he had started the engine and due to excessive speed, the wheel of the engine was broken, in which besides the deceased, two other persons had suffered the injuries. Since, there was no employer-employee relation between the appellant and the deceased therefore he is not covered under the definition of workman given in the Act of 1923. So no compensation could have been awarded and the learned Commissioner, without considering the material and evidence on record, wrongly and illegally held that the deceased Shyam Narain was in casual employment in agriculture business of the appellant. It has also been submitted that since the deceased had suffered injuries in the accident in question therefore the appellant had got him treated in the district hospital and spent money from where he was referred to Lucknow.

9. On the other hand, learned counsel for the respondent-claimants had submitted that the deceased was an engine mechanic. He was called by the appellant for repairing of the engine therefore he was in his casual employment. But despite efforts of the respondent-claimants the appellant was not ready to settle the matter with compromise therefore the claim was filed before the learned Commissioner which has rightly been allowed in accordance with law after considering the pleadings of the parties and evidence. There is no illegality or error in the judgment passed by the learned Commissioner.

10. I have considered the submissions of learned counsel for the parties and perused the record.

11. In view of above, the substantial questions of law involved in this appeal are as to whether the deceased was a workman as defined under Section 2(1)(n) of the Act of 1923 and whether there was any relation of employer and employee between the appellant and the deceased.

12. The relevant provisions of 'The Workmen's (now Employee's) Compensation Act 1923 are extracted below for the convenience:-

"(e) "employer" includes any body of persons whether incorporated or not and any managing agent of an

employer and the legal representative of a deceased employer, and, when the services of workman are temporarily lent or let on hire to another person by the person with whom the workman has entered into a contract of service or apprenticeship means such other person while the workman is working for him."

The definition of workman has been given in Section 2(1)(n) of the Act of 1923, which is reproduced as under:-

"(n) " workman" means any person (other than a person whose employment is of a casual nature and who is employed otherwise than for the purposes of the employer' s trade or business) who is--

(i) a railway servant as defined in section 3 of the Indian Railways Act, 1890 (9 of 1890), not permanently employed in any administrative, district or sub- divisional office of a railway and not employed in any such capacity as is specified in Schedule II, or

(ii) employed12in any such capacity as is specified in Schedule II. whether the contract of employment was made before or after the passing of this Act and whether such contract is expressed or implied, oral or in writing; but does not include any person working in the capacity of a member of3the Armed Forces of the Union]4; and any reference to a workman who has been injured shall, where the workman is dead, include a reference to his dependants or any of them."

13. The definition of workmen was amended by amendment Act 46 of 2000 and the words " Other than a person whose employment is of a casual nature and who is employed otherwise than for the purpose of employer's trade or business" have been omitted. But it would not be applicable on the present case because in the present case the accident is of 15.06.1996. However, even after amendment it is to established that the workman was under the employment of the alleged employer far a claim under the Act of 1923.

14. In view of aforesaid definitions the workman means any person who is employed in any such capacity as specified in the schedule-II. Schedule-II (iii) provides that any person who is employed for the purpose of making, altering, repairing, ornamenting, finishing or otherwise adapting for use, transport or sale any article or part of an article in any premises wherein or within the precincts whereof twenty or more persons are so employed. In state amendment of Uttar Pradesh in Schedule II, after clause (iii), clause (xliii) provides employed in installation, maintenance or repair of pumping equipment used for lifting of water from wells, tub wells, ponds, lakes, streams and the like.

15. Section 3(1) of the Act of 1923 provides the employer's liability for compensation if personal injuries caused to a workman by accident arising out of and in the course of his employment. Therefore, for a claim under the Act of 1923 it is necessary that the workman should be actually working at the time of injury or the accident and the injury must be caused in the course of and out of the employment, which is to be established. The prima facie tests for employer and employee relationship is existence of right in the master to supervise and control the work directly done by the servant not only in the matter of directing what work the servant is to do but also the manner in which he shall do work.

16. From combined reading of above, if persons employed in any premises wherein or within the precincts whereof twenty or more persons are so employed can be treated workmen within the meaning of Section 2(1)(n). Though the schedule has been amended and the words 'wherein or within the precincts whereof twenty or more persons are so employed' has been omitted by Act 45 of 2009 w.e.f. 18.01.2010 but the same is not applicable on the present case because in the present case the accident is of 15.06.1996.

17. The perusal of the record indicates that a claim was filed by the respondent-claimants before the learned Commissioner. The learned Commissioner decided the issues no.1 and 2 without considering the pleadings, evidence and law applicable at the relevant time recording a cryptic finding that it is clear from the statements of local witnesses available on record that the deceased Shyam Narain was a mechanic of engine who had gone to repair the engine of Manju Chauhan i.e. the appellant. In this way the deceased Shyam Narain was in the casual employment in agriculture business of Manju Chauhan while the evidence is otherwise. Since, the deceased Shyam Narain had died in the accident occurred during repairing of engine of Manju Chauhan so his dependents are entitled for compensation under schedule-II, category (xliii) of the Act of 1923. Accordingly, the issues no.1 and 2 are decided against the appellant-respondent and in favour of the respondent-claimants. It is apparent from the aforesaid finding recorded by the learned Commissioner that the rival contentions of the parties and the evidence adduced by them have neither been considered nor discussed before arising on the aforesaid conclusion. The pleadings also does not indicate the Manju Chauhan was in agriculture business.

18. Perusal of the pleadings and evidence of the respondent-claimants indicates that the deceased was a mechanic of engine and he was called by the appellant for repairing his engine. It was denied by the appellant-respondent. It is also reflected from the record that the application dated 22.07.1996 was submitted by the wife of the appellant to the Superintendent of Police, Lakhimpur Kheri alleging therein that on Saturday i.e. 15.06.1996 at about 05:30 in the evening mechanic Om Prakash S/o Sita Ram was repairing the diesel pumpset of the appellant. When the engine was repaired then he was fixing the fan. In the meantime, Shyam Narain S/o Sambharu of his village came and started the engine after lifting the handle despite prohibiting from starting the engine at that time by the husband of the applicant i.e. the appellant and the mechanic Om Prakash but he did not stop and started the engine from the handle. Therefore, due to excessive speed the wheel of engine was broken by which the mechanic Om Prakash, Shri Pal of the village and the deceased Shyam Narain suffered serious injuries. They were got admitted in the Sadar Hospital, Lakhimpur, from where the doctors had referred Shyam Narain to Lucknow Medical College on 16.06.1996 where he died on 17.06.1996. The information of the whole matter was given by the husband of the applicant at the Police Station and now the brothers of the deceased; Ram Vilas and Shyam Vilas S/o Sambharu, on the instigation of other rivals of the village, are harassing and demanding Rs.15,000/- and threatening that failing which they will capture their

land. This complaint, given by the wife of the appellant, was proved by the appellant in his evidence. The respondent-claimants have also stated that after the accident they had tried to settle the matter with compromise but the appellant was not ready, therefore they had filed the claim. Therefore, the allegation in the application also seems to be correct looking to the evidence.

19. In the evidence the appellant has specifically stated that he had called mechanic Om Prakash S/o Sita Ram for repairing engine (pumpset). After repairing he was tightening the fan and told that wheel is cracked and without changing the same it would not be proper to run the engine. But the deceased Shyam Narain despite prohibiting had started the engine and the wheel of engine was broken, on account of which the mechanic Om Prakash, deceased Shyam Narain and Shri Pal of his village had suffered serious injuries and subsequently Shyam Narain had died. It has also been stated by him that after the accident, the appellant had brought the tractor trolley of Ram Gopal of his village in which he had sent them to Sadar Hospital, Lakhimpur.

20. Om Prakash S/o Sita Ram was examined as DW-2, who has stated in his evidence that he was working on the post of operator in a farm. He was called by the appellant for repairing his engine on the date of accident. He also supported the evidence given by the appellant.

21. On behalf of the respondent-claimants the respondent no.1, Guddi Devi W/o the deceased Shyam Narain was examined as PW-1. She is not an eye witness. Though she stated her husband knew the repairing of engine but further stated that she does not know from where he has learnt the same and her husband had not opened any shop for repairing of engine and she also does not know as to where he used to go for repairing but stated that he had gone to the place of the appellant for repairing of the engine. She has also stated that the respondent-claimants and her relatives tried to settle the matter by compromise but the appellant was not ready for it. Therefore she has filed the claim.

22. PW-2, Ram Asrey stated that at the time of accident he was at home and on information he went on the spot and found that the wheel of the engine was broken and the deceased alongwith two others had suffered injuries. But in the cross-examination he has stated that he had gone to his field and on coming back the information was given by his wife. He has also stated that he knows Om Prakash who works in farm and he is a mechanic. In regard to Shyam Narain, he stated that he does not know as to where he learnt the repairing of engine though he had seen him repairing the engine of one Bhajan Singh of Rihua. He has also stated that the deceased and he are of one caste. He is resident of Azamgarh and the deceased of Mau and he knows him.

23. PW-3, Nandu Ram has stated that at the time of accident he was at home. On receiving the information he also went at the spot and saw that the deceased and two others were injured and the appellant had taken to the deceased from his tractor trolley to Lakhimpur. In the cross-examination he has stated that he does not know the date of accident and also as to why Shyam Narain had gone. He also stated that he is of the same caste of the deceased and both are of the same district of Azamgarh.

24. In view of above, the evidence given by the witnesses of the respondent claimants is self contradictory and does not prove that the deceased Satya Narain was a mechanic of engine and gone to repair engine of the appellant. On the other hand it is evident from the evidence that Om Prakash produced as DW-2 was a mechanic who was repairing the engine of the appellant. It is also evident from the complaint given by the wife of the appellant to the Superintendent of Police on 22.06.1996 in regard to the harassment by the brothers of the deceased after the accident on 15.06.1996 and death of the deceased on 17.06.1996, which has been proved in the evidence of the appellant that the engine was repaired by the mechanic Om Prakash and not by the deceased. The mechanic Om Prakash was also examined in evidence as DW-2 and admitted that he was repairing the engine. In the cross-examination nothing could be elicit to disbelieve the evidence. But all these evidences have not been considered and discussed by the learned Commissioner before recording a perverse finding in regard to issues no.1 and 2 and holding that the deceased was in casual employment of the appellant and he died during employment therefore it is not sustainable and liable to be set-aside.

25. Similarly, in regard to issue no.5 no finding has been recorded as to whether the deceased Shyam Narain was himself responsible for the accident and the accident had occurred due to his negligence and only it has been stated that it is clear from the statement of witnesses available on the file that the accident had occurred due to bursting of engine of the appellant for which the deceased Shyam Narain was not responsible. While there is no evidence that the accident had occurred due to bursting of engine and the accident had occurred due to breaking of the wheel. It also shows that the case has been decided without application of mind at all.

26. The Hon'ble Apex Court in the case of ***Shri Chintaman Rao & Another Vs. the State of Madhya Pradesh; AIR 1958 SC 388*** (Three judge Bench) has held that the concept of employment involves three ingredients: (1) Employer (2) Employee and (3) the Contract of Employment. The employer is one who employs i.e. one who engages the services of other persons. The employee is who works for other for hire. The employment is that contract of service between the employer and the employee where under an employee agrees to serve the employer subject to his control and supervision. Therefore, unless a contract of employment between the deceased and the appellant is proved he could not come within the definition of workman and unless the deceased come under the definition of workman he is not entitled for compensation under the Act of 1923.

27. In the present case the respondent-claimants have failed to prove that the deceased was a mechanic of engine and in employment of the appellant or there was any contract of employment with him. Even calling to the mechanic Om Prakash may only be an agreement for service which may not be covered under the Act. Therefore, the injuries suffered by the deceased, on account of which he died, can not be said at all to have been arose out of and in the course of employment at the time of accident.

28. The case of ***Valli, Minor Sengottaiyan, Minor Neelambal and Periyathayee Vs. Sidhan and Others***

dated 29.02.2008 of the Madras High Court, relied by the respondent-claimants in which the accident had occurred on 18.03.1996, was allowed on the ground that death arose out of and in the course of employment and the work of claimant can not be considered to be one of casual nature but the learned Deputy Commissioner had ignored the material evidence on record. The court has also observed that from the definition of word 'Workman' in section 2(1)(n) of the Act it is seen that a person other than a person whose employment is of casual nature and who is employed otherwise than for the purposes of employer's trade or business is a workman as per the definition. Similarly, the other case cited by the learned counsel for the respondents of Kerala High Court in the case of ***Kottayan Vs. Zacharia Kurien @ Babu*** decided on 22.03.2014 is also of no assistance because it is not proved in the present case that the deceased was a mechanic of engine and employed by the appellant.

29. The Hon'ble Apex Court, in the case of ***Smt. T.S. Shylaja Vs. Oriental Insurance Company & Another; AIR 2014 SC 893,*** relied by the respondent-claimants, has held that the High Court could not have, without adverting to the documents vaguely referred to by it have upset the finding of fact which the Commissioner was entitled to record and the High Court has neither referred to nor determined any question of law much less a substantial question of law in existence whereof was a condition precedent for the maintainability of any appeal under Section 30, which can not be disputed.

30. In view of above discussion, this court is of the considered opinion that the respondent-claimants have failed to prove that the deceased was a workman as per the definition under Section 2(1)(n) of the Act of 1923 and there was any relation of employer and employee between the appellant and the deceased. The findings recorded by the learned Commissioner are without application of mind and without considering and appreciating correctly the material and evidence on record, therefore the same are not sustainable in the eyes of law and liable to be set-aside.

31. Thus, the substantial questions of law involved in this appeal are decided in favour of the appellant and against the respondent-claimants. Consequently, the judgment and award dated 22.01.2004 passed in Case No.13/5/3/3/3/1/25 under Section 22 of the Act of 1923 passed by the Workmen's Compensation Commissioner / Collector, Kheri is hereby set-aside and the application filed by the respondent-claimants is dismissed.

32. The appeal is, accordingly, **allowed.** No order as to costs.

(2020)02ILR A1299

APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 28.01.2020

BEFORE
THE HON'BLE JASPREET SINGH, J.

First Appeal From Order No. 366 of 2005

The New India Assurance Co. Ltd.
...Appellant
Versus
Smt. Neelam Jaiswal & Ors.
...Respondents

Counsel for the Appellant:
Anand Mohan, G.S. Chadha, H.S. Chadha, I.P. Singh Chadha

Counsel for the Respondents:
Ravindra Pratap Singh

A. Civil Law-Civil Procedure Code (5 of 1908) - O.41 R.33 - Power of Court of Appeal - to enhance the compensation amount awarded even in absence of cross-appeal or cross objection by claimant - object sought to be achieved is to avoid inconsistency and unworkable decree - Usually power under Rule 33 is exercised when the portion of the decree appealed against is so inseparably connected with the portion not appealed against that for the reason of the latter portion being left untouched either injustice would result or inconsistent decrees would follow

Insurance company preferred appeal in the year 2005 – claimant/respondents neither filed any cross appeal nor filed any cross objection and permitted the quantum to become final – when the judgment was being dictated, oral plea for enhancement of compensation amount raised by the claimant - plea turned down by High Court - *Held* - Insurance Company challenged award on limited ground whether the said award was to be satisfied by the Insurance Company or the owner - There was no challenge to the quantum - Nothing prevented the claimant from filing an appeal or taking cross objections - dismissal of Insurance company appeal would not result in any inconsistent, contrary or unworkable decree (Para 25)

B. Civil Law-Motor Vehicles Act, 1988 - Ss 166 - Practice & Procedure - Claim Petition - merely by quoting wrong provisions under which the claim petition is filed will not denude the jurisdiction of the Authority of the Claims Tribunal

In claim petition it was mentioned it was being filed under Section 163-A, 166, 140 of the Motor Vehicles Act, 1988 - Insurance company contention claimants could not have simultaneously pressed their claim petition in the aforesaid sections - *Held* - it was clear in the mind of the parties that the claim petition was proceeded under Section 166 and merely by incorporating Section 163-A in the nomenclature of the claim petition alongwith Section 166 will not make claim petition to be bad (Para 12)

C. Civil LawMotor Vehicles Act, 1988 - Ss 166 - Practice & Procedure - Claim – merely taking a plea in the written statement will not partake the nature of evidence before the tribunal - unless effort is made to establish and substantiate the said plea by leading evidence (Para 14)

First Appeal From Order dismissed (E-5)

List of cases cited :

1. Jitendra Khimshankar Trivedi & Ors Vs Kasam Daud Kumbhar & Ors 2015 (1) T.A.C. 673

2. New India Assurance Co. Ltd. Vs Resha Devi & Ors 2017 (4) T.A.C. 288

3. Banarsi & Ors Vs Ram Phal 2003 (9) SCC 606

4. Indian Bank Vs ABS Marine Products 2006 (5) SCC 72

5. Lakshmanan & Ors Vs G. Ayyasamy 2016 (13) SCC 165

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

1. Heard Shri I. P. Chadha learned counsel for the appellant and Shri R. P. Singh learned counsel appearing for the claimant-respondents no.1, 2 and 3.

2. None has put in appearance on behalf of the respondents no.4 to 6 and accordingly the appeal has been heard in their absence.

3. The insurance company has preferred the instant appeal being aggrieved against the award dated

18.01.2005 passed in Claim Petition No.442 of 1998 by the Motor Accident Claims Tribunal/Additional District Judge, Court No.2, Barabanki wherein a sum of rupees three lakh forty seven thousand alongwith six per cent interest per annum has been awarded in favour of the claimant-respondents no.1, 2 and 3.

4. The submission of the learned counsel for the appellant is two fold:-

(i) The claim petition was bad at the very inception since it mentioned that it was being filed under Section 163-A, 166, 140 of the Motor Vehicles Act, 1988. Thus, it has been urged that the claimants could not have simultaneously pressed their claim petition in the aforesaid sections and they had to elect whether it was under 163-A or under Section 166. This not having been done, has vitiated the proceedings and accordingly the award is bad.

(ii) It has also been urged that a specific plea was taken by the offending truck owner that his truck was not involved in the accident which is said to have occurred within the jurisdiction of Barabanki while at the alleged given time and date of the accident the said truck was stationed at Muzaffar Nagar. It has also been stated that in the FIR which was lodged post the accident. The truck number was not mentioned nor the police upon investigation found the involvement of the aforesaid truck. Consequently, the finding given by the tribunal in respect of the truck being involved in the accident also suffers from error and for the said reason, the award cannot be sustained.

5. Per contra Shri R. P. Singh learned counsel for the respondents no.1, 2 and 3 has submitted that merely by quoting wrong provisions under which the claim petition is filed will not denude the jurisdiction of the Authority of the Claims Tribunal.

6. In light of the pleadings and the evidence led it was clear in the mind of the parties that the claim petition was proceeded under Section 166 and merely by incorporating Section 163-A in the nomenclature of the claim petition alongwith Section 166-A will not make claim petition to be bad and the aforesaid submissions of the learned counsel for the appellant does not merit consideration.

7. It has further been submitted by Shri R.P.Singh that a specific issue was framed and in light thereof the party had to lead evidence. Since the owner of the truck had raised a plea in his written statement that on the date and time of the alleged accident the aforesaid truck was at Muzaffar Nagar, this plea was required to be proved by the truck owner. However, he led no evidence on the aforesaid point and therefore merely by taking a plea in the written statement will not partake the nature of evidence before the tribunal, to consider the aforesaid plea as having been proved and thus the other ground as raised by the learned counsel for the appellant also has no force.

8. The Court has heard the learned counsel for the parties and also perused the record.

9. Briefly, the facts giving rise to the aforesaid appeal are, that the claim petition bearing No.442 of 1998 was filed before the Motor Accident Claims Tribunal/Additional District Judge, Court No.2, Barabanki with the averments that Ashok Kumar Jaiswal on 10.11.1998 was

riding his scooter bearing number UME 8120 and was moving towards Zaidpur. It is pleaded that while he had reached Phalahri Chauraha in police station Barabanki, a truck bearing number HR-37/2901 which was being driven rashly and negligently hit the scooter of Ashok Kumar Jaiswal who fell and sustained grievous injuries as a result he died on the spot. The accident was reported to the police concerned by the real brother of Ashok Kumar Jaiswal and a case was registered in respect thereto. It is in respect of the aforesaid that the claim petition was filed by the wife and children of Ashok Kumar Jaiswal stating that Ashok Kumar Jaiswal was earning about rupees five thousand a month and for the aforesaid loss, a total claim compensation of rupees eleven lakh forty seven thousand one hundred and twenty was claimed.

10. The owner of the offending truck filed his written statement wherein he pleaded that his vehicle was duly insured with New India Assurance Company Ltd. which was valid for the period 19.01.1998 to 18.01.1999. It also pleaded that the vehicle had a valid permit and its driver also had an effective and valid licence. The substantial plea raised by the truck owner was to the effect that on the date of the aforesaid accident his truck was at Muzaffar Nagar and that in the FIR also no truck number was mentioned and that the police also filed a final report and in view thereof the involvement of the truck was questionable while a specific plea was taken that no accident had occurred from the aforesaid truck.

11. Upon the pleadings of the parties, the tribunal framed five issues. The tribunal after considering the evidence including the statement of two eye witnesses concluded that the accident occurred on account of rash and negligent driving of the truck bearing number HR 37/2901 wherein Ashok Kumar Jaiswal received injuries and ultimately he expired. The tribunal also found that the aforesaid truck was duly insured. Its driver had a valid licence and all the necessary papers, accordingly upon assessing the compensation, it awarded a sum of rupees three lakh forty seven thousand alongwith six per cent interest by means of award dated 18.01.2005. It is this award which has been assailed in the instant appeal.

12. Upon considering the material available on record in light of the submissions made by the learned counsel for the appellant. This Court finds that merely because in the claim petition there is a mention of Section 163-A alongwith Section 166 will not denude the powers of the tribunal to try the case. The income of the deceased was stated to be rupees five thousand per month coupled with the fact that clear evidenced was led to establish the negligence of the truck driver.

13. In view of the above as well as in light of the evidence led before the tribunal, there can be no doubt that the parties were clear in the mind what case they had to meet and the claim petition was apparently under Section 166 of the Motor Vehicles Act. The ground taken by the learned counsel for the appellant is wholly super technical without any basis coupled with the fact that there is nothing on record to indicate that at any point of time the appellant had tried to confine to bring the inquiry within the scope of 163-A. Thus, for the aforesaid reasons, the first contention of the learned counsel for the appellant fails.

14. Coming to the other ground it would be relevant to note that the claimants have been able to establish the factum of the accident with the truck in question by examining two eye witnesses. The plea was raised by the truck owner. However, he did not lead any evidence to indicate that his truck was stationed at Muzaffar Nagar. Rather no evidence has been led at all on behalf of the truck owner. Merely by raising the plea in his written statement will not give the leverage to either the truck owner or to the insurance company who has been saddled with the liability, when no such plea was raised before the tribunal and no effort was made to establish and substantiate the aforesaid plea.

15. At this stage, learned counsel for the claimant-respondents Shri R. P. Singh has made a submission that the award passed by the tribunal is on the lower side; inasmuch as amount towards non-pecunary damages have been inadequately awarded. It has further been submitted that the Court while hearing on appeal can enhance the amount awarded if it finds that the amount is inadequate.

16. The Court had put a query to the learned counsel for the respondents that the appeal has been preferred in the year 2005 and the claimant-respondents have not filed any cross appeal nor filed any cross objection, then under what circumstances at the stage when the judgment was being dictated, this plea has been raised regarding enhancement in absence of any cross objections or cross appeal.

17. Shri R. P. Singh submits that the Court has ample power under Order 41 Rule 33 CPC and in order to do substantial justice, the Court can enhance the amount. Shri Singh has also relied upon a decision of the Apex Court in the case of ***Jitendra Khimshankar Trivedi and others Vs. Kasam Daud Kumbhar and others reported in 2015 (1) T.A.C. 673*** and a Division Bench Judgment of this Court in the case of ***New India Assurance Co. Ltd. Vs. Resha Devi and others reported in 2017 (4) T.A.C. 288***.

18. Relying upon the aforesaid decisions, learned counsel for the claimant-respondents has submitted that the Division Bench of this Court in the case of Resha Devi (supra) more specifically in paragraph-16 has laid down that where circumstances exist which necessitates the exercise of discretion conferred by Rule 33 of Order 41, the Court cannot be found wanting when it comes to the exercise of such powers and therefore even though the claimant-respondents have not filed any cross appeal or cross objections yet the award can be enhanced.

19. Before dealing with the aforesaid submission of Shri R. P. Singh, it will be apposite to note the provisions of Order 41 Rule 33 CPC and order 41 Rule 22 CPC and how they differ in its applicability.

20. This aspect of the matter regarding the difference between Order 41 Rule 22 and Rule 33 CPC was considered by the Apex Court in the case of ***Banarsi and others Vs. Ram Phal reported in 2003 (9) SCC 606.*** The question before the Apex Court was regarding the powers of the appellate court to interfere and reverse or modify the decree appealled against by the appellant in absence of any cross appeal or cross objection by the respondents under Order 41 Rule 22 CPC

and the scope and power conferred on the appellate court under Rule 33 of Order 41 CPC.

21. The Apex Court taking note of the amendment brought in Rule 22 of Order 41 CPC and relying upon the earlier judgments noticing the scope of the aforesaid provisions first dealt with the scope of Order 41 Rule 22 CPC and the relevant portion reads as under:-

9. Any respondent though he may not have filed an appeal from any part of the decree may still support the decree to the extent to which it is already in his favour by laying challenge to a finding recorded in the impugned judgment against him. Where a plaintiff seeks a decree against the defendant on grounds (A) and (B), any one of the two grounds being enough to entitle the plaintiff to a decree and the court has passed a decree on ground (A) deciding it for the plaintiff while ground (B) has been decided against the plaintiff, in an appeal preferred by the defendant, in spite of the finding on ground (A) being reversed the plaintiff as a respondent can still seek to support the decree by challenging the finding on ground (B) and persuade the appellate court to form an opinion that in spite of the finding on ground (A) being reversed to the benefit of the defendant-appellant the decree could still be sustained by reversing the finding on ground (B) though the plaintiff-respondent has neither preferred an appeal of his own nor taken any cross-objection. A right to file cross-objection is the exercise of right to appeal though in a different form. It was observed in Sahadu Gangaram Bhagade v. Special Dy. Collector, Ahmednagar [(1970) 1 SCC 685 : (1971) 1 SCR 146] that the right given to a respondent in an appeal to file cross-objection is a right given to the same extent as is a right of appeal to lay challenge to the impugned decree if he can be said to be aggrieved thereby. Taking any cross-objection is the exercise of right of appeal and takes the place of cross-appeal though the form differs. Thus it is clear that just as an appeal is preferred by a person aggrieved by the decree so also a cross-objection is preferred by one who can be said to be aggrieved by the decree. A party who has fully succeeded in the suit can and needs to neither prefer an appeal nor take any cross-objection though certain finding may be against him. Appeal and cross-objection -- both are filed against decree and not against judgment and certainly not against any finding recorded in a judgment. This was the well-settled position of law under the unamended CPC.

10. The CPC amendment of 1976 has not materially or substantially altered the law except for a marginal difference. Even under the amended Order 41 Rule 22 sub-rule (1) a party in whose favour the decree stands in its entirety is neither entitled nor obliged to prefer any cross-objection. However, the insertion made in the text of sub-rule (1) makes it permissible to file a cross-objection against a finding. The difference which has resulted we will shortly state. A respondent may defend himself without filing any cross-objection to the extent to which decree is in his favour; however, if he proposes to attack any part of the decree he must take cross-objection. <u>The amendment inserted by the 1976 amendment is clarificatory and also enabling and this may be made precise by analysing the provision. There may be three situations:</u>

(i) The impugned decree is partly in favour of the appellant and partly in favour of the respondent.

(ii) The decree is entirely in favour of the respondent though an issue has been decided against the respondent.

(iii) The decree is entirely in favour of the respondent and all the issues have also been answered in favour of the respondent but there is a finding in the judgment which goes against the respondent.

11. In the type of case (i) it was necessary for the respondent to file an appeal or take cross-objection against that part of the decree which is against him if he seeks to get rid of the same though that part of the decree which is in his favour he is entitled to support without taking any cross-objection. The law remains so post-amendment too. In the type of cases (ii) and (iii) pre-amendment CPC did not entitle nor permit the respondent to take any cross-objection as he was not the person aggrieved by the decree. Under the amended CPC, read in the light of the explanation, though it is still not necessary for the respondent to take any cross-objection laying challenge to any finding adverse to him as the decree is entirely in his favour and he may support the decree without cross-objection; the amendment made in the text of sub-rule (1), read with the explanation newly inserted, gives him a right to take cross-objection to a finding recorded against him either while answering an issue or while dealing with an issue. The advantage of preferring such cross-objection is spelled out by sub-rule (4). In spite of the original appeal having been withdrawn or dismissed for default the cross-objection taken to any finding by the respondent shall still be available to be adjudicated upon on merits which remedy was not available to the respondent under the unamended CPC. In the pre-amendment era, the withdrawal or dismissal for default of the original appeal disabled the respondent to question the correctness or otherwise of any finding recorded against the respondent.

22. The matter before the Apex Court in the case of Banarsi (supra) was considering an appeal arising out of a suit for specific performance wherein the trial court had passed a decree of refund of the earnest money. However, it also provided a conditional decree that in case if the aforesaid sum was not paid within a period of two months, then the defendant was directed to execute the sale deed. Before the appellate court two appeals came to be filed and both the appeals were dismissed. However, a fact to be noted was that the respondents did not file any cross objection. Thereafter the matter came up before the High Court where again two appeals were preferred and the High Court opined that it was open for the respondents not to file an appeal against the trial court's decree on the belief that he would either get his money back within two months as provided or the contract would be specifically performed. On account of the interim order since the decretal amount was not paid, hence while dismissing the appeal the High Court in exercise of powers under Order 41 Rule 33 passed a decree for specific performance in favour of the respondents.

23. It is in this backdrop as noticed above, the Apex Court considered the provisions of Order 41 Rule 22 and then it explained the applicability for the aforesaid propositions which read as under:-

"12. ....A plaintiff who files a suit for specific performance claiming

compensation in lieu of or in addition to the relief of specific performance or any other relief including the refund of any money has a right to file an appeal against the original decree if the relief of specific performance is refused and other relief is granted. The plaintiff would be a person aggrieved by the decree in spite of one of the alternative reliefs having been allowed to him because what has been allowed to him is the smaller relief and the larger relief has been denied to him. A defendant against whom a suit for specific performance has been decreed may file an appeal seeking relief of specific performance being denied to the plaintiff and instead a decree of smaller relief such as that of compensation or refund of money or any other relief being granted to the plaintiff for the former is larger relief and the latter is smaller relief. The defendant would be the person aggrieved to that extent. It follows as a necessary corollary from the abovesaid statement of law that in an appeal filed by the defendant laying challenge to the relief of compensation or refund of money or any other relief while decree for specific performance was denied to the plaintiff, the plaintiff as a respondent cannot seek the relief of specific performance of contract or modification of the impugned decree except by filing an appeal of his own or by taking cross-objection.

13. We are, therefore, of the opinion that in the absence of cross-appeal preferred or cross-objection taken by the plaintiff-respondent the first appellate court did not have jurisdiction to modify the decree in the manner in which it has done. Within the scope of appeals preferred by the appellants the first appellate court could have either allowed the appeals and dismissed the suit filed by the respondent in its entirety or could have deleted the latter part of the decree which granted the decree for specific performance conditional upon failure of the defendant to deposit the money in terms of the decree or could have maintained the decree as it was passed by dismissing the appeals. What the first appellate court has done is not only to set aside the decree to the extent to which it was in favour of the appellants but also granted an absolute and out-and-out decree for specific performance of agreement to sell which is to the prejudice of the appellants and to the advantage of the respondent who has neither filed an appeal nor taken any cross-objection."

24. Thereafter the Apex Court considered the provisions of Order 41 Rule 33 and also its scope and relying upon the earlier decisions of the Apex Court in the case of ***Pannalal Vs. State of Bombay*** reported in A.I.R. 1963 S.C. 1516, ***Harihar Prasad Singh Vs. Balmiki Prasad Singh*** reported in (1975) 2 S.C.R. 932 and ***Nirmala Bala Ghose Vs. Balai Chand Ghose,*** reported in A.I.R. 1965 S.C. 1874 has held in under paras 15, 16, 17, 18 and 19 as under:-

15. Rule 4 seeks to achieve one of the several objects sought to be achieved by Rule 33, that is, avoiding a situation of conflicting decrees coming into existence in the same suit. The above said provisions confer power of the widest amplitude on the appellate court so as to do complete justice between the parties and such power is unfettered by consideration of facts like what is the subject-matter of the appeal, who has filed the appeal and whether the appeal is being dismissed, allowed or disposed of by modifying the judgment appealed against. While dismissing an appeal and though

confirming the impugned decree, the appellate court may still direct passing of such decree or making of such order which ought to have been passed or made by the court below in accordance with the findings of fact and law arrived at by the court below and which it would have done had it been conscious of the error committed by it and noticed by the appellate court. While allowing the appeal or otherwise interfering with the decree or order appealed against, the appellate court may pass or make such further or other, decree or order, as the case would require being done, consistently with the findings arrived at by the appellate court. The object sought to be achieved by conferment of such power on the appellate court is to avoid inconsistency, inequity, inequality in reliefs granted to similarly placed parties and unworkable decree or order coming into existence. The overriding consideration is achieving the ends of justice. Wider the power, higher the need for caution and care while exercising the power. Usually the power under Rule 33 is exercised when the portion of the decree appealed against or the portion of the decree held liable to be set aside or interfered by the appellate court is so inseparably connected with the portion not appealed against or left untouched that for the reason of the latter portion being left untouched either injustice would result or inconsistent decrees would follow. The power is subject to at least three limitations: firstly, the power cannot be exercised to the prejudice or disadvantage of a person not a party before the court; secondly, a claim given up or lost cannot be revived; and thirdly, such part of the decree which essentially ought to have been appealed against or objected to by a party and which that party has permitted to achieve a finality cannot be reversed to the advantage of such party. A case where there are two reliefs prayed for and one is refused while the other one is granted and the former is not inseparably connected with or necessarily depending on the other, in an appeal against the latter, the former relief cannot be granted in favour of the respondent by the appellate court exercising power under Rule 33 of Order 41.

16.Panna Lal v. State of Bombay [AIR 1963 SC 1516 : (1964) 1 SCR 980] so sets out the scope of Order 41 Rule 33 in the widest terms:

The wide wording of Order 41 Rule 33 was intended to empower the appellate court to make whatever order it thinks fit, not only as between the appellant and the respondent but also as between a respondent and a respondent. It empowers the appellate court not only to give or refuse relief to the appellant by allowing or dismissing the appeal but also to give such other relief to any of the respondents as "the case may require'. If there was no impediment in law the High Court in appeal could, therefore, though allowing the appeal of the defendant-appellant by dismissing the plaintiff's suits against it, give the plaintiff-respondent a decree against any or all the other defendants who were parties to the appeal as respondents. While the very words of the rule make this position abundantly clear the Illustration puts the position beyond argument.

The suit was filed by the plaintiff impleading the State Government and the Deputy Commissioner seeking recovery of compensation for the work done under a contract and the price of the goods supplied. The trial court held that the State was liable as it had beyond doubt benefited by the performance of the plaintiff. The suit was decreed against the

State. The State preferred an appeal in the High Court. The plaintiff and other defendants including the Deputy Commissioner were impleaded as respondents. Disagreeing with the trial court, the High Court held that the contract entered into by the Deputy Commissioner was not binding on the State Government; that the Deputy Commissioner signed the contract at his own discretion; and further, that the contract not having been entered into in the form as required under Section 175(3) of the Government of India Act, 1935, was not enforceable against the State Government. The High Court also held that the Government could not be held to have ratified the action of the contract entered into by the Deputy Commissioner. The State was held also not to have benefited by the performance of the plaintiff. On this finding, the High Court set aside the trial court's decree passed against the State Government. In an appeal to this Court, the Constitution Bench held that it was a fit case for the exercise of jurisdiction under Order 41 Rule 33 CPC. On the findings arrived at by the High Court, while setting aside the decree against the State, the High Court should have passed a decree against the Deputy Commissioner. It was not necessary for the plaintiff to have filed any cross-objection and the Illustration appended to Order 41 Rule 33 was enough to find solution.

17. In Rameshwar Prasad v. Shambehari Lal Jagannath [AIR 1963 SC 1901 : (1964) 3 SCR 549] the three-Judge Bench speaking through Raghubar Dayal, J. observed that:

"Rule 33 really provides as to what the appellate court can find the appellant entitled to. It empowers the appellate court to pass any decree and make any order which ought to have been passed or made in the proceedings before it and thus could have reference only to the nature of the decree or order insofar as it affects the rights of the appellant. It further empowers the appellate court to pass or make such further or other decree or order as the case may require. The court is thus given a wide discretion to pass such decrees and orders as the interests of justice demand. Such a power is to be exercised in exceptional cases when its non-exercise will lead to difficulties in the adjustment of rights of the various parties." (vide AIR p. 1905, para 17)

(emphasis supplied)

18. In Harihar Prasad Singh v. Balmiki Prasad Singh [(1975) 1 SCC 212] the following statement of law made by Venkatarama Aiyar, J. (as His Lordship then was) in the Division Bench decision in Venukuri Krishna Reddi v. Kota Ramireddi [AIR 1954 Mad 848 : (1954) 2 MLJ 559] was cited with approval which clearly brings out the wide scope of power contained in Rule 33 and the Illustration appended thereto, as also the limitations on such power: (SCC p. 236, para 36)

"Though Order 41 Rule 33 confers wide and unlimited jurisdiction on courts to pass a decree in favour of a party who has not preferred any appeal, there are, however, certain well-defined principles in accordance with which that jurisdiction should be exercised. Normally, a party who is aggrieved by a decree should, if he seeks to escape from its operation, appeal against it within the time allowed after complying with the requirements of law. Where he fails to do so, no relief should ordinarily be given to him under Order 41 Rule 33.

But there are well-recognised exceptions to this rule. One is where as a result of interference in favour of the appellant it becomes necessary to readjust the rights of other parties. A second class of cases based on the same principle is where the question is one of settling mutual rights and obligations between the same parties. A third class of cases is when the relief prayed for is single and indivisible but is claimed against a number of defendants. In such cases, if the suit is decreed and there is an appeal only by some of the defendants and if the relief is granted only to the appellants there is the possibility that there might come into operation at the same time and with reference to the same subject-matter two decrees which are inconsistent and contradictory. This, however, is not an exhaustive enumeration of the class of cases in which courts could interfere under Order 41 Rule 33. Such an enumeration would neither be possible nor even desirable."

19. In the words of J.C. Shah, J. speaking for a three-Judge Bench of this Court in Nirmala Bala Ghose v. Balai Chand Ghose [AIR 1965 SC 1874 : (1965) 3 SCR 550] the limitation on discretion operating as bounds of the width of power conferred by Rule 33 can be so formulated: (AIR p. 1884, para 22)

"The rule is undoubtedly expressed in terms which are wide, but it has to be applied with discretion, and to cases where interference in favour of the appellant necessitates interference also with a decree which has by acceptance or acquiescence become final so as to enable the court to adjust the rights of the parties. Where in an appeal the court reaches a conclusion which is inconsistent with the opinion of the court appealed from and in adjusting the right claimed by the appellant it is necessary to grant relief to a person who has not appealed, the power conferred by Order 41 Rule 33 may properly be invoked. The rule however does not confer an unrestricted right to reopen decrees which have become final merely because the appellate court does not agree with the opinion of the court appealed from."

25. Thus applying the aforesaid principles as laid down by the Apex Court, it would indicate that the decree passed by the tribunal is not inseparablly connected nor there are two reliefs. The award is in favour of the claimants and the amount was crystallized. The dispute before this Court as raised by the Insurance Company was limited to the extent whether the said award was to be satisfied by the Insurance Company or the owner. There was no challenge to the quantum which by not filing a cross appeal or cross objection had attained finality. Nothing prevented the respondents herein from filing an appeal or taking cross objections. The dismissal of the present appeal is not resulting in any inconsistent, contrary or unworkable decree which may come into existence while the Appellate Court interferes with the award so as to enable this Court to exercise its power under Order 41 Rule 33 CPC.

26. In the aforesaid backdrop as well as the dictum of the Apex Court under what circumstances Order 41 Rule 33 CPC is to be applied, does not apply in the present facts and circumstances and for the said reason, this Court is not inclined to countenance the arguments raised by the learned counsel for the claimants-respondents.

27. There is another angle to look at the aforesaid situation. In the decision relied upon by the learned counsel for the respondents in the case of Resha Devi (supra) it would be seen that the appeal had been preferred by the Insurance Company. The submission of the learned counsel for the Insurance Company is noted in paragraph-4 of the judgment of the Division Bench and from the perusal whereof, it would indicate that the question before Hon'ble the Division Bench as raised by the Insurance Company was on quantum; inasmuch as it had been contended that the multiplier as adopted by the tribunal was on the higher side and the compensation accordingly was excessive.

28. It is in the aforesaid circumstance, where the question of quantum was before the Division Bench and in such circumstance considering the fact that the Division Bench found that the award was on the lower side had applied the power under Order 41 Rule 33 CPC and has enhanced the award by adding non-pecuniary damages. Thus, it would be seen that the facts before the Division Bench were completely different; inasmuch as the issue of quantum was before the High Court specifically raised by the Insurance Company and as an appeal is a continuation of the proceedings and the tribunal is required to hold an inquiry to ascertain the compensation which is just and fair, hence in the aforesaid circumstances where the Division Bench came to be conclusion that the Insurance Company was contending that the award was excessive, but it found that it was on the lower side, hence in order to do substantial justice despite the claimants did not file a cross appeal the Division Bench exercised its power under Order 41 Rule 33 CPC and enhance the same.

29. Similarly, in the case of Jitendra Khimshankar Trivedi (supra) the issue before the Apex Court was regarding the quantum of compensation. Moreover, the decision of the Apex Court in paragraph-15 has clearly noticed that the said judgment was being passed by exercising powers under Article 142 of the Constitution and accordingly the relevant portion reads as under:-

"15. As against the award passed by the Tribunal even though the claimants have not preferred any appeal and even though the claimants have then prayed for compensation of Rs.2,96,480/-, for doing complete justice to the parties, exercising jurisdiction under Article 142 of the Constitution of India, we deem it appropriate to award enhanced compensation of Rs.6,47,00/- to the claimants."

30. At this juncture, it will also be relevant to note that the Apex Court in the case of ***Indian Bank Vs. ABS Marine Products reported in 2006 (5) SCC 72*** has clearly held that the law or directions issued under Article 142 of the Constitution do not lay a binding precedent.

31. In view of the above, the decisions of the Apex Court in the case of Jitendra Khimshankar Trivedi (supra) does not come to the rescue of the claimant-respondents.

32. In light of the aforesaid discussions, this Court is of the considered view that the facts and circumstances of the present case does not permit this Court to invoke the powers under Order 41 Rule 33 CPC as suggested by the claimants respondent to enhance the compensation while this Court finds that since the claimants-respondents did not choose to file any cross appeal or cross objections and permitted the quantum to have become

final cannot seek the shelter of the aforesaid decisions relied upon by the claimant-respondents and for the said reason, this Court rejects the submissions of the learned counsel for the claimant-respondents.

33. This Court is also fortified in its view in light of the later judgment of the Apex Court in the case of ***Lakshmanan and others Vs. G. Ayyasamy reported in 2016 (13) SCC 165*** and the relevant portion whereof reads as under:-

"7...Usually the power under Rule 33 is exercised when the portion of the decree appealed against or the portion of the decree held liable to be set aside or interfered by the appellate court is so inseparably connected with the portion not appealed against or left untouched that for the reason of the latter portion being left untouched either injustice would result or inconsistent decrees would follow. The power is subject to at least three limitations: firstly, the power cannot be exercised to the prejudice or disadvantage of a person not a party before the court; secondly, a claim given up or lost cannot be revived; and thirdly, such part of the decree which essentially ought to have been appealed against or objected to by a party and which that party has permitted to achieve a finality cannot be reversed to the advantage of such party. A case where there are two reliefs prayed for and one is refused while the other one is granted and the former is not inseparably connected with or necessarily depending on the other, in an appeal against the latter, the former relief cannot be granted in favour of the respondent by the appellate court exercising power under Rule 33 of Order 41." (Ram Phal case [Banarsi v. Ram Phal, (2003) 9 SCC 606] , SCC p. 619, para 15) (emphasis supplied)

8. In support of the same proposition of law, the learned counsel for the appellants placed reliance upon another judgment of this Court in Pralhad v. State of Maharashtra [Pralhad v. State of Maharashtra, (2010) 10 SCC 458 : (2010) 4 SCC (Civ) 212] , wherein this Court after interpretation of Order 41 Rule 33 CPC has clearly held that in the absence of an independent appeal or cross-objection being filed by the aggrieved party, the relief which was denied by the courts below cannot be granted in the second appeal filed by the appellant."

34. In light of the above and upon perusal of the judgment/award passed by the Motor Accident Claim Tribunal dated 18.01.2005, this Court is satisfied that the same does not suffer from any error and is based on material evidence available on record and is accordingly affirmed.

35. In light of the above discussions, the appeal is devoid of merits and is accordingly dismissed. In the facts and circumstances, there shall be no order as to costs. Any amount deposited with this Court shall be remitted to the tribunal concerned to be released in favour of the claimants-respondent in accordance with the award and the rest amount shall be deposited by the appellant before the tribunal concerned within a period of eight weeks from today.

(2020)02ILR A1311

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 25.02.2020

BEFORE
THE HON'BLE RAJNISH KUMAR, J.

First Appeal From Order No. 456 of 2005

Smt. Pramila Chopra & Ors. ...Appellants
Versus
New India Insurance Company Ltd. & Ors. ...Respondents

Counsel for the Appellants:
K.C. Tripathi, Deepak Kumar Agarwal

Counsel for the Respondents:
Atul Shukla, Pradeep Raje, Sumit Mishra, U.P.S. Kushwaha

A. Civil Law-Motor Accident claim - Motor Vehicles Act (59 of 1988) - Composite Negligence - claimant entitled to sue - both or any one of the joint tort feasors - and to recover the entire compensation - as liability of joint tort feasors is joint and several

Accident occurred due to negligence of drivers of jeep and of the matador - owner, driver and insurer of one of the vehicle not impleaded - *Held* - Tribunal not justified in awarding only half of the compensation assessed by it from the insurance company of the vehicle which was impleaded - claimants are entitled for whole of the compensation from the Driver / Owner / Insurance Company of the vehicle impleaded who may sue the other (Para 21)

B. Civil Law-Motor Accident claim - Motor Vehicles Act (59 of 1988) - Contributory Negligence - in the case of contributory negligence the person himself contributes to the accident

Deceased travelling in the jeep no.UMF 6695 - accident occurred due to negligence of drivers of jeep no.UMF 6695 and the driver of the matador no. DBL 6897, coming from the opposite side - not a case of contributory negligence - deceased can not be said to have contributed in the happening of the accident (Para 18)

C. Civil Law-Motor Vehicles Act (59 of 1988) - S.168 – Just Compensation - Function of Tribunal/ Court under S.168 is to award 'just compensation' - No restriction to Tribunal/Court to award compensation in excess of amount claimed - "just compensation" is one which is reasonable, based on evidence produced on record (Para 17)

Held - Respondent Insurance Company - directed to pay compensation alongwith interest @ 8% per annum w.e.f. the date of filing of petition till the date of realization. (Para 35)

First Appeal from Order allowed (E-5)

List of cases cited :

1. Jitendra Khimshankar Trivedi & Ors Vs Kasam Daud Kumbhar & Ors 2015 (1) TAC 673

2. Ramla Vs National Insurance Company Limited (2019) 2 SCC 192

3. Khenyei Vs New India Assurance Company 2015 (2) TAC 677 (SC)

4. Rajesh & Ors Vs Rajbir Singh & Ors (2013) 9 SCC 54 / 2013 (3) TAC 679

5.Sandhya Rani Debbarma & Ors Vs The National Insurance Company Limited & Ors 2016 (4) TAC 165 SC

6.National Insurance Company Limited Vs Pranay Sethi & Ors (2017) 16 SCC 680

7. Sri Niwas Mani Tripathi & Ors Vs New India Assurance Company Limited & Ors 2014 (2) AICC 1066

8. Alok Shankar Pandey Vs Union of India & Ors AIR 2007 SC 1198

9. Kantibhai Valjibhai Shah Vs Kokilaben & Ors 2011 (3) TAC 112 (Gujarat)

10. New India Assurance Company Limited Vs Vimla Devi & Ors 2011 (3) TAC 70 (SC)

11.Amrit Lal Sood & Anr Vs Kaushalya Devi Thaper & Ors 1998 (2) TAC 97 (SC)

12.Shantaben & Ors Vs Yakubbhai Ibrahimbhai Patel & Ors 2013 (2) TAC 791 (Guj)

(Delivered by Hon'ble Rajnish Kumar, J.)

1. Heard, Shri Deepak Kumar, learned counsel for the appellant and Shri U.P.S. Kushwaha, learned counsel for the respondent no.1 New India Assurance Company Ltd.

2. The instant appeal has been filed for modification of the judgment and award dated 17.02.2005 passed in claim petition no. 35 of 1988; Smt. Pramila Chopra and others versus New India Assurance Company Ltd. and others by Motor Accident Claims Tribunal, /Additional District Judge, Court no. 1, Lucknow by means of which the claim petition has been partly allowed and enhancement of the amount of compensation.

3. The brief facts of the case for adjudication of the present appeal are that on 18.06.1988 deceased Madan Chopra was coming from Bareilly to Kanpur by Jeep no. UMF-6695. When he reached near village Dinmayapur Vivku at about 08:30 A.M. within the circle of Police Station Shahabad, district Hardoi, a Matador no. DBL-6897 coming from the opposite side, driven by it's driver rashly and negligently, dashed the jeep of the deceased. The Madan Chopra, died on the spot on account of injuries sustained by him in the accident. The deceased was travelling as a passenger in the jeep. The jeep was being plied on a normal speed. The entire responsibility of the accident rests on the owner and the driver of the matador. The owner of the matador no.DBL-6897 is responsible vicariously along with the driver of the matador, and liable to pay compensation to the respondents/petitioners who are wife, son and daughter of the deceased. With the aforesaid the claim petition was filed claiming compensation.

4. The respondents filed their written statements. On the basis of pleadings of the parties, two issues were framed. The first issue, is as to whether Madan Chopra died due to rash and negligent driving of matador no. DBL 6897. The issue was decided holding that the Madan Chopra died on 18.06.1988 due to rash and negligent driving of matador no. DBL 6897 and jeep no. UMF 6695 and the drivers of both the vehicles are responsible for the alleged accident, as such, there was composite negligence of the drivers of both the vehicles in the accident.

5. The second issue as to whether the petitioners are entitled to get compensation, if yes, its amount and from which of the opposite parties, has been decided assessing the total amount of compensation as Rs.3,02,980/-. However, the learned Tribunal held that since there was composite negligence of both the drivers and the petitioners have claimed compensation only from the owner, driver and Insurance company of matador no. DBL 6897, therefore they are entitled to get only half of the amount from them and the remaining amount can be claimed from the other vehicle.

6. The learned tribunal partly allowed the claim petition for an amount of Rs.1,51,490/- along with interest at rate of 8 per cent per annum from the date of filing of petition till the realization of the amount excluding the interest for the period from 18.05.1994 to 01.05.1999 as the claim petition was dismissed in default on 18.05.1994 and the restoration application was moved on 01.05.1999. It has further been provided that the compensation shall be realized first from

the respondent no. 1 i.e. New India Assurance Company Ltd and each of the petitioner shall get one third share.

7. Being aggrieved, the instant appeal has been filed for enhancement of the amount of compensation as claimed in the claim petition and to modify the judgment and award dated 17.02.2005 passed by the MACT.

8. Learned counsel for the appellant had submitted that the learned tribunal has come to the conclusion that the deceased Madan Chopra had died in the accident between the matador no. DBL 6897 and Jeep no. UMP 6695 on account of rash and negligent driving of their drivers and there was composite negligence of the drivers of both the vehicles in the accident. But wrongly and illegally deducted 50 per cent of the amount of compensation assessed by the Tribunal on the ground that the appellant/claimants have claimed compensation only from the owner, driver and Insurance company of matador no. DBL 6897. While it is a settled law that in the case of composite negligence both are liable for payment of compensation jointly and severely. Therefore, the appellant/claimants are entitled for payment of the total compensation from the owner/driver/insurance company of any of the vehicle involved in the accident and they are liable to pay the total compensation and they may recover it from the other.

9. He had further submitted that the deceased Madan Chopra was an employee in the UP Handloom Corporation. He was getting a salary of Rs. 4376/- per month. In proof, there of a salary certificate vide paper no. C-40 issued by the Corporation was filed, which was also proved by adducing oral evidence of Shri Kuber Nath as PW 1 who was an employee in the UP Handloom Corporation. The learned tribunal also came to the conclusion that the total salary of the deceased was Rs. 4376/- but considered only Rs. 3335/- on the ground that it has been mentioned in Para 6 of their petition. Once the income of the deceased was proved by oral as well as documentary evidence the learned tribunal ought to have considered the same for assessing the compensation.

10. He had further submitted that no future prospects have been allowed while the appellant is also entitled for the future prospects and lesser amounts have been allowed towards conventional heads which are also liable to be enhanced. The learned counsel for the appellant lastly submitted that the learned tribunal has wrongly and illegally disallowed the interest with effect from 18.05.1994 to 01.05.1999. While once the application for recall of the order and restoration of the claim petition was allowed, the appellant/claimants are entitled interest for the whole period.

11. Per contra, learned counsel for the respondent no.1; insurance company had submitted that the date of accident in the instant case is 18.06.1988 and the new Motor Vehicles Act, 1989 came into effect w.e.f. 01.07.1989. Therefore, the accident in question was governed by the Motor Vehicles Act, 1939 under which the liability of the insurance company was limited under section 95(A)(2) to the extent of Rs.1,50,000/- as the vehicle insured was a goods vehicle. It was further submitted that policy was an act policy and for any additional liability the extra premium was to be paid, which was not paid. It was further submitted that since the awarded sum by the tribunal was Rs.

1,51,490/- alongwith interest which has already been satisfied by the insurance company, therefore any additional liability, in case the appeal is allowed, should not be saddled on the insurance company since it has already exhausted its liability. He had also submitted that the applicability of the old act on the accident in question was a question of law which need not be pleaded but the learned tribunal, without considering the same, has allowed the claim-petition on the basis of the new act.

12. On the basis of affidavit filed in compliance of the order passed by this court learned counsel for the respondent no.1 had also submitted that in view of the India Motor Tariff three types of policies were issued. The comprehensive insurance of the vehicle and payment of higher premium on this score does not mean that the limit of liability with regard to third party risk becomes unlimited or higher than the statutory liability. The additional benefits under the commercial vehicle tariff were not applicable to motor trade road risk as per Annexure No.C to the affidavit. He had also pointed out that offending vehicle was covered under Clause A(2) and for any additional liability the additional premium was to be paid, which was not paid in the instant policy therefore the answering insurance company is not liable to make the payment of any amount enhanced by this Court. He had further submitted that interest for the period from the date of dismissal of the claim petition up to the date of recall and restoration of the claim petition is not admissible because in that there was no fault of the insurance company. However, he submitted that in regard to the claim of the petitioner regarding income of Rs.4376/- in place of Rs.3335/- and composite negligence there is no quarrel.

13. On the basis of above, learned counsel for the insurance company had submitted that the appeal is liable to be dismissed against the answering insurance company.

14. I have considered the submissions of learned counsel for the parties and perused the record.

15. The undisputed facts are that the deceased- Madan Chopra had died in the accident on 18.06.1988 while he was travelling in jeep no.UMF 6695 and the driver of the matador no. DBL 6897 came from the opposite side and dashed the jeep. The claim petition filed by the appellants in regard to the accident in question has been allowed and an amount of Rs.3,02,980/- has been assessed as compensation by the learned tribunal out of which, on account of composite negligence of the drivers of both the vehicles, the tribunal has directed to the respondent insurance company to pay Rs.1,51,490/- alongwith interest @ 8% per annum from the date of filing of the petition till the date of realization excluding the interest for the period from 18.05.1994 to 01.05.1999, the period within which the claim petition was dismissed and application for restoration was filed.

16. The deceased- Madan Chopra aged about 52 years was employed as Marketing Inspector in U.P. Handloom Corporation. He was getting a salary of Rs.4676/-. The last pay certificate of the deceased was filed as paper No.C40. The salary certificate was proved by Shri Kuber Nath, PW-1, who was an employee in the U.P. Handloom Corporation. He has specifically stated that the deceased was drawing monthly salary of Rs.4376/- on

the date of accident i.e. 18.06.1988. But since the appellants had mentioned the income of the deceased as Rs.3335/- in the claim petition, therefore, that amount has only been taken into consideration for assessing and calculating the compensation, which could not have been done by the learned tribunal. The deceased was an employee of the corporation and his certificate of last pay was filed which were proved by documentary and oral evidence of an employee of the Corporation, the same was liable to be considered for determining the compensation. It is settled proposition of law that the tribunal has to consider and award the just compensation. Therefore, the income of the deceased for determining the compensation at the time of accident was Rs.4376/- per month.

17. The Hon'ble Apex Court in the case of ***Jitendra Khimshankar Trivedi & Others Vs. Kasam Daud Kumbhar & Others; 2015 (1) TAC 673,*** has observed that it is obligatory on the part of the courts / the tribunals to award just and reasonable compensation. The Hon'ble Apex Court, in the case of ***Ramla Vs. National Insurance Company Limited; (2019) 2 SCC 192,*** has held that grant of amount in excess of claimed is permissible because a "just compensation" is one which is reasonable, based on evidence produced on record.

18. The next question for consideration is the deduction of 50% of the amount of compensation assessed by the tribunal on account of contributory negligence of drivers of jeep no.UMF 6695 and the driver of the matador no. DBL 6897. The present case can not be a case of contributory negligence because in the case of contributory negligence the person himself contributes to the accident for which he can not claim any compensation. In the present case the deceased- Madan Chopra was travelling in the jeep no.UMF 6695 and as per finding recorded by the learned tribunal the accident had occurred due to negligence of drivers of both the vehicles i.e. the jeep and the metador. Therefore, the deceased can not be said to have contributed in the happening of the accident and it can be on account of the composite negligence of the drivers of both the vehicles that the deceased had died in the accident in question. It has also been held by the tribunal that both the drivers were responsible. However, if the owner, driver and insurer of the jeep no.UMF 6695 were not impleaded the learned tribunal was not justified in determining the extent of composite negligence of drivers of both the vehicles in absence of evidence of other driver and awarded only half of the compensation assessed by it from the insurance company of the vehicle which was impleaded.

19. The learned tribunal, has recorded a finding that it appears that alleged accident had occurred on the middle of the Damar road due to rash and negligent driving of both the vehicles and there had been a head on collision between the two vehicles. It appears that being impressed by the evidence to the effect that the accident had occurred on account of head on collision in the middle of the road, the learned tribunal has recorded a finding of negligence by both the drivers while such finding should have been recorded on the basis of the cogent evidence and not on probability. In the present case the driver of matador has also given evidence contrary to stand in written statement which has been categorically

recorded by the tribunal therefore it is not believable at all. Learned counsel for the respondent insurance company had also not disputed the fact of composite negligence in the present case.

20. The Hon'ble Apex Court considered the difference between the contributory and composite negligence in the case of ***Khenyei Vs. New India Assurance Company; 2015 (2) TAC 677 (SC)*** and held that in the case of contributory negligence a person, who has himself contributed to the extent, can not claim compensation for the injuries sustained by him in the accident to the extent of his own negligence; whereas in the case of composite negligence a person who has suffered has not contributed to the accident but the outcome of combination of negligence of two or more other persons and he need not establish the extent of responsibility of each wrong doer separately. The Hon'ble Apex Court in regard to the claim in the case of composite negligence and how it is to be dealt has held as under in paragraph 18:-

" (18) What emerges from the aforesaid discussion is as follows :

(i) In the case of composite negligence, plaintiff/claimant is entitled to sue both or any one of the joint tort feasors and to recover the entire compensation as liability of joint tort feasors is joint and several.

(ii) In the case of composite negligence, apportionment of compensation between two tort feasors vis a vis the plaintiff/claimant is not permissible. He can recover at his option whole damages from any of them.

(iii) In case all the joint tort feasors have been impleaded and evidence is sufficient, it is open to the court/tribunal to determine inter se extent of composite negligence of the drivers. However, determination of the extent of negligence between the joint tort feasors is only for the purpose of their inter se liability so that one may recover the sum from the other after making whole of payment to the plaintiff/claimant to the extent it has satisfied the liability of the other. In case both of them have been impleaded and the apportionment/ extent of their negligence has been determined by the court/tribunal, in main case one joint tort feasor can recover the amount from the other in the execution proceedings.

(iv) It would not be appropriate for the court/tribunal to determine the extent of composite negligence of the drivers of two vehicles in the absence of impleadment of other joint tort feasors. In such a case, impleaded joint tort feasor should be left, in case he so desires, to sue the other joint tort feasor in independent proceedings after passing of the decree or award."

21. In view of above, this court is of the considered opinion that since there was no contribution of the deceased in the accident in question therefore even if it was a case of composite negligence he was entitled to claim it from any one of them and the compensation could not have been reduced on the ground that the owner, driver and insurance company of other vehicle has not been impleaded. Therefore, the appellant / claimants are entitled for whole of the compensation from the Driver / Owner / Insurance Company of the vehicle impleaded i.e. the respondents in the present case, who may sue the other.

22. The learned tribunal has allowed Rs.2000/- towards funeral expenses, Rs.5000 towards loss of consortium and

Rs.2500 towards loss of estate in total Rs.9500/- which the learned counsel for the appellants had submitted that they are liable to be enhanced and the appellants are also entitled for the future prospects. Learned counsel for the appellants has relied on ***Rajesh & Others Vs. Rajbir Singh & Others; (2013) 9 SCC 54 / 2013 (3) TAC 679*** and ***Sandhya Rani Debbarma & Others Vs. The National Insurance Company Limited & Others; 2016 (4) TAC 165 SC.*** A constitution Bench judgment of the Hon'ble Apex Court after considering several judgments of the Hon'ble Apex Court in the case of ***National Insurance Company Limited Vs. Pranay Sethi & Others; (2017) 16 SCC 680*** has overruled the case of Rajesh & Others (Supra) and in para 59.8 held that the reasonable figures on conventional heads namely loss of estate, loss of consortium and funeral expenses shall be Rs.15,000/-, Rs.40,000/- and Rs.15,000/- respectively. Therefore, this court is of the view that the appellants are entitled for Rs.15,000/-, Rs.40,000/- and Rs.15,000/- towards loss of estate, loss of consortium and funeral expenses respectively in place of Rs.2500/-, Rs.5000/- and Rs.2000. The appellants are also entitled for addition of 15% towards future prospects in view of paragraph 59.3 of the said Constitution Bench judgment as the deceased was 52 years of age.

23. The learned tribunal has allowed the interest @ 8% per annum from the date of filing of the claim petition till the date of realization excluding the interest from the date of 18.05.1994 to 01.05.1999 on the ground that the claim petition was dismissed on 18.05.1994 and the application for restoration was filed on 01.05.1999. It is not permissible once the application for restoration was allowed after considering the ground sufficient in the application. The Division Bench of this Court in the case of ***Sri Niwas Mani Tripathi and Others Vs. New India Assurance Company Limited and Others; 2014 (2) AICC 1066*** has held as under in paragraph 33:-

"(33). Further this is sufficient ground to interfere in the appeal filed for enhancement of the award to the extent that the interest would not be applicable for the period, when the claim was dismissed. We find that the restoration application is allowed only when the Court finds sufficient grounds for non-appearance of the claims, where the claimants have shown good and sufficient cause, they cannot be blamed or denied subsequently with the interest on the amount awarded to them as compensation."

24. The Hon'ble Apex Court in the case of ***Alok Shankar Pandey Vs. Union of India and Others; AIR 2007 SC 1198*** has held that interest is not a penalty or punishment at all but it is a normal accretion on capital. For example if A had to pay B a certain amount, say 10 years ago, but he offers that amount to him today, then he has pocketed the interest on the principal amount. Had A paid that amount to B 10 years ago, B would have invested that amount somewhere and earned interest thereon, but instead of that A has kept that amount with himself and earned interest on it for this period. Hence equity demands that A should not only pay back the principal amount but also the interest thereon to B.

25. In view of above, this court is of the considered opinion that the learned tribunal has erred in deducting the interest

for the period from 18.05.1994 to 01.05.1999 and the appellants are entitled for the interest awarded by the tribunal w.e.f. the date of filing of the claim petition till the date of realization.

26. In view of above, this court is of the considered opinion that the claimant-appellants are entitled for enhancement of the compensation. Thus, the claimant-appellants are entitled to get Rs.4,376 + (15% of Rs.4,376) Rs.656.40 = Rs.5,032.40 x 12 x 11 = Rs.6,64,276.80 and by deducting 1/3rd (6,64,276.80x1/3=2,21,425.60) amount, the payable amount comes to Rs.4,42,851.20. The appellants are also entitled to get Rs.15,000/-, Rs.40,000/- and Rs.15,000/- respectively towards loss of estate, loss of consortium and funeral expenses. Thus, the total amount of compensation comes to **Rs.512851.20,** which is to be paid alongwith interest @ 8% awarded by the tribunal w.e.f. the date of filing of the petition till the date of realization after adjusting the amount already paid.

27. Adverting to the question of plea of the learned counsel for the respondent no.1 regarding limited liability of Rs.1,50,000/- under Section 95(2)(A) of the Motor Vehicles Act, 1939, this court finds that this plea was neither raised before the tribunal nor such objection has been filed before this court. This plea was raised during course of arguments. It can not be said to be a purely question of law because it was required to be pleaded that what type of policy was issued by the insurance company for the vehicle in question and as to whether any additional premium was paid or not towards the additional liability for claiming benefit of limited liability. On the other hand the insurance company has satisfied the award of Rs.1,51,490/- alongwith interest @ 8% per annum awarded by the tribunal which is much more than Rs.1,50,000/-, without any demur. However, Since a plea was raised at the time of arguments therefore this court had directed to file an affidavit explaining the position.

28. In compliance thereof an affidavit was filed annexing some photo copies of Motor Insurance Rating Guide which has been referred as India Motor Tariff and a photo copy of the Guide Book for Motor Insurance Under Writing containing the Motor Insurance Rating Guide was produced. On the top of which private and confidential (for use by employee and field staff of the company only) is mentioned. Therefore, the respondent insurance company is trying to take a shelter for non-payment of the additional amount over and above Rs.1,50,000/- on the basis of a document which is private and confidential while it has already paid the compensation more than Rs.1,50,000/-.

29. Paper No. C-36/1, which is a copy of the insurance certificate of vehicle matador no.DBL-6897 involved in the accident in question, indicates that Rs.240/- has been charged as premium for third party alongwith an additional sum of Rs.16/- and Rs.08/-, as such total of Rs.264/- has been charged alongwith premium of comprehensive . The policy is a comprehensive policy. In terms of Section 95(2)(A) of the Motor Vehicles Act, 1939 the insurance company is obliged to satisfy the liability to an extent of Rs.1,50,000/- in so far as goods carriage vehicle is concerned unless an additional premium is paid for additional liability.

30. The Motor Insurance Rate Guide filed by the respondent insurance company sets out the provisions relating to the benefits under the Motor Insurance, types of insurance policy and payment of

premium, the relevant portion of which has been filed alongwith the affidavit and a photo copy was produced at the time of arguments. As per the definition of the three types of policy, each one of them are distinct and separate. In the present case this court is concerned with the first type of policy which is a comprehensive insurance policy which provides the contingencies of loss or damage to the damaged vehicle subject to the limitation mentioned in the policy and liability to the public risk including Act liability.

31. The provision of India Motor Tariff indicates that the premium of Rs.200/- is the premium for the Act only and Rs.240/- for the liability to the public risk. So far as the plea of the respondent counsel regarding non-applicability of the additional benefit under the commercial vehicle tariff is concerned, it is mentioned in paragraph-11 of Annexure No.C filed by the appellants that the benefits mentioned herein may not be insured separately but only in conjunction with a "Comprehensive" or "liabilities to the public risk" policies only by charging extra premium as stated above. Above that in N.B.2, it is mentioned that the rates are subject to minimum of Rs.75/- for comprehensive cover, Rs.40/- for liability to the public risks and Rs.25/- for 'Act only Cover'. In the present case Rs.240/- has been charged for the third party towards the liability to the public risk but the learned counsel for the appellant had failed to clarify as to when Rs.240/- has been charged towards liability to the public risk and Rs.200/- is for Act only Policy then how the liability of the respondent insurance company is limited only to Rs.1,50,000/-. Therefore, it is apparent that the premium for public risk was charged which was with additional premium to Act only therefore the contention of the learned counsel for the respondent insurance company regarding limited liability is misconceived and for enhanced liability a sum of Rs.240/- was charged and it is nothing but implicit agreement between the owner and the insurance company for taking additional and extra premium for covering the public risk.

32. The Gujarat High Court in the case of ***Kantibhai Valjibhai Shah Vs. Kokilaben & Others; 2011 (3) TAC 112 (Gujarat)*** has considered the India Motor Tariff and it has recorded that only in respect of the common policy a sum of Rs.200/- is chargeable whereas for enhanced liability a sum of Rs.240/- is charged and it is nothing but implicit agreement between the owner as well as insurance company for taking additional and extra premium for covering the public risk. Therefore, the extra premium was charged for covering the public risk which includes unlimited liability.

33. Perusal of the policy (Paper No.C-36/1) also indicates that it contains "avoidance of certain terms and right of recovery" clause which is given in Paper No.C-68 issued by the respondent insurance company which provides that nothing in this policy or any endorsement thereon shall affect the right of any person indemnified by this policy or any other person to recover an amount under or by virtue of provisions of the Motor Vehicles Act, 1939, Section 96. But the insured shall repay to the company all sums paid by the company which the company would not have been liable to pay but for the said provisions. Therefore, even in the case of limited liability the insurance company is liable to discharge the entire liability of

compensation but the insured would have to repay to the company all the sums paid by the company which is in excess of its liability under the policy of insurance.

34. The Hon'ble Apex Court in the case of ***New India Assurance Company Limited Vs. Vimla Devi & Others; 2011 (3) TAC 70 (SC)*** after considering the aforesaid avoidance clause, and referring to the decision in the case of ***Amrit Lal Sood & Another Vs. Kaushalya Devi Thaper & Orthers;1998 (2) TAC 97 (SC)*** held that the insurance company was rightly directed by the High Court to make payment of the full amount of compensation and to recover the excess amount from the owner of the motor vehicle. A full Bench of Gujarat High Court in the case of ***Shantaben & Others Vs. Yakubbhai Ibrahimbhai Patel & Others; 2013 (2) TAC 791 (Gaj.)*** and framed the question for consideration in paragraph-25 and answered the same in paragraph-41, which are extracted below:-

"25. Having thus heard the learned counsel for the parties, short question that calls for consideration is whether the Insurance Company can be directed to discharge the entire liability of compensation fixed by the claims tribunal or whether the liability of the Insurance Company would be restricted too the statutory liability of Rs.50,000/- prevailing at the relevant time."

"41. Our answer to the question farmed is that wherever the insurance policy contains an avoidance clause providing that nothing in the policy shall affect the right of any person indemnified by the policy or any other person by recovering amount under or by virtue of provisions of Motor Vehicle Act, but further requires insured to repay to the Insurance Company all such sums paid by the company which the company would not have been liable to pay, but for this provision, the Insurance Company cannot press in service the statutory limit of liability under the Motor Vehicles Act insofar as the claimants are concerned. But the insured would have to repay to the company all the sums paid by the company which is in excess of its liability under the policy of insurance."

35. In view of above, this Court is of the considered opinion that the appeal is liable to be allowed and the impugned judgment and award modified and the respondent insurance company is liable to pay the entire amount of compensation. Accordingly, the judgment and award dated 17.02.2005 passed in claim petition no. 35 of 1988; Smt. Pramila Chopra and others versus New India Assurance Company Ltd. and others by Motor Accident Claims Tribunal, /Additional District Judge, Court no. 1, Lucknow is modified. The respondent no.1 / New India Assurance Company Ltd. shall pay amount of compensation to the tune of Rs.5,12,851.20 alongwith interest @ 8% per annum w.e.f. the date of filing of petition till the date of realization, after adjusting the amount already paid within a period of six weeks from today.

36. The appeal is, accordingly, **allowed**. No order as to costs.

(2020)02ILR A1321

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 20.11.2019

BEFORE
THE HON'BLE BALA KRISHNA NARAYANA, J.
THE HON'BLE ROHIT RANJAN AGARWAL, J.

First Appeal From Order No. 2200 of 2014

Smt. Urmila Devi & Ors. ...Appellants
Versus
Nathuni Ray & Ors. ...Respondents

Counsel for the Appellants:

Sri Ankit Kumar Sinha, Deepali Srivastava Sinha

Counsel for the Respondents:
Sri Arvind Kumar, Sri Saurabh Srivastava

A. Civil Law-Motor Accident Claim - Motor Vehicles Act, 1988 - Ss 166, 168 - Compensation - Income - net monthly income Vis-a-vis gross income

Tribunal for the purpose of computation of deceased's monthly income, had taken into account the *net monthly income* of the deceased - *Held* - Tribunal ought to have awarded compensation on the basis of *gross salary* of the deceased which is Rs. 8,500/- as the income of the deceased was not within taxable range limits (Para 14, 16)

B. Civil Law-Motor Vehicles Act, 1988 - Ss 166, 168 - Future Prospects - Deceased was 40 yrs & held permanent job - *Held* - addition of 30% if the age of the deceased was 40 to 50 years & had a permanent job - Tribunal ought to have added 30% of actual salary to the income of the deceased towards future prospects. (Para 19)

C. Civil Law-U.P. Motor Vehicles Rules, 1998 - Rule 220-A - Compensation - Deduction towards personal & living expenses - deceased left behind his parents, his wife, four minor children - minor children as per Rule 220-A of the U.P. Motor Vehicles Rules, 1998, shall be treated as two units - total five dependants - Held - keeping in view the dictum laid down in paragraph 14 of Sarla Verma, the deduction should have been one-fifth. (Para 24)

D. Civil Law-Motor Vehicles Act, 1988 - Ss 166, 168 - Compensation - Selection of Multiplier - deceased aged about 42 years - Held - as per the table provided in judgement of Sarla Verma , the Tribunal ought to have adopted the multiplier 14 (Para 26)

E. Motor Vehicles Act, 1988 - Ss 166, 168 - Compensation - Reasonable figures on conventional heads, namely, loss of estate, loss of consortium & funeral expenses is Rs. 15,000/, Rs. 40,000/- and Rs. 15,000/ respectively (Para 9)

F. Motor Vehicles Act, 1988 - Ss 166, 168 - Compensation - Interest - Tribunal not justified in awarding interest on the amount of compensation conditionally.

Tribunal awarded a sum of Rs. 7,89,000/- together with interest @ 8% p.a. *in case the opposite parties/respondents failed to deposit the entire amount of awarded compensation within 30 days of the award* - *Held* - Tribunal was not justified in awarding interest on the amount of compensation conditionally - claimants/appellants entitled to interest @ 8% p.a. from the date of filing of the claim petition till the actual payment is made. (Para 25, 28)\

G. Civil Law-Civil Procedure Code (5 of 1908) - O.41 R.33 - Power of Court of Appeal- appellate court have power to pass any decree which ought to have been passed or made - this power may be exercised in favour of all or any of the respondents or parties, although they may not have filed any cross appeal or objection (Para 26)

Appeal Partly allowed (E-5)

List of cases cited :

1. Smt. Sarla Verma & Ors Vs Delhi Transport Corporation & Anr 2009 (2) T.A.C. 677 (SC)

2. National Insurance Company Ltd Vs Pranay Sethi & ors 2017 ACJ 2700 (SC)

(Delivered by Hon'ble Bala Krishna Narayana, J.)

1. Seen the office report dated 18.3.2017. Service on respondent no. 1 is deemed to be sufficient in view of the provisions of Chapter VIII Rule 12, Explanation (II) of the High Court Rules.

2. Heard Sri Amit Kumar Sinha, learned counsel for the appellants and Sri Saurabh Srivastava, learned counsel for respondent no. 3.

3. This appeal has been preferred by the claimants/appellants for enhancement of compensation awarded to them by Motor Accident Claims Tribunal/Additional District Judge, Court No.3, Allahabad by judgement and award dated 27.2.2014 passed in M.A.C.P No. 01 of 1998 by which a sum of Rs. 7,89,000/- together with interest @ 8% p.a. in case the opposite parties/respondents failed to deposit the entire amount of awarded compensation within 30 days of the award, was awarded as compensation.

4. It appears from the perusal of the record that one Ravi Shankar Pandey (deceased) aged about 42 years on the relevant date, was posted as Assistant Auditing Officer and was earning a sum of Rs. 8,700/- per month. On 31.8.1997, while the deceased was going from Kalipara to Navpara at Bahraich, by a jeep bearing registration no. U.P. 40/A 2423, it collided with truck bearing registration no. W.B. 03/A 4458 due to rash and negligent driving of the drivers of both the vehicles. In the accident so caused, the deceased received severe head injuries and he was admitted to Krishna Medical Centre, Lucknow, and had remained there under the treatment of Dr. Piyush Mittal from 31.8.1997 to 13.9.1997 incurring expenses of Rs. 50,000/- towards treatment. At the time of his death, his wife Smt. Urmila, sons-Ajay Kumar Pandey, Jitendra Kumar Pandey and Vinay Kumar Pandey, daughter Km. Pratibha Pandey, father Hari Lal Pandey and mother Devkanya Devi were dependent on him. The claim petition was filed by the claimants/appellants for an award of Rs. 70,00,000/- as compensation for the death of Ravi Shankar Pandey as a result of the injuries sustained by him in an accident which was caused due to rash and negligent driving of drivers of the two vehicles.

5. The claim petition was contested by opposite party/respondent no. 2, Irrigation Department Khand Irrigation and opposite party/respondent no. 3, United India Insurance Company Ltd. The owner of the tanker, opposite party/respondent no. 1, Nathuni Ray in this appeal did not contest the claim petition.

6. The Insurance Company in its written statement though broadly admitted the allegations made in the claim petition, but pleaded that the owner of the tanker alone could not be saddled with the liability of payment of entire compensation as it is the case of a contributory negligence and the liability should be apportioned between owners of both the vehicles. The Insurance Company further sought time for verification of the driving license of the driver of truck bearing registration no. W.B. 03/A 4458. The Irrigation Department in its written statement neither admitted nor considered it necessary to reply to the averments made in the claim petition. It further pleaded that the driver of the jeep in which the deceased was travelling, possessed a valid driving license and was driving the jeep at the time of the accident as per the traffic rules i.e. at the speed of 20-25 km/hour and the accident had been caused due to rash and negligent driving of the tanker by its driver.

7. On the basis of the pleadings of the parties, the Tribunal framed following issues :-

1) Whether Ravi Shankar Pandey died in the accident caused due to rash and negligent driving of the driver of the truck bearing registration no. W.B. 03/A 4458 on 31.08.1997 at 11.45 am?

2) What compensation are the claimants entitled to ?

3) Is the truck in question fully insured?

4) Is the Insurance Company not liable to pay the compensation?

5) Relief.

8. The claimant/appellants in support of their claim, lead oral as well as documentary evidence. The oral evidence comprised of the statements of P.W.1 Smt. Urmila Devi, P.W.2 Kamla Prasad Mishra and P.W.3 Satish Chandra whereas the documentary evidence adduced comprised of copy of First Information Report of the accident registered as Case Crime No. 121 of 1997, registration certificate of vehicle no. W.B. 03/A 4458, permit, copy of insurance policy, death certificate of the deceased issued by Krishna Medical Centre, extract of family of Ravi Shankar Pandey, High School mark sheet of the deceased, charge-sheet filed in Case Crime No. 121 of 1997, site plan of the place of accident, Technical Examination Report of the two vehicles bearing registration nos. U.P. 40/A 2423 and W.B. 03/A 4458 on behalf of the opposite party/respondent no. 2, Irrigation Department Khand Irrigation and the copy of driving license of Prabhu Dayal, driver of vehicle no. U.P. 40A/2423.

9. Notice may be taken of the fact that initially the M.A.C.P. No. 01 of 1998 was decreed ex-parte qua the opposite party/respondent no. 2, Irrigation Department by judgement and award dated 16.7.2004. However, the application filed by the Irrigation Department under IX Rule 13 was allowed by the M.A.C.T. and the ex-parte judgement and award dated 16.7.2004 was set aside and thereafter the impugned judgement and award has been passed.

10. The Motor Accident Claims Tribunal/Additional District Judge, Court No.3, Allahabad after considering the submissions advanced before him by the learned counsel for the parties and scrutinizing the evidence on record, awarded the sum of Rs. 7,89,000/- as compensation inter alia holding that the deceased at the time of his death was aged about 42 years and earning Rs. 6,500/- and had left behind seven dependents including four minor children treated as two units as per Rule 220-A of the U.P. Motor Vehicles Rules, 1998 and after deducting (1/3 of 6,500) amount towards personal and living expenses of the deceased, he would have contributed a sum of Rs. 4333/- per month or Rs. 51996/- per annum towards his family and applied the multiplier of 15 and since it was a case of contributory negligence, accordingly, Tribunal fixed the liability of 50-50.

11. The impugned judgement and award has been assailed by learned counsel for the appellant on the following grounds :-

1) The M.A.C.T. erred in law in holding the monthly income of the deceased as Rs. 6,500/- whereas the gross salary of the deceased was Rs. 8,500/- at the time of his death, for the purpose of computing the compensation.

2) The M.A.C.T. did not award any amount towards future prospects.

3) The amount awarded under the conventional heads is too meagre and not in consonance with the principles laid down by the Constitutional Bench of the Apex Court in the case of ***National Insurance Company Limited Versus Pranay Sethi and Others*** reported in ***2017 ACJ 2700 (SC) .***

4) The M.A.C.T. erred in deducting one-third amount towards living and personal expenses of the deceased, whereas considering the number of his heirs and legal representatives, the deduction made should have been one-fifth.

5) The M.A.C.T. erred in awarding the interest on the amount of awarded compensation conditionally by illegally providing that the interest on the awarded amount will be payable only if the Insurance Company fails to deposit the entire awarded compensation within 30 days of the award.

12. Per contra, learned counsel for the respondent nos. 2 and 3 made their submissions in support of the impugned judgement and award.

13. After having heard learned counsel for the parties, we find that there is force in the submissions made by learned counsel for the appellants.

14. Coming to the first ground of challenge to the impugned judgement and award, we find that the Tribunal for the purpose of computation of deceased's monthly income, had taken into account the net monthly income of the deceased whereas the gross income of the deceased ought to have been made the basis for calculating the compensation.

15. Our attention has been invited by learned counsel for the appellant to paragraph 10 of the judgement of the Apex Court in the case of ***Sarla Verma and others vs. Delhi Transport Corporation & another reported in 2009 (2) T.A.C. SC 677,*** wherein the Apex Court has held hereinunder :-

"10. Generally the actual income of the deceased less income tax should be the starting point for calculating the compensation. The question is whether actual income at the time of death should be taken as the income or whether any addition should be made by taking note of future prospects. In Susamma Thomas, this Court held that the future prospects of advancement in life and career should also be sounded in terms of money to augment the multiplicand (annual contribution to the dependants); and that where the deceased had a stable job, the court can take note of the prospects of the future and it will be unreasonable to estimate the loss of dependency on the actual income of the deceased at the time of death. In that case, the salary of the deceased, aged 39 years at the time of death, was Rs.1032/- per month. Having regard to the evidence in regard to future prospects, this Court was of the view that the higher estimate of monthly income could be made at Rs.2000/- as gross income before deducting the personal living expenses. The decision in Susamma Thomas was followed in Sarla Dixit v. Balwant Yadav [1996 (3) SCC 179], where the deceased was getting a gross salary of Rs.1543/- per month. Having regard to the future prospects of promotions and increases, this Court assumed that by the time he retired, his earning would have nearly doubled, say Rs.3000/-. This court took the average of the actual income at the time of death and the projected income if he had lived a normal life period, and determined the monthly income as Rs.2200/- per month. In Abati Bezbaruah v. Dy. Director General, Geological Survey of India [2003

(3) SCC 148], as against the actual salary income of Rs.42,000/- per annum, (Rs.3500/- per month) at the time of accident, this court assumed the income as Rs.45,000/- per annum, having regard to the future prospects and career advancement of the deceased who was 40 years of age."

16. Thus in view of the principles culled out in the case of ***Sarla Verma (supra),*** we find that the Tribunal erred in taking into account the net salary of the deceased as the basis for awarding compensation wherein it ought to have awarded compensation on the basis of gross salary of the deceased which is Rs. 8,500/- as the income of the deceased was not within taxable range limits.

17. As regards the second ground of challenge canvassed by the appellants that the Tribunal acted illegally in not awarding any amount towards future prospects, we find force in the same.

18. The Constitutional Bench of the Apex Court in paragraph 61-iii of ***Pranay Sethi*** (supra) has observed as hereinunder :-

"(iii) While determining the income, an addition of 50% of actual salary to the income of the deceased towards future prospects, where the deceased had a permanent job and was below the age of 40 years, should be made. The addition should be 30%, if the age of the deceased was between 40 to 50 years. In case the deceased was between the age of 50 to 60 years, the addition should be 15%. Actual salary should be read as actual salary less tax."

19. In the present case, there is no dispute about the fact that the deceased at the time of attaining the age of 40 years and was holding permanent job and hence the Tribunal ought to have added 30% of actual salary to the income of the deceased towards future prospects. We thus add 30% of the actual salary to the income of the deceased towards future prospects, while computing his income.

20. Coming to the third ground of challenge that the amount awarded under conventional heads was too meagre and not in consonance with the principles laid down in paragraph 61 (viii) of ***Pranay Sethi (supra),*** the same also has force. The Apex Court in the case of ***Pranay Sethi (supra)*** in paragraph 61 (viii) has observed as hereinunder :-

"(viii) Reasonable figures on conventional heads, namely, loss of estate, loss of consortium and funeral expenses should be Rs. 15,000/-, Rs. 40,000/- and Rs. 15,000/- respectively. The aforesaid amounts should be enhanced at the rate of 10% in every three years."

21. In the instant case, we find that the Tribunal has awarded the sum of Rs. 5,000/-, Rs. 2,000/- and Rs. 2,000/- towards loss of consortium, funeral expenses and loss of estate respectively under the conventional heads, which is neither reasonable nor justifiable.

22. We, accordingly, hold that the claimants/appellants are entitled to Rs. 15,000/-, Rs. 40,000/- and Rs. 15,000/- respectively for loss of estate, loss of consortium and funeral expenses.

23. Considering the fourth ground of challenge that at the time of death of the deceased, he had left behind seven family members who were dependent upon him, we find that the deduction towards personal and living expenses of the deceased should have been one-fifth as

made by the Tribunal in view of the principle laid down in the case of ***Sarla Verma (supra)*** by the Apex Court. Paragraph 14 of the judgement of ***Sarla Verma (supra)*** which is relevant for our purpose is being reproduced hereinbelow :-

"14. Though in some cases the deduction to be made towards personal and living expenses is calculated on the basis of units indicated in Trilok Chandra, the general practice is to apply standardized deductions. Having considered several subsequent decisions of this court, we are of the view that where the deceased was married, the deduction towards personal and living expenses of the deceased, should be one-third (1/3rd) where the number of dependent family members is 2 to 3, one-fourth (1/4th) where the number of dependant family members is 4 to 6, and one-fifth (1/5th) where the number of dependent family members exceed six."

24. In the present case, the deceased had left behind his wife Urmilla, four minor children which as per Rule 220-A of the U.P. Motor Vehicles Rules, 1998, shall be treated as two units and his parents, total five dependants, hence, keeping in view the dictum laid down in paragraph 14 of ***Sarla Verma (supra)***, the deduction should have been one-fifth.

25. Coming to the last ground upon which the impugned judgement and award has been challenged, in our opinion, the Tribunal was not at all justified in awarding interest on the amount of compensation conditionally.

26. Although there is no appeal of the Insurance Company challenging the correctness of the multiplier adopted by the Tribunal in considering the fact that at the time of his death the deceased was aged about 42 years, then as per the table provided in paragraph 21 of the judgement of ***Sarla Verma (supra)***, the Tribunal ought to have adopted the multiplier 14 (M-14) but nevertheless in order to do complete justice between the parties, we can exercise the power conferred under Order 41 Rule 33 of the C.P.C. which provides that the appellate court shall have power to pass any decree which ought to have been passed or made and this power may be exercised by the Court in favour of all or any of the respondents or parties, although they may not have filed any cross appeal or objection. Order 41 Rule 33 C.P.C. is being reproduced hereinbelow :-

"33 . Power of Court of Appeal-- The Appellate Court shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the Court notwithstandng that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection and may, where there have been decrees in cross-suits or where two or more decrees are passed in one suit, be exercised in respect of all or any of the decrees, although an appeal may not have been filed against such decrees."

27. Thus, in view of above, keeping in view the legal principles followed by the Apex Court in paragraph 21 of ***Sarla Verma (supra)***, we hold that the multiplier which should have been adopted in the instant case should be 14 and not 15.

28. We accordingly proceed to recalculate the compensation in the light of the aforesaid principles. As noted above, the actual salary of the deceased was Rs.

8,500/- per month or Rs. 1,02,000/- p.a. By adding 30% towards future prospects as the deceased was between the age of 40 to 50 years, the deemed gross income of the deceased would be Rs. 8,500/- + 30% of Rs. 8,500/- = Rs. 11,050/- per month or Rs. 1,32,600/- p.a. After deducting 1/5th amount (i.e. 11,050-2,210) towards the living and personal expenses of the deceased, his contribution to the family is determined as Rs. 8,840/- per month or Rs. 1,06,080/- p.a. By applying the multiplier of 14, the total loss of dependency is assessed at Rs. 14,85,120/-. We further award a sum of Rs. 15,000/- towards funeral expenses, Rs. 40,000/- under the head of loss of consortium and Rs. 15,000/- towards loss of estate. We accordingly increase the compensation awarded to the claimants/appellants by the Tribunal from Rs. 7,89,000/- to Rs. 15,55,120/-. The claimants/appellants shall further be entitled to interest @ 8% p.a. on the increased amount of compensation from the date of filing of the claim petition till the actual payment is made.

29. The appeal is allowed in part.

30. The impugned judgement and award stand modified to the extent indicated hereinabove.

31. The parties shall bear their respective costs.

(2020)02ILR A1328

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 10.12.2019

BEFORE
THE HON'BLE BALA KRISHNA NARAYANA, J.
THE HON'BLE ROHIT RANJAN AGARWAL, J.

First Appeal From Order No. 3373 of 2014

Smt. Mamta @ Savita & Ors. ...Appellants
Versus
Chaman Kumar & Ors. ...Respondents

Counsel for the Appellants:
Sri S.D. Ojha

Counsel for the Respondents:
Sri Devendra Dahma, Sri Navneet Chandra Tripathi, Sri Ramji Yadav

A. Civil Law-Motor Vehicles Act, 1988 - Ss 166, 168 - Compensation - Deduction towards personal & living expenses - one-fourth (1/4 th) where the number of dependant family members is 4 to 6 - *Held* - Deceased left behind his wife, his three minor children and his parents - Total number of dependants comes to 3.5 unit excluding the father - Tribunal committed error by deducting 1/3rd amount towards personal expenses - as it should have deducted 1/4th amount from income of the deceased (Para 8)

B. Civil Law-Motor Vehicles Act, 1988 - Ss 166, 168 - Future Prospects - Deceased below 40 yrs - *Held* - Tribunal failed to award any compensation towards future prospects by adding 40% of the established income (Para 9)

C. Civil Law-Motor Vehicles Act, 1988 - Ss 166, 168 - Compensation - Reasonable figures on conventional heads, namely, loss of estate, loss of consortium & funeral expenses is Rs. 15,000/, Rs. 40,000/ and Rs. 15,000/ respectively (Para 9)

First Appeal From Order Partly allowed (E-5)

List of cases cited :

1. Smt. Sarla Verma & Ors Vs Delhi Transport Corporation & Anr 2009 (2) T.A.C. 677 (SC)

2. National Insurance Company Ltd Vs Pranay Sethi & ors 2017 (4) TAC 673 (SC)

(Delivered by Hon'ble Rohit Ranjan Agarwal, J.)

1. This appeal has been filed by claimants-appellants under Section 173 of the Motor Vehicles Act, 1988 not being satisfied by judgment and award dated 04.08.2014 passed by Additional District Judge, Court No. 7/ Motor Accident Claims Tribunal, Meerut in Motor Accident Claim Petition No. 211 of 2013.

2. Facts as narrated in the judgment and award are that one Rukesh Kumar, husband of claimant-appellant no. 1, father of claimant-appellant nos. 2, 3 and 4 and son of claimant-appellant nos. 5 and 6, was driver of Truck bearing No. MP 07 HB- 0149. On 24.10.2012 along with one Santosh, when deceased's truck was coming from Muzaffar Nagar to Hapur, it met with an accident at around 4 a.m. in the morning near Naugaja Peer, PS- Kharkhauda, District- Meerut with another Truck bearing No. HR 37 B-2896 coming from opposite direction. The driver of truck bearing no. MP 07 HB-0149 died on the spot, and was aged about 29 years.

3. A claim petition, being MACP No. 211 of 2013 was filed by claimant-appellants before the Motor Accident Claims Tribunal, Meerut. The said petition was contested by owner of Truck No. HR 37 B-2896 and the Insurance Company of the same truck number. Tribunal found that there was a contributory negligence on the part of both the parties and the deceased Rukesh Kumar who was driving Truck No. MP 07 HB-0149 contributed 20% to the accident while the negligence of the other truck driver was of 80%. Further, Tribunal while deciding issue no. 6 of the impugned judgment awarded compensation of Rs.5,26,400/- on the basis that income of deceased, Rukesh Kumar was Rs.4,500/- per month and after deducting 1/3 towards personal expenses and applying the multiplier of 18, as deceased was aged about 28 years awarded Rs.6,48,000/-. Further, Rs.5,000/- was awarded towards as loss of consortium, Rs.2,500/- as funeral expenses and Rs.2,500/- towards loss of estate. The total amount comes to Rs.6,58,000/-. Out of which 20% amount was deducted being contributory negligence of the deceased thus, the total amount awarded came to Rs.5,26,400/-.

4. Sri S.D. Ojha, learned counsel appearing for the claimants-appellants submitted that the court below had wrongly deducted 1/3 towards personal expenses from income of the deceased and placed reliance upon the paragraph 14 of the judgment in case of ***Smt. Sarla Verma and others vs. Delhi Transport Corporation and another 2009 (2) T.A.C. 677 (S.C.),*** in which the Hon'ble Apex Court had held deductions should be 1/4th towards personal and living expenses of deceased in case where there are 4 to 6 dependants in the family. In the present case, as the deceased is survived by his wife, three minor children along with his parents, thus, the total number of dependants left by him are six and as there are three minors, they will be counted as 1/2 unit. Thus, only 1/4th of the amount should have been deducted towards his personal and living expenses in view of the judgment rendered by Apex Court in ***Smt. Sarla Verma*** (supra).

5. He further submitted that the Tribunal had not considered future prospects and law laid down in case of ***National Insurance Company Ltd. vs. Pranay Sethi and others 2017 (4) T.A.C.***

673 (S.C.) that claimants are entitled for 40% addition to the total income of the deceased toward future prospects. Lastly, it was contended that the amount awarded under the heads of loss of estate, loss of consortium and funeral expenses was not kept in line with the judgment of the Apex Court in ***Pranay Sethi.***

6. We have heard learned counsel for the claimant-appellants and perused the material on record.

7. It is not in dispute that alleged incident took on 24.10.2012 wherein the driver of Truck No. MP 07 HB-0149, Rukesh Kumar succumbed to his injuries leaving behind the claimants-appellants as his legal heirs. The Tribunal further recorded in the finding that age of the deceased was 28 years, while calculating the award deducted 1/3 amount towards his personal expenses without calculating the number of dependants of the deceased.

8. In ***Sarla Verma*** (supra), the Apex Court had held that where number of dependants in the family were 4 to 6 then 1/4th amount was to be deducted towards personal expenses. In the present case, the deceased Rukesh Kumar had left behind his wife Mamta, his three minor children and his parents. The total number of dependants as per the judgment of the Apex Court in ***Smt. Sarala Verma*** (supra) comes to 3.5 unit excluding the father of the deceased thus, in our view, the Tribunal committed error by deducting 1/3rd amount towards personal expenses of the deceased, as it should have deducted 1/4th amount from income of the deceased while calculating the amount of compensation.

9. Secondly, the Tribunal failed to award any compensation towrads future prospects by adding 40% of the established income where the deceased was below 40 years as held in the case of ***Pranay Sethi*** (supra). The third objection was in relation to loss of estate, loss of consortium and funeral expenses which should have been awarded at the rate of Rs.15,000/-, Rs.40,000/- and Rs.15,000/- respectively as held by Apex Court in case of ***Pranay Sethi*** (supra).

10. We accordingly proceed to recalculate the compensation in the light of the aforesaid principles. As noted above, the actual salary of the deceased was Rs. 4,500/- per month or Rs. 54,000/- p.a. By adding 40% towards future prospects as the deceased was below 40 years, the deemed gross income of the deceased would be Rs. 4,500/- + 40% of Rs. 4,500/- = Rs. 6,300/- per month or Rs. 75,600/- p.a. After deducting 1/4th amount (i.e. 6300 - 1575) towards the living and personal expenses of the deceased, his contribution to the family is determined as Rs. 4,725/- per month or Rs. 56,700/- p.a. By applying the multiplier of 18, the total loss of dependency is assessed at Rs. 10,20,600/-. We further award a sum of Rs. 15,000/- towards funeral expenses, Rs. 40,000/- under the head of loss of consortium and Rs. 15,000/- towards loss of estate. We accordingly increase the compensation awarded to the claimants/appellants by the Tribunal from Rs. 5,26,400/- to Rs. 10,90,600/-. The claimants/appellants shall further be entitled to interest @ 7% p.a. on the increased amount of compensation from the date of filing of the claim petition till the actual payment is made. The appeal is ***allowed in part.***

11. The impugned judgment and award stands modified to the extent indicated hereinabove.

12. The parties shall bear their respective costs.

(2020)02ILR A1331

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 17.01.2020

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.
THE HON'BLE RAJEEV MISRA, J.

First Appeal No. 69 of 2017

Smt. Seema @ Aarju ...Appellant
Versus
Ravindra Singh ...Respondent

Counsel for the Appellant:
Ms. Pragya Pandey, Sri Imran Syed

Counsel for the Respondent:
Sri Gulab Chandra, Sri Hari Manish Bahadur Sinha, Sri Vinay Kumar Singh

A. Civil Law-Hindu Marriage Act (25 of 1955) - S.13(1)(ia) - Divorce - Cruelty - specific instances of 'cruelty' - suit for divorce on ground of 'cruelty' can succeed only when specific instances of 'cruelty' are pleaded & proved by plaintiff - single instance of cruelty by itself is insufficient to constitute 'cruelty' - Held - husband not pleaded any specific instance of 'cruelty', but only made general allegations of 'cruelty' - vague and general allegations are insufficient to constitute 'cruelty' - Husband not entitled for decree of divorce (Para 21)

First Appeal allowed. (E-5)

List of cases cited :

1. Srikant Ram Sajiwan Vs Saroj 2001 (2) DMC 295

2.Kusum Lata Vs Kamta Prasad AIR 1965 All 280

3.Narayan Ganesh Dastane Vs Smt. Sucheta Narayan Dastane AIR 1970 Bombay 812

4.Abha Agarwal Vs Sunil Agarwal AIR 2000 All (77)

5.Hanumantha Rao Vs Shamani AIR 1990 SC 1318

6.Mukesh Vs Chanchal 2006 Legal (LE) Delhi 957

7.Neelam Kumar Vs Daya Rani 2010 (13) SCC 298

8.Vishwanath Vs Prakash Chand AIR 1992 ALL 261

9.Samar Ghosh Vs Jaya Ghosh 2007 (4) SCC 511

10.Navin Kohli Vs Nilu Kohli 2006 (4) SCC 558

11.Anil Kumar Jain Vs Smt. Kalpana Jain 2019 (8) ADJ 1

12.Smt. Sarita Devi Vs Sri Ashok Kumar Singh 2018 (3) AWC 2328

13.Neelam Kumar Vs Daya Rani 2010 (13) SCC 298

14.Vishwanath Vs Prakash Chand AIR 1992 ALL 261

15.Ravi Kumar Vs Julmi Devi 2010 (4) SCC 476

16.K. Srinivas Rao Vs D. A. Deepa 2013 (5) SCC 226

17.Manish Tyagi Vs Deepak Kumar 2010 (4) SCC 339

(Delivered by Hon'ble Rajeev Misra, J.)

1. Challenge in this appeal under section 19 of Family Courts Act, 1984 (hereinafter referred to as 'Act, 1984') preferred by defendant respondent is to the judgement dated 30.11.2016 and decree dated 3.12.2016, passed by Kamlesh Dubey, Principal Judge, Family Court, Hapur, whereby Suit No. 468 of 2018 (Ravindra Singh Vs. Seema @ Aarju) filed by plaintiff-respondent for divorce has been decreed.

2. We have heard Ms. Pragya Pandey, learned counsel for defendant-appellant (hereinafter referred to as 'appellant') and Mr. Hari Manish Bahadur Sinha for plaintiff-respondent (hereinafter referred to as respondent.

3. Respondent filed Original Suit No. 468 of 2013 (Ravindra Singh Vs. Seema @ Aarju) in the Court of Civil Judge (Senior Division) Hapur for a decree of divorce vide plaint dated 1.8.2013. According to plaint allegations, case of plaintiff in brief was that marriage of appellant and respondent was solemnized on 29.6.2012 in accordance with Hindu Rites and Customs without any dowry. Respondent in discharge of his obligation as husband provided every comfort to appellant; however, inspite of aforesaid, appellant was neither satisfied nor happy; Appellant is of an agitated mind and demanding in nature; Appellant is physically assaulted respondent and his mother; On account of her charged character, appellant extended threat to respondent of getting him killed; Appellant is having relationship with another person as she holds talk with him for long hours on telephone; Family of respondent complained to family members of appellant regarding her aforesaid character but in vain; appellant and his family members have committed 'mental cruelty' upon respondent; there is a serious threat to his life in company of appellant, as he can be murdered on any day; and on 4.7.2013, appellant left house of respondent along with Gold and Silver Jewellery, expensive clothes and Rs.10,000/- cash, without taking permission of respondent. On the aforesaid basis, respondent is alleged to have requested appellant to seek divorce which ultimately, she refused on 26.7.2013. The suit for divorce was filed by respondent on the ground of 'cruelty' which is a ground recognized for divorce, under section 13 (1) (ia) of Act 1955.

4. Suit filed by plaintiff was contested by appellant by filing a written statement. Appellant in her written statement, not only denied plaint allegations but also raised additional pleas. Appellant denied allegations of 'cruelty' levelled against her in plaint. Appellant pleaded that respondent is working in Excise Department, Hapur and drawing salary of Rs. 35,000/- per month; Respondent was having illicit relationship with his Bhabi namely, Monika @ Guddu and was caught by appellant in compromising position, for which respondent felt sorry; To save marriage, appellant excused plaintiff for the aforesaid act of adultery but again on 13.3.2013, plaintiff was seen in compromising position with his Bhabi, upon which hue and cry was raised and Police was informed on Phone No. 100; on 27.4.2013 criminality was committed upon her by her Jeth Indrajeet, which is punishable under section 376 IPC; as no F.I.R. was lodged as Indrajeet is working in Police Department, an application under section 156 (3) was filed before the concerned Magistrate which is pending; Appellant agreed to return to her matrimonial home on conditions that plaintiff will not talk to his Bhabi and Indrajeet will never visit her house; On 10.8.2013 appellant returned to her matrimonial home along with her bhabi as she was in advanced family way; however, on 21.8.2013, family members of plaintiff as well as plaintiff assaulted appellant and her Bhabi for which complaint was made at Police Station- Babughad and appellant and her Bhabi were medically examined. It was thus prayed that divorce suit has been filed with an oblique motive and on non existent grounds. As such, divorce suit is liable to be dismissed.

5. On the pleadings of parties, Trial Court framed following issue for determination:

(I) Whether in view of grounds raised in plaint, marriage of parties solemnized on 29.6.2012, is liable to be disolved.

6. After issue was framed, parties went to trial. Respondent (plaintiff) in order to prove his case, filed documentary

evidence which included complaint pertaining to Complaint Case No. 65 of 2014 (Rakesh Vs. Ravindra) under sections 498 A, 452, 323, 504 IPC and section ¾ Dowry Prohibition Act, summoning order dated 21.3.2014 passed in above mentioned complaint case and also copy of charge-sheet submitted in Case Crime No. 48 of 2014, under Sections 323, 325, 504 IPC. Respondent (plaintiff), besides himself, further adduced P.W. 2 Mahendri and , P.W. 3 Monika to prove his case. s

7. Appellant in order to establish her defence, Court below, also filed documentary evidence. She filed copy of letter dated 24.9.2013, addressed to Superintendent of Police, Hapur, Certified copy of application filed by appellant before Chief Judicial Magistrate, Ghaziabad, under section 156 (3) Cr.P.C, Certified copy of summoning order dated 24.9.2016 passed in Complaint Case No. 3474 of 2015 (Seema Vs. Indrajeet) under sections 452 and 376 IPC. Defendant adduced herself as D.W.1 and Rajendri Devi as D.W.2 to prove her case.

8. Upon appreciation of pleadings of parties and evaluation of oral and documentary evidence on record, Court below concluded that commission of 'cruelty' upon plaintiff by appellant is established and therefore, decreed suit for divorce filed by plaintiff on the ground of 'cruelty' vide judgement dated 30.11.2016 and decree dated 3.12.2016.

9. Perusal of judgement passed by Court below goes to show that Court below concluded that various allegations of cruelty levelled by plaintiff in the plaint against appellant, when considered cumulatively, constitute commission of 'cruelty'. To arrive at aforesaid conclusion, Court below has referred to **Srikant Ram Sajiwan Vs. Saroj, 2001 (2) DMC 295; Kusum Lata Vs. Kamta Prasad, AIR 1965 All 280; Narayan Ganesh Dastane Vs. Smt. Sucheta Narayan Dastane, AIR 1970 Bombay 812; Abha Agarwal Vs. Sunil Agarwal, AIR 2000 All (77); Hanumantha Rao Vs. Shamani, AIR 1990 SC 1318; Mukesh Vs. Chanchal, 2006 Legal (LE) Delhi 957.**

10. Feeling aggrieved by aforesaid judgement and decree passed by Court below, appellant has now come to this Court by means of present first appeal under section 19 of Act 1984.

11. Ms. Pragya Pandey, learned counsel for appellant, in support of her challenge to impugned judgement and decree submits that plaintiff has not pleaded any specific instance of 'cruelty', but has only made general allegations of 'cruelty' in the plaint; law on the subject is now crystallized and suit for divorce on ground of 'cruelty' can succeed only when specific instances of 'cruelty' are pleaded and proved by plaintiff; single instance of cruelty by itself is insufficient to constitute 'cruelty' vide **Neelam Kumar Vs. Daya Rani, 2010 (13) SCC 298 and Vishwanath Vs. Prakash Chand, AIR 1992 ALL 261.**

12. Elaborating her arguments, she invited attention of Court to plaint of Original Suit No. 468 of 2013 (Ravindra Singh Vs. Seema @ Aarju) which is part of paper book, to contend that plaint presented by plaintiff is vague and ambiguous. Allegations giving specific instances of cruelty are conspicuous by their absence.

13. We find force in the argument raised by learned counsel for appellant. Accordingly, we confronted Mr. H.M.B.

Sinha, lerned counsel for plaintiff to explain aforesaid anomaly. He tried to support impugned judgement on the strength of findings recorded therein as well as observations made by Court below in the impugned judgement. It was strenuously urged by learned counsel Sri Sinha that allegations of cruelty, made in the plaint where considered cumulatively, they have the effect of constituting cruelty upon plaintiff. Therefore, no illegality was committed by Court below in decreeing suit for divorce filed by plaintiff. To lend support to his submissions, reliance is placed upon **Samar Ghosh Vs. Jaya Ghosh 2007 (4) SCC 511; Navin Kohli Vs. Nilu Kohli, 2006 (4) SCC 558** and a Division Bench judgement of this Court in **Anil Kumar Jain Vs. Smt. Kalpana Jain 2019 (8) ADJ 1**. We shall refer to them in later part of this judgement.

14. Having heard learned counsel for parties and upon consideration of material on record, in our considered opinion, sole point of determination, arise in this appeal, is as under:

"Whether plaintiff has duly pleaded and proved commission of cruelty upon him by defendant and finding recorded by Court below on the issue of cruelty is unsustainable in law."

15. Before proceeding to examine the issue involved in the present appeal, it would be appropriate to reproduce section 13 of Act, 1955 which provides for grounds of divorce.

"" 13 Divorce. --(1) Any marriage solemnized, whether before or after the commencement of this Act, may, on a petition presented by either the husband or the wife, be dissolved by a decree of divorce on the ground that the other party--

[(i) has, after the solemnization of the marriage, had voluntary sexual intercourse with any person other than his or her spouse; or

(i-a) has, after the solemnization of the marriage, treated the petitioner with cruelty; or

(i-b) has deserted the petitioner for a continuous period of not less than two years immediately preceding the presentation of the petition; or]

(ii) has ceased to be a Hindu by conversion to another religion; or

[(iii) has been incurably of unsound mind, or has been suffering continuously or intermittently from mental disorder of such a kind and to such an extent that the petitioner cannot reasonably be expected to live with the respondent.

Explanation.--In this clause,--

(a) the expression "mental disorder" means mental illness, arrested or incomplete development of mind, psychopathic disorder or any other disorder or disability of mind and includes schizophrenia;

(b) the expression "psychopathic disorder" means a persistent disorder or disability of mind (whether or not including sub-normality of intelligence) which results in abnormally aggressive or seriously irresponsible conduct on the part of the other party, and whether or not it requires or is susceptible to medical treatment; or]

(iv) has, been suffering from a virulent and incurable form of leprosy; or

(v) has, been suffering from venereal disease in a communicable form; or

(vi) has renounced the world by entering any religious order; or

(vi) has not been heard of as being alive for a period of seven years or more by those persons who would naturally have heard of it, had that party been alive;

(vii) [Explanation. —In this sub-section, the expression "desertion" means the desertion of the petitioner by the other party to the marriage without reasonable cause and without the consent or against the wish of such party, and includes the wilful neglect of the petitioner by the other party to the marriage, and its grammatical variations and cognate expressions shall be construed accordingly.]

[(1-A) Either party to a marriage, whether solemnised before or after the commencement of this Act, may also present a petition for the dissolution of the marriage by a decree of divorce on the ground--

(i) that there has been no resumption of cohabitation as between the parties to the marriage for a period of 22 [one year] or upwards after the passing of a decree for judicial separation in a proceeding to which they were parties; or

(ii) that there has been no restitution of conjugal rights as between the parties to the marriage for a period of 22 [one year] or upwards after the passing of a decree for restitution of conjugal rights in a proceeding to which they were parties.]

(2) A wife may also present a petition for the dissolution of her marriage by a decree of divorce on the ground,---

(i) in the case of any marriage solemnised before the commencement of this Act, that the husband had married again before such commencement or that any other wife of the husband married before such commencement was alive at the time of the solemnisation of the marriage of the petitioner: Provided that in either case the other wife is alive at the time of the presentation of the petition; or

(ii) that the husband has, since the solemnisation of the marriage, been guilty of rape, sodomy or [bestiality; or]

[(iii) that in a suit under section 18 of the Hindu Adoptions and Maintenance Act, 1956 (78 of 1956), or in a proceeding under section 125 of the Code of Criminal Procedure, 1973 (2 of 1974) [or under the corresponding section 488 of the Code of Criminal Procedure, 1898 (5 of 1898)], a decree or order, as the case may be, has been passed against the husband awarding maintenance to the wife notwithstanding that she was living apart and that since the passing of such decree or order, cohabitation between the parties has not been resumed for one year or upwards; or

[(iv) that her marriage (whether consummated or not) was solemnised before she attained the age of fifteen years and she has repudiated the marriage after attaining that age but before attaining the age of eighteen years.]

Explanation. --This clause applies whether the marriage was solemnised before or after the commencement of the Marriage Laws (Amendment) Act, 1976 (68 of 1976).]

STATE AMENDMENT

Uttar Pradesh.-- In its application to Hindus domiciled in Uttar Pradesh and also when either party to the marriage was not at the time of marriage a Hindu domiciled in Uttar Pradesh, in section 13--

(i) in sub-section (1), after clause (i) insert (and shall be deemed always to have been inserted) the following

"(1-a) has persistently or repeatedly treated the petitioner with such cruelty as to cause a reasonable

apprehension in the mind of the petitioner that it will be harmful or injurious for the petitioner to live with the other party; or", and

(ii) for clause (viii) (since repealed) substituted and deem always to have been so substituted for following.

"(viii) has not resumed cohabitation after the passing of a decree for judicial separation against that party and--

(a) a period of two years has elapsed since the passing of such decree, or

(b) the case is one of exceptional hardship to the petitioner or of exceptional depravity on the part of other party; or"." "

16. The term 'cruelty' has not been defined in Act of 1956 and therefore, same has been subject matter of debate for long. Different Courts in India have tried to explain meaning of the term 'cruelty' and also crystallize actions which can constitute 'cruelty'. In doing so varied aspects of human nature in the changing vicissitudes of time have been taken into consideration.

17. A Division Bench of this Court in ***Smt. Sarita Devi Vs. Sri Ashok Kumar Singh reported in 2018 (3) AWC 2328*** has considered the concept of 'cruelty' in detail by referring to the meaning assigned to the term in different dictionaries and text. Following has been observed in paragraphs 16, 17, 18 and 19:-

"16. In Samar Ghosh vs. Jaya Ghosh (2007) 4 SCC 511 Court considered the concept of cruelty and referring to Oxford Dictionary defines 'cruelty' as 'the quality of being cruel; disposition of inflicting suffering; delight in or indifference to another's pain; mercilessness; hard-heartedness'.

17. In Black's Law Dictionary, 8th Edition, 2004, term "mental cruelty" has been defined as, "a ground for divorce, one spouse's course of conduct (not involving actual violence) that creates such anguish that it endangers the life, physical health, or mental health of the other spouse."

18. The concept of cruelty has been summarized in Halsbury's Laws of England, Vol.13, 4th Edition Para 1269, as under:

"The general rule in all cases of cruelty is that the entire matrimonial relationship must be considered, and that rule is of special value when the cruelty consists not of violent acts but of injurious reproaches, complaints, accusations or taunts. In cases where no violence is averred, it is undesirable to consider judicial pronouncements with a view to creating certain categories of acts or conduct as having or lacking the nature or quality which renders them capable or incapable in all circumstances of amounting to cruelty; for it is the effect of the conduct rather than its nature which is of paramount importance in assessing a complaint of cruelty. Whether one spouse has been guilty of cruelty to the other is essentially a question of fact and previously decided cases have little, if any, value. The court should bear in mind the physical and mental condition of the parties as well as their social status, and should consider the impact of the personality and conduct of one spouse on the mind of the other, weighing all incidents and quarrels between the spouses from that point of view; further, the conduct alleged must be examined in the light of the complainant's capacity for endurance and the extent to which that

capacity is known to the other spouse. Malevolent intention is not essential to cruelty but it is an important element where it exits."

19. In 24 American Jurisprudence 2d, the term "mental cruelty" has been defined as under:

"Mental Cruelty as a course of unprovoked conduct toward one's spouse which causes embarrassment, humiliation, and anguish so as to render the spouse's life miserable and unendurable. Plaintiff must show a course of conduct on the part of Defendant which so endangers the physical or mental health of Plaintiff as to render continued cohabitation unsafe or improper, although Plaintiff need not establish actual instances of physical abuse. "

18. In **Vishwanath Sitram Agarwal Vs. San. Sarle Vishwanath Agarwal, 2012 (7) SCC 288,** Court considered various earlier decisions with regard to meaning of term 'cruelty'. Their Lordships observed as follows in paragraphs 22 to 32:-

22.The expression "cruelty" has an inseparable nexus with human conduct or human behaviour. It is always dependent upon the social strata or the milieu to which the parties belong, their ways of life, relationship, temperaments and emotions that have been conditioned by their social status.

23. In Sirajmohmedkhan Janmohamadkhan v. Hafizunnisa

Yasinkhan [(1981) 4 SCC 250 : 1981 SCC (Cri) 829] , a two-Judge Bench approved the concept of legal cruelty as expounded inPancho v. Ram Prasad [AIR 1956 All 41] wherein it was stated thus: (Pancho case [AIR 1956 All 41] , AIR p. 43, para 3)

"3. ... Conception of legal cruelty undergoes changes according to the changes and advancement of social concept and standards of living. With the advancement of our social conceptions, this feature has obtained legislative recognition that a second marriage is a sufficient ground for separate residence and separate maintenance. Moreover, to establish legal cruelty, it is not necessary that physical violence should be used.

Continuous ill-treatment, cessation of marital intercourse, studied neglect, indifference on the part of the husband, and an assertion on the part of the husband that the wife is unchaste are all factors which may undermine the health of a wife."

It is apt to note here that the said observations were made while dealing with the Hindu Married Women's Right to Separate Residence and Maintenance Act (19 of 1946). This Court, after reproducing the passage, has observed that the learned Judge has put his finger on the correct aspect and object of mental cruelty.

24. In Shobha Rani v. Madhukar Reddi [(1988) 1 SCC 105 : 1988 SCC (Cri) 60] , while dealing with "cruelty" under Section 13(1)(i-a) of the Act, this Court observed that the said provision does not define "cruelty" and the same could not be defined. "Cruelty" may be mental or physical, intentional or unintentional. If it is physical, the court will have no problem to determine it. It is a question of fact and degree. If it is mental, the problem presents difficulty. Thereafter, the Bench proceeded to state as follows: (SCC p. 108, para 4)

"4. ... First, the enquiry must begin as to the nature of the cruel treatment. Second, the impact of such treatment on the mind of the spouse.

Whether it caused reasonable apprehension that it would be harmful or injurious to live with the other. Ultimately, it is a matter of inference to be drawn by taking into account the nature of the conduct and its effect on the complaining spouse. There may, however, be cases where the conduct complained of itself is bad enough and per se unlawful or illegal. Then the impact or the injurious effect on the other spouse need not be enquired into or considered. In such cases, the cruelty will be established if the conduct itself is proved or admitted."

25. After so stating, this Court observed in Shobha Rani case[(1988) 1 SCC 105 : 1988 SCC (Cri) 60] about the marked change in life in modern times and the sea change in matrimonial duties and responsibilities. It has been observed that: (SCC p. 108, para 5)

"5. ... when a spouse makes a complaint about the treatment of cruelty by the partner in life or relations, the court should not search for standard in life. A set of facts stigmatised as cruelty in one case may not be so in another case. The cruelty alleged may largely depend upon the type of life the parties are accustomed to or their economic and social conditions. It may also depend upon their culture and human values to which they attach importance."

26. Their Lordships in Shobha Rani case [(1988) 1 SCC 105 : 1988 SCC (Cri) 60] referred to the observations made in Sheldon v.Sheldon [1966 P 62 : (1966) 2 WLR 993 : (1966) 2 All ER 257 (CA)] wherein Lord Denning stated, "the categories of cruelty are not closed". Thereafter, the Bench proceeded to state thus: (Shobha Rani case [(1988) 1 SCC 105 : 1988 SCC (Cri) 60] , SCC p. 109, paras 5-6)

"5. ... Each case may be different. We deal with the conduct of human beings who are not generally similar. Among the human beings there is no limit to the kind of conduct which may constitute cruelty. New type of cruelty may crop up in any case depending upon the human behaviour, capacity or incapability to tolerate the conduct complained of. Such is the wonderful (sic) realm of cruelty.

6. These preliminary observations are intended to emphasise that the court in matrimonial cases is not concerned with ideals in family life. The court has only to understand the spouses concerned as nature made them, and consider their particular grievance. As Lord Reid observed in Gollinsv. Gollins [1964 AC 644 : (1963) 3 WLR 176 : (1963) 2 All ER 966 (HL)] : (All ER p. 972 G-H)

7. "... In matrimonial affairs we are not dealing with objective standards, it is not a matrimonial offence to fall below the standard of the reasonable man (or the reasonable woman). We are dealing with this man or this woman.'"

8. (emphasis in original)

9. 27. In V. Bhagat v. D. Bhagat [(1994) 1 SCC 337] , a two-Judge Bench referred to the amendment that had taken place in Sections 10 and 13(1)(i-a) after the (Hindu) Marriage Laws (Amendment) Act, 1976 and proceeded to hold that the earlier requirement that such cruelty has caused a reasonable apprehension in the mind of a spouse that it would be harmful or injurious for him/her to live with the other one is no longer the requirement. Thereafter, this Court proceeded to deal with what constitutes mental cruelty as contemplated in Section 13(1)(i-a) and

observed that mental cruelty in the said provision can broadly be defined as that conduct which inflicts upon the other party such mental pain and suffering as would make it not possible for that party to live with the other. To put it differently, mental cruelty must be of such a nature that the parties cannot reasonably be expected to live together. The situation must be such that the wronged party cannot reasonably be asked to put up with such conduct and continue to live with the other party. It was further observed, while arriving at such conclusion, that regard must be had to the social status, educational level of the parties, the society they move in, the possibility or otherwise of the parties ever living together in case they are already living apart and all other relevant facts and circumstances. What is cruelty in one case may not amount to cruelty in another case and it has to be determined in each case keeping in view the facts and circumstances of that case. That apart, the accusations and allegations have to be scrutinised in the context in which they are made. Be it noted, in the said case, this Court quoted extensively from the allegations made in the written statement and the evidence brought on record and came to hold that the said allegations and counter-allegations were not in the realm of ordinary plea of defence and did amount to mental cruelty.

28. In Parveen Mehta v. Inderjit Mehta [(2002) 5 SCC 706 : AIR 2002 SC 2582] , it has been held that mental cruelty is a state of mind and feeling with one of the spouses due to behaviour or behavioural pattern by the other. Mental cruelty cannot be established by direct evidence and it is necessarily a matter of inference to be drawn from the facts and circumstances of the case. "A feeling of anguish, disappointment and frustration in one spouse caused by the conduct of the other can only be appreciated on assessing the attending facts and circumstances in which the two partners of matrimonial life have been living." (Parveen Mehta case[(2002) 5 SCC 706 : AIR 2002 SC 2582] , SCC p. 716, para 21) The facts and circumstances are to be assessed emerging from the evidence on record and thereafter, a fair inference has to be drawn whether the petitioner in the divorce petition has been subjected to mental cruelty due to the conduct of the other.

29. In Vijaykumar Ramchandra Bhate v. Neela Vijaykumar Bhate [(2003) 6 SCC 334 : AIR 2003 SC 2462] , it has been opined that a conscious and deliberate statement levelled with pungency and that too placed on record, through the written statement, cannot be so lightly ignored or brushed aside.

30. In A. Jayachandra v. Aneel Kaur [(2005) 2 SCC 22] , it has been ruled that the question of mental cruelty has to be considered in the light of the norms of marital ties of the particular society to which the parties belong, their social values, status and environment in which they live. If from the conduct of the spouse, it is established and/or an inference can legitimately be drawn that the treatment of the spouse is such that it causes an apprehension in the mind of the other spouse about his or her mental welfare, then the same would amount to cruelty. While dealing with the concept of mental cruelty, enquiry must begin as to the nature of cruel treatment and the impact of such treatment on the mind of the spouse. It has to be seen whether the conduct is such that no reasonable person would tolerate it.

31. In Vinita Saxena v. Pankaj Pandit [(2006) 3 SCC 778] , it has been ruled that as to what constitutes mental

cruelty for the purposes of Section 13(1)(i-a) will not depend upon the numerical count of such incident or only on the continuous course of such conduct but one has to really go by the intensity, gravity and stigmatic impact of it when meted out even once and the deleterious effect of it on the mental attitude necessary for maintaining a conducive matrimonial home.

32. In Samar Ghosh v. Jaya Ghosh [(2007) 4 SCC 511] , this Court, after surveying the previous decisions and referring to the concept of cruelty, which includes mental cruelty, in English, American, Canadian and Australian cases, has observed that: (SCC pp. 545-46, paras 99-100)

"99. ... The human mind is extremely complex and human behaviour is equally complicated. Similarly human ingenuity has no bound, therefore, to assimilate the entire human behaviour in one definition is almost impossible. What is cruelty in one case may not amount to cruelty in the other case. The concept of cruelty differs from person to person depending upon his upbringing, level of sensitivity, educational, family and cultural background, financial position, social status, customs, traditions, religious beliefs, human values and their value system.

100. Apart from this, the concept of mental cruelty cannot remain static; it is bound to change with the passage of time, impact of modern culture through print and electronic media and value system, etc. etc. What may be mental cruelty now may not remain a mental cruelty after a passage of time or vice versa. There can never be any straitjacket formula or fixed parameters for determining mental cruelty in matrimonial matters. The prudent and appropriate way to adjudicate the case would be to evaluate it on its peculiar facts and circumstances...."

19. In **Ravi Kumar Vs. Julmi Devi 2010 (4) SCC 476,** following was observed in paragraphs 19 to 22:-

19.It may be true that there is no definition of cruelty under the said Act. Actually such a definition is not possible. In matrimonial relationship, cruelty would obviously mean absence of mutual respect and understanding between the spouses which embitters the relationship and often leads to various outbursts of behaviour which can be termed as cruelty. Sometime cruelty in a matrimonial relationship may take the form of violence, sometime it may take a different form. At times, it may be just an attitude or an approach. Silence in some situations may amount to cruelty.

20. Therefore, cruelty in matrimonial behaviour defies any definition and its categories can never be closed. Whether the husband is cruel to his wife or the wife is cruel to her husband has to be ascertained and judged by taking into account the entire facts and circumstances of the given case and not by any predetermined rigid formula. Cruelty in matrimonial cases can be of infinite variety--it may be subtle or even brutal and may be by gestures and words. That possibly explains why Lord Denning in Sheldon v.Sheldon [(1966) 2 WLR 993 : (1966) 2 All ER 257 (CA)] held that categories of cruelty in matrimonial cases are never closed.

21.This Court is reminded of what was said by Lord Reid inGollins v. Gollins[1964 AC 644 : (1963) 3 WLR 176 : (1963) 2 All ER 966 (HL)] about judging cruelty in matrimonial cases. The pertinent observations are: (AC p. 660)

"... In matrimonial cases we are not concerned with the reasonable man as we are in cases of negligence. We are dealing with this man and this woman and the fewer a priori assumptions we make about them the better. In cruelty cases one can hardly ever even start with a presumption that the parties are reasonable people, because it is hard to imagine any cruelty case ever arising if both the spouses think and behave as reasonable people."

The aforesaid passage was quoted with approval by this Court inN.G. Dastane (Dr.) v. S. Dastane [(1975) 2 SCC 326] .

22. About the changing perception of cruelty in matrimonial cases, this Court observed in Shobha Rani v. Madhukar Reddi[(1988) 1 SCC 105 : 1988 SCC (Cri) 60 : AIR 1988 SC 121] at AIR p. 123, para 5 of the report: (SCC p. 108, para 5)

"5. It will be necessary to bear in mind that there has been [a] marked change in the life around us. In matrimonial duties and responsibilities in particular, we find a sea change. They are of varying degrees from house to house or person to person. Therefore, when a spouse makes complaint about the treatment of cruelty by the partner in life or relations, the court should not search for standard in life. A set of facts stigmatised as cruelty in one case may not be so in another case. The cruelty alleged may largely depend upon the type of life the parties are accustomed to or their economic and social conditions. It may also depend upon their culture and human values to which they attach importance. We, the Judges and lawyers, therefore, should not import our own notions of life. We may not go in parallel with them. There may be a generation gap between us and the parties."

20. Reference in this regard may be made to the judgement in **K. Srinivas Rao Vs. D. A. Deepa, 2013 (5) SCC 226** wherein following has been observed in paragraphs 10 and16:

"10. Under Section 13(1)(i-a) of the Hindu Marriage Act, 1955, a marriage can be dissolved by a decree of divorce on a petition presented either by the husband or the wife on the ground that the other party has, after solemnisation of the marriage, treated the petitioner with cruelty. In a series of judgments this Court has repeatedly stated the meaning and outlined the scope of the term "cruelty". Cruelty is evident where one spouse has so treated the other and manifested such feelings towards her or him as to cause in her or his mind reasonable apprehension that it will be harmful or injurious to live with the other spouse. Cruelty may be physical or mental.

16.Thus, to the instances illustrative of mental cruelty noted inSamar Ghosh[(2007) 4 SCC 511] , we could add a few more. Making unfounded indecent defamatory allegations against the spouse or his or her relatives in the pleadings, filing of complaints or issuing notices or news items which may have adverse impact on the business prospect or the job of the spouse and filing repeated false complaints and cases in the court against the spouse would, in the facts of a case, amount to causing mental cruelty to the other spouse."

21. When case in hand is examined in the light of law relating to

pleadings in a suit for divorce filed on the ground of 'cruelty', as contemplated under section 13 (1) (ia) of Act 1955 and also as per law laid down by Apex Court and meaning assigned to the term 'cruelty', the inevitable conclusion is that plaintiff failed to plead and prove specific instances of 'cruelty' for decree of divorce prayed by him. When plaint of divorce suit filed by plaintiff is examined in light of law as noted above, this Court finds that plaintiff has miserably failed to plead and prove specific instances of 'cruelty'. Vague and general allegations devoid of material facts regarding commission of cruelty by appellant have been levelled in the plaint. Absence of material facts regarding allegations of 'cruelty' is an half hearted attempt to seek divorce. Absence of material particulars in support of allegations made in the plaint renders the case of plaintiff doubtful. Further once material facts in support of allegations of cruelty alleged in the plaint are absent, no amount of evidence could be looked into to support facts not pleaded. A Division Bench of this Court in **Anil Kumar (Supra)** has held that vague and general allegations, by themselves are insufficient to constitute 'cruelty'. Even otherwise, when allegations made in plaint are considered cumulatively also, it cannot be said that there has been continuous ill treatment, cessation of marital intercourse, studied neglect or indifference which may lead to inference of 'cruelty'. Reference in this regard be made to **Manish Tyagi Vs. Deepak Kumar, 2010 (4) SCC 339,** wherein Court has observed in paragraph 27 as under:

"27.The classic example of the definition of cruelty in the pre-1976 era is given in the well-known decision of this Court in N.G. Dastane (Dr.) v. S. Dastane [(1975) 2 SCC 326] , wherein it is observed as follows: (SCC p. 337, para 30)

"30. ... The enquiry therefore has to be whether the conduct charged as cruelty is of such a character as to cause in the mind of the petitioner a reasonable apprehension that it will be harmful or injurious for him to live with the respondent."

This is no longer the required standard. Now it would be sufficient to show that the conduct of one of the spouses is so abnormal and below the accepted norm that the other spouse could not reasonably be expected to put up with it. The conduct is no longer required to be so atrociously abominable which would cause a reasonable apprehension that it would be harmful or injurious to continue the cohabitation with the other spouse. Therefore to establish cruelty it is not necessary that physical violence should be used. However, continued ill-treatment, cessation of marital intercourse, studied neglect, indifference of one spouse to the other may lead to an inference of cruelty. However, in this case even with aforesaid standard both the trial court and the appellate court had accepted that the conduct of the wife did not amount to cruelty of such a nature to enable the husband to obtain a decree of divorce."

"

22. Consequently, view taken by Court below that when various allegations of 'cruelty' made by plaintiff are taken up together, they cumulatively have the effect of constituting cruelty upon paintiff, is patently erroneous.

23. In view of discussion made herein above, Impugned judgement and decree passed by Court below cannot be

sustained. Appeal succeeds and is accordingly allowed. Judgement dated 30.11.2016 and decree dated 3.12.2016, passed by Kamlesh Dubey, Principal Judge, Family Court, Hapur, whereby Suit No. 468 of 2018 (Ravindra Singh Vs. Seema @ Aarju), are hereby set aside. Suit No. 468 of 2018 (Ravindra Sigh Vs. Seema @ Arju) filed by plaintiff for divorce shall stand dismissed. In the facts and circumstances of case, we are of considered view that appellant is also entitled to cost which we quantify at Rs. 1,00,000/-. The same shall be paid by plaintiff to appellant within a period of one month, by furnishing a bank draft in her name before Court below.

(2020)02ILR A1343

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 17.01.2020

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.
THE HON'BLE RAJEEV MISRA, J.

First Appeal No. 385 of 2016

Smt. Shalini Singh ...Appellant
Versus
Alok Kumar Singh ...Respondent

Counsel for the Appellant:
Sri Rahul Sahai, Sri Aditya Singh Parihar

Counsel for the Respondent:
Sri Sanjay Singh, Sri Adarsh Bhushan, Sri Amrendra Nath Rai

A. Civil Law-Hindu Marriage Act (25 of 1955) - S.13(1)(ib) - Divorce - On ground of desertion – Pre condition - Proof of two years of continuous desertion - on the date of filing/institution of suit - necessary for grant of divorce as per provision of S.13(1)(ib) - period of desertion subsequent to filing of divorce suit cannot be looked into for calculating mandatory period of two years - Held - suit for divorce filed by husband on the ground of 'desertion' was not maintainable, as statutory period of two years desertion by other party had not expired on the date of institution of suit- Husband not entitled to divorce. (Para 16)

First Appeal allowed. (E-5)

List of case cited :

Adhyatma Bhattar Alwar Vs Adhyatma Bhattar Sri Devi 2002 (1) SCC 308

(Delivered by Hon'ble Rajeev Misra, J.)

1. This is defendant's appeal under Section 19 of Family Courts Act 1984 (hereinafter referred to as 'Act, 1984'), arising out of judgment and decree dated 5.9.2016, passed by Principal Judge, Family Court, Azamgarh in Case No. 50 of 2014 (Alok Kumar Singh Vs. Smt. Shalini Singh), whereby aforesaid case filed by plaintiff-respondent for divorce on ground of desertion has been decreed.

2. We have heard Mr. Aditya Singh Parihar, Advocate holding brief of Mr. Rahul Sahai, learned counsel for defendant-appellant (hereinafter referred to as 'appellant') and Mr. Amrendra Nath Rai, learned counsel representing plaintiff-respondent (hereinafter referred to as 'respondent').

3. It transpires from record that marriage of appellant (wife) was solemnized with respondent (husband) on 12.12.2006 in accordance with Hindu Rites and Customs. It is alleged by respondent (husband) that appellant (wife) deserted respondent about one month prior to date of institution of divorce case. For

better appreciation, it is useful to reproduce paragraphs 6 and 10 of plaint of Case No. 50 of 2014 (Alok Kumar Singh Vs. Smt. Shalini Singh) :

''6– यह कि अर्सा करीब एक माह पूर्व विपक्षी/प्रतिवादिनी के बड़े भाई हम वादी के घर आये तथा पिताजी से कहे कि खानदान मे ही लड़की की शादी है, शालिनी को विदा कर दीजिये। लड़की की शादी में शिरकत करने हेतु हम वादी के माता–पिता बखुशी व रजामंदी विपक्षी को खुशी–खुशी मय कपड़े जेवरात व नकदी के साथ विदा कर दिये।

10– यह कि वाद कारण दिनांक 15–1–2014 को पैदा हुआ जब कि विपक्षी हम वादी के घर रहने व उपरोक्त अवधि अर्सा करीब 3–4 वर्ष पूर्व से कोहैविट करने व शारीरिक सम्बंध स्थापित करने से इन्कार करने व संयुक्त परिवार के लोगो के साथ दुर्व्यवहार व गाली–गलौज व तोड़फोड़ करने व दाम्पत्य जीवन से गुरेज करने के कारण श्रीमान के न्यायालय के क्षेत्राधिकार के तहत पैदा हुआ और न्यायालय को वाद की सुनवाई का पूर्ण क्षेत्राधिकार है।''

"6. That around one month ago elder brother of the lady respondent/defendant came to our house and requested father to give a send-off to Shalini because a marriage was to be solemnised in their family. We, the parents of the petitioner, gave a sent-off on a happy note and with all pleasure to the respondent alongwith clothes, jewellery and cash for her participation in girl's marriage.

10. That a cause of action arose on 15.1.2014 under the jurisdiction of your goodself's court when respondent refused to reside in the petitioner's house, to cohabit and establish physical relation with the petitioner for the aforesaid period i.e. about 3-4 years, thus refrained from marital life, and also misbehaved with members of our joint family; and this Court has proper jurisdiction to hear the case."*(English Translation by Court)*

4. Suit filed by respondent was contested by appellant. Accordingly, appellant filed a written statement whereby, most of the allegations made in plaint were denied and additional pleas were also raised. Admitting the factum of marriage respondent and appellant, it was pleaded by appellant that from the aforesaid wedlock, two daughters namely, Vijeta and Pihu were born. The averments made in paragraphs 6 and 10 of plaint, were categorically denied. It was stated that desertion as a ground of divorce has been set up by plaintiff on incorrect facts. There is no factual basis for pleading desertion. It was also stated that respondent and his family members have continuously demanded additional dowry from appellant. In pursuit of their aforesaid demand, appellant has continuously been harassed and treated with cruelty by respondent and his family members. Respondent wants to have a second marriage and therefore, suit for divorce on the ground of desertion has been filed which is liable to be dismissed. Appellant categorically pleaded her readiness and willingness to reside with respondent.

5. On the pleadings of parties as noted above, Court below framed following three issues:

(i) Whether defendant-appellant is residing separately from plaintiff-respondent at her maternal home without any valid reason. If yes, its effect.

(ii) Whether defendant-appellant has deserted plaintiff-respondent without any valid reason, if yes, its effect.

(iii) To what relief is plaintiff-respondent entitled for.

6. After issues were framed, parties went to trial. Respondent in order to prove his case, adduced himself as P.W. 1 and Lok Nath Singh as P.W.2. Further respondent filed two documents in evidence vide list of documents-Paper No. 7 Ga-1 namely, (photocopy of identity card-8 Ga-1) and Paper No. 39 Ga-1 (pay slip for the month of May and June, 2016 Paper No. 40 Ga-1).

7. Appellant in order to establish her defence adduced herself as D.W.1 and one Bhupendra Kumar Singh as D.W.2. In documentary evidence, appellant filed medical certificate dated 21.5.2016 i.e. Paper No. 30 Ga-2.

8. Court below proceeded to decide above mentioned divorce suit by considering pleadings of parties and oral as well as documentary evidence adduced by parties. In respect of Issue No.1, Court below concluded that appellant is residing separately from respondent since last three to four years. Regarding Issue No.2, Court below held that failure on the part of appellant in not residing with respondent, without any sufficient reason, amounts to commission of 'mental cruelty'. Further, respondent has succeeded in proving desertion on the part of defendant-appellant. In view of findings recorded in respect of issue nos. 1 and 2, Court below concluded that respondent is entitled to decree of divorce on the ground of desertion by appellant (wife) without any valid reason. Consequently, Court below by means of judgement and decree dated 5.9.2016, decreed suit of plaintiff-respondent on the ground of 'desertion'. Feeling aggrieved by aforesaid judgement and decree appellant (wife) has approached this Court by means of present First Appeal filed under Section 19 of Act 1984.

9. Mr. Aditya Singh Parihar, learned counsel appearing for appellant submits that impugned judgement and decree passed by Court below is unsustainable in law and fact, Consequently, same are liable to be set aside by this Court. According to learned Counsel, suit for divorce was filed by respondent on the ground of 'desertion' and not on the ground of 'cruelty'. Consequently, Court below, did not frame any issue with regard to commission of 'cruelty' by appellant upon respondent. Since suit was filed on the ground of 'desertion', pre-condition necessary for a decree of divorce on ground of desertion must have been satisfied on the date of filing of suit. The period of desertion subsequent to filing of divorce suit cannot be looked into for calculating mandatory period of two years, which is a pre condition for filing a suit for divorce on the ground of 'desertion'. In the case in hand, suit was filed before expiry of a period of two years of desertion on the part of appellant. As such, essential pre-condition for seeking a decree of divorce on the ground of 'desertion' was not satisfied on the date of institution of suit. Court below by adopting a strange procedure has concluded that mental 'cruelty' was committed by defendant-appellant upon plaintiff-respondent in the years subsequent to filing of suit and therefore, it proved desertion also. Hence, impugned judgement and decree passed by Court below are liable to be set aside by this Court.

10. Mr. Amrendra Nath Rai, learned counsel for respondent has supported impugned judgement and decree on the reasonings recorded by Court below in impugned judgement. He has further relied upon various observations made by Court below and on cumulative basis, he submits that impugned judgement and decree passed by Court below are not liable to be interfered with.

11. Having heard learned counsel for parties at length and in detail we find that

only issue which arises for consideration in this appeal is:- "Whether suit for divorce filed by respondent on the ground of 'desertion' was not maintainable, as statutory period of two years desertion by other party had not expired on the date of institution of suit".

12. Before proceeding to consider the issue involved in the present appeal, it would be prudent to reproduce Section 13 of Hindu Marriage Act, 1955 (hereinafter referred to as' Act, 1955') which provides for grounds of divorce:

" 13 Divorce. --(1) Any marriage solemnized, whether before or after the commencement of this Act, may, on a petition presented by either the husband or the wife, be dissolved by a decree of divorce on the ground that the other party--

[(i) has, after the solemnization of the marriage, had voluntary sexual intercourse with any person other than his or her spouse; or

(i-a) has, after the solemnization of the marriage, treated the petitioner with cruelty; or

(i-b) ***has deserted the petitioner for a continuous period of not less than two years immediately preceding the presentation of the petition; or]***

(ii) has ceased to be a Hindu by conversion to another religion; or

[(iii) has been incurably of unsound mind, or has been suffering continuously or intermittently from mental disorder of such a kind and to such an extent that the petitioner cannot reasonably be expected to live with the respondent.

Explanation.--In this clause,--

(a) the expression "mental disorder" means mental illness, arrested or incomplete development of mind, psychopathic disorder or any other disorder or disability of mind and includes schizophrenia;

(b) the expression "psychopathic disorder" means a persistent disorder or disability of mind (whether or not including sub-normality of intelligence) which results in abnormally aggressive or seriously irresponsible conduct on the part of the other party, and whether or not it requires or is susceptible to medical treatment; or]

(iv) has, been suffering from a virulent and incurable form of leprosy; or

(v) has, been suffering from venereal disease in a communicable form; or

(vi) has renounced the world by entering any religious order; or

(vi) has not been heard of as being alive for a period of seven years or more by those persons who would naturally have heard of it, had that party been alive;

Explanation. —In this sub-section, the expression desertion means the desertion of the petitioner by the other party to the marriage without reasonable cause and without the consent or against the wish of such party, and includes the wilful neglect of the petitioner by the other party to the marriage, and its grammatical variations and cognate expressions shall be construed accordingly.

(1-A) Either party to a marriage, whether solemnised before or after the commencement of this Act, may also present a petition for the dissolution of the marriage by a decree of divorce on the ground--

(i) that there has been no resumption of cohabitation as between the parties to the marriage for a period of 22 [one year] or upwards after the passing of

a decree for judicial separation in a proceeding to which they were parties; or

(ii) that there has been no restitution of conjugal rights as between the parties to the marriage for a period of 22 [one year] or upwards after the passing of a decree for restitution of conjugal rights in a proceeding to which they were parties.

(2) A wife may also present a petition for the dissolution of her marriage by a decree of divorce on the ground,---

(i) in the case of any marriage solemnised before the commencement of this Act, that the husband had married again before such commencement or that any other wife of the husband married before such commencement was alive at the time of the solemnisation of the marriage of the petitioner: Provided that in either case the other wife is alive at the time of the presentation of the petition; or

(ii) that the husband has, since the solemnisation of the marriage, been guilty of rape, sodomy or [bestiality; or]

[(iii) that in a suit under section 18 of the Hindu Adoptions and Maintenance Act, 1956 (78 of 1956), or in a proceeding under section 125 of the Code of Criminal Procedure, 1973 (2 of 1974) [or under the corresponding section 488 of the Code of Criminal Procedure, 1898 (5 of 1898)], a decree or order, as the case may be, has been passed against the husband awarding maintenance to the wife notwithstanding that she was living apart and that since the passing of such decree or order, cohabitation between the parties has not been resumed for one year or upwards; or

[(iv) that her marriage (whether consummated or not) was solemnised before she attained the age of fifteen years and she has repudiated the marriage after attaining that age but before attaining the age of eighteen years.]

Explanation. --This clause applies whether the marriage was solemnised before or after the commencement of the Marriage Laws (Amendment) Act, 1976 (68 of 1976).]

13. There is a State of U.P. Amendment also but it is not relevant for the present purpose, hence we are not referring it.

14. The term 'desertion' has not been defined in Act, 1955. Section 13 (1) (1b) of Act, 1955 only provides for pre-condition necessary for seeking divorce on ground of desertion. In this regard, reference be made to **Adhyatma Bhattar Alwar Vs. Adhyatma Bhattar Sri Devi, 2002 (1) SCC 308,** wherein Court has dealt with concept of 'desertion' and observed as follows in paragraphs 7, 8, 9, 10, 11 and 12:

"7. "Desertion" in the context of matrimonial law represents a legal conception. It is difficult to give a comprehensive definition of the term. The essential ingredients of this offence in order that it may furnish a ground for relief are:

1. the factum of separation;

2. the intention to bring cohabitation permanently to an end -- animus deserendi;

3. the element of permanence which is a prime condition requires that both these essential ingredients should continue during the entire statutory period;

The clause lays down the rule that desertion to amount to a matrimonial

offence must be for a continuous period of not less than two years immediately preceding the presentation of the petition. This clause has to be read with the Explanation. The Explanation has widened the definition of desertion to include "wilful neglect" of the petitioning spouse by the respondent. It states that to amount to a matrimonial offence desertion must be without reasonable cause and without the consent or against the wish of the petitioner. From the Explanation it is abundantly clear that the legislature intended to give to the expression a wide import which includes wilful neglect of the petitioner by the other party to the marriage. Therefore, for the offence of desertion, so far as the deserting spouse is concerned, two essential conditions must be there, namely, (1) the factum of separation, and (2) the intention to bring cohabitation permanently to an end (animus deserendi). Similarly, two elements are essential so far as the deserted spouse is concerned: (1) the absence of consent, and (2) absence of conduct giving reasonable cause to the spouse leaving the matrimonial home to form the necessary intention aforesaid. The petition for divorce bears the burden of proving those elements in the two spouses respectively and their continuance throughout the statutory period.

8. This Court in the case of Bipin Chander Jaisinghbhai Shah v.Prabhawati [1956 SCR 838 : AIR 1957 SC 176] observed: (AIR pp. 183-84 & 190-91, paras 10 & 21)

"Thus the quality of permanence is one of the essential elements which differentiates desertion from wilful separation. If a spouse abandons the other spouse in a state of temporary passion, for example, anger or disgust, without intending permanently to cease cohabitation, it will not amount to desertion. For the offence of desertion, so far as the deserting spouse is concerned, two essential conditions must be there, namely, (1) the factum of separation, and (2) the intention to bring cohabitation permanently to an end (animus deserendi). Similarly two elements are essential so far as the deserted spouse is concerned: (1) the absence of consent, and (2) absence of conduct giving reasonable cause to the spouse leaving the matrimonial home to form the necessary intention aforesaid. The petitioner for divorce bears the burden of proving those elements in the two spouses respectively. Here a difference between the English law and the law as enacted by the Bombay Legislature may be pointed out. Whereas under the English law those essential conditions must continue throughout the course of the three years immediately preceding the institution of the suit for divorce, under the Act, the period is four years without specifying that it should immediately precede the commencement of proceedings for divorce. Whether the omission of the last clause has any practical result need not detain us, as it does not call for decision in the present case.Desertion is a matter of inference to be drawn from the facts and circumstances of each case. The inference may be drawn from certain facts which may not in another case be capable of leading to the same inference; that is to say, the facts have to be viewed as to the purpose which is revealed by those acts or by conduct and expression of intention, both anterior and subsequent to the actual acts of separation. If, in fact, there has been a separation, the essential question always is whether that act could be attributable to an animus deserendi. The offence of desertion commences when the fact of separation and the animus

deserendi coexist. But it is not necessary that they should commence at the same time. The de facto separation may have commenced without the necessary animus or it may be that the separation and the animus deserendi coincide in point of time; for example, when the separating spouse abandons the marital home with the intention, express or implied, of bringing cohabitation permanently to a close. The law in England has prescribed a three years' period and the Bombay Act prescribed a period of four years as a continuous period during which the two elements must subsist. Hence, if a deserting spouse takes advantage of the locus poenitentiae thus provided by law and decides to come back to the deserted spouse by a bona fide offer of resuming the matrimonial home with all the implications of marital life, before the statutory period is out or even after the lapse of that period, unless proceedings for divorce have been commenced, desertion comes to an end and if the deserted spouse unreasonably refuses to offer, the latter may be in desertion and not the former. Hence it is necessary that during all the period that there has been a desertion, the deserted spouse must affirm the marriage and be ready and willing to resume married life on such conditions as may be reasonable. It is also well settled that in proceedings for divorce the plaintiff must prove the offence of desertion, like and other matrimonial offence, beyond all reasonable doubt. Hence, though corroboration is not required as an absolute rule of law the courts insist upon corroborative evidence, unless its absence is accounted for to the satisfaction of the court.

But it is not necessary that at the time the wife left her husband's home she should have at the same time the animus deserendi. Let us therefore examine the question whether the defendant in this case, even if she had no such intention at the time she left Bombay, subsequently decided to put an end to the matrimonial tie. This is in consonance with the latest pronouncement of the Judicial Committee of the Privy Council in the case of Lang v. Lang [1955 AC 402 : (1954) 3 All ER 571 : (1954) 3 WLR 762 (PC)] AC at p. 417(F) in an appeal from the decision of the High Court of Australia, to the following effect:

"Both in England and in Australia, to establish desertion two things must be proved: first, certain outward and visible conduct -- the "factum' of desertion; secondly, the "animus deserendi' -- the intention underlying this conduct to bring the matrimonial union to an end.

In ordinary desertion the factum is simple; it is the act of the absconding party in leaving the matrimonial home. The contest in such a case will be almost entirely as to the "animus'. Was the intention of the party leaving the home to break it up for good, or something short of, or different from that?' "

(emphasis supplied)

9. In the case of Lachman Utamchand Kirpalani v. Meena [AIR 1964 SC 40 : (1964) 4 SCR 331] a Constitution Bench of this Court, considering the case of judicial separation on the ground of desertion without just cause, held on facts that the respondent (wife) left the appellant's matrimonial home on 26-2-1954 with the intention of permanently breaking it up, and ***that such desertion continued during the requisite period of two years*** *and that the appellant's letter of 1-4-1955, did not constitute an interruption of the respondent's desertion by its being a just cause for her to remain away from the matrimonial home; and*

that, in consequence, the appellant was entitled to a decree for judicial separation under Section 10(1)(a) of the Hindu Marriage Act, 1955. It was observed that: (AIR p. 52, para 28)

"An offer to return to the matrimonial home after some time, though desertion had started, if genuine and sincere and represented his or her true feelings and intention, would bring to an end the desertion because thereafter the animus deserendiwould be lacking, though the factum of separation might continue; but on the other hand, if the offer was not sincere and there was in reality no intention to return, the mere fact that letters were written expressing such an intention would not interrupt the desertion from continuing."

In this connection, reference was also made to the decision in the case of Bipin Chander Jaisinghbhai Shah v. Prabhawati [1956 SCR 838 : AIR 1957 SC 176] .

10. This Court in the case of Rohini Kumari v. Narendra Singh[(1972) 1 SCC 1 : 1972 SCC (Cri) 1] while considering the case of judicial separation on the ground of desertion under Section 10(1)(a) of the Act read with the Explanation, held: (SCC pp. 3-4, paras 4-5)

"The two elements present on the side of the deserted spouse should be absence of consent and absence of conduct reasonably causing the deserting spouse to form his or her intention to bring cohabitation to an end. The requirement that the deserting spouse must intend to bring cohabitation to an end must be understood to be subject to the qualification that if without just cause or excuse a man persists in doing things which he knows his wife probably will not tolerate and which no ordinary woman would tolerate and then she leaves, he has deserted her whatever his desire or intention may have been. The doctrine of "constructive desertion' is discussed at p. 229. It is stated that desertion is not to be tested by merely ascertaining which party left the matrimonial home first. If one spouse is forced by the conduct of the other to leave home it may be that the spouse responsible for the driving out is guilty of desertion. There is no substantial difference between the case of a man who intends to cease cohabitation and leaves the wife and the case of a man who with the same intention compels his wife by his conduct to leave him.

In Lachman Utamchand Kirpalani v. Meena [AIR 1964 SC 40 : (1964) 4 SCR 331] this Court had occasion to consider the true meaning and ambit of Section 10(1)(a) of the Act read with the Explanation. Reference was made in the majority judgment to the earlier decision in Bipin Chander Jaisinghbhai Shah v.Prabhawati [1956 SCR 838 : AIR 1957 SC 176] in which all the English decisions as also the statement contained in authoritative textbooks were considered. After referring to the two essential conditions, namely, the factum of physical separation and the animus deserendi which meant the intention to bring the cohabitation permanently to an end as also the two elements so far as the deserted spouse was concerned i.e. (1) the absence of consent and (2) absence of conduct giving reasonable cause to the spouse leaving the matrimonial home to form the intention aforesaid, it was observed while examining how desertion might come to an end:

"In the first place, there must be conduct on the part of the deserted spouse which affords just and reasonable cause for the deserting spouse not to seek

reconciliation and which absolves her from her continuing obligation to return to the matrimonial home. In this one has to have regard to the conduct of the deserted spouse. But there is one other matter which is also of equal importance, that is, that the conduct of the deserted spouse should have had such an impact on the mind of the deserting spouse that in fact it causes her to continue to live apart and thus continue the desertion. But where, however, on the facts it is clear that the conduct of the deserted spouse has had no such effect on the mind of the deserting spouse there is no rule of law that desertion terminates by reason of the conduct of the deserted spouse.' "

(emphasis supplied)

11. This Court in the case of Sanat Kumar Agarwal v. Nandini Agarwal [(1990) 1 SCC 475] considering a case under Section 13(1)(ib) of the Act, held that it is well settled that the question of desertion is a matter of inference to be drawn from the facts and circumstances of each case and those facts have to be viewed as to the purpose which is revealed by those facts or by conduct and expression of intention, both anterior and subsequent to the actual act of separation.

This extract is taken from Adhyatma Bhattar Alwar v. Adhyatma Bhattar Sri Devi, (2002) 1 SCC 308 at page 317

12. In a recent case in Chetan Dass v. Kamla Devi [(2001) 4 SCC 250] this Court considered the question whether the offer made by the husband in this Court to keep his wife, was held to be not sincere and did not deserve to be seriously considered. In that connection, this Court held: (SCC p. 258, para 12)

"12. During the course of the arguments, learned counsel for the appellant, so as to show the allegations made against the appellant about having illegitimate relationship with Sosamma Thomas (sic), submitted that the appellant is still prepared to keep the respondent Kamla Devi with him. According to him, the appellant never refused to live with her. In reply, learned counsel for the respondent submitted that the respondent was also prepared to live with the appellant provided that he discontinued his relationship with Sosamma Thomas. The hollowness of the submission that the appellant was still prepared to keep the respondent with him is quite apparent. It is on record that it was on the same undertaking that the respondent was taken to Ganganagar by the appellant to live with him but there she was subjected to humiliating treatment meted out to her by the appellant himself having his food only in the room of Sosamma Thomas and staying there during the night leaving his wife and sister alone on the ground floor. With this kind of attitude, the offer as made on behalf of the appellant is too shallow to deserve any serious thought. At the same time, the condition on which the respondent is prepared to live with him seems to be quite justified, that is to say, she is still prepared to live with him provided he behaves and snaps his relationship with the other woman. It is apparent that it is the own conduct of the appellant which led the respondent to live separate from the appellant. None else, but the appellant alone, is to be blamed for such an unhappy and unfortunate situation. The findings of facts, as recorded by the two courts below, do not deserve to be disturbed in any manner nor have they been seriously assailed before us." (Emphasis added)

15. This Court now has to examine the claim of respondent as per mandate of

section 13 (1)(ib) of Act 1955 and meaning assigned to the term 'desertion' as noted above. Section 13 (1) (ib) of Act 1955, clearly provides for grant of decree of divorce on the ground of 'desertion'. However, in order to seek decree of divorce on the ground of 'desertion', plaintiff must prove that he/she has been deserted for a continuous period of not less than two years immediately, preceding the presentation of the petition. Therefore, what implies from plain reading of aforesaid section is that defendant must have deserted petitioner for a continuous period of two years prior to the date of institution of suit. The aforesaid requirement can be termed as a necessary pre- condition for seeking a decree of divorce on ground of desertion. Therefore, it is imperative on the part of plaintiff to plead and prove that defendant has deserted plaintiff and has continued doing so uninterruptedly for a period of two years, prior to the institution of suit.

16. Consequently, now this Court has to examine whether the pre requisite condition for grant of a decree of divorce on the ground of desertion is satisfied in the present case or not. When we examine the averments made in paragraphs 6 and 10 of plaint, as quoted above, we find that respondent has miserably failed to plead that appellant has deserted respondent continuously for a period of two years prior to the date of institution of suit. What has been considered by Court below is the period subsequent to institution of suit i.e., there has been continuous desertion on part of appellant for a period of three to four years. View taken by court below cannot be sustained as according to scheme of Act, it is the period of two years of continuous desertion prior to institution of suit, which has to be pleaded and proved by plaintiff in order to succeed in a suit for divorce on ground of desertion. Since respondent failed to plead and prove that appellant had deserted him continuously for a period of two years, prior to date of presentation of plaint, suit for divorce on the ground of 'desertion' could not have been decreed. Apart from above, we also find that in order to justify 'desertion' on part of defendant-appellant, court below has taken into consideration the subsequent events which took place after institution of suit. View taken by Court below is manifestly illegal as subsequent events could not have been taken into consideration in a suit for divorce as per scheme of Act itself.

17. We, accordingly, confronted learned counsel for respondent on the aforesaid aspect of matter, but he could not create any dent. Except for reiterating the findings recorded by court below and observations made in the impugned judgement, nothing new could be added to dissuade us from the view taken by us with regard to import of section 13 (1) (ib) of Act 1955.

18. In view of discussions made herein-above, present appeal succeeds and is liable to be allowed. It is accordingly allowed. Impugned judgement and decree dated 5.9.2016, passed by Principal Judge, Family Court, Azamgarh in Case No. 50 of 2014 (Alok Kumar Singh Vs. Smt. Shalini Singh), are hereby set aside. Appellant shall be entitled to cost, which we quantify at Rs. 1,00,000/-. Cost shall be deposited by respondent with the Court below by means of a Bank Draft payable in favour of appellant within a period of one month from today.

(2020)02ILR A1353

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 26.02.2019

BEFORE

THE HON'BLE SURYA PRAKASH KESARWANI, J.

First Appeal No. 591 of 2009

Kailash Nath Gupta ...Appellant
Versus
The Collector, Varanasi ...Respondent

Counsel for the Appellant:
Sri S.K. Singh, Sri R.C. Maurya

Counsel for the Respondent:
Standing Counsel

A. Civil Law- Land Acquisition Act (1 of 1894) - S.18 - Acquisition - Reference - Reference is not appeal - Material relied on by Acquisition Officer in award - cannot be relied upon by the reference court unless same material is produced and proved before reference court

Held - There was no justification for the reference court to determine the market value of the acquired land on the basis of a sale deed which was neither filed in evidence nor it was before it but was merely referred in the award passed by the S.L.A.O. (Para 9)

B. Land Acquisition Act - Deduction - 40% - on account of largeness of area

Held - As per sale deed exemplars filed in evidence, smaller area measuring 10 dhoors was sold while total land measuring 1.492 acres, i.e. 2 bighas 7 biswas and 16 dhoors was acquired and therefore a deduction on account largeness of area made - Court applied deduction of 40% for the largeness of the area (Para 10)

First Appeal partly allowed (E-5)

List of case cited :

Chimanlal Hargovinddas vs. Special Land Acquisition Officer (1988) 3 SCC 751

(Delivered by Hon'ble Surya Prakash Kesarwani, J.)

1. Heard Sri R.C. Maurya, learned counsel for the claimant-appellant and Sri B.K. Yadav, learned standing counsel for the State-respondents.

2. This first appeal has been filed for enhancement of compensation.

3. Briefly stated facts of the present case are that by notification under Section 4(1) of the Land Acquisition Act, 1894 published in the U.P. Gazette on 17.04.1982, an area of 1.492 acres land of certain khasra plots including plot Nos.75 and 77 measuring 16 biswas in village Rajpura, Pargana Bhadohi, Tehsil Gyanpur, District Varanasi belonging to the claimant-Appellant, which was acquired for construction of a building for telephone exchange. Notification under Section 6 of the Act was published in the Gazette on 17.04.1982. Possession was transferred on 18.01.1983. The Special Land Acquisition Officer made the award on 13.03.1984 awarding compensation @ Rs.6428.50 per biswa.

4. As per the impugned judgment of the reference court, the **boundaries of the acquired khasra plot Nos.75 and 77 of the claimant-appellant,** are undisputedly as under:

"East: Bhadohi Gyanpur Road
West: Cold Storage of Ram Sundar Ram Nath
North: House of Daya Yadav in which business of caustic soda is carried on
South: Residential Houses"

5. The S.L.A.O. and the court below found that Bhadohi Railway Station (Railway Crossing) is situate at a distance of one furlong from the acquired land of the claimant-appellant, the acquired land is within the municipal limits of Nagarpalika Bhadohi, means of transportation are available and near the acquired land there are residential houses and businesses establishments and the area is regularly developing. The S.L.A.O. selected a sale deed at Serial No.46 of his chart as exemplar to determine the compensation.

6. I have looked into the records of the court below and I find that as per chart prepared by the S.L.A.O. the aforesaid sale deed at Serial No.46 is dated 07.04.1981 with respect to khasra plot No.73, measuring 10.5 dhoor disclosing selling rate of Rs.8571.43 per biswa. Perusal of the map of the village filed in evidence and available in the records of the court below shows that plot No.73 (subject matter of the selected sale deed exemplar) is not adjoining the road but between it and the road, there is plot No.72 whereas the plots of the claimant-appellant are adjoining the road.

7. Before the reference court, the respondents have not led any evidence with regard to the market value of the acquired land of the claimant-appellant. The claimant-appellant has filed in evidence two sale deed exemplars namely sale deed dated 22.01.1982 (paper No.22ga) whereby one Devi Prasad has sold 10 biswas land of his khasra plot No.123 for Rs.10,000/- and the sale deed dated 02.01.1982 (paper No.23ga) whereby one Devi Prasad has sold 10 biswas land of his khasra plot No.123 for Rs.10,000/-. These sale deeds indicate selling rate of nearby road side land of khasra plot No.123 to be Rs.20000/- per bigha. As per map of the village available in the records of the court below, khasra plot No.123 is adjoining the road and is near to the acquired land of the claimant-appellant. These sale deeds were executed about one year before the acquisition. It is not the case of the respondents that these sale deeds are not genuine or motivated. Therefore, there was no justification for the reference court to reject these two evidences and instead to rely upon the observation of the S.L.A.O. made in the award.

8. In **Chiman Lal Hargovinddas v. Special Land Acquisition Officer, Poona and another, (1988)3 SCC 751** (para-4), Hon'ble Supreme Court laid down the law for determination of market value in acquisition, as under:

"4. The following factors must be etched on the mental screen:

(1) A reference under section 18 of the Land Acquisition Act is not an appeal against the award and the Court cannot take into account the material relied upon by the Land Acquisition officer in his Award unless the same material is produced and proved before the Court.

(2) So also the ***Award of the Land Acquisition officer is not to be treated as a judgment of the trial Court*** *open or exposed to challenge before the Court hearing the Reference.* ***It is merely an offer made by the Land Acquisition officer and the material utilised by him for making his valuation cannot be utilised by the Court unless produced and proved before it. It is not the function of the Court to sit in appeal against the Award,approve or disapprove its reasoning, or correct its error or affirm,***

modify or reverse the conclusion reached by the Land Acquisition officer, as if it were an appellate court.

(3) The Court has to treat the reference as an original proceeding before it and determine the market value afresh on the basis of the material produced before it.

(4) The claimant is in the position of a plaintiff who has to show that the price offered for his land in the award is inadequate on the basis of the materials produced in the Court. Of course the materials placed and proved by the other side can also be taken into account for this purpose.

(5) The market value of land under acquisition has to be determined as on the crucial date of publication of the notification under Section 4 of the Land Acquisition Act (dates of Notifications under sections 6 and 9 are irrelevant).

(6) The determination has to be made standing on the date line of valuation (date of publication of notification under Section 4) as if the valuer is a hypothetical purchaser willing to purchase land from the open market and is prepared to pay a reasonable price as on that day. It has also to be assumed that the vendor is willing to sell the land at a reasonable price.

(7) In doing so by the instances method, the Court has to correlate the market value reflected in the most comparable instance which provides the index of market value.

(8) Only genuine instances have to be taken into account. (Some times instances are rigged up in anticipation of Acquisition of land).

(9) ***Even post notification instances can be taken into account (1) if they are very proximate,(2) genuine and (3) the acquisition itself has not motivated the purchaser to pay a higher price on account of the resultant improvement in development prospects.***

(l0) The most comparable instances out of the genuine instances have to be identified on the following considerations:

(i) proximity from time angle,

(ii) proximity from situation angle.

(11) Having identified the instances which provide the index of market value the price reflected therein may be taken as the norm and the market value of the land under acquisition may be deduced by making suitable adjustments for the plus and minus factors vis-a-vis land under acquisition by placing the two in juxtaposition.

(12) A balance-sheet of plus and minus factors may be drawn for this purpose and the relevant factors may be evaluated in terms of price variation as a prudent purchaser would do.

(13) The market value of the land under acquisition has there after to be deduced by loading the price reflected in the instance taken as norm for plus factors and unloading it for minus factors.

(14) The exercise indicated in clauses (11) to (13) has to be undertaken in a common sense manner as a prudent man of the world of business would do. We may illustrate some such illustrative (not exhaustive) factors:

Plus factors	***Minus factors***
1. smallness of size	*1. largeness of area*
2. proximity to a road	*2. situation in the interior at a distance from the Road*
3. frontage on a road	*3. Narrow strip of land with*

very small frontage compared to depth

4. nearness to developed area

4. lower level requiring the depressed portion to be filled up 5. regular shape 5. remoteness from developed locality

6. level vis-a-vis land under acquisition 6. some special disadvantageous factor which would deter a purchaser

7. special value for an owner of an adjoining property to whom it may have some very special advantage

(15) The evaluation of these factors of course depends on the facts of each case. There cannot be any hard and fast or rigid rule. Common sense is the best and most reliable guide. For instance, take the factor regarding the size. A building plot of land say 500 to 1000 sq. yds cannot be compared with a large tract or block of land of say l0000 sq. yds or more. ***Firstly while a smaller plot is within the reach of many, a large block of land will have to be developed by preparing a lay out, carving out roads, leaving open space, plotting out smaller plots, waiting for purchasers (meanwhile the invested money will be blocked up) and the hazards of an entrepreneur. The factor can be discounted by making a deduction by way of an allowance at an appropriate rate ranging approximately between 20 percent to 50 percent to account for land required to be set apart for carving out lands and plotting out small plots.*** *The discounting will to some extent also depend on whether it is a rural area or urban area, whether building activity is picking up, and whether waiting period during which the capital of the entrepreneur would be looked up, will be longer or shorter and the attendant hazards.*

(16) Every case must be dealt with on its own fact pattern bearing in mind all these factors as a prudent purchaser of land in which position the Judge must place himself.

*(17) These are general guidelines to be applied with understanding informed with common sense."****(Emphasis supplied by me)***

9. In view of the law laid down by Hon'ble Supreme Court in the case of **Chiman Lal Hargovinddas** (supra), it is clear that a reference under Section 18 of the Act is not an appeal against the award and the court cannot take into account the material relied upon by the Land Acquisition Officer in his award unless the same material is produced and proved before the court. Undisputedly, the sale deed relied by the S.L.A.O. was not produced or provided by the respondents before the reference court in the reference. Likewise, the sale deeds exemplars as collected by the S.L.A.O. were not filed in evidence before the court below by the respondents. Learned standing counsel could not point out from the paper book or from the records of the lower court that any sale deed exemplar in evidence was filed by the respondents. Therefore, there was no justification for the reference court to determine the market value of the acquired land on the basis of a sale deed which was neither filed in evidence nor it was before it but was merely referred in the award passed by the S.L.A.O. On the contrary, the sale deed exemplars being paper Nos.22ga and 23ga, were filed in evidence by the claimant-appellant to establish that nearby similar road side land situate on

the Bhadohi-Gyanpur road was sold @ Rs.20,000/- per biswa.

10. Under the circumstances, I am of the considered view that the sale deed exemplars being paper Nos.22ga and 23ga can be made basis to determine market value of the acquired land of the claimant-appellant as on the date of acquisition, i.e. 17.04.1982. Since as per the sale deed exemplars filed in evidence, smaller area measuring 10 dhoors was sold @ Rs.20,000/- per biswa while total land measuring 1.492 acres, i.e. 2 bighas 7 biswas and 16 dhoors was acquired and therefore a deduction on account largeness of area deserves to be made.

11. Considering the facts and evidences on record and after applying deduction of 40% for the largeness of the area, the market value of the acquired land of the claimant-appellant is determined @ Rs.12,000/- per biswa. The claimant-appellant shall be entitled to all other statutory benefits as per the impugned judgment of the reference court dated 23.02.1985 in L.A.R. No.113 of 1984 (Kailash Nath Gupta vs. Collector, Varanasi). The impugned judgment and decree is accordingly modified.

12. The appeal is **partly allowed** to the extent indicated above.

(2020)02ILR A1357

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 06.01.2020

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.

Second Appeal No. 1798 of 1978

Mohammad Alim & Ors. ...Appellants
Versus
Tahir Husain ...Respondent

Counsel for the Appellants:
Sri R. Asthana, Sri Gulrez Khan, Sri H.S. Ahmad, Sri Haji Iqbal Ahmad, Sri Javed Husain Khan, Sri Ramendra Asthana, Sri W.H. Khan

Counsel for the Respondent:
Sri R.K. Jain, Sri R.G. Prasad

A. Muslim Law - Transfer of property - Right of 'Pre-emption' - also called right of *'Shufaa'* - Right of pre-emption to co-sharers - is valid and not violative of Articles 14, 15 and 16 of Constitution - *Held* - Plaintiff was a co-sharer with defendant-3 in respect of property in dispute - to this extent right of pre-emption of plaintiff is valid (Para 28, 29)

B. Muslim Law - Transfer of property - Pre-emption - Exercise of right of pre-emption - Right of pre-emption has to be exercised only when transfer of property/sale is complete and not before thereto - till transfer is completed, there is no occasion to exercise right of pre-emption - Waiver of right of pre-emption - Onus - When a plea is raised by defendant that right of pre-emption has been waived, onus lie upon defendant to prove

Held - Defence by defendants that offer was made to plaintiff before execution of sale deed and since he did not agree, it amounts to waiver of his right of pre-emption - *Held* - it cannot be said that plaintiff did not exercise his right of pre-emption and waived such right before execution of sale deed since till transfer is completed, there is no occasion to exercise right of preemption. (Para 34, 38)

Second Appeal dismissed. (E-5)

List of cases cited :

1. Bhanu Ram Vs B. Baijnath Singh AIR 1961 SC 1327;

2. Sant Ram Vs Labh Singh AIR 1965 SC 314

3. A. Razzaque Sajansaheb Bagwan Vs Ibrahim Haji Mohd. Hussain AIR 1999 SC 2043

4. Bishan Singh Vs Khazan Singh AIR 1958 SC 838

5. Irishna Vs State of Haryana AIR 1994 SC 2536

6. Begum Vs Muhammad Yakub (1894) IL 16 All 344

7. Zamani Begum Vs Khan Muhammad (1924) 46 All 142

10. Radhakisan Laxminarayan Vs Shridhar AIR 1960 SC 1368

11. Ram Saran Lall Vs Mst. Domini Kuer AIR 1961 SC 1747

12. S.K.Mohd. Rafiq Vs Khalilul Rehman AIR 1972 SC 2162

13. Kumar Gonsusab Vs Sri Mohammed Miyan JT 2008 (9) SC 334

(Delivered by Hon'ble Sudhir Agarwal, J.)

1. Sri W.H.Khan, Senior Advocate, assisted by Sri J.H.Khan, learned counsel for appellants is present. None has appeared on behalf of respondents though this appeal has been called in revise. Since appeal is old one, relates to the year 1978, hence I proceed to hear and decide the same ex parte.

2. This is defendants' appeal under Section 100 of Code of Civil Procedure *(hereinafter referred to as "C.P.C.")* arising from judgment and decree dated 01.6.1978 passed by Sri I.P.Singh, Vth Additional District and Sessions Judge, Saharanpur, in Civil Appeal No.337 of 1976 dismissing the same and confirming judgment and decree dated 18.9.1976 passed by Sri R.C.Pandey, Civil Judge, Saharanpur decreeing Original Suit No.42 of 1972.

3. Appeal was admitted vide order dated dated 17.7.1978 on the substantial questions (A) and (D), which read as under :

"A. Whether ***right of pre-emption is barred by the Constitution of India*** *as it imposes an unreasonable restriction to hold the property?*

D. Whether ***plaintiff was entitled to pre-emption*** *even when he did not perform the necessary Talabs according to law."*

(emphasis added)

4. The facts giving rise to present appeal are that Original Suit No.42 of 1972 was filed by Tahir Husain, sole plaintiff-respondent *(hereinafter referred to as "plaintiff")* against Mohammad Alim and Mohammad Arif, sons of Zinda Hasan, impleaded as defendants 1 and 2 and Mst. Naimat (Niyamat) Ilahi, widow of Sheikh Habib Ahmad, (defendant 3), in the Court of Civil Judge (Senior Division), Saharanpur.

5. As per plaint dated 03.03.1972, suit property detailed at the bottom of plaint is described as under :

"One Daribast Arazi Tal untilled in the east direction, and in the west direction, towards the north side, a balcony of Shakasti is built in the remaining part of the property, and some other constructions are also there. Remaining part of the land is untilled, and is situated in Mohalla Mala Gate, Saharanpur as defined below.

East: Public Drainage and public road.

West: Haweligada. Boarding House

South: Deewan of the Haweligada Boarding House

North: Wall of the house Jagan Nath Panjabi, and in the middle joint in north-south direction. And wall of the related Mahal Khana, and shop in the ownership of Abrar Ahmad, and heirs of Late Abdul Hakeem.

North: Public drainange and road."

6. The plaint case set up by plaintiff Tahir Husain is that Darogha Mohd. Ibraheem was first owner in possession of suit property. When Darogha Mohd. Ibraheem expired, he left behind two heirs i.e. two daughters viz. Mrs. Amtul and Mrs. Amna Khatoon. Thereafter, Mst. Amtul died without leaving any issue. She left her sister Mrs. Amna Khatoon as her heir, who became sole owner in possession of property mentioned in the plaint. Later on, Amna Khatoon also died. She left two sons viz. Shabbeer Ahmad and Reyaz Ahmad and daughter Niyamat Ilahi, as heirs, who became joint-owners in possession of property mentioned in the plaint. Subsequently, Shabbeer Ahmad S/o (Late) Amna Khatoon also died. He left plaintiff, Zahid Husain, Tauheed Hasan and Mohd. Mobeen, (his sons); Mrs. Tahira Begum, Raeesa Begum, Mansoor Fatima and Shahida and Nadira (his daughters); and widow Khushnuma Begum as heirs.

7. Plaintiff is joint-owner in possession of property as described in the plaint in accordance with Shariyat, along with his brothers, sisters, Mrs. Khushnuma Begum (step-mother) and Reyaz Ahmad and Mrs. Niyamat Ilahi. Suit property is located at a very prime locality near Makan Ram Leela, at Madarsa Mazahirul Uloom, at a crossing inside the city, Saharanpur. It was around twenty years ago that the rent used to be very nominal in city Saharanpur. Zinda Hasan S/o Abdul rented suit property at the rate of Rs.30/-. He started business of Taal Sokhta. Plaintiff is engaged in sale and purchase of trees. He owns no shop. He felt dire need of a shop for the purpose of keeping wood-log. Hence, in 1971, he asked Zinda Hasan to vacate suit property. However, he plotted a conspiracy in collusion with others who were his relatives and refused to vacate the premises.

8. Zinda Hasan, under the apprehension of being vacated, in collusion with Mrs. Niyamat Ilahi, who was his relative, agreed secretly to sell her 1/5th part of suit property to appellants-defendants-1 and 2 on a consideration of Rs.8,500/-, without knowledge of or information to plaintiff. Defendant -3, Mst. Niyamat Ilahi, sold out her 1/5th part of suit property through sale deed dated 24.09.1971, for consideration of Rs.8,500/- secretly, without knowledge of and information to plaintiff. As soon as plaintiff came to know about sale deed executed between Mrs. Niyamat Ilahi and defendants-1 and 2, first he performed duty of pre-emption and immediately went to the spot alongwith witnesses in the presence of defendants 1 and 2 and performed duty of preemption. On 27.10.1971, he gave an application for copy of sale deed in the office of Sub-Registrar, Saharanpur. He received copy on 12.11.1971. Parties are Sunni Muslims and Mohammadan Law is applicable to them. Plaintiff has been a co-sharer in the property mentioned even before sale deed

dated 24.09.1971 was executed between defendant 3 and defendants-1 and 2. Defendants -1 and 2 had no share or right in suit property before said sale deed. Hence, plaintiff, in preference to defendants-1 and 2, has got a right to purchase, on the basis of pre-emption, as provided in Shariyat. Defendants- 1 and 2, in spite of knowledge of right of pre-emption, bought part of suit property for consideration of Rs.8,500/-, hence the suit. Cause of action arose when sale deed dated 24.09.1971 was executed and on 27.10.1971 when plaintiff got knowledge of sale deed for the first time.

9. Plaintiff claimed following reliefs :

"अ. बरूये डिग्री शुफा शरई प्रतिवादीगण नं0 1 व 2 को हुक्म दिया जावे कि वह वादी के सर्फा से जायदाद मुफस्सला जैल के 1/5 हिस्से की बाबत अन्दर मियाद मोइयना अदालत वादी के हक में बयनामा तहरीर व तकमील कर के रजिस्ट्री करा दे। और मुबलिग 8500 रूपये रजिस्ट्री पर वसूल कर ले। और अगर प्रतिवादीगण नं0 1 व 2 ऐसा करने में कासिर रहे तो अदालत उनकी तरफ से बयनामा व जरे समन मुबलिग 8500 रूपये वादी के हक में तहरीर व तकलीम कर दे और मुबलिक 8500 रूपये अदालत में जमा करने का वादी को मौका दिया जावे।

ब. वादी को खर्चा मुकदमा प्रतिवादीगण नं0 1 व 2 ने दिलाया जावे।"

A. That as pre-emption, defendants no-1 & 2 be directed to get the registry executed of the 1/5 part of the property mentioned, in favour of the plaintiff within the stipulated time and recover the amount of Rs. 8500/-, and if the defendants 1 and 2 fail to do so, the Court may kindly receive an amount of Rs. 8500/- for the purpose of sale deed and get the sale deed executed. The plaintiff may be allowed to deposit the amount of Rs. 8500/- in the court.

B. The expenses of the case be awarded to the plaintiff from the defendants no-1 and 2.

(English Translation by Court)

10. Suit was contested by defendants 1 and 2 by filing a combined written statement dated 02.8.1972. Contents of paras 1 to 4 of plaint were admitted. Contents of para 5 were admitted to the extent of death of Shabeer Ahmad and rest was denied. Contents of para 7 of plaint to the extent property is situated in Saharanpur city, adjacent to the house of Ram Leela was admitted. In para 8 of plaint, tenancy of Zinda Hasan was admitted. In paras 10 and 11 of plaint, purchase of 1/5th portion of suit property by defendant Mujeeb from defendant Niyamat Ilahi for consideration of Rs.8,500/- was admitted. Rest part of plaint is not admitted. In additional pleas, defendants pleaded that :

(i) Plaintiff is not entitled for any relief as no cause of action has arisen and suit is liable to be dismissed with costs.

(ii) Plaintiff's contention that he had no knowledge and information about sale of 1/5th share of suit property to defendants Mujeeb was incorrect.

(iii) Defendant 3 desired to sell her 1/5th share in suit property since long and made various efforts which ultimately settled with defendant Mujeeb.

(iv) One of the broker Munshi Abrar Husain engaged by defendant-3 had also enquired from plaintiff about purchase of 1/5th share of defendant 3 but he did not care to purchase the same for consideration of Rs.8,000/-.

(v) Ms. Tahra Begum, real sister of plaintiff married to Ahmad, real brother of Mujeeb and plaintiff used to visit defendant's house time to time.

(vi) Defendant Mujeeb himself disclosed to plaintiff that he is going to buy 1/5th share of suit property from Smt. Niyamat Ilahi for consideration of Rs.8,500/- and plaintiff told him that it was offered to him for Rs.8,000/- but he was not inclined to purchase the said share as it was fetching meagre rent.

(vii) 1/5th share of Smt. Niyamat Ilahi has been purchased by Mujeeb after refusal by plaintiff. Hence has has no right to file suit allegedly exercising his right of pre-emption.

(viii) Suit is barred by estoppel and acquiescence.

(ix) Date of knowledge disclosed by plaintiff is false as he had prior knowledge of transaction.

(x) Conditions precedent for exercising right of pre-emption are not fulfilled and claim set up by plaintiff is based on no factual foundation.

(xi) The suit property was under tenancy of father of defendants 1 and 2 for the last 35 years. Plaintiff's claim that he asked Zinda Hasan in the year 1971 to vacate suit property is false and it is also incorrect that sale deed was executed under the apprehension of eviction.

(xii) Suit property is not situated in any locality of special significance. It is incorrect that defendant Mujeeb or his father had close relationship with Smt. Niyamat Ilahi.

11. Subsequently, there was amendment in the written statement. Paras 10a and 10b were inserted stating as under :

"10 अ. यह कि दौरान अपील मौरखा 30.4.77 ई0 को श्री रईसा बेगम यके अज् शरीक सहीम व हिस्सेदार ने अपना कुल हक व हिस्सा सिहाज अज 260 सिहाय प्रतिवादीगण के हक में बजरिये हिबेनामा मौरखा 23.4.1977 मु0 रजिस्ट्री शुदा हिब्बे करके मुत्तकिल कर दिया जिसको प्रतिवादीगण ने कबूल व मंजूर किया और वह बतौर शरीक व हिस्सेदार काबिज हो गया।

10 ब. यह कि मज़कुरा वाला कारण से भी दावा शुफा वादी काबिले पशरफ़्त नहीं है।"

10a. That on 30.4.77 during pendency of the appeal, the shareholder Smt. Raeesa Begum transferred her total rights and share of 260 units in favour of the defendants by way of a registered gift deed dated 23.4.77, which the defendants accepted and came in possession over the same as shareholder.

10b. That for the aforesaid reason as well, the suit of the plaintiff for pre-emption does not deserve to be proceeded with.

(English Translation by Court)

12. Trial Court formulated following four issues :

"1. Whether the plaintiff is entitled to seek pre-emption?

2. Whether the plaintiff performed necessary demands as alleged?

3. Whether the plaintiff had the knowledge of the impugned sale deed? If so, whether the suit is barred by estoppel?

4. To what relief, if any, is the plaintiff entitled?"

13. Issue-1 was answered in favour of plaintiff and thereafter issues 2 and 3 were taken together. Both these issues were answered in favour of plaintiff. As a result thereof issue-4 was answered holding that suit is liable to be decreed. Consequently, Trial Court decreed the suit and operative part of judgment reads as under :

"The suit for pre-emption in respect of one-fifth share of the defendant

No.3 in the property detailed at the foot of the plaint is decreed. The defendants 1 and 2 are directed to execute the sale deed in favour of the plaintiff after receiving Rs.8500/- from the plaintiff within three months failing which the plaintiff will have a right to get the sale deed executed through court at the expenses of the defendants. The parties shall bear their own costs of the suit."

14. Defendants 1 and 2 i.e. Mohammad Alim and Mohammad Arif assailed judgment of Trial Court filing Civil Appeal No.337 of 1976 in the Court of District Judge, Saharanpur vide memo of appeal dated 7.11.1976.

15. Subsequently, an amendment application was filed stating that after pronouncement of judgment by Trial Court, but before filing of appeal, defendant 3 in the suit i.e. Smt. Niyamat Ilahi, widow of Sheikh Habib Ahmad had died on 20.9.1976 and she was impleaded as defendant 1 in appeal, therefore against her name, 'deceased' be written and Haji Amir Hasan, Shamshad Hasan, Jamil Ahmad and Smt. Fazal Ilahi, legal heirs be impleaded as defendant/respondents 1/1 to 1/4. However, said amendment was rejected vide order dated 16.7.1977 passed by Sri Vikram Singh, District Judge, Saharanpur.

16. Lower Appellate Court *(hereinafter referred to as "LAC")* considered following questions for deciding appeal:

(i) Impugned decree is not made in terms of Order 20 Rule 14 C.P.C.

(ii) Appellants having become co-sharerer in disputed property, no pre-emption can be enforced against them.

(iii) Whether there was requisite demand for pre-emption?

17. While answering question (i), Court found that Trial Court has obviously ignored Order 20 Rule 14 C.P.C., but. that defect was curable therefore, that defect will not vitiate the judgment. Questions (ii) and (iii) were answered against appellants. Consequently, appeal was dismissed.

18. Before this Court, Appellants filed an application dated 21.4.2019 under Section 100(5) Second Proviso, C.P.C., proposing three more substantial questions of law, and formulated the same as under :

"F. Whether the lower appellate court erred in law in converting a decree of specific performance of contract into ***a decree of pre-emption on an assumption that it was the mistake of the trial court without looking into the plaint which itself prayed a decree of specific performance.*** *There was no amendment sought by the plaintiff to amend the prayer in the plaint nor the plaintiff filed any cross objection or cross appeal?*

G. Whether the lower appellate court erred in law in importing his personal knowledge by observing that plaintiff committed a mistake in his statement that he came to know of the impugned sale deed dated 24.09.1971 on 27.09.1971 while he meant 27.10.1971 as the date on which he acquired knowledge of the said sale deed. In recording this finding lower appellate Judge imported his personal knowledge by observing that it was his mistake in recording the statement of plaintiff when he was

presiding officer of trial court. No application for correction of statement was made by plaintiff at any stage that his statement was wrongly recorded.

(H) Whether first appeal abated as a whole when the plaintiff failed to substitute legal representatives of defendant no.3 Smt. Niamat Ilahi and Lower Court erred in taking the contrary view."

19. This application has been opposed by plaintiff-respondent by filing objection/counter affidavit sworn on 29.5.2019 stating that suit was for decree founded on pre-emption and not specific performance. Finding was already recorded by Courts below that sale deed dated 24.9.1971 came to the knowledge of plaintiff on 27.10.1971 and that defendant 3 was a proforma respondent against whom no relief was sought, hence, it is pleaded that additional questions sought to be raised have not arisen in this appeal and should not be allowed.

20. I have gone through additional questions and find that entire case set up by plaintiff was founded on the right of 'pre-emption' and that is why appeal was admitted on two questions relating to alleged right of pre-emption, pleaded by plaintiff, and decided by Courts below. With regard to date of sale deed and knowledge, I find that date of sale deed is not in dispute and date of knowledge is also subsequent to the date of execution of sale deed. Therefore, it would make no material difference. Further non substitution of heirs of defendant 3 after her death would not result in abating entire proceedings as no relief was claimed against Smt. Niyamat Ilahi since she had already executed sale deed in favour of Mujeeb. Therefore in my view, the three additional questions, sought to be formulated by appellants can neither be said to be substantial questions of law arising in this appeal nor need be allowed to be raised at this stage. Suffice it to state that two questions, already formulated by this Court while admitting appeal, only need be decided. Hence application requesting to allow additional substantial question of law is hereby rejected.

21. Now, I proceed to decide two substantial questions of law, as noticed above.

22. Right of "pre-emption', also called right of "Shufaa', is right which the owner of an immovable property, possesses, to acquire by purchase, another immovable property, which had been sold to another person in preference by paying a price equal to that settled, or paid by the latter. Now, it is settled that right of pre-emption based on vicinage is void and unconstitutional. It has been declared so by Supreme Court in **Bhanu Ram vs. B. Baijnath Singh AIR 1961 SC 1327; Sant Ram vs. Labh Singh AIR 1965 SC 314 and A. Razzaque Sajansaheb Bagwan vs. Ibrahim Haji Mohd. Hussain AIR 1999 SC 2043.**

23. Pre-emption is not a right of "re-purchase', either from vendor or vendee, involving any new contract of sale. It is simply a right of substitution, entitling pre-emptor, by reason of a legal incident to which the sale itself was subject to stand in the shoes of the vendee in respect of all the rights and obligations arising from the sale, under which he has derived his title.

24. In **Bishan Singh vs. Khazan Singh AIR 1958 SC 838,** Court said that right of pre-emption is a right of

substitution but not of repurchase. Pre-emptor takes the entire bargain and steps into the shoes of original vendee.

25. Validity of right of pre-emption has been examined by Supreme Court in the cases noticed above in the light of Article 19(1)(f) of Constitution, which confered fundamental right to acquire, hold and dispose of property. The aforesaid right of property has now been ceased to be a fundamental right by virtue of 42nd amendment of Constitution and has become a constitutional right under Article 300A, which is drafted in a different language. Therefore, law as it was earlier need be examined afresh in the cases arising after amendment of Article 19(1)(f).

26. However, that is not material in the present case since right of pre-emption sought to be exercised in this case relates to the period when Article 19(1)(f) was on the statute book. Therefore, I have to decide the matter as the law as then was.

27. Right of pre-emption is an incident annexed to a property. Although it is essentially a right in rem but it its exercise, from the time it arises upto the time of decree, is restricted as a personal right, which is neither heritable nor transferable. Right of pre-emption by a co-sharer has been upheld by Supreme Court in **Bhanu Ram (supra)** with reference to Article 19(5) of Constitution treating it to be a reasonable restriction.

28. While considering validity of Section 15(1)(b) of Punjab Pre-emption Act, 1923, in **Irishna vs. State of Haryana AIR 1994 SC 2536** Court held that right of pre-emption to co-sharers is valid and not violative of Articles 14, 15 and 16 of Constitution.

29. In the present case, admittedly plaintiff was a co-sharer with defendant-3 in respect of property in dispute, therefore, to this extent right of pre-emption of plaintiff is valid and constitutional.

30. In view of above discussion, it cannot be said that right of pre-emption as a whole is unconstitutional. In a restricted way, right of pre-emption of co-sharers has been held to be constitutional, therefore, **question (A) is answered against appellants.**

31. Now, coming to question (D), it is also now well settled that right of pre-emption arise only out of a valid, complete and bona fide sale. A Full Bench of this Court in Begum vs. Muhammad Yakub (1894) IL 16 All 344 followed in Zamani Begum vs. Khan Muhammad (1924) 46 All. 142 has taken a view that right of pre-emption arises not only when an out-and-out sale has been completed, but also, when a complete contract of sale without any option to the vendor has been made.

32. This aspect has now been considered in **Radhakisan Laxminarayan vs. Shridhar AIR 1960 SC 1368** and it has been held that transfer of property where Transfer of Property Act, 1882 *(hereinafter referred to as "Act, 1882")* applies, has to be under the provisions of that Act only. Mohomedan Law or any other personal law of transfer of property cannot override the statute. Therefore, unless title has passed in accordance with Act, 1882, no right to enforce pre-emption arises. Supreme Court thus has made it clear that demand, exercising right of pre-emption, should be made after registration of sale deed. This view has been subsequently followed in **Ram Saran Lall Vs. Mst. Domini Kuer AIR 1961 SC 1747** and also reiterated in

S.K.Mohd. Rafiq vs. Khalilul Rehman AIR 1972 SC 2162.

33. The above aspect stands further clarified from a subsequent judgment in **Kumar Gonsusab vs. Sri Mohammed Miyan JT 2008 (9) SC 334** wherein it has been held that a contract for sale does not by itself create any interest in or charge on immovable property. Therefore, where parties enter into mere agreement to sell, it creates no interest in the suit property in favour of vendee. The proprietary title does not validly pass from vendor to vendee. Until that is completed, no right to enforce pre-emption arises.

34. This also reiterate the fact that right of pre-emption can be exercised only when sale is complete and not before thereto. When a plea is raised by defendant that right of pre-emption has been waived, onus lie upon defendant to prove it.

35. I may also add at this stage that right of pre-emption has not been looked upon with great favour by Courts since it is in derogation of right of owner to alienate his/her property. It is neither illegal nor fraudulent for parties to a transfer to avoid and defeat a claim for pre-emption by all legitimate means. It is a weak right and Courts would not go out of their way to help the pre-emptor.

36. In the present case, defence taken by defendants is that offer was made to plaintiff before execution of sale deed and since he did not agree, it amounts to waiver of his right of pre-emption. This plea goes contrary to law, as discussed above, since right of pre-emption has to be exercised only when transfer of property is complete. Therefore, it cannot be said that plaintiff did not exercise his right of pre-emption and waived such right before execution of sale deed since till transfer is completed, there is no occasion to exercise right of pre-emption.

37. Moreover, Question (D), which has been argued by learned counsel for appellants, based on defence taken by defendants that plaintiff was given offer to purchase suit property before execution of sale deed but he did not agree and thereafter sale deed was executed. This made it clear that there was no waiver on the part of plainitff and with regard to his subsequent exercise of right of pre-emption, nothing otherwise has been brought to the notice of this Court. Hence, I find no reason but to **answer question (D) against appellants.**

38. No other point has been argued.

39. Appeal lacks merit and is dismissed with costs throughout.

(2020)02ILR A1365

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 23.01.2020

BEFORE
THE HON'BLE ARVIND KUMAR MISHRA-I, J.
THE HON'BLE GAUTAM CHOWDHARY, J.

Government Appeal No. 2116 of 2001

State of U.P. ...Appellant

Versus

Abid & Anr. ...Respondents

Counsel for the Appellant:
Sri R.P. Dubey, A.G.A.

Counsel for the Respondents:

Sri T.A. Khan, Sri Sushil Kumar Pandey

A. Govt. Appeal-against-order of acquittal-u/ss. 364, 302 r/w 34 & 201 IPC-charges not proved beyond reasonable ground-if alternate view emanates-the view-in favour of accused-to be preferred by A.C.-Appeal Dismissed.

B. Held, in our considered opinion obviously, it cannot be said with certainty that the motive behind committing the offence was established for the reason that it being the circumstantial evidence case, the motive for committing the offence forms central theme and unless and until the motive is proved specifically, the prosecution shall not be able to bring home the charge framed against the accused. This being the present position when the case becomes weak on the central point of motive, then the other considerations fall on the periphery of the case and that don't substantially go in favour of the prosecution. The point under consideration is very much based on fact whether on the analogy made by the trial Judge, the conclusion drawn was altogether impossible or perverse on the face or was based on material on record. We upon careful perusal find that the conclusion drawn is supported by the material on record, as such no interference is required. May be that another alternate view is also emanating from the same material but the view and the alternative, which favours the accused, is to be preferred by the Appellate Court. Consequently, this Government Appeal lacks merit an the same is liable to be dismissed. We hereby affirmed judgement and order of acquittal dated 28.03.2001 passed by Additional Sessions Judge, court no.8 Muzaffarnagar in Sessions Trial No.475 of 1996, under Sections 364, 302 read with 34, 201 I.P.C., police station-Bhopa, district- Muzaffarnagar. The leave to appeal is hereby refused.

List of cases cited:-

1. State of W.B. vs Mir Mohammad Omar and others, 2000 8 SCC 382

(Delivered by Hon'ble Arvind Kumar Mishra-I, J. & Hon'ble Gautam Chowdhary, J.)

(1) Report of the C.J.M.-Muzaffarnagar dated 18.04.2019 reflects that accused- respondent no.1- Abid- has expired 10-12 years ago.

(2) In view of the report of C.J.M.-Muzaffarnagar dated 18.04.2019, this appeal stands **abated** qua **accused-respondent no.1- Abid** and is dismissed.

(3) Now, this appeal qua the surviving respondent no.1- Amir- is for adjudication.

(4) Case called out in the revised list. No one is present on behalf of the respondents to press this appeal.

(5) Heard Sri Krishna Pahal, learned A.A.G. assisted by Sri Nafis Ahmad, Sri Bhanu Prakash Singh, Sanjay Kumar Rajbhar, Ajay Kumr Singh, Jitendra Kumar and Mahesh Kumar Dwivedi, learned A.G.A.s for the State, perused the impugned judgement of acquittal and record of the appeal.

(6) The instant Government Appeal has been preferred by the State against judgement and order of acquittal dated 28.03.2001 passed by Additional Sessions Judge, court no.8 Muzaffarnagar in Sessions Trial No.475 of 1996, under Sections 364, 302 read with 34, 201 I.P.C., police station- Bhopa, district-Muzaffarnagar.

(7) Relevant facts as discernible from the record giving rise to this appeal appear to be that- complainant Patora s/o Kutubuddin gave a written report in police station- Bhopa on 4.1.1996 with the allegations that both the accused were usually coming to his house who belonged to same village and they came to his house at 4.30 p.m. and called Najjay and took him with them and since then whereabouts of Najjay is not known and there is suspicion that he will be killed by the accused- respondents. The report be lodged and action be taken.

(8) On this written report, Exhibit Ka-1, a first information report was lodged at police station- Bhopa on 04.01.1996, under section 3642 I.P.C. at case crime no. 1/96. The entry in the General Diary was prepared as G.D. No.21 on 4.1.1996 at 6.15 hours in the aforesaid sections of Indian Penal Code against the accused-respondents.

(9) The investigation was carried out by Investigating Officer- Sri P.K. Jetha, who arrested the accused- respondents and on their pointing out, the dead body of Najjay was recovered on 12.1.1996, thereafter case was converted under Section 302, 201 IPC. The investigation has been completed and after the investigation accused was charge- sheeted.

(10) Thereafter during course of hearing on the point of charge, the court concerned found the case covered under Section 364, 302 read with Section 34 and 201 IPC- against accused, therefore, committed the case to the Sessions Court, whereupon, accused were heard on the point of charge and charges under the aforesaid sections were framed against aforesaid accused persons, who denied charges and opted for trial.

(11) In order to prove its case, prosecution produced P.W.1 Patora, P.W.2 Liyaqat, P.W.3 Jodh Singh, P.W.4 Dr. A.S. Rathore, P.W.5 P.K. Jetha and P.W.6 H.C. Surendra Pal. All the aforesaid prosecution witnesses are witnesses of fact/formal witnesses and the eye-witnesses. Thereafter, evidence for the prosecution was closed and the statement of accused persons were recorded under Section 313 Cr.P.C., wherein, it was submitted that they have been falsely implicated in this case on account of partibandi.

(12) The defence did not lead any evidence, whatsoever and after considering the merit of the case, charges were found not proved beyond reasonable doubt. Resultantly, the trial court returned finding of acquittal against the accused.

(13) Consequently, this Government Appeal.

(14) The contention of learned A.A.G. for the State- appellant is specific to the ambit that in this case, infact, the charge was framed under Sections 364, 302, 201 IPC in Case Crime No.1/1996, Police Station- Bhopa, District-Muzaffarnagar and accused was tried by the court, wherein, the trial court after vetting the entire testimony and the circumstances of this case, found the case not proved against the respondent-accused, consequently, acquitted him of the charges under Sections 364, 302 read with 34 and Section 201 IPC.

(15) Learned A.A.G. assails the aforesaid judgement and order of acquittal dated 28.3.2001 on ground that the findings drawn by the trial Judge are not sustainable in view of fact that there is categorical allegation and the allegation

has been proved by the testimony of the prosecution witnesses of fact. The investigation was properly conducted and charge- sheet was filed and that testimony cannot be overlooked merely on casual remark that there was no motivating force existing against the deceased and working for the accused to commit the crime in question. It is not necessary that the dead body should normally be recovered and it must be identified and then alone the case would fall under Section 302 IPC even in the absence of corpus, the matter can be considered and adjudicated upon provided evidence is forthcoming in that regard.

(16) In support of his claim, learned A.A.G. has placed reliance on **(2000) 8 Supreme Court Cases 382, State of W.B. versus Mir Mohammad Omar and others,** wherein under the prevailing facts and circumstances of this case where abduction for murder took place then in the absence of proper identification the fact of murder had not come to light and only this much was heard that he will eliminated the deceased. A presumption was raised regarding death of the victim. Learned A.A.G. submitted that in this case, the testimony establishes the last scene theory and proper identification of the dead body/corpus is very much there, still the trial court held otherwise that the dead body was not identifiable and there was no motive as such for committing the offence, though some *panchayat* had taken place.

(17) We have considered relevant aspect of the case and taken note of fact that the incident in question was reported at the police station- Bhopa on 4.1.1996 that the accused took away with him- the son of the informant- around 4.30 P.M. and the whereabouts of the informants son is not known/untraceable. The matter was taken down at Case Crime No.1/96, under Section 364 IPC, Police Station- Bhopa and relevant entries were made in the concerned General Diary and the case was registered under aforesaid sections of Indian Penal Code, vide Rapate No.14 on 4.1.1996. The matter was investigated by the Investigating Officer Sri P.K. Jetha. On 12.1.1996, the accused was apprehended by the Investigating Officer upon whose pointing out the dead body was allegedly recovered thereafter proper action was taken and after completing the investigation, charge- sheet was filed in the case. Consequently, the trial court charged the accused under Section 364, 302/34 IPC apart from framing charge under Section 201 IPC. The prosecution produced its witnesses and after completion of the prosecution evidence, the evidence was closed and statement of the accused recorded under Section 313 Cr.P.C. No defence whatsoever was led. The trial court while considering the entirety of the case, recorded specific finding on point of non-identifiable of the corpus recovered. Apart from that the motivating force behind committing the offence was found non- existing. In view of above, the circumstances explained and it was found that the chain of circumstances were not complete, therefore, passed the acquittal order in favour of the accused.

(18) We have also perused the entire judgement impugned and also considered the submission so raised also perused the carefully citation of the Hon'ble Apex Court.

(19) In our considered opinion obviously, it cannot be said with certainty that the motive behind committing the

offence was established for the reason that it being the circumstantial evidence case, the motive for committing the offence forms central theme and unless and until the motive is proved specifically, the prosecution shall not be able to bring home the charge framed against the accused. This being the present position when the case becomes weak on the central point of motive, then the other considerations fall on the periphery of the case and that don't substantially go in favour of the prosecution. The point under consideration is very much based on fact whether on the analogy made by the trial Judge, the conclusion drawn was altogether impossible or perverse on the face or was based on material on record. We upon careful perusal find that the conclusion drawn is supported by the material on record, as such no interference is required. May be that another alternate view is also emanating from the same material but the view and the alternative, which favours the accused, is to be preferred by the Appellate Court.

(20) Consequently, this Government Appeal lacks merit an the same is liable to be **dismissed.** We hereby affirmed judgement and order of acquittal dated 28.03.2001 passed by Additional Sessions Judge, court no.8 Muzaffarnagar in Sessions Trial No.475 of 1996, under Sections 364, 302 read with 34, 201 I.P.C., police station- Bhopa, district-Muzaffarnagar.

(21) The leave to appeal is hereby refused.

(2020)02ILR A1369

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 29.01.2020
BEFORE

THE HON'BLE PANKAJ NAQVI, J.
THE HON'BLE SAMIT GOPAL, J.

Habeas Corpus Writ Petition No. 893 of 2019

Afsar ...Petitioner
Versus
State of U.P. & Ors. ...Opposite Parties

Counsel for the Petitioner:
Sri Syed Ali Imam

Counsel for the Opposite Parties:
G.A., A.S.G.I., Sri Jitendra Prasad Mishra

A. Constitution of India – Article 226— Habeas Corpus petition - National Security Act (65 of 1980) - Section 3(2) – Detention - Detenue involved in cow slaughter case- Released on bail and subsequently detained - Unexplained delay of 19 days in furnishing independant report by Central Agency - No reason given as to why report from Central agency was called for - Detention, illegal. (Para-7,12,13)

Present matter are that the respondent No. 2 passed the impugned order of detention on the grounds that the petitioner is involved in cow slaughter case under Section 3/5/5(A)/8 of Cow Slaughter (Prevention) Act. (Para-6)

Held:- The right of the petitioner under Article 22 (5) of the Constitution of India was seriously infringed, rendering his detention as illegal. (Para-13)

Petition allowed. (E-7)

List of cases cited:-

1. Afsar vs. State of U.P. ,Criminal Misc. Bail Application No. 28863 of 2019

2. Sonu @ Firoz vs. State of U.P. and others, Habeas Corpus Writ Petition No. 390 of 2019

3. Rajammal vs. State of T.N. and Another, (1999) 1 SCC 417
4. K.M. Abdulla Kunhi vs. Union of India, (1991) 1 SCC 476

(Delivered by Hon'ble Samit Gopal, J.)

1. Additional Affidavit filed by respondent No. 2 today in Court is taken on record.

2. Heard Syed Ali Imam, learned counsel for the petitioner and Sri Jitendra Prasad Mishra, Advocate for respondent No. 2 / Union of India and the learned A.G.A for respondent Nos. 1, 3, 4 and 5.

3. The present petition has been filed challenging the order of detention dated 26.07.2019 Annexure -1 to the writ petition passed by respondent No. 3 vide order No. 1569 / Nyay Sahayak in exercise of powers under Section (3) of the National Security Act, 1980 directing the detention of the petitioner (Afsar) under Section 3 (2) of the National Security Act as a simple prisoner under the supervision of the respondent No. 4. Counter affidavits of all the respondents have been filed and the rejoinder affidavits to the same have also been filed. This Court while entertaining the petition on 03.01.2020 passed the following order:-

"Heard in part.

Put up in the additional cause list on 20.1.2020 in order to enable Sri Jitendra Prasad Mishra, the learned counsel appearing for Union Of India to file a supplementary counter affidavit along with the alleged report of the Central Agency, explaining the delay on a day-to-day basis, from the receipt of the representation in the Ministry on 23.8.2019 till its placing before the Under Secretary (NSA) on 11.9.2019, as averred in the counter affidavit dated 16.12.2019. Copy of this order be supplied to Sri Mishra forthwith."

4. Subsequently, in compliance to order dated 03.01.2020 counsel for respondent No. 2 placed before us a sealed envelope and after going through the same the following order was passed on 20.01.2020:-

"Supplementary counter affidavit on behalf of respondent no. 2 and a rejoinder affidavit are taken on record.

Sri Jitendra Prasad Mishra for respondent no. 2 / Union of India has placed on record a sealed envelop, which on our directions, is opened. We have gone through its contents and do not find the said document to be either confidential or of such sensitivity which may put national security at risk.

We direct the Bench Secretary to seal the envelop with its contents and hand over the same to Sri Mishra in the Court itself.

List on 29.1.2020 on which date Sri Mishra, learned counsel for respondent no. 2 shall file an affidavit of a duly authorized person, bringing the contents of the envelop on record as also the material disclosing the satisfaction, if any, by the officer concerned, forming the basis for the report."

5. Today an affidavit in compliance of order dated 20.01.2020 was filed.

6. The facts as emerging in the present matter are that the respondent No. 2 passed the impugned order of detention on the grounds that the petitioner is involved in Case Crime No. 318 of 2018 under Section 3/5/5(A)/8 of Cow Slaughter (Prevention) Act. He was served with the detention order dated 26.07.2019 on the same date. The State Government approved the detention order on 05.08.2019. The petitioner preferred a

representation dated 08.08.2019 which was submitted on the same day before the Jail Superintendent, Bulandshahar. The said representation was then forwarded by the jail authorities and was received by the District Magistrate on 09.08.2019 itself. On 09.08.2019 the District Magistrate called for comments from the sponsoring authorities, in compliance of which the police submitted its comments on 14.08.2019. The District Magistrate then rejected the representation on 15.08.2019 on the ground that it was submitted after the approval of the detention by the State Government. The representation was then forwarded on 15.08.2019 to the State Government which was received therein on 16.08.2019. The State Government rejected the same on 28.08.2019. The Central Government received the representation of the petitioner on 23.08.2019 and rejected the same on 12.09.2019. In the meantime, the State Government vide its order dated 05.09.2019 confirmed the detention order.

7. Learned counsel for the petitioner argued that there has been an inordinate delay by respondent No. 2 / Union of India in deciding the representation of the petitioner for which there is no explanation. He further stated that the respondent No. 2 received the representation on 23.08.2019 whereas it was rejected on 12.09.2019 i.e. after about 19 days of the date of receipt of the same. He argued that the unexplained delay of 19 days in deciding the representation of the petitioner by the Union of India is good enough to allow the present petition and to set aside the order of detention and direct the release of the petitioner forthwith as there is no justifiable explanation when liberty of a citizen guaranteed under Article 21 of the Constitution of India is violated.

8. Paragraph 5 and 6 of the counter affidavit dated 16.12.2019 on behalf of respondent No. 2 attempts to give some details about the delay in deciding the representation but one fact which emerges from the same is that the representation of the petitioner was received on 23.08.2019, some enquiry / report was called for by the said officer from a Central Agency which was subsequently received and then the file was placed before the Under Secretary, N.S.A on 11.09.2019 and later on the said representation was rejected on 12.09.2019. Since the delay in deciding the representation was not explained on day to day basis another affidavit dated 20.01.2020 titled as supplementary affidavit on behalf of respondent No. 2 was filed in which in paragraph 4 it was mentioned that the file reached the table of the Joint Secretary concerned on 23.08.2019, the Union Home Secretary then directed to seek an independent report from the Central Agency on 24.08.2019, 25.08.2019 was a holiday being Sunday, then on 28.08.2019 a letter followed by a reminder letter was sent which was again forwarded on 09.09.2019 to the Central Agency for seeking the requisite report. The report of the Central Agency was received on 11.09.2019 and subsequently on 12.09.2019 the said representation was rejected. On the question as to what was the reason for the officer concerned to seek a report from the Central Agency, an additional affidavit dated 28.01.2020 is filed today disclosing in paragraph 3 the contents of the report obtained from the Central Agency. The said report as obtained has been quoted in paragraph 3 of the additional affidavit. Even in the

present affidavit the officer concerned has not explained the reason as to why the report from the said independent agency was called for as there was no reference of the petitioner being involved in any serious or any anti national activity. Even in the report of the sponsoring officer, dated 24.07.2019 / Annexure -5 to the writ petition, the recommendation of the Senior Superintendent of Police, Bulandshahar dated 25.07.2019 / Annexure- 3 to the writ petition and even the grounds of detention Annexure- 2 to the writ petition, the perusal of the report of the independent agency as quoted in paragraph- 3 of the additional affidavit nowhere gives any detail of the petitioner being involved in any serious anti national activity. The petitioner was granted bail in the case on which his detention was sought for by the sponsoring officer vide order dated 19.07.2019 passed in Criminal Misc. Bail Application No. 28863 of 2019 **(Afsar vs. State of U.P.)** by the High Court. The said order is Annexure- 12 to the writ petition. The petitioner could not come out of jail in the said case after the order granting him bail and has been detained in the National Security Act, 1980 on the basis of the impugned detention order dated 26.07.2019. The delay as is being tried to be explained by respondent No. 2 in deciding the representation is wholly unsatisfactory which vitiates his detention.

9. The Apex Court in ***Rajammal vs. State of T.N. and Another (1999) 1 SCC 417*** relying upon the decision in ***K.M. Abdulla Kunhi vs. Union of India (1991) 1 SCC 476*** held as follows:-

"6. Learned counsel also cited an earlier two Judge Bench decision of this Court in Raghavendra Singh vs. Superintendent, District Jail, Kanpur (1986 1 SCC 650) in which similar delay of a few days in considering the representation was found to have vitiated the detention. That is a case where delay was held be "wholly unexplained". A three Judge Bench of this Court in Rumana Begum vs. State of Andhra Pradesh (1993 Supp. 2 SCC 341) disapproved the delay in considering the representation on the mere ground that the representation on the mere ground that the representation was not addressed to the Chief Secretary. That was a case where representation was sent to the Governor. Hence it was found that there was unexplained and unreasonable delay and consequently the detention was held vitiated. We are reminded of the following observations made by this Court in Kundanbhai Dulabhai Sheikh vs. District Magistrate, Ahmedabad: (SCC p. 203, para 21)

"21. In spite of law laid down above by this Court repeatedly over the past three decades, the Executive, namely, the State Government and its officers continue to behave in their old, lethargic fashion and like all other files rusting in the secretariat for various reasons including red tapism, the representation made by a person deprived of his liberty, continue to be dealt with in the same fashion. The government and its officers will not give up their habit of maintaining a consistent attitude of lethargy. So also, this Court will not hesitate in quashing the order of detention to restore the 'liberty and freedom' to the person whose detention is allowed to become bad by the government itself on account of his representation not being disposed of at the earliest."

7. It is a constitutional obligation of the Government to consider the representation forwarded by the detenu without any delay. Though no period is

prescribed by Article 22 of the Constitution for the decision to be taken on the representation the words "as soon as may be" in clause (5) of Article 22 convey the message that the representation should be considered and disposed of at the earliest. But that does not mean that the authority is pre-empted from explaining any delay which would have occasioned in the disposal of the representation. The Court can certainly consider whether the delay was occasioned due to permissible reasons or unavoidable causes. This position has been well delineated by a constitution Bench of this Court in K.M. Abdulla Kunhi and B.L. Abdul Khader vs. Union of India and others (1991 (1) SC 476). The following observations of the Bench canprofitable be extracted here:(SCC p. 484, para 12)

"It is a constitutional mandate commanding the concerned authority to whom the detenu submits his representation to consider the representation and dispose of the same as expeditiously as possible. The words "as soon as may be" occurring in clause (5) of Article 22 reflects the concern of the Framers that the representation should be expeditiously considered and disposed of with a sense of urgency without an avoidable delay. However, there can be no hard and fast rule in this regard. It depends upon the facts and circumstances of each case. There is no period prescribed either under the Constitution or under the concerned detention law, within which the representation should be dealt with. The requirement however, is that there should not be supine indifference, slackness or callous attitude in considering the representation. Any unexplained delay in the disposal of representation would be a breach of the constitutional imperative and it would render the continued detention impermissible and illegal."

8. The position, therefore, now is that if delay was caused on account of any indifference or lapse in considering the representation such delay will adversely affect further detention of the prisoner. In other words, it is for the authority concerned to explain the delay, it any, in disposing the representation. It is not enough to say that the delay was very short. Even longer delay can as well be explained. So the test is not the duration or range of delay, but how it is explained by the authority concerned."

10. In the judgment of Rajammal (Supra) the Supreme Court held that an unexplained delay of 05 days from 09.02.1998 to 14.02.1998 in deciding the representation of detenue vitiated his continued detention. The relevant part of the said judgment is extracted herein below:-

"9. What happened in this case was that the Government which received remarks from different authorities submitted the relevant files before the Under Secretary for processing it on the next day. The Under Secretary forwarded it to the Deputy Secretary on the next working day. Thus there is some explanation for the delay till 9.2.1998. Thereafter the file was submitted before the Minister who received it while he was on tour. The Minister passed the order only on 14.2.1998. Though there is explanation for the delay till 9.2.1998, we are unable to find out any explanation whatsoever as for the delay which occurred thereafter. Merely stating that the Minister was on tour and hence he could pass orders only on 14.2.1998 is not a justifiable explanation, when the liberty of

a citizen guaranteed under Article 21 of the Constitution is involved. Absence of the Minister at the Headquarters is not sufficient to justify the delay, since the file could be reached the Minister with utmost promptitude in cases involving the vitally important fundamental right of a citizen.

11. We are, therefore, of the opinion that the delay from 9.2.1998 to 14.2.1998 remains unexplained and such unexplained delay has vitiated further detention of the detenu. The corollary thereof is that further detention must necessarily be disallowed. We therefore allow this appeal and set aside the impugned judgment. We direct the appellant-detenu to be set at large forthwith."

11. From the above judgment of the three Judge Bench of the Hon'ble Supreme Court the legal principle which comes out is that if there is a delay in deciding the representation of a detenue the same is to be explained by the concerned authority. It is not the duration of delay, rather cause for delay is relevant. The authority is duty bound to explain delay, if any, in deciding the representation by demonstrating that it was actually necessary for the authorities to work on the same during the intervening period without which they could not have effectively dealt with the representation. A Division Bench of this Court in Habeas Corpus Writ Petition No. 390 of 2019 **(Sonu @ Firoz vs. State of U.P. and others)** quashed the detention order due to unexplained delay from 22.12.2018 to 27.12.2018 i.e. of 05 days in not submitting the comments / report called for from the sponsoring authority. In the present case from the supplementary affidavit dated 20.01.2020 it is not evident that what was the reason that compelled the officer concerned to call for an independent report from the Central Agency. The delay in deciding the representation for the period 23.08.2019 to 12.09.2019 (19 days) clearly shows that it was without any explanation.

12. Thus we hold that the delay of 19 days in furnishing the independent report by the Central Agency remained unexplained. The officer dealing with the representation of the petitioner acted in a most irresponsible and negligent manner and has failed to account for the reason as to why did he call for the report from the Central Agency.

13. We in view of above discussion are of the considered opinion that the right of the petitioner under Article 22 (5) of the Constitution of India was seriously infringed, rendering his detention as illegal. The petition is **allowed.** The order of detention dated 26.07.2019 is quashed. The petitioner shall be set at liberty forthwith unless wanted in any other case. No order as to costs.

(2020)02ILR A1374

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.09.2018

BEFORE
THE HON'BLE BALA KRISHNA NARAYANA, J.
THE HON'BLE RAVINDRA NATH KAKKAR, J.

Habeas Corpus Writ Petition No. 3353 of 2018

Yogesh Verma ...Petitioner(In Custody)
Versus
Superintendent, Meerut & Ors.
...Opposite Parties

Counsel for the Petitioner:
Sri Daya Shankar Mishra, Sri Chandrakesh Mishra, Sri Mohd. Farooq

Counsel for the Opposite Parties:
A.S.G.I., G.A., Sri Narendra Dev Rai, Sri Rajeev Kumar Giri

A. Constitution of India,1950 – Article 226— Habeas Corpus petition – National Security Act, 1980 - Section 3(2) - Detention – validity of detention under challenge – logically that if no bail application is pending, then there is no likelihood of the person in custody being released on bail, and hence the detention order will be illegal - the impugned detention order legally unsustainable - detention order illegal.(Para- 7,9)

In this petition, the validity of the detention of petitioner (detenu) has been challenged - He has been detained by the District Magistrate under Section 3 (2) of the National Security Act, 1980 - The impugned order of preventive detention was passed against the petitioner while he was confined to District Jail, Meerut on account of his being accused in following fifteen cases - the applicant had not moved any bail application in two out of the fifteen cases pending against him. (Para-2,3,4)

Held :- The detaining authority could not reasonably conclude that there was likelihood of the petitioner being released on bail even though no bail application of his was pending. (Para-8)

Impugned order set-aside. (E-7)

List of cases cited:-

1. Rekha Vs.. State of Tamil Nadu through Secretary to Government and another , (2011)

2 SCC 596 = 2011 (73) ACC 936 (SC) = 2011 (101) AIC 73.

(Delivered by Hon'ble Bala Krishna Narayana, J.)

1. The argument of this case was concluded on 19.09.2018. We then made the following order:-

"Heard Sri Daya Shankar Mishra, learned counsel for the petitioner, Sri Jitendra Prasad Mishra, learned counsel for Union of India, Smt. Manju Thakur, learned A.G.A.-I and Sri J. K. Upadhyay, learned A.G.A. for the State.

We will give reasons later. But we are making the operative order here and now.

This habeas corpus writ petition is allowed. The impugned detention order dated 08.05.2018 passed by respondent no. 2, District Magistrate, Meerut detaining the petitioner u/s 3 (2) of the National Security Act, 1980 is hereby set-aside.

The petitioner Yogesh Verma (detenu) shall be released forthwith unless he is wanted in any other criminal case."

2. Here are the reasons:- In this petition, the validity of the detention of petitioner Yogesh Verma (detenu) has been challenged. He has been detained by the District Magistrate, Meerut by an order dated 08.05.2018 made under Section 3 (2) of the National Security Act, 1980 (hereinafter referred to as the NSA).

3. The impugned order of preventive detention was passed against the petitioner while he was confined to District Jail, Meerut on account of his being accused in following fifteen cases namely :-

(a) Case Crime No. 365 of 2018 u/s 147, 148, 149, 323, 307, 504, 506, 336, 337, 427, 332, 353, 342, 143, 34 I.P.C. & Section 7 Criminal Law Amendment Act.

(b) Case Crime No. 364 of 2018 u/s 147, 148, 149, 323, 307, 504, 506, 395, 336, 337, 427, 332, 353, 143, 342, 34 I.P.C. & Section 7 Criminal Law Amendment Act.

(c) Case Crime No. 362 of 2018 u/s 147, 148, 149, 323, 307, 504, 506, 336, 337, 427, 332, 353, 342, 143, 34 I.P.C. & Section 7 Criminal Law Amendment Act.

(d) Case Crime No. 363 of 2018 u/s 147, 148, 149, 307, 504, 506, 143, 332, 353, 336, 337, 436, 342, 395, 34, 427 I.P.C. & Section 7 Criminal Law Amendment Act & Section ¾ of Prevention of Damage to Public Property Act.

(e) Case Crime No. 358 of 2018 u/s 147, 148, 149, 307, 504, 506, 143, 332, 353, 336, 337, 436, 342, 395, 34, 427 I.P.C. & Section 7 Criminal Law Amendment Act & Section ¾ of Prevention of Damage to Public Property Act.

(f) Case Crime No. 359 of 2018 u/s 25/27/30 of Arms Act.

(g) Case Crime No. 360 of 2018 u/s 25/27/30 of Arms Act.

(h) Case Crime No. 361 of 2018 u/s 25/27/30 of Arms Act.

(i) Case Crime No. 221 of 2018 u/s 147, 148, 149, 323, 504, 506, 332, 336, 325, 352, 353, 307, 395, 397, 452, 427, 342, 436, 188, 120-B I.P.C. & Section ¾ of Prevention of Damage to Public Property Act & Section 7 Criminal Law Amendment Act.

(j) Case Crime No. 350 of 2018 u/s 147, 148, 149, 307, 332, 353, 336, 341, 427, 436, 120-B I.P.C. & Section 2/3 of Prevention of Damage to Public Property Act & Section 7 Criminal Law Amendment Act.

(k) Case Crime No. 218 of 2018 u/s 395, 397 I.P.C.

(l) Case Crime No. 159 of 2018 u/s 147, 148, 149, 332, 353, 336, 435, 307, 395, 504, 120-B, 427 I.P.C. & Section 7 Criminal Law Amendment Act & Section ¾ of Prevention of Damage to Public Property Act.

(m) Case Crime No. 158 of 2018 u/s 147, 184, 149, 353, 435, 307, 341, 352, 120-B, 427 I.P.C. & Section 7 Criminal Law Amendment Act.

(n) Case Crime No. 390 of 2018 u/s 147, 148, 323, 504, 506, 336, 435, 427 I.P.C. & Section ¾ of Prevention of Damage to Public Property Act.

(o) Case Crime No. 389 of 2018 u/s 147, 148, 427 I.P.C.

Apart from the aforesaid cases, following five cases were also shown against the petitioner in the detention order namely :-

(a) Case Crime No. 47 of 2012 u/s 332, 353, 186, 188, 127 I.P.C.

(b) Case Crime No. 85 of 2012 u/s 147, 148, 149, 307, 323, 504, 506, 452, 354, 34 I.P.C.

(c) Case Crime No. 91 of 2012 u/s 126 Ka of Representation of People Act.

(d) Case Crime No. 126 of 2012 u/s 127 Ka of Representation of People Act.

(e) Case Crime No. 315 of 2012 u/s 147, 148, 149, 452, 323, 504, 506, 307 I.P.C.

4. Learned counsel for the petitioner submitted that in the instant case, it is evident from the perusal of the grounds of detention that the applicant had not moved any bail application in two out of the fifteen cases pending against him namely in Case Crime No. 221 of 2018 u/s 147, 148, 149, 323, 504, 506, 332, 336, 325, 352, 353, 307, 395, 397, 452, 427, 342, 436, 188, 120-B I.P.C. & Section ¾ of Prevention of Damage to Public Property Act & Section 7 of Criminal Law Amendment Act and Case Crime No. 359 of 2018 u/s 25/27/30 of Arms Act and hence, the satisfaction recorded by the detaining authority in the impugned order

that there was possibility of the detenu being released and if released on bail, he was likely to indulge in activities prejudicial to the maintenance of public order, is totally vitiated and suffers from non-application of mind by the detaining authority to the material on record and hence, the impugned detention order cannot be sustained and is liable to be set-aside. In support of his aforesaid submissions, learned counsel for the petitioner has placed reliance upon decision of the Apex Court in the case of ***Rekha v. State of Tamil Nadu through Secretary to Government and another*** *reported in* ***(2011) 2 SCC 596 = 2011 (73) ACC 936 (SC) = 2011 (101) AIC 73.***

5. Per contra Smt. Manju Thakur, learned A.G.A.-I submitted that the impugned detention order does not suffer from any illegality or infirmity requiring any interference by this Court. She further submitted that there was sufficient material before the respondent no. 2 justifying his belief that in case the detenu was released on bail, he would again indulge in activities disturbing the public order.

6. We have very carefully scanned the impugned order and the grounds of detention and also the counter affidavits filed on behalf of the respondent nos. 1 to 4 in this writ petition and we are constrained to observe that the satisfaction recorded by the respondent no. 2 in the impugned order that there was likelihood of the detenu being released on bail despite being fully conscious of the fact that the petitioner had not moved any bail application in Case Crime Nos. 221 of 2018 and 359 of 2018, is in our opinion, wholly unjustified and per se illegal. There was no likelihood of his being released even if he was granted bail in the other six cases pending against him. We stand fortified in our view by the decision of the Apex Court in the case of ***Rekha (supra).***

7. The Hon'ble Apex Court in paragraph 27 of its judgment rendered in the case of **Rekha (supra)** has observed as hereunder :-

"27. In our opinion, there is a real possibility of release of a person on bail who is aleady in custody provided he has moved a bail application which is pending. It follows logically that if no bail application is pending, then there is no likelihood of the person in custody being released on bail, and hence the detention order will be illegal. However, there can be an exception to this rule, that is, where a co-accused whose case stands on the same footing had been granted bail. In such cases, the detaining authority can reasonably conclude that there is likelihood of the detenu being released on bail even though no bail application of his is pending, since most Courts normally grant bail on this ground. However, details of such alleged similar cases must be given, otherwise the bald statement of the authority cannot be believed."

8. The instant case is not covered under the exception carved out to the general proposition of law laid down by the Apex Court in the case of **Rekha (supra).** It is nobody's case that in the two cases in which the petitioner had not moved any bail application, any co-accused whose case stood on the same footing, had been granted bail and hence, the detaining authority could not reasonably conclude that there was likelihood of the petitioner being released on bail even though no bail

application of his was pending in the aforesaid cases.

9. In view of the above, the impugned order cannot be sustained and is liable to be set-aside.

10. These are the reasons upon which we had set-aside the impugned order dated 08.05.2018 passed by the respondent no. 2, District Magistrate, Meerut.

(2020)02ILR A1378

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 12.01.2017

BEFORE
THE HON'BLE RAKESH SRIVASTAVA, J.

Misc. Single No. 713 of 2017

Narendra Kumar ...Petitioner
Versus
A.D.J. Room No. 4 Sultanpur & Ors.
...Respondents

Counsel for the Petitioner:
Bajrang Bahadur Singh

Counsel for the Respondents:

A. Civil Law-Code of Civil Procedure, 1908-O-VIII R-1-Petitioners-application for filing W.S-as was not filed-due to the mistake of the counsel-rejected-on the ground of-delay of more than 24 years-O-VIII R-1-provides a period of 30 days-for filing WS-for reasons to be recorded-not later than 90 days-it can be extended only in exceptional circumstances-occasioned by reasons beyond the control of defendant-extention of time-can't be frequently and routinely exercised-petitioner was a party-since beginning-a literate person-fully aware of the proceedings-no convincing or cogent reasons-to justify delay. Petition Dismissed.

B. Held, suit filed by resps. In the year 1990. More than 26 years have passed since the dat of institution of the suit.the petitioner was a party in the said suit from the very beginning, but he failed to file any WS. The petitioner is a literate personand is working as a lekhpal, and as such he was fully aware of the on going proceedings. The petitioner had full opportunity to file his WS but he chose not to do the same. It is not the case of the petitioner that he was not aware about the suit. There is no convincing or cogent reason provided by the petitioner for not filing his WS for such an extremely long period of time, and therefore, at this distance of time, the petitioner cannot be permitted to file WS.

List of cases cited:-

Salem Advocate Bar Association, T.N vs UOI 2005 (6) SCC 344

(Delivered by Hon'ble Rakesh Srivastava, J.)

1. Heard Shri Bajrang Bahadur Singh, learned counsel for the petitioner.

2. This petition under Article 227 of the Constitution of India has been filed challenging the order date 19.11.2015, passed by the Civil Judge (Junior Division), Room No. 15, Sultanpur, in Regular Suit No. 258 of 1990 (Hari Prasad and another v. Ram Autar and others) and the order dated 24.08.2016, passed by the Additional District Judge, Room No. 4, Sultanpur, in Civil Revision No. 124 of 2015 (Narendra Kumar Nikhar v. Hari Prasad and others).

3. The basic facts of the matter are not in dispute. On 09.11.1990, the plaintiffs - Hari Prasad and Kamla Devi, respondent nos. 3 and 4 herein, filed a suit (Regular Suit No. 258 of 1990 in the court of District Judge, Sultanpur) against Ram Autar and his three sons namely Ravindra Kumar, Virendra Kumar and Narendra Kumar, for declaration of title and permanent injunction with regards to House No. 98, situated at Mohalla-Shahganj, Murari Das Ki Gali, Pargana-Meeranpur, Tehsil & District Sultanpur.

4. Summons were served upon the defendants on 30.4.1991. Ram Autar (the first defendant) filed his written statement. On 18.08.1994 issues were framed. After exchange of pleadings the suit was posted for evidence of the plaintiffs on 05.03.2002. Issue no. 8 was decided on 07.01.2003. On 21.12.2003 Ram Autar died. The sons of Ram Autar were already party in the suit and as such his daughters, Usha Nikhar and Asha, respondent no. 7 and 8 herein, were substituted as his legal representatives. On 23.01.2006 the evidence of the plaintiffs was closed and the matter was posted for the evidence of the defendants, if any. On 23.02.2006, Usha Nikhar and Virendra Kumar (the third defendant) filed their joint written statement which was taken on record. On 26.02.2006 the opportunity to adduce evidence of the petitioner (the fourth defendant) was closed. However, on the application of the petitioner the said order was recalled. The petitioner, thereafter, filed his evidence in the shape of affidavit.

5. On 10.09.2015, the petitioner moved an application (384Ga-2) seeking permission to file his written statement. In his application the petitioner inter alia stated that the first defendant had filed the written statement on his own behalf; that the petitioner had not moved any application adopting the said written statement; that because of the mistake on the part of the petitioner's counsel, written statement on his behalf could not be filed.

6. The respondent nos. 3 and 4 filed their objections to the said application contending *inter alia* that the said application was not maintainable; and that the petitioner had not made out any substantial ground to condone the delay of more than 24 years in filing the written statement.

7. By the order dated 19.11.2015, the trial Judge rejected the application of the petitioner on the ground that on the basis of the written statement filed by the first defendant, the petitioner had already filed his affidavit by way of evidence and the matter was being posted for his cross examination. There was an order passed by this Court for expeditious disposal of the suit in a petition filed by respondent no. 9 (the third defendant). In these circumstances, it was not proper to give an opportunity to the petitioner to file his written statement at this stage. The revision filed by the petitioner against the said order was dismissed by the Additional District Judge for the same reason. Both these orders are under challenge in this petition.

8. Learned counsel for the petitioner has submitted that the trial Court was obliged to grant time to the petitioner to file his written statement. In case the petitioner is not granted time, he shall suffer irreparable loss.

9. Order 8 Rule 1 of the Code of Civil Procedure, 1908 was amended by Act No. 22/2002 w.e.f. 01.07.2002. Order VIII Rule 1, after the amendment, casts an obligation on the defendant to file written statement within 30 days from the date of service of summons on him. The proviso thereto stipulates that where the defendant fails to file the written statement within the said period of 30 days, he shall be allowed to file the same on such other day, as may be specified by the court, for reasons to be recorded in writing, but shall not be later than 90 days from the date of service of summons. However, the Apex Court has repeatedly held that the extension of time for filing of the written statement cannot be allowed in a routine manner.

10. In *Kailash v. Nanhku, (2005) 4 SCC 480* though the Apex Court has held that the period of 90 days prescribed for filing written statement was directory in nature but in the same breath has held that time for filing written statement can be extended only in exceptional circumstances for reasons which were beyond the control of the defendant. The relevant portion of the report is extracted below:-

"42. *Ordinarily, the time schedule prescribed by Order 8 Rule 1 has to be honoured.* The defendant should be vigilant. No sooner the writ of summons is served on him he should take steps for drafting his defence and filing the written statement on the appointed date of hearing without waiting for the arrival of the date appointed in the summons for his appearance in the court. The extension of time sought for by the defendant from the court whether within 30 days or 90 days, as the case may be, should not be granted just as a matter of routine and merely for the asking, more so, when the period of 90 days has expired. *The extension can be only by way of an exception and for reasons assigned by the defendant and also recorded in writing by the court to its satisfaction. It must be spelled out that a departure from the time schedule prescribed by Order 8 Rule 1 of the Code was being allowed to be made because the circumstances were exceptional, occasioned by reasons beyond the control of the defendant and such extension was required in the interest of justice, and grave injustice would be occasioned if the time was not extended."*

(emphasis supplied)

11. The same view has been expressed by the Apex Court in the case of *Salem Advocate Bar Association, Tamil Nadu v. Union of India, (2005) 6 SCC 344,* in the following words:

"21. ...There is no restriction in Order 8 Rule 10 that after expiry of ninety days, further time cannot be granted. The court has wide power to "make such order in relation to the suit as it thinks fit". Clearly, therefore, the provision of Order 8 Rule 1 providing for the upper limit of 90 days to file written statement is directory. Having said so, we wish to make it clear that the order extending time to file written statement cannot be made in routine. *The time can be extended only in exceptionally hard cases*. While extending time, it has to be borne in mind that the legislature has fixed the upper time-limit of 90 days. *The discretion of the court to extend the time shall not be so frequently and routinely exercised so as to nullify the period fixed by Order 8 Rule 1."* (emphasis supplied)

12. Coming back to the facts of the present matter, the suit filed by the respondent nos. 3 and 4 is of the year 1990. More than 26 years have passed since the date of institution of the suit. The petitioner was a party in the said suit from the very beginning, but he failed to file any written statement. The petitioner is a literate person and is working as a Lekhpal, and as such he was fully aware of the ongoing proceedings. The petitioner had full opportunity to file his written statement but he chose not to do the same. It is not the case of the petitioner that he was not aware about the suit. There is no convincing and cogent reason provided by the petitioner for not filing his written statement for such an extremely long period of time, and therefore, at this distance of time, the petitioner cannot be permitted to file written statement.

13. The petition is devoid of merit and is accordingly dismissed

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(2020)02ILR A1381

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 07.02.2020

BEFORE
THE HON'BLE MRS. SANGEETA CHANDRA, J.

Misc. Single No. 987 of 2010

Ganga Ram ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Rajendra Singh Kushwaha

Counsel for the Respondents:
C.S.C.

A. Petitioner-challenging order-rejecting his appeal-showing deficiency in the stamp duty-as petitioner using it-for residential purpose-finding based on presumption-as land indispute surrounded by abadi-ex parte-spot inspection-no notice to petitioner-u/s. 33 r/w 47A & R-7(2)-collector-may inspect-the property-after due notice to the parties-Collector-failed to exercise the same-committing gross violation-of provisions of Indian Stamp Act-made orders-relying upon the ex parte report. Petition Allowed.

B. Held, this Court has carefully examined the village map, a copy of which, has been filed as Annexure-9 to the petition. Plot no.381, 1/4th part of which had been bought by the petitioner through the Sale Deed executed on 16.6.20017, has been shown as Domat-1 in the village map. Domat-1 is a category of soil, on the basis of which, land revenue or "lagaan' is determined for agricultural land, but the village map does not show the property in question to be situated in the middle of village Abadi. This Court fails to understand as to when power was given to respondent no.4 to make an on the spot inspection of the property in question, then why the same was not exercised and on the spot inspection was not carried out and the ex-parte report of the Sub Registrar, Mohammdi, Lakhimpur Kheri alone was relied upon in passing the orders impugned. Writ petition stands allowed.

Writ Petition allowed. (E-8)

List of cases cited:-

1. Sumati Nath Jain vs. State of U.P. and another, 2016 (2) ADJ 533,

2. Smt. Pushpa Sareen vs. State of U.P.,2015 (3) ADJ 136.

3. Smt. Prakashwati vs. Chief Controlling Revenue Authority, Board of Revenue, U.P. at Allahabad and others, (1996) 4 SCC 657

4. State of U.P. and other vs. Ambrish Tandon and another, (2012) 5 SCC 566

5. Shakeel Ahmad vs. Additional Commissioner, Judicial, Faizabad, Writ Petition No.1494 (MS) of 2009

6. Hridya Narayan Mishra vs. Commissioner, Allahabad Division and another Writ Petition No.3126 (MS) of 2009

7. Smt. Kusum Lata Jaiswal vs. State of U.P. and others, 2010(2) ADJ 274

8. Dinesh Tiwari vs. Commissioner, Gorakhpur and others, 2012(3) AWC 2343: 2011(10) ADJ 1 (NOC)

9. Ramesh Chand Bansal and others vs. District Magistrate/Collector, Ghaziabad and others, AIR 1999 SC 2126

(Delivered by Hon'ble Mrs. Sangeeta Chandra, J.)

1. This petition has been filed by the petitioner challenging the order dated 5.2.2010 passed by the Appellate Authority, rejecting the appeal of the petitioner against the order passed by the

Collector, Lakhimpur Kheri dated 26.2.2008 and also the order dated 26.2.2008.

2. Brief facts of the case, as have been stated in the writ petition, are to the effect that the petitioner purchased 1/4th portion of Plot no.381 ad-measuring 0.271 hectare of agricultural land through a registered Sale Deed dated 16.6.2007. The said Sale Deed was registered as Sale Deed no.5008 of 2007 before the Sub Registrar, Mohammdi, Lakhimpur Kheri after paying the requisite fee of registration and stamp duty etc. as per Circle Rate fixed by the District Magistrate, Lakhimpur Kheri.

3. It has been submitted by the learned counsel for the petitioner that the Sub Registrar, Mohammdi, Lakhimpur Kheri filed a wrong report, annexing an incomplete map of the area, where the land in question was situated on 30.8.2007 and recommended to the Collector and the Assistant Commissioner (Stamp) for action to be initiated under Section 33 of the Indian Stamp Act (for short "the Act') read with Section 47-A of the Act, indicating a deficiency of Rs.25,070/- as deficiency of stamp duty (Rs.4460/- as registration fees). A notice was issued to the petitioner on 5.11.2007 by the Assistant Commissioner (Stamp) and the petitioner submitted his written objection, stating that the land in question is agricultural in nature and his crops are standing thereon and it was not used for any residential purposes and that a spot inspection may be carried out by the Tehsildar concerned. The objection of the petitioner was ignored and the recommendation report of the Sub Registrar, Mohammdi, Lakhimpur Kheri was confirmed by the Collector, Lakhimpur Kheri by his order dated 26.2.2008, also imposing penalty of Rs.25,070- and Rs.3760/- as interest.

4. The petitioner being aggrieved, filed an appeal before respondent no.2, namely Appeal no.129/466/2008-09 under Section 56 of the Act and also deposited Rs.19,454/- i.e. 1/3rd of the amount of fine and stamp duty in the Treasury. On 2.12.2008, the Appellate Authority stayed the implementation of the order dated 26.2.2008. Later, however, the appeal was rejected and the order of respondent no.4 was affirmed by the Appellate Authority.

5. It has been argued by the learned counsel for the petitioner that at the time of purchase, execution and registration of Sale Deed, the land in question was recorded as agricultural land in the revenue records. Till date, no notification under Section 143 of the U.P.Z.A. and L.R. Act has been issued by the competent authority, declaring it as land used for non agricultural purposes. It has been submitted that there are several judgments of this Court, which hold that stamp duty is to be charged on the property in accordance with its present status and not its future potential. The valuation cannot be determined on a presumption that the land is situated in close proximity of Abadi area or on the presumption that the land is intended to be used for the purpose other than agricultural.

6. Learned counsel for the petitioner has submitted that the khasra of the land in question i.e. the field book of village Kunwarpur shows that crops of sugarcane, potato, and onion was being sown on the land in question.

7. Learned Standing Counsel, on the basis of counter affidavit filed on behalf of the respondents has submitted that within two months of the date of purchase of the property in question, the site was inspected

by the Sub Registrar, Mohammdi, Lakhimpur Kheri on 30.8.2007 and he submitted his report, finding that the Sale Deed had been executed and the stamp duty paid, showing the property in question to be used for agricultural purposes, whereas the purchaser had bought the property in question for residential purposes. It was found that no crop was sown in the property in question. Instead, it was being used for drying cow-dung cakes to be used as fuel. Moreover, the boundaries shown in the Sale Deed were also misrepresented. It was found on inspection that on the eastern side of the plot in question, there was the field of Ganga Ram. On the west, there was a eight feet wide road and thereafter, the residence of Saligram and also the Sahan of Saligram on the northern side of the plot and on the southern side, there was a vacant land. Since the land in question was situated in the midst of Abadi of the village, it was rightly inferred by the Sub Registrar, Mohammdi, Lakhimpur Kheri that the same had been purchased for residential purposes.

8. It has also been submitted that the procedure prescribed under the Rules was followed and proper opportunity of hearing was given to the petitioner by issuing a notice to him on 5.11.2007 and then the order impugned was passed. The Collector had found that at the time when the Sale Deed was executed, the Circle Rate determined by the District Magistrate for village Abadi was Rs.500/- per square meter. The property in question being 1/4th area of Plot no.381 ad-measuring 678.94 square meters, on the basis of the Circle Rate determined by the District Magistrate, its value was Rs.33,40,000/-, and on such value Rs.27,200 was payable as stamp duty and Rs.5020/- as registration fees. The petitioner, on the other hand, had paid only Rs.2170/- as stamp duty and Rs.540/- as registration fee, therefore, deficiency in stamp duty, deficiency in registration fee and penalty was imposed and as per Rules, the same was payable with 1.5% interest per month to be charged from the date of execution of Sale Deed till the date of actual payment.

9. With regard to the submissions made by the learned counsel for the petitioner that the field book showed that sugarcane crop, potato crop and onion crop were being sown on the plot in question, it has been stated in the counter affidavit that the entries in the filed book cannot be treated to be final in such a case. Moreover, Collector had rightly found from a perusal of the map of the village submitted by the petitioner along with his reply to the show cause notice that the plot in question was situated in the middle of village Abadi and there was a valid presumption drawn that it can be used for residential purposes.

10. With regard to the contention raised in the writ petition that no declaration/notification under Section 143 of the U.P.Z.A. and L.R. Act had been made by the competent authority, it has been stated in the counter affidavit that the petitioner cannot derive any benefit out of his own wrong. The petitioner was supposed to get declaration under Section 143 of the U.P.Z.A. and L.R. Act issued from the appropriate authority.

11. Learned counsel for the petitioner while arguing the case, has placed reliance upon several decisions of the coordinate Benches of this Court, namely, *(i) Smt. Neelam Gupta Vs. Commissioner, Kanpur Division,* reported in ***(2007) (25) LCD 36;***

(ii) *Naresh Kumar Sonkar Vs. State of U.P. and Others,* reported in ***[2008 (26) LCD 1590];*** (iii) *Surendra Singh and Another Vs. State of U.P. and Others,* reported in ***[2009 (27) LCD 442];*** (iv) *Ashish Kumar Singh and Others Vs. State of U.P. and Others,* reported in ***[2010 (28) LCD 945]***;(v) *Bansal Global Finance Limited Vs. Chief Controlling Revenue Authority and Others,* reported in ***[2010 (28) LCD 1574]***; (vi) *Varun Goyal Vs. State of U.P. and Others,* reported in ***(2015) 2 ADJ 311;*** (vii) *Smt. Kaushilya Dwivedi and Another Vs. Commissioner, Lucknow Division and Others,* writ petition decided by a Co-ordinate Bench of this Court on 19.05.2010, and a judgment of the Division Bench in *Sumati Nath Jain vs. State of U.P. and another,* reported in ***2016 (2) ADJ 533***, and a Full Bench decision of this Court in Smt. Pushpa Sareen vs. State of U.P., reported in 2015 (3) ADJ 136.

12. Learned counsel for the petitioner has also placed reliance upon two judgments of the Supreme Court in the cases of ***Smt. Prakashwati vs. Chief Controlling Revenue Authority, Board of Revenue, U.P. at Allahabad and others, (1996) 4 SCC 657*** and ***State of U.P. and other vs. Ambrish Tandon and another, (2012) 5 SCC 566.***

13. Learned Standing Counsel, on the other hand, has placed reliance upon two judgments rendered by this Court in *Writ Petition No.1494 (MS) of 2009: Shakeel Ahmad vs. Additional Commissioner, Judicial, Faizabad,* decided on 16.5.2019, and *Writ Petition No.3126 (MS) of 2009: Hridya Narayan Mishra vs. Commissioner, Allahabad Division and another,* decided on 21.2.2019.

14. Having heard the learned counsel for the parties, this Court has perused the impugned order passed by respondent no.4 dated 26.2.2008. From a perusal thereof, it appears that the proceedings under Section 33/47-A of the Act were initiated on a report submitted by the Sub Registrar, Mohammdi, Lakhimpur Kheri dated 30.8.2007 regarding deficiency in stamp duty and registration fee with regard to the property in question. The petitioner was issued a notice and he filed his reply. The respondent no.4 found that the plot Inspection report stated that the property in question had been wrongly shown to be used for agricultural purposes and its boundaries had also been wrongly shown. No crop was found to be sown on the property in question and it being surrounded on the western side by eight feet wide road and on the other three sides by residential houses and properties and being situated in the middle of the village Abadi, was liable to be charged at the Circle Rate determined by the Collector @ Rs.500/- per square meter for residential purpose. Not only the boundaries were wrongly shown of the plot in question, but no crop was found to be sown in the property and it was being used for drawing cow-dung cakes for fuel. The respondent no.4, therefore, found deficiency in stamp duty and imposed penalty, amounting to total of Rs.54,600/- and also directed payment of interest @ 1.5% per month from the date of execution of Sale Deed till the date of actual payment.

15. In the order passed by the Appellate Authority also, the same

facts that were mentioned by the Collector in the impugned order, have been reiterated and the order of the respondent no.4 has been affirmed by the respondent no.2.

16. In the judgments, that have been relied upon by the learned counsel for the petitioner, passed by various coordinate Benches of this Court, few main points have been reiterated that relate to non declaration of the property to be used for non agricultural purposes under Section 143 of the U.P.Z.A. and L.R. Act, and also that future or intended use of the property in question would not determine the stamp duty payable in respect of agricultural land.

17. The coordinate Benches have also referred to the judgments of this Court and of the Supreme Court that situation of the land in a semi urban area or near a residential colony cannot lead to a presumption that the land in question shall be used for residential purposes.

18. A Full Bench of this Court in ***Smt. Pushpa Sareen*** (supra) has taken care of such judgments of Hon'ble Single Judges and Division Benches in Paras 21 and 23 of the said report. Paras 21 and 23 are being quoted hereinbelow:

"21. The attention of the Court has been drawn to certain judgments of the learned Single Judges of this Court which had taken the view that the market value of the land could not be determined with reference to the use of the land to which the buyer intends to put it in future.

23. In certain judgments of the learned Single Judges of this Court, a view had been taken that the authorities are required to determine the value of the land on the date on which the sale was made and cannot consider the potential value of the land to which it could be put to use in future. Smt. Kusum Lata Jaiswal vs. State of U.P. and others, ***2010(2) ADJ 274.*** *Similarly in Dinesh Tiwari vs. Commissioner, Gorakhpur and others, 2012(3) AWC 2343:* ***2011(10) ADJ 1 (NOC),*** *it was held that the Collector had no power to assess the market value of the property on the basis of a future value which the property may acquire."*

19. The Full Bench thereafter considered the question whether the Collector has power to fix the valuation of a plot on the assumption that it is likely to be used for commercial purposes/residential purposes and whether the presumed future prospective use of the land can be a criterion for valuation by the Collector.

20. The Full Bench in ***Smt. Pushpa Sareen (supra)*** has referred to object of the Indian Stamp Act as was discussed by the Supreme Court in ***Ramesh Chand Bansal and others vs. District Magistrate/Collector, Ghaziabad and others, AIR 1999 SC 2126*** (Para-5 thereof). It has been submitted that the object of the Indian Stamp Act is to protect the State revenue. The Supreme Court observed in Para-5 as follows:

"5. .....It is matter for common knowledge in order to escape such duty by unfair practice, many a time under valuation of a property or lower consideration is mentioned in a sale deed. The imposition of stamp duty on sale deeds are on the actual market value of such property and not the value described in the instrument. Thus, an obligation is cast on authority to properly ascertain its true

value for which he is not bound by the apparent tenor of the instrument. He has to truly decide the real nature of the transaction and value of such property. For this, Act empowers an authority to charge stamp duty on the instrument presented before it for registration. The market value of a property may vary from village to village; from location to location and even may differ from the sizes of area and other relevant factors. This apart there has to be some material before such authority as to what is likely value of such property in that area. In its absence it would be very difficult for such Registering Authority to assess the valuation of such instrument. It is to give such support to the Registering Authority the Rule 340-A is introduced. Under this Collector has to satisfy himself based on various factors mentioned therein before recording the circle rate, which would at best be the prima facie rate of that area concerned. This is merely a guideline which helps the Registering Authority to assess the true valuation of a transaction in an instrument. This gives him material to test prima facie whether description of valuation in an instrument is proper or not.... Reading Section 47-A with the aforesaid Rule 340-A it is clear that the circle rate fixed by the Collector is not final but is only a prima facie determination of rate of an area concerned only to give guidance to the Registering Authority to test prima facie whether the instrument has properly described the value of the property. The circle rate under this Rule is neither final for the authority nor to one subjected to pay the stamp duty. So far sub-sections (1) and (2) it is very limited in its application as it only directs the Registering Authority to refer to the Collector for determination in case property is under valued in such instrument. The circle rate does not take away the right of such person to show that the property in question is correctly valued as he gets an opportunity in case of under valuation to prove it before the Collector after reference is made. This also marks the dividing line for the exercise of power between the Registering Authority and the Collector. In case the valuation in the instrument is same as recorded in the circle rate or is truly described it could be registered by Registering Authority but in case it is under valued in terms of sub-section (1) or sub-section (2), it has to be referred and decided by the Collector. Thus, the circle rate, as aforesaid, is merely a guideline and is also indicative of division of exercise of power between the Registering Authority and the Collector."

21. Thereafter, the Full Bench in Para-27 of the report held as under:

"27. Undoubtedly, the Collector is not permitted to launch upon a speculative inquiry about the prospective use to which a land may be put to use at an uncertain future date. ***The market value of the property has to be determined with reference to the use to which the land is capable reasonably of being put to immediately or in the proximate future. The possibility of the land becoming available in the immediate or near future for better use and enjoyment reflects upon the potentiality of the land. This potential has to be assessed with reference to the date of the execution of the instrument. In other words, the power of the Collector cannot be unduly circumscribed by ruling out the potential to which the land can be advantageously deployed at the time of the execution of the instrument or a period reasonably proximate thereto.***

Again the use to which land in the area had been put is a material consideration. If the land surrounding the property in question has been put to commercial use, it would be improper to hold that this is a circumstance which should not weigh with the Collector as a factor which influences the market value of the land." *(Emphasis Supplied)*

22. The Full Bench considered the fact that the land may be put to some other use at a later point of time, but that may not be a relevant criteria for deciding the value for the purpose of stamp duty as held by the Supreme Court in the case of ***Ambrish Tandon*** (supra).

23. The Full Bench, nevertheless in Para-28 observed thus:

*"28. .....**Where, however, the potential of the land can be assessed on the date of the execution of the instrument itself, that is clearly a circumstance which is relevant and germane to the determination of the true market value.** At the same time, the exercise before the Collector has to be based on adequate material and cannot be a matter of hypothesis or surmise. The Collector must have material on the record to the effect that there has been a change of use or other contemporaneous sale deeds in respect of the adjacent areas that would have a bearing on the market value of the property which is under consideration."*

(Emphasis Supplied)

24. In view of the observations made by the Full Bench of this Court, the Collector, no doubt was entitled to issue notice on the basis of Spot Inspection Report submitted by the Sub Registrar, Mohammdi, Lakhimpur Kheri, but the procedure thereafter prescribed under the Rules was not followed.

25. Under the U.P. Stamp Valuation of Property Rules, 1997, Rule-7 provides the procedure on receipt of a Reference or when suo motu action is proposed under Section 47-A of the Act. Rule 7(2)(c) provides that the Collector may inspect the property after due notice to parties to the instrument.

26. The complete reading of the aforesaid Rule clearly indicates that while deciding the proceedings under Section 47-A of the Act, the Collector or any other officer authorized to determine stamp duty, is required to make an inspection after due notice to the parties to the instrument. The proceedings under Section 47-A of the Act shall not be decided merely placing reliance on the ex-parte report of the Sub Registrar or the Tehsildar for that purpose.

27. In the case at hand, the petitioner has stated in the writ petition that the Sub Registrar, Mohammdi, Lakhimpur Kheri inspected the property in question on 30.8.2007 without notice to the petitioner and an ex-parte report was submitted. The petitioner disputed the report by annexing copies of the field book and all the land records i.e. khasra and khatauni, showing that the land was not only recorded as land for agricultural purposes in the khatauni, but was actually being used for agricultural purposes in khasra. A dispute having been raised, an inspection ought to have been carried out by respondent no.4. He took a shortcut instead. He examined the map of the village concerned and as mentioned in the order impugned that the land in question was surrounded by Abadi land of the village, therefore, a

presumption was drawn that the land in question would be used for residential purposes.

28. This Court has carefully examined the village map, a copy of which, has been filed as Annexure-9 to the petition. Plot no.381, 1/4th part of which had been bought by the petitioner through the Sale Deed executed on 16.6.20017, has been shown as Domat-1 in the village map. Domat-1 is a category of soil, on the basis of which, land revenue or "lagaan' is determined for agricultural land, but the village map does not show the property in question to be situated in the middle of village Abadi.

29. This Court fails to understand as to when power was given to respondent no.4 to make an on the spot inspection of the property in question, then why the same was not exercised and on the spot inspection was not carried out and the ex-parte report of the Sub Registrar, Mohammdi, Lakhimpur Kheri alone was relied upon in passing the orders impugned.

30. The orders impugned dated 26.02.2008 and 05.02.2010 are ***set aside.***

31. The petitioner has already deposited Rs.19,454/- before the Appellate Authority in the nature of a pre-deposit for filing of appeal and has also deposited Rs.15,000/- in pursuance of the conditional interim order granted by this Court on 24.2.2010. The same shall be returned to the petitioner on appropriate application being made by the petitioner to the competent authority.

32. The writ petition stands ***allowed.***

(2020)02ILR A1388

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 11.02.2020

BEFORE
THE HON'BLE MRS. SANGEETA CHANDRA, J.

Misc. Single No. 3855 of 2020

Matawar Prasad ...Petitioner
Versus
District Judge Shravasti & Ors. ...Respondents

Counsel for the Petitioner:
Mohan Singh

Counsel for the Respondents:
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A. Civil Law-Civil procedure Code, 1908-O-XXXIX R-1 & 2 and Sec 151-Petitioner-challenging order-rejecting-temporary injunction application-seeking direction-restraining respondents from using the sahan land-as raasta-no final finding-by the Court-regarding-title or claim of the petitioner—prima facie finding-based on revenue records-property in dispute-be raasta-no infirmity in the order-Petition Dismissed.

B. Held, this Court considered the three ingredients for grant of temporary injunction under Order 39 Rule 1 and 2 CPC i.e. prima facie case, balance of convenience and irreparable loss. In this judgment again this Court held that ultimately it is for the court to decide whether in the facts and circumstances of the case it is necessary to protect the property which is subject matter of suit. Also it observed that if a party fails to prove prima facie case to go for trial, it is not open to the court to grant interim injunction in his favour even if he made out a case for balance of convenience being in his favour and that he would suffer irreparable loss or injury if no injunction order is granted. This Court finds from the orders impugned that no final finding has been arrived at with regard to the title or

the claim of the petitioner to the land in dispute to be used by him as sahan. Only a prima facie finding has been recorded that in the revenue records, Plot no.580 has been recorded as raasta and in the Amin Commissioner's report also, it was found to be used by other persons as well and that the houses of other persons were opening there on the disputed piece of land.

List of cases cited:-

1. Kendriya Karmchari Sahkari Grih Nirman Samiti Ltd. vs. New Okhla Industrial Development Authority, 2009 (27) LCD 185

2. Anupam Sahkari Avas Samiti Ltd. vs. Additional District Judge, Lucknow, 2006 (24) LCD 137

3. Badadeen and another vs. Additional District Judge, W.P No.962 (MS) of 2014

4. Manohar Lal Chopra vs. Rai Bahadur Rao Seth Hiralal AIR 1962 SC 527

(Delivered by Hon'ble Mrs. Sangeeta Chandra, J.)

1. Heard learned counsel for the petitioner and perused the orders impugned.

2. The petitioner is aggrieved by the order dated 18.9.2019 passed by the Civil Judge (Junior Division), Shravasti, rejecting the application of the petitioner for temporary injunction in Regular Suit No.36/2017 (Matawar Prasad vs. Jagdish and others) and the order dated 13.1.2020 passed by the District Judge, Shrawasti in Misc. Civil Appeal No.22/2019.

3. It is the case of the petitioner that he filed a regular suit for permanent injunction against the private respondents, who are the Gram Pradhan and his two brothers saying that the petitioner has a house situated in village Parsiya and his house is in two parts; one part of the house is used for residence and the remaining is used for Ghari, Bhusaila and Charani for cattle, where he has also installed his machinery. In between two parts of the residential houses and Bhusaila, there is a sahan land, which is also used as ingress and egress of tractor and trolley belonging to the petitioner. The sahan land is now being tried to be converted into public raasta by the respondent nos.3 to 5 due to panchayat election rivalry. The sahan land is marked as A, B, C and D in the map annexed with the plaint and that the respondents no.3 to 5 be restrained from using the sahan land as raasta and making it into the kharanja marg. On the case being registered and notice being issued, respondent nos.3 to 5 filed their objection to the application for temporary injunction, but in the meantime, the trial court had also passed an ex-parte interim order on the date of registration of the suit i.e. on 17.1.2017 that the parties shall maintain status quo over the land in question. After written statement and objections were filed, the petitioner filed his replication also. An Amin Commissioner was appointed by the learned trial court on 17.1.2017 on an application moved by the petitioner and the Amin Commissioner visited the land in question on 18.4.2017 and submitted his report. The petitioner filed his objection to the report of the Amin Commissioner. The learned trial court while deciding the application for temporary injunction Paper no.6A by the impugned order dated 18.9.2019, has rejected the petitioner's apprehension on the ground of failure

to make out a prima facie case. The petitioner filed an appeal, which has also been rejected.

4. It has been pointed out that during the pendency of appeal, an interim order of maintenance of status quo had been granted by the appellate court, which has now merged with the order, rejecting the appeal. Hence the need arose to file this petition.

5. It has been submitted by the learned counsel for the petitioner that the learned trial court while passing the order impugned has misinterpreted the Amin's report and has taken the raasta mentioned in the revenue records as Gata no.580 to be the land on which the petitioner's sahan is situated, whereas the petitioner's house is situated on Abadi Gata no.669 and not on Gata no.580.

6. It has also been submitted by the learned counsel for the petitioner that while rejecting the application for temporary injunction, the learned trial court has failed to appreciate the principles for grant of temporary injunction and has conducted a mini trial, giving a finding against the petitioner.

7. Learned counsel for the petitioner has submitted on the basis of judgment rendered in *Kendriya Karmchari Sahkari Grih Nirman Samiti Ltd. vs. New Okhla Industrial Development Authority, 2009 (27) LCD 185* that when the question of immovable property is involved, the trial court should have passed an order to maintain status quo. Learned counsel for the petitioner says that rejection of the application for temporary injunction may lead to irreparable loss being caused to the petitioner. He has referred to Para-9 of the judgment to buttress his argument.

8. Learned counsel for the petitioner has also placed reliance upon the judgment in *Anupam Sahkari Avas Samiti Ltd. vs. Additional District Judge, Lucknow, 2006 (24) LCD 137*, and has referred to Para-17 of the judgment to say that mini trial should not be conducted while considering the application for temporary injunction by the trial court.

9. Learned counsel for the petitioner has also placed reliance upon the judgment and order dated 17.2.2014 passed in Writ Petition No.962 (MS) of 2014 (Badadeen and another vs. Additional District Judge, Court no.3, Bahraich and others) to say that there is a difference between the prima facie case and prima facie title, which the trial court has failed to appreciate while considering the application for temporary injunction.

10. This Court has perused the impugned orders passed by the trial court, where the trial court after mentioning the facts as mentioned in the plaint has also mentioned the facts as mentioned in the objections to the application Paper no.6C by the defendants registered as Paper no.21A. The defendants had stated that the land in question is a public raasta on which, under the village development plan, kharanja has to be laid and not only the petitioner house is situated on the northern side of such raasta, but that of others including the defendants are situated on the northern side of such raasta. A mention has also been made of the fact that objection has been raised regarding non joinder of necessary party

under Order 1 Rule 8 CPC as the petitioner in effect wants the Court to declare pubic raasta as his sahan. The Gram Panchayat is a necessary party and has not been impleaded. The learned trial court thereafter has considered the arguments raised by the leaned counsel for the plaintiffs that the land in question had been left by the plaintiffs themselves to be used as sahan and the Amin Commissioner had found it being used by the people but such people were the family members of the petitioner himself and not the members of general public. However it has rejected such argument by going through the Amin Commissioner's report which mentioned clearly that the land in dispute which the plaintiff was referring to as his sahan was being used by several people for going from the road to the pond on the other side. The revenue records also show Plot no.580 to be public raasta, therefore, no prima facie case was made out in favour of the plaintiff and since there was no prima facie case, there was no question of balance of convenience in favour of the plaintiff and irreparable loss being cause to the plaintiff.

11. The learned trial court has also considered the argument raised by the learned counsel for the plaintiff that the land in question is 15 feet wide on the western side and 17 feet wide on the eastern side, therefore, although it is 147 feet in length, it cannot be considered as public raasta, as for public raasta, both sides must be equal, but has observed that such argument cannot be appreciated as in villages, there is no planned development and, therefore, there may be a difference on the western and eastern side of the land in question, but from the nature of its measurements, it may still be considered to be a public raasta.

12. Learned counsel for the petitioner has stated that the petitioner had taken this ground in appeal that the land in question is situated at Plot no.669 and not on Plot no.580, which is marked as public way in revenue records, but it has not been appreciated correctly by the learned trial court.

13. The petitioner's argument regarding the land in question being situated in Abadi Gata no.669 and not in Gata no.580 recorded as public raasta has also been considered by the appellate court and it has rejected the same by saying that although the petitioner may have some case with regard to declaration of the land in dispute being situated at Gata nos.669 and not Gata no.580, but the fact that the revenue entries showed that it is part of Plot no.580 cannot be overlooked and the Civil Court cannot entertain any dispute with regard to revenue entries. If the appellant had any dispute regarding wrong marking of Plot no.580 in the revenue map of the village concerned, then he may approach the competent court for correction of the same.

14. This Court finds that whether the land in dispute is situated in Plot no.669 which is Abadi plot or Plot no.580, which is marked as public way in the revenue records and village map, is a question to be decided on the basis of the pleadings and evidence to be led before the appropriate court.

15. This Court has considered the order passed by the learned trial court, rejecting the application for temporary injunction and also the order passed by the appellate court and finds that there is a detailed consideration of the submissions made and also an appreciation of the

revenue records and the report of Amin Commissioner. It cannot be said that the orders have been passed without application of mind to the case setup by the petitioner.

16. With regard to the illegality in the orders passed, as submitted by the learned counsel for the petitioner that the trial court has conducted a mini trial and has failed to appreciate the difference between the prima facie case and prima facie title, this Court finds that the argument can also be raised the other way round. From a bare perusal of the Amin Commissioner's report and the map that the petitioner had submitted along with the plaint and the map submitted by the defendants in their objections and written statement, it is evident that the land in question is 147 feet long and 15 to 17 feet wide on the western and eastern side respectively and not only the petitioner's house, Ghari, Bhusaila and Charani opened on the same but that of other houses also opened on the same. Therefore, it appears that the learned trial court and the appellate court did not commit any illegality in rejecting the application for temporary injunction as any temporary injunction in such matters would also affect the right of all others in the village without they being made a party or without the sitting Gram Panchayat being made a party. The contesting respondents/defendants have been impleaded by the petitioner in their personal capacity, although one of them is the Gram Pradhan and in the written statement it has come out that the land in question has been identified in the village development plan for laying kharanja i.e. brick soiling.

17. Now this Court considers the judgments cited by the learned counsel for the petitioner.

18. In the first case i.e. in *Kendriya Karmchari Sahkari Grih Nirman Samiti Ltd.* (supra), the petitioner was a Cooperative Housing Society which had allegedly purchased 292 bighas of land situated in village Chhalera of District Gautam Budh Nagar, commonly known as NOIDA, U.P. for housing purposes from the funds contributed by its members before acquisition by the State Government for establishment of NOIDA. After acquisition NOIDA wanted to allot the plots to the members of the Society in its planned developed sectors. NOIDA directed the Society to furnish list of bona fide members and also directed to deposit 40% of the premium. The plaintiff petitioner did so and in between 1994 to 1996, a total sum of Rs.36 crores had been deposited. The allotment of certain land was done by NOIDA initially but was later on cancelled on grounds of misrepresentation. The Society filed its civil suit along with an application for temporary injunction. The learned trial court held that by issuance of allotment letter, no legal right had been created in respect of the land in favour of the plaintiff Society. The application for temporary injunction was rejected by the trial court on 30.5.2006, which was appealed in a First Appeal From Order before this Court, which was being considered by the Division Bench.

The Division Bench came to the conclusion on the basis of evidence led that the trial court had proceeded in a matter as if it was going to finally conclude the hearing of a suit and held that when there is a question of title involved and decision is yet to be taken on the basis of material evidence, no final conclusion can be drawn. Learned trial court failed to appreciate in spite of cancellation of allotment. NOIDA had not returned a huge amount of 36 crores that the Society had

deposited and NOIDA was enjoying its interest till the date of hearing of First Appeal by this Court. In such case, if interim injunction was refused only because of cancellation of allotment while the other Societies standing on equal footing had already got the allotment, it would act against the interest of the plaintiff. If today the land, which was allotted to the society, was given to a third party, right of such third party will accrue. In such circumstances, efforts of the appellant would be futile. The Division Bench made such observations in a First Appeal From Order and not in a petition under Article 227 of the Constitution of India.

19. In *Anupam Sahkari Avas Samiti Ltd.* (supra), learned counsel for the petitioner has placed reliance upon Para-17. However, Para 17 cannot be read without reference to the fact in which this court made the observation. The petitioner was a housing society which had entered into a registered agreement of sale for a plot of land with private persons. Some part of land was sold of by a private person to the Society and the name of the Society was mutated in the revenue records. Later on private persons executed an unregistered sale deed in favour of another cooperative housing society for the rest of the land and the private housing society transferred the land to a third society, respondent no.2 through a registered sale deed. The third society tried to encroach upon the land of the petitioner society and the petitioner filed a suit along with an application for temporary injunction. The trial court had granted ex-parte temporary injunction directing the parties to maintain status quo and also directing the defendants to file their written statements. Feeling aggrieved by the order passed by the trial court an appeal was filed by the defendant which was allowed by the appellate court and therefore, petition was filed under Article 227 by the plaintiff praying for setting aside the order passed by the appellate court. This Court considered the fact that the right of the defendant had arisen on the basis of an unregistered sale deed.

It referred to the judgment rendered by the Supreme Court in *Manohar Lal Chopra vs. Rai Bahadur Rao Seth Hiralal AIR 1962 SC 527,* where it was held that the power of the competent court does not only flow from Order 39 Rule 1 and 2 CPC but also Section 151 of the CPC while relates to inherent power to make necessary the order in the interest of justice. The court can exercise its inherent jurisdiction under Section 151 CPC when it considers it necessary in the ends of justice to so do. It also referred to the judgment of the Supreme Court in *Anand Prasad Agarwalla* where the Supreme Court held that it may not be appropriate to hold a mini trial at the grant of temporary injunction. The plaintiff had approached the court on the basis of sale certificate issued in an auction sale. A presumption arose in favour of such person and unless the sale certificate was set aside or declared to be a nullity, it remained legally valid and in force and it could not be said that no right could be derived from such certificate and made the observation in Para-17 with regard to the claim of the petitioner before it.

20. In *Babadeen* (supra), this Court considered the three ingredients for grant of temporary injunction under Order 39 Rule 1 and 2 CPC i.e. prima facie case, balance of convenience and irreparable loss. In this judgment again this Court held

that ultimately it is for the court to decide whether in the facts and circumstances of the case it is necessary to protect the property which is subject matter of suit. Also it observed that if a party fails to prove prima facie case to go for trial, it is not open to the court to grant interim injunction in his favour even if he made out a case for balance of convenience being in his favour and that he would suffer irreparable loss or injury if no injunction order is granted.

21. This Court finds from the orders impugned that no final finding has been arrived at with regard to the title or the claim of the petitioner to the land in dispute to be used by him as sahan. Only a prima facie finding has been recorded that in the revenue records, Plot no.580 has been recorded as raasta and in the Amin Commissioner's report also, it was found to be used by other persons as well and that the houses of other persons were opening there on the disputed piece of land.

22. This Court therefore, does not find any legal infirmity in the orders impugned. It is only one of the possible views that can be taken by the trial court and the appellate court and this Court under Article 227 enjoys a very limited jurisdiction to interfere in the orders passed by the subordinate courts.

23. The writ petition is ***dismissed.*** No order as to costs.

24. It is, however, clarified that the finding recorded by this Court in this order shall not prejudice the case of the petitioner, which is yet to be proved on the basis of evidence led by both the parties.

(2020)02ILR A1394

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 29.01.2020

BEFORE
THE HON'BLE ALOK MATHUR, J.

Misc. Single No. 4499 of 2015

Hari Shanker ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Gulam Rabbani

Counsel for the Respondents:
C.S.C.

A. Child Labour (Prohibition & Regulation) Act, 1986-Sec.3-Petitioner-found guilty-vide impugned order-for employing person below-14 years of age-denying the fact-petitioner sumitted marks sheet-aged around 18 years-secs. 10 & 16- certificate granted by-prescribed medical officer-to be conclusive proof-child found to be 13 years old-as per medical certificate-Petition Dismissed.

B. Held, In the instant case it is clear that the prescribed authority has given his considered opinion and indicated the age of the child to be thirteen years and in light of Section 16 of the Act of 1986, and the said age having been determined by the prescribed authority shall be a conclusive evidence as to the age of the child. In the present case I am of the view that the age determined by the prescribed Medical Authority is thirteen years and therefore the proceedings drawn against the petitioner under the Act of 1986 clearly borne out. The petitioner has setup a case with regard to a person whose identity has been disputed. The photograph of the person setup by the petitioner does not match with the photograph which was taken at the time of incident which is also in the records of the respondents as well as the certificate issued by the Chief Medical Authority. In case such a stand was taken by the petitioner regarding identity then onus will

go on the petitioner to prove to the satisfaction of the authorities concerned. While on the other hand the State has clearly proved that the offence has been committed by the petitioner by employing a person whose age has already been determined by the prescribed Medical Authority to be less than fourteen years.

Writ Petition dismissed. (E-8)

(Delivered by Hon'ble Alok Mathur, J.)

1. Heard Mr. Gulam Rabbani, learned counsel for the petitioner as well as learned Standing Counsel appearing for the respondents.

2. The petitioner has approached this Court being aggrieved by the order dated 09.07.2015 passed by the Deputy Labour Commissioner, Faizabad Division Faizabad, whereby petitioner has been found to be guilty of Section 3 of the Child Labour (Prohibition and Regulation) Act, 1986 (hereinafter referred to as Act, 1986) and a penalty of Rs.20,000/- has been imposed upon him for employing the person below the age of fourteen years.

3. The brief facts of the case are that petitioner runs a Motor Cycle repairing shop in the name and style Pappu Hero Honda Repairing Centre, Mawai Chauraha Faizabad and on 13.08.2013 the Labour Enforcement Officer/ Inspector, Faizabad. Respondent No.4 came to the shop of the petitioner and found one Sonu to be working in the repair shop. On the basis of the aforesaid a show cause notice dated 18.12.2013 was given to the petitioner with direction to give a reply to the allegations stated therein with regard to the fact that he had employed a minor in his shop who was found during the inspection of the premises of the petitioner. The petitioner has submitted his reply on 12.02.2014 and denying the fact that he had employed any minor in his shop and submitted a marksheet of a student named as Shiv Kumar having the date of birth as 15.02.1996 and submitted that person so named in the show cause notice is not a minor and is aged around eighteen years and therefore there is no violation Section 3 of the of Act, 1986.

4. Subsequently another show cause notice was given to the petitioner by the Deputy Labour Commissioner, Faizabad dated 18.06.2014 reiterating the same facts. It has been submitted that reply of the said show cause notice could not be given. It is relevant to submit that the order dated 18.06.2014 as well as order dated 18.12.2013 are similarly worded and reply to the show cause notice 18.12.2013 was already been submitted by the petitioner. The impugned order was passed by the Deputy Labour Commissioner, Faizabad after taking into account the reply submitted by the petitioner.

5. The counsel for the petitioner has submitted that the impugned order is illegal and arbitrary, inasmuch as the person who was employed in the premises of the petitioner was not a minor and he had provided a copy of the High School Certificate of the said Sri Shiv Kumar, which indicates that he is nearly eighteen years of age.

6. In light of the above he has vehemently submitted that the impugned order is liable to be set-aside being passed contrary to the provisions of the Act.

7. Learned Standing Counsel on the other hand has supported the impugned. He has submitted that during the time of inspection on 13.08.2013 a minor was found to be working in the Motor Cycle repairing shop of the petitioner. He has further submitted that the age of the child was confirmed when he was produced before the Chief Medical Officer, Faizabad who after examining the boy issued a certificate dated 14.08.2013 indicating the

boy age to be thirteen years. The photo of the person whose age was determined by the Chief Medical Officer was also affixed with a certificate issued by him.

8. It has been submitted that in light of the conclusive proof of the age of the person so found in the premises of the petitioner, there is a clear violation of Section 3 of the Act, 1986 for which the petitioner has been found to be guilty and penalty imposed thereupon.

9. I have heard the learned counsel for the parties and perused the record.

10. The premises of the petitioner were inspected on 13.08.2013 and the said person was produced before the Chief Medical Officer who certified that the date of birth of Sonu is 13 years by the certificate dated 14.08.2013. The entire controversy in the present petition relates to the identity and the age of the person so found during inspection. The petitioner on one hand has submitted a High School Certificate of one person known as Shiv Kumar, whose date of birth has been shown as 15.02.1996 and has submitted that on the date when the premises were inspected he was not minor. While on the other hand the State has relied upon Medical Certificate issued by the Chief Medical Officer, who determined the age of the person who was found in the premises at the time of inspection to be thirteen years.

11. To resolve the controversy, the provisions relating to determination of age as provided in the Child Labour (Prohibition and Regulation) Act, 1986 are as under:-

*"**16. Procedure relating to offences-** (1) Any person, police officer of Inspector may file a complaint of the commission of an offence under this Act in any Court or contempt jurisdiction.*

(2) Every certificate as to the age of a child which has been granted by a prescribed medical authority shall, for the purposes of this Act, be conclusive evidence as to the age of the child to whim it relates.

(3) No Court inferior to that of a Metropolitan Magistrate or a Magistrate of the first class shall try any offence under this Act."

12. From the above, it is clear that the certificate granted by the prescribed Medical Authority shall be the conclusive evidence as to the age of Child and in the present case certificate dated 14.08.2013 issued by the Chief Medical Officer has determined the age of the child to be thirteen years. While on the other hand Section 10 of the Act of 1986 relates to dispute as to the age which is quoted for ready reference:-

*"**10. Disputes as to age-** If any question arises between an Inspector and an occupier as to the age of any child who is employed or is permitted to work by him in an establishment, the question shall, in the absence of a certificate as to the age of such child granted by the prescribed medical authority, be referred by the Inspector for decision to the prescribed medical authority."*

13. A bare reading of Section 10 of the Act of 1986 clearly indicates that the dispute will arise only in a case where no certificate has been granted by the Prescribed Medical Authority. Petitioner on the other hand has contended that the High School Certificate issued by the Board indicates that the child is above seventeen years of age. While the certificate issued by the Chief Medical Authority, Faizabad indicates that the age

of the child is thirteen years. The provision of Section 10 of the Act of 1986 would be attracted only in absence of any certificate issued by the prescribed Medical Authority.

14. In the instant case it is clear that the prescribed authority has given his considered opinion and indicated the age of the child to be thirteen years and in light of Section 16 of the Act of 1986, and the said age having been determined by the prescribed authority shall be a conclusive evidence as to the age of the child. In the present case I am of the view that the age determined by the prescribed Medical Authority is thirteen years and therefore the proceedings drawn against the petitioner under the Act of 1986 clearly borne out. The petitioner has setup a case with regard to a person whose identity has been disputed. The photograph of the person setup by the petitioner does not match with the photograph which was taken at the time of incident which is also in the records of the respondents as well as the certificate issued by the Chief Medical Authority.

15. In case such a stand was taken by the petitioner regarding identity then onus will go on the petitioner to prove to the satisfaction of the authorities concerned. While on the other hand the State has clearly proved that the offence has been committed by the petitioner by employing a person whose age has already been determined by the prescribed Medical Authority to be less than fourteen years.

16. The Deputy Labour Commissioner has considered the entire conspectus of the case and has come to a clear finding against the petitioner and imposed penalty of Rs.20,000/- upon him. No other fact or material had been brought on record which may persuade this Court to interfere with the impugned order. No other ground was urged by the petitioner.

17. In pursuance to the interim order of this Court dated 06.08.2015, the petitioner has already deposited Rs.20,000/- on 18.08.20215. In light of the above no further action in this regard is required to be taken.

18. I do not find any reason to interfere with the order of the Deputy Labour Commissioner. The writ petition is without merit and is hereby ***dismissed.***

(2020)02ILR A1397

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 21.01.2020

BEFORE
THE HON'BLE ALOK MATHUR, J.

Misc. Single No. 5973 of 2011

C/M Baroda U.P. Gramin Bank
...Petitioner
Versus
The Presiding Officer, Employees Provident Fund & Ors. ...Respondents

Counsel for the Petitioner:
Anupras Singh

Counsel for the Respondents:
Pradeep Raje, Om Prakash Pandey, Rajesh Kumar Verma

A. Service Law-Employees Provident Fund & Misc. provisions Act, 1952-Sec. 7A-Regional Rural Banks Act, 1976-Petitioner bank-challenging order of Tribunal-denied to pay towards EPF of-engaged sweepers-paid consolidated amount on monthly basis-by Branch Manager-on the ground-not employees of the Bank-u/s 2(f)-any person employed for

wages in any kind of work-is employee-safai karmachari-employed by management-paid wages regularly-master servant relationship exists-Petition Dismissed.

B. Held, that after due consideration of the issues involved, I am of the considered opinion that Safai Karmachari are employed by the management of the branches and the management has full control on them and they are paid wages regularly on the basis of which master and servant relationship exists between the Bank and Safai Karmachari and they would be 'employees' within the meaning of Section 2(f) of the Provident Fund Act and are entitled all the benefits as such. No other argument or fact was placed by the petitioners to assail the findings recorded by the Tribunal. Having considered the arguments of counsels and the order of Tribunal, I do not find any infirmity with the order of Tribunal. The petition being without merits is hereby dismissed.

Writ Petition dismissed. (E-8)

List of cases cited:-

1. CESC Ltd. v. Subhash Chandra Bose

2. C.V. Satheeshchandran Vs. General Manger, UCO Bank and others (2008) 2 Supreme Court Cases 653

3. M/s Ahmadabad Cooling Printing Ltd. Vs. Rehmat Ali

4. M/s P.M. Patel and sons and others Vs. Union of India and others (1986) 1 Supreme Court Cases 32

5. Sub Regional Provident Fund Office and another Vs. Godavari Garments Limited (2019) 8 Supreme Court Cases 149

6. The Regional Provident Fund Commissioner, Andhra Pradesh Vs. Sri T. S. Hariharan, 1971 (2) Supreme Court Cases 68

(Delivered by Hon'ble Alok Mathur, J.)

1. Heard Sri Anupras Singh, learned counsel for the petitioner as well as Sri R. K. Verma, learned Advocate appearing for respondent Nos. 1 and 2 and Sri Om Prakash Pandey, learned counsel for respondent No.3.

2. By means of the present writ petition the petitioner has challenged the order dated 4.7.2011 passed by Employees Provident Fund Appellate Tribunal as well as order dated 31.12.2007 passed by Regional Provident Fund Commissioner (II), Varanasi issued in proceedings under Section 7A of the Employees Provident Fund and Misc. Provision Act, 1952 (hereinafter referred to as the Act). Petitioner has further challenged the order dated 26.8.2011 issued by Regional Provident Fund Commissioner (II), Allahabad.

3. Petitioner has submitted that he is a Regional Rural Bank sponsored by the Bank of Baroda and set up by the Government under the Regional Rural Banks Act, 1976. Originally the petitioner was known as Sultanpur Regional Rural Bank. However, the petitioner bank along with other Regional Rural Banks sponsored by the Bank of Baroda in U.P. was merged together into two new entities namely Baroda Eastern U.P. Gramin Bank and Baroda Western U.P. Gramin Bank vide notification dated 23.2.2006 issued by the Central Government under the provisions of the Regional Rural Bank Act. Thereafter vide Notification dated 31.3.2008 the above two Gramin Banks were merged into Baroda U.P. Gramin Bank by the Central Government.

4. He has submitted that the work of cleaning of the premises in the instant case is done by the persons engaged as part time sweepers and are paid consolidated amount on monthly basis by the Branch

Manager of the Bank and they are working only for a period of half to one hour per day and such persons were not restrained to work elsewhere and are in fact employed to do similar or other work in other establishments. On the basis of above facts the petitioner has urged that the petitioner is not liable to deposit any money towards its contribution in regard to such persons engaged as sweepers by the Bank as per the Provident Fund Act. His main contention is that such part time sweepers cannot be termed as bank employees because though they were doing the work of sweeping but the same cannot be said to be employees of the Bank within the meaning of definition of Section 2(f) of the Provident Fund and Miscellaneous Provisions Act.

5. A complaint was filed by the Bareilly Kshetriya Gramin Bank Employees Union with the Regional Provident Fund Commissioner, Bareilly that part time sweepers employed by the Bank were not being given benefits of Provident Funds Act. On receipt of the aforesaid complaint the Assistant Provident Fund Commissioner directed the petitioner to provide details about of engagements of such part time sweepers since 1.6.2001. The Bank denying the allegations made in the said complaint stated that there was no post of sweepers in the Bank and said part time sweepers were not employees of the Bank. Due to the fact that they were not the employees of the Bank there was no statutory duties in relation to such part time persons as provided in Employees Provident Fund and Misc. Provision Act, 1952. The Bank further informed by means of the letter dated 2.12.2009 that in view of the Bipartite Settlement entered into between the Bank Employees Unions and the Banks, such part time sweepers who do not work for more than six hours do not fall within the definition of "employees" and are not entitled to the benefit of the Provident Fund contribution. The Regional Provident Fund Commissioner vide letter dated 10.4.2013 issued notice to the Bank for commencing proceedings under Section 7A of the Act holding such part time Safai Karmachari are employees of the Bank under the Act and issued directions to deposit the statutory dues in respect of such part time workers.

6. Being aggrieved by the order dated 10.4.2013 of the Regional Commissioner, the petitioner filed appeal before Employees Provident Fund Appellate Tribunal. The Tribunal by means of the order dated 4.7.2011 rejected the appeal of the petitioner on the ground that even part time employees are considered employees of the establishment, therefore, the part time sweepers are the employees of the Bank and the Bank is liable to pay the provident fund dues under the Act and the scheme. Vide order dated 26.8.2011 passed by Regional Provident Fund Commissioner (II), Allahabad the petitioner was ordered to deposit the dues within fifteen days.

7. The order of the appellate tribunal has been assailed before us in the present writ petition. Subsequent to the order passed by appellate tribunal recovery proceedings under Section- 7(A), 8(b) and 18 (g) of the Act were commenced by the Commissioner, Bareilly which have also been impugned in the instant writ petition. The appellate tribunal while deciding the controversy in question has considered the meaning of the term "employee" as given under Section 2(f) of the EPF Act as well as pronouncements of various High Courts

and concluded that the definition of Section 2(f) is extremely wide so as to include even the petitioners who are working in connection with the work of appellant establishment and are being paid wages for the same. After the aforesaid consideration, he has held that there is no infirmity in the order passed by Regional Provident Fund Commissioner and thereby dismissed the appeal.

8. Learned counsel for the respondents, on the other hand, has submitted that they are "employees" within the meaning of Section 2(f) of the Act read with Provident Fund Act and it does not make a difference whether they are working for one hour or for 8 hours as the definition of employees as stated in Employees Provident Fund Act, does not make any such distinction as the definition being extreme wide and being a beneficial piece of legislation and as such a liberal interpretation has to be taken so as to include Safai Karmachari within the ambit and scope of the Act and they are entitled to the benefit of Provident Fund.

9. Learned counsel appearing for Baroda U.P. Gramin Bank Employees Union has submitted that bipartite agreement also cannot restrict the meaning, scope and ambit of Section 2(f) of the Provident Funds Act and its members are entitled to the benefit under the Act.

10. I have heard learned counsel for the parties and perused the record.

11. The seminal question for consideration before this Court is as to whether the Safai Karmachari working in the establishment of the petitioner and working for few hours each day and receiving wages therefor are entitled to be counted under the definition of "employees" under Provident Funds Act. The admitted position which emerges is that Safai Karmachari have been engaged by the Branch Managers and they are working for half to one hour per day totalling to about three to six hours in a week and even as per the petitioner himself they are paid consolidated amount on monthly basis though they have stated that they are free to work elsewhere but no assertion has been made that they are, in fact, working anywhere else. The definition of employee given under Section 2(f) of the Employees Provident Funds Act is quoted as under:-

"2. Definition:

(f) "employee" means any person who is employed for wages in any kind of work, manual or otherwise, in or in connection with the work of (an establishment, and who gets, his wages directly or indirectly from the employer, and includes any person:

(i) employed by or through a contractor in or in connection with the work of the establishment:

(ii) engaged as an apprentice, not being an apprentice engage under the Apprentices Act, 1961 (52 of 1961), or under the standing orders of the establishment."

12. The definition of employee under Section 2(f) of the Act is inclusive definition and has wide scope so as to include the persons engaged either directly or indirectly in employment of the establishment. It will be noticed that the terms of definition are very wide including not only the persons directly employed or even through a contractor.

13. It has been submitted by the petitioner that Safai Karmachari have been engaged on local level by the Branch Managers and undoubtedly they are receiving wages for the work they are doing in the premises of the petitioner. Applying the provisions of Section 2(f) to the facts of the present case it is clear that the Safai Karmachari who have been engaged by the petitioner for the purpose of cleaning the establishment for which work they are being paid wages. would be entitled to be covered under the definition of "employee". The work which they are doing is of regular nature as cleaning of the Branches is done by them on each date on which the Branch is opened. It is not the case of the petitioner that it is only due to some emergency that these workers are engaged and subsequently they are discontinued from their engagements as they continue to give service of cleaning of the premises regularly. Hon'ble Supreme Court while considering the provisions of Section 2 (f) of the Employees Provident Fund Act in the case of ***M/s P.M. Patel and sons and others Vs. Union of India and others (1986) 1 Supreme Court Cases 32*** has held in paragraphs 10 and 11 as under:-

"10. In the context of the conditions and the circumstances set out earlier in which the home workers of a single manufacturer go about their work, including the receiving of raw material, rolling the beedis at home and delivering them to the manufacturer subject to the right of rejection there is sufficient evidence of the requisite degree of control and supervision for establishing the relationship of master and servant between the manufacturer and the home worker. it must be remembered that the work of rolling beedis is not of a sophisticated nature, requiring control and supervision at the time when the work is done. It is a simple operation which, as practice has shown, has been performed satisfactorily by thousands of illiterate workers. It is a task which can be performed by young and old, men and women, with equal facility and it does not require a high order of skill. In the circumstances, the right of rejection can constitute in itself an effective degree of supervision and control. We may point out that there is evidence to show that the rejection takes place in the presence of the home worker. That factor, however, plays a merely supportive role in determining the existence of the relationship of the master and servant. The petitioners point out that there is no element of personal service in beedi rolling and that it is open to a home worker to get the work done by one or the other member of his family at home. The element of personal service, it seems to us, is of little significance when the test of control and supervision lies in the right of rejection.

11. In our opinion, the home workers are "employees" within the definition of contained in clause (f) of Section 2 of the Employees' Provident Funs Act. "

In another case of ***Officer -in-Charge, Sub Regional Provident Fund Office and another Vs. Godavari Garments Limited (2019) 8 Supreme Court Cases 149,*** Hon'ble Supreme Court has considered the ratio laid down in aforesaid case of M/s P.M. Patel and sons and others (supra) and further considered various judgments it has been held as under in paragraphs 9.8 to 11 as under:-

"9.8. The EPF Act is a beneficial social welfare legislation which was enacted by the legislature for the benefit of the workmen. This Court in Daily Partap

v. regl. Provident Fund Commr., held that: (SCC p.98, para 9)

"9....It has to be kept in view that the Act in question, is a beneficial social welfare legislation meant for the protection of weaker sections of society, namely, workmen who had to eke out their livelihood from the meagre wages they receive after toiling hard for the same." Hence, the provisions under the EPF Act have to be interpreted in a manner which is beneficial to the workmen."

9.9. In the present case, the women workers were certainly employed for wages in connection with the work of the respondent Company. The definition of "employee" under Section 2(f) is an inclusive definition, and includes workers who are engaged either directly or indirectly in connection with the work of the establishment, and are paid wages.

10. In the present case, the women workers were directly engaged by the management in connection with the work of the respondent Company, which was set up as a ready made garments industry in Marathwada. The women workers were paid wages on per-piece basis for the services rendered. Merely because the women workers were permitted to do the work offsite, would not take away their status as employees of the respondent Company.

11. The respondent Company placed reliance on this Court's decision in CESC Ltd. v. Subhash Chandra Bose, wherein it was held that :

"14. In the textual sense 'supervision' of the principal employer or his agent is on 'work' at the places envisaged and the word 'work' can neither he construed so broadly to be the final act of acceptance or rejection of work, nor so narrowly so as to be supervision at all limes and at each and every step of the work. A harmonious construction alone would help carry out the purpose of the Act, which would mean moderating the two extremes. When the employee is put to work under the eye and gaze of the principal employer, or his agent, where he can be watched secretly, accidentally, or occasionally, while the work is in progress, so as to scrutinise the quality thereof and to detect faults therein, as also put to timely remedial measures by directions given, finally leading to the satisfactory completion and acceptance of the work, that would in our view be supervision for the purposes of Section 2(9) of the Act."

14. Learned counsel for the petitioner, on the other hand, placed reliance on the Supreme Court judgment in the case of ***The Regional Provident Fund Commissioner, Andhra Pradesh Vs. Sri T. S. Hariharan, 1971 (2) Supreme Court Cases 68*** wherein Hon'ble Apex Court considered as to whether employment of few persons for a short period on account of some pressing necessity or some temporary emergency beyond the control of the company, would be held to be employment under the provisions of Section 2(f) of the Act. Clearly, the facts of the case before the Hon'ble Apex Court in the said case are distinguishable from the facts of the present case. It is not the case of the petitioner that Safai Karmachari are employees for short period on account of pressing necessity or due to some temporary emergency.

15. Another case relied upon by petitioner counsel is in the matter of ***C.V. Satheeshchandran Vs. General Manger, UCO Bank and others (2008) 2 Supreme Court Cases 653*** with regard to binding nature of bipartite agreement. The

controversy in the set of facts of this case is related to promotion of Assistant Manager in UCO bank wherein he has relied upon the bipartite agreement. It has been held in paragraph 10 that bipartite agreements are binding upon both the bank and the appellant. The facts of this case are clearly distinguishable form the issue raised by the petitioner in present set of facts.

16. The Tribunal while holding that Safai Karmachari are "employees" has considered the case of ***M/s Ahmadabad Cooling Printing Ltd. Vs. Rehmat Ali*** where Hon'ble Supreme Court has held that, "where the management engaged the sweeper who worked twice or thrice a week, the night watchman who kept watch in the other shops in the locality and the gardner who came for work 10 days a month will be deemed as employee in order to attract the applicability of the EPF Act."

17. In the light of above, it is clear that the Safai Karmachari are employed with the petitioner-Bank for the purpose of cleaning their premises on regular basis. The petitioner establishment is a regular and continuous establishment and admittedly the Safai Karmachari are being paid wages on monthly basis for the work done by them. The bipartite agreement cannot restrict the width, ambit and scope of statutory enactment and despite the provisions being made by bipartite agreement the benefit of provident fund would be available only to those employees who work for more than six hours a day, cannot restrict the scope of the persons like the Safai Karmachari who are otherwise covered by the definition of employees as provided under Section 2-F of the Act

18. For determination as to whether Safai Karmachari fall within the definition of Section 2 (f) only the meaning given therein would be relevant and the argument of the petitioner -Bank cannot be accepted and the width, ambit and scope cannot be left to the whims and fancies of the employer to reduce the same even if it is by means of an agreement or consent or by any other instrument. No evidence was led by the petitioner that Safai Karmachari are also employed in any other establishment nor could the prove this before the authority or appellate tribunal.

19. After due consideration of the issues involved, I am of the considered opinion that Safai Karmachari are employed by the management of the branches and the management has full control on them and they are paid wages regularly on the basis of which master and servant relationship exists between the Bank and Safai Karmachari and they would be 'employees' within the meaning of Section 2(f) of the Provident Fund Act and are entitled all the benefits as such.

20. No other argument or fact was placed by the petitioners to assail the findings recorded by the Tribunal.

21. Having considered the arguments of counsels and the order of Tribunal, I do not find nay infirmity with the order of Tribunal. The petition being without merits is hereby **dismissed**.

(2020)02ILR A1404

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.02.2020

BEFORE
THE HON'BLE BISWANATH SOMADDER, J.
THE HON'BLE DR. YOGENDRA KUMAR SRIVASTAVA, J.

Income Tax Appeal No. 13 of 2020

Manoj Kumar Sharma ...Appellant
Versus
Income Tax Officer, Gautam Budh Nagar ...Respondent

Counsel for the Appellant:
Sri Chandra Bhan Gupta

Counsel for the Respondent:
Sri Gaurav Mahajan

Substantial question of law - issues or questions framed are factual in nature.

Appeal Rejected.(E-10)

(Delivered by Hon'ble Biswanath Somadder, J.
&
Hon'ble Dr. Yogendra Kumar Srivastava, J.)

1. This appeal, under section 260-A of the Income Tax Act, 1961, has been taken out in respect of a judgment and order of the learned Income Tax Appellate Tribunal, Delhi Bench (S.M.C.), New Delhi, dated 3rd October, 2019. The appellant has essentially tried to make out a case on two questions of law, which, according to the learned advocate appearing for the appellant, are substantial questions of law. The questions of law are as follows:-

1. "Whether there was no service of notice under section 148 of the Income Tax Act, 1961 ?

2. Whether additional/fresh evidence was taken into consideration by the Commissioner of Income Tax (Appeals)-I ?"

2. In our view, the two questions of law cannot be termed as "substantial questions of law". The answer to the two questions, however, are clearly reflected in the order of the Commissioner of Income Tax (Appeals)-I dated 11th May, 2018, wherefrom the appellant preferred an appeal before the learned Income Tax Appellate Tribunal, Delhi Bench (S.M.C.), New Delhi.

3. So far as the first question is concerned, the following paragraphs extracted from the order of the Commissioner of Income Tax (Appeals)-I will speak for itself:-

"10. The appellant raised a ground that the address on which the notices were sent by the Ld. AO being "Manoj Kumar Sharma, Nai Abadi, Dadri, G.B. Nagar" was not the correct address as there could be more than one Manoj or Manoj Kumar or Manoj Kumar Sharma in Dadri and the post office might have ended up serving the notices of the Ld. AO to any one of those persons named Manoj. It was contended by the appellant that merely because the notices sent by the Ld. AO were not returned by the postal authorities it cannot be presumed that those notices stood served upon the appellant and the service of notice was complete in terms of the provisions of law. Based upon such logic, the appellant has contended that there was no service of notice u/s 148 and therefore, the impugned assessment order was bad in law and liable to be deleted.

11. The ground taken by the appellant stands negated by the admitted position of the appellant himself.

judgment assessment in its case only when it received the notice u/s 274 of I.T. Act, 1961 asking it to show cause vide a penalty u/s 271(1)(c) of I.T. Act, 1961 be not imposed on the appellant. A copy of the said notice has been placed on the record of this office under self authentication by the appellant. It is seen that the said notice vide F. No. ITO/W-2(2)/Noida/271(1)(c)/2017-18 dated 04.05.2017 file F. No./PAN/229/148 was issued on the same address on which the Ld. AO has issued earlier notices, i.e., Manoj Kumar Sharma, Nai Abadi, Dadri, G.B. Nagar.

13. Once the postal authorities have duly served the notice issued by the Ld. AO upon the appellant on that address as on May, 2017 there can be no ground unless proved otherwise to assume that postal authorities would not have been able to serve the notices issued by the Ld. AO upon the appellant on that very address earlier, i.e., prior to the service of notice in May 2017. As none of the notices were returned by the postal authorities as unserved for want of complete or correct address the presumption of bonafide as obtaining in favour of the State would hold the ground. In any case, the appellant has received the notices sent by the Ld. AO on that same address as late as May 2017 and it cannot claim that the address was incorrect or incomplete.

14. Therefore, in view of the admission of the appellant the claim of the appellant that it did not receive

12. The appellant has stated in its reply to the report of the Ld. AO that the appellant came to know about the best the notices issued by the Ld. AO because of the address on which the said notices were sent by the Ld. AO was either incomplete or incorrect is not tenable."

4. So far as the second question is concerned, the answer to the same is at paragraph 8 of the said order of the Commissioner of Income Tax (Appeals)-I dated 11th May, 2018, which reads as follows:-

"8. The Ld. AO by its report dated 26.03.2018 submitted its response to the fresh evidence of the appellant and rejected the same and recommended that the grounds raised by the appellant were neither maintainable nor acceptable in the eyes of the law and the appeal of the appellant deserved to be dismissed by this office."

5. Both these issues were considered by the learned Tribunal while passing the judgment and order dated 3rd October, 2019, which is evident from a plain reading of paragraph 5 of the said judgment and order dated 3rd October, 2019. In order to avoid prolixity, we refrain from reproducing the same.

6. As stated hereinbefore, we do not find any substantial question(s) of law involved in this matter. Rather, the issues are essentially factual in nature. The appeal is, therefore, liable to be dismissed and stands dismissed accordingly.

(2020)02ILR A1406

REVISIONAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 24.01.2020

BEFORE
THE HON'BLE ALOK MATHUR, J.

Trade Tax Revision No. 198 of 2010

The Commissioner, Commercial Tax
...Revisionist
Versus
M/S Mahesh & Co., Lucknow
...Opposite Party

Counsel for the Revisionist:
Standing Counsel

Counsel for the Respondents:
P.K. Sinha

.....

Held: Para-

Case Law discussed:

(Delivered by Hon'ble Alok Mathur, J.

1. Heard Sri Rohit Nandan Shukla, learned Standing counsel for the revisionist, who has instant revision as well as Sri P. K. Sinha appearing for the respondent.

2. The State has preferred this revision against the order of Commercial Tax Tribunal dated 15th November, 2007 whereby the Tribunal has allowed the appeal preferred by the revisionist.

3. Following questions of law has been pressed by the revisionist:-

"(i)Whether the Tribunal was justified in providing the benefit of exemption of tax to the Respondent contrary to the findings arrived at by the Assessing Authority and that too without considering the adverse material found during survey dated 4/5th July, 2001 ?

(ii) Whether the Learned Trade Tribunal was justified in waiving of the interest which was liable under Section 8(1) on the admitted sale turn over like admitted tax?

(iii) Whether the judgment and order passed by the Tribunal is justified ignoring the facts set out in the assessment order which was passed strictly in accordance facts available on records as also the provisions of the Trade Tax Rules ?"

4. It has been submitted by counsel for the revisionist that the respondent /Dealer is engaged in business of betel nuts, catechu, tea, Ilaichi, General merchant etc. A survey was conducted by the Central Excise Department with regard to the business place of M/s Harsingar Gutaka Pvt. Ltd. and M/s Gopal Grinding Industries on 4th and 5th July, 2001 and on the inspection it was found that the owner of the firm M/s Mahesh & Co.(The respondent/Firm) is also the Director of M/s Harshringar Gutka and the respondent/firm supplied the raw material, betel nuts, catechu etc. to M/s Harshringar Gutka Pvt. Ltd. The stock of the respondent/firm was in Satnam Cold Storage and on on inspection 200 bags of betel nuts was found related with M/s Mahesh and Co.

5. The grinding works of the goods sent by M/s Mahesh & Co. was being done by M/s Gopal Grinding Industries and in the said Gopal Grinding Industries difference in stock was found. On the basis of material collected during aforesaid inspection the assessing authority rejected

the books of accounts and determined tax of Rs.1,18,27,701.00 on the sale turnover of Rs.15,20,000/- vide assessment order dated 4.2.2006. While passing the order the assessing authority recorded that there was huge difference in the stock by the respondent and further that Gopal Grinding Industries did not show any purchase or sale itself but the said purchase of betel nut was certainly done with collusion with M/s Mahesh & Co. and Harshringar Gutka Pvt. Ltd. as has been borne out from the report submitted by Central Excise department during the physical verification. It was recorded that in the assessment order that there was discrepancies in respect of 1000 kilograms of betel nuts in the accounts of M/s Gopal Grinding Industries which has been borne out from the statement.

6. As against the assessment order the respondent preferred first appeal under Section 9 of U.P. Trade Tax Act 1948 before the Joint Commissioner (Appeal)-2, Trade Tax, Lucknow and the appeal was dismissed by means of order dated 23.8.2006.

7. The first appellate authority concurred with the findings of the assessing authority and rejected the contentions of the respondent holding that evasion of tax has been established during the course of survey conducted on 4/5.7.2001 and the said tax evasion has been done by the respondent firm in collusion with M/s Harshringar Gutka Pvt. Ltd. and further he was not satisfied with the explanation given with regard to cash transaction of Rs.12,20,000.00. It also stated that form 3 B has been obtained after 2 years, therefore, the same are not valid for the assessment year in question. It was further observed that the sale has been made by the respondent-firm after purchase of goods from unregistered firm and gave cogent reasons for imposing the tax and concurred with the reasons given by the assessing authority and confirmed for imposing tax on respondents.

8. Being aggrieved by the order passed by first appellate authority dated 23.8.2006 the respondent preferred second appeal before the Commercial Tax Tribunal. The Tribunal by means of order dated 15.11.2007 has partially allowed the appeal. The Tribunal in the impugned judgment has considered the fact that the owner of the respondent firm is also the Director of M/s Harshringar Gutka Co. and on the basis of the allegations of collusion with regard to evasion of tax with Gopal Grinding Industries and further that the respondent firm has continuously supplied betel nuts without entering the same in the books of accounts. The Tribunal did not accept and the findings of assessing authority as well as first assessing authority while partially allowing the appeal of the assesse.

9. The Tribunal observed that only on the basis of conjectures and surmises the assessment been done and the revisionist has been assessed to tax with regard to goods which were dispatched form Gopal Grinding Industries

10. The second issue which was considered by the Tribunal was with regard to the interests levied on the tax while rejecting form 3 B. In this regard the Tribunal observed that the respondent had submitted Form 3 B dated 5th March, 2004 while the transactions were conducted for the assessment year 2000-2001. The said form 3 B being beyond two years were not liable to be accepted and,

therefore, benefit of Form 3B was not admissible to the respondent.

11. They further held that according to Section 8 the interest amount could not be levied upon the respondent as disputed amount would amount "admitted tax" and the said amount not being admitted tax no interest was liable to be paid according to Explanation of Section 8 of U.P. Trade Tax Act. 1948.

12. To deal with the question with regard to addition made by the assessing authority it will be relevant to consider the reasons stated by the assessing authority in his order dated 4.2.2006. It has been observed that information was received by the department from Central Excise Department which had conducted the inspection with regard to M/s Harshringar Gutka Pvt. Ltd. which is a sister concern of M/s Gopal Grindings Industries, M/s Mahesh and Company and M/s Satnam Cold Storage from where the documents were examined by Deputy Commissioner (SIT) Sales Tax, Region B, Lucknow.

13. It has been stated that during the inspection it was found that Shri Mahesh is the Director of M/s Mahesh and Company as well as M/s Harshringar Gutka Pvt. Ltd where he is working as Managing Director. M/s Mahesh and Company supplied raw material for preparation of end product by M/s Harshringar Gutka Pvt. Ltd. It was discovered that raw material which is being supplied by M/s Harshringar Gutka Pvt. Lt. were sent through M/s Gopal Grinding Industries, Daliganj, Lucknow.

14. During the investigation the stock allegedly sent by M/s Mahesh and Company to the Gopal Grinding Industries was not found but it was discovered that it found its way to Satnam Cold Storage which premises were found locked at the time of inspection.

15. It was also found that there was difference in raw material being supplied by M/s Gopal Grinding Industries to M/s. Harshringar Gutka Pvt. Ltd. and difference in the two it was presumed was being sold to unregistered dealers with intention to evade tax. It was also presumed that unexplained cash to the tune of Rs. 12,20,000/- was utilized for purchase and sale from unregistered dealers which was also brought to tax.

16. Learned counsel for the respondent submitted that he has been maintaining regular book of accounts and has been paying taxes accordingly. He has challenged the assessment made by the assessing authority solely on the ground that the report submitted by the Excise Department on an inspection made of Ms/ Gopal Grinding Industries. He has vehemently urged that M/s Gopal Grinding Industries is a separate firm and is is not connected to the opposite parties and the amount of Rs.12,20,000/- found in cash book was with regard to transactions between various parties who were duly recorded and was in no way connected with sale and purchase of Gutka or any of its ingredients.

17. The Revenue could not justify the nexus between the unaccount fund and cash book and the transaction between various firms with regard to purchase and sale of various ingredients of gutka and, therefore, the first appellate authority came to the conclusion that opposite parties cannot be held to be liable for evasion of taxes and also that the amount found in

cash book could not related to the transactions conducted by the opposite parties, therefore, set aside the order of assessing authority in this regard.

18. The first appellate authority concurred with the findings of the assessing authority and rejected the findings of respondents. Considering the aforesaid facts the Tribunal in the second appeal concluded that books of accounts of the respondent has been rejected without any reasonable basis. During inquiry no adverse material was found in the premises of the respondent. Just because certain material dispatched from Gopal Grinding Industries to Harshringar Gutka Pvt. was not tracable in the said premises adverse inference has been recorded without there being any material to support such findings. Only reasons for rejecting the books of accounts is the cash entry for 12,20,000/- for which explanation has been given by the respondent that the Tribunal in the aforesaid circumstances were satisfied with the explanation given by the respondent, therefore, decided the second appeal in favour of the respondent and against the Revenue in this regard.

19. Considering the submissions of both the parties it emerges that only because there was some difference in stock with regard to inspection conducted by Excise Department in the premises of Gopal Grinding Industries additions were made while assessing the respondent.

20. The second ground for revision that Rs.12,20,000/- was found in the cash book which according to the assessing authority was linked to the transactions of sale and purchase of raw material in manufacturing of Gutka, while the assessee was able to satisfy the Tribunal that the amount found in cash register was not related to the sale and purchase transactions and that there was no evasion of tax by the respondent. The Tribunal in this regard has considered the entire material and gave reasons for coming to the said conclusion.

21. The State, on the other hand, while assailing the said finding of the Tribunal had only reiterated the findings spelt out in the order passed by the assessing authority as well as the first appellate authority and no fact could be placed before it which could persuade us from giving a finding different from the finding recorded by the Tribunal. In this regard, I do not find any infirmity with the orders of the Tribunal and the question number (i) is answered against the revisionist and in favour of the assessee.

22. The Tribunal has accepted the reasoning given by the assessee that the amount of cash of Rs.12,20,000/- discovered was not utilized towards the sale or purchase of raw material and also that the Assessing Authority could not found any discrepancy in the cash book and various documents and accounts maintained by the assessee and, therefore, the rejection of book of accounts was against the provisions of law. It has also been observed by the Tribunal that from the cash book maintained by the assessee transaction from the date 3.7.2000 to 15.11.2000 the cash of Rs.12,20,000/- found could not be said to be related to any transaction and nor the said transaction has been pointed out in the assessing order and, therefore, no adverse interference in this case can be made against the assessee and, therefore, the additions made were set aside.

23. No fact could be placed by the State which can persuade this Court to take a view different from the view recorded by the Tribunal and, therefore, this question is answered in favour of the assessee as against the the respondent.

24. The second question relates to the additions made by the Assessing Officer while rejecting Form 3 Kha as from 3.1.1991 to 5.3.2004 which are not valid for the assessment year 2000-01. The Assessing Officer has levied interest payable on the admitted sale turnover as if it was admitted tax. The Tribunal while allowing the appeal of the assessee has upheld the imposition of tax but waived off all the interest imposed on the said tax. It is the case of the assessee that the turnover in the return was not admitted and, therefore, interest under Section 8 could not have been levied.

25. In the present case, Form 3 Kha was not valid for the assessment year in question and, therefore, the tax was rightly levied upon the sale transaction. In the case of ***M/s. Hindustan Aluminium Corporation Ltd. Vs. Commissioner of Sales Tax and Commissioner of Sales Tax v. M/s. Hindustan Aluminium Corporation,*** reported in 1996 U.P.T.C. 795 the word "tax admittedly payable has been considered in detail, which is quoted hereinbelow:-

"As regards the last contention of the learned Standing Counsel Section 8 of the Act, as I have mentioned earlier Section 8 of the Act uses an expression 'tax admittedly payable' and then it uses the item on which the interest shall become due and to be payable i.e. 'upaid amount' and then under expression 'such amount' the use of these expression indicate that as regards tax admittedly payable and the said amount of tax is not deposited within the time prescribed of any part of that amount remain unpaid then on that unpaid account till the date of payment of such amount interest shall become due and payable. It means the expression 'tax' admittedly payable' refers to the amount of tax admittedly payable according to the dealer i.e. the amount of tax calculated on his turnover by the dealer on the basis of the entry admitted by him to be applicable over the admitted turnover of the dealer and this section indicates that out of the amount of tax admittedly payable if the same either in part or in whole is not deposited in time the liability of interest will arise in regard to the amount. This leads once to the only conclusion that any amount of tax in regard to which there is a dispute be it on account of the dispute particular and dispute regarding applicability of the entry and the rate of other wie under law the interest will not be payable. No where this section discloses any such thing as bonafide or malafide dispute and therefore, the question of bona fide and mala fide is irrelevant. If there has been a dispute as in the present case with reference to the applicability of the entry under which the item in question was covered which dispute had been decided by the Supreme Court finally as mentioned earlier after debate, the dispute did exist and therefore, the dealer could be subjected to imposition of interest. It is another thing that the matter of precaution dealer might have realized the tax but that is not relevant at this juncture because the section does not provide any such thing as bona fide dispute. This had been the view taken by the Supreme Court as well as in the case of Commissioner Sales Tax v. M/s.Qureshi Cruciblc Centre, 1993 U.P.T.C. 901(8): A.I.R. 1994. S.C. 25,

after having referred to the observations of the learned Single Judge of our High Court in the revision which reads as under:

'There have been no finding by the Tribunal that the assessee acted mala fide in not depositing the tax at the rate 7 per cent. The demand of interest was not justified.'

Their Lordships observed:

"We are unable to see any relevance of the mala fides in the case, Section 8 (1) does not say that the non-payment should be mala fide. This is also not a case where the rate of tax applicable was in dispute or disputed by the dealers. This is simply a case where the dealer calculated the tax at an inapplicable rate. He did not and could not plead ignorance of the change in rate of tax selected two years earlier. In the circumstances, the concept of such mala fide was not relevant in the context."

26. Section 8 of the U.P. Trade Tax Act is quoted hereinbelow:

"8. Payment and recovery of tax:

(1) The tax admittedly payable shall be deposited within the time prescribed or by the thirty-first day of August, 1975, whichever is later failing which simple interest at the rate of 2 per cent per mensem shall become due and be payable on the unpaid amount with effect from the day immediately following the last date prescribed or till the date of payment of such amount, whichever is later and nothing contained in Section 7 shall prevent or have the effect of postponing the liability to pay such interest.

Explanation:- For the purposes of this sub-section, the tax admittedly payable means the tax which is payable under this Act on the turnover of sales or, as the case may be, the turnover or purchases, or of both, as disclosed in the accounts maintained by the dealer, or admitted by him in any return or proceeding under this Act, whichever is granted or, if no accounts were maintained then according to the estimate of the dealer and includes the amount payable under Section 3B or sub-section (6) of section 4B."

11. The explanation to the said sub-section clearly defines the term " the tax admittedly payable" and illustrates the situation in which the tax would be deemed to be admittedly payable, the same are as follows:-

(i) The tax which is payable under this Act on the turnover of sales, as the case may be, the turnover of purchase, or both, as disclosed in the accounts maintained by the dealer.

(ii) The tax admitted by the dealers in any return or proceedings under this act, whichever is greater.

(iii) If no accounts were maintained, then according to the estimate of the dealer and included the amount payable under section 3-B or subsection (6) of section 4-B."

27. It is not in dispute in the present case that the assessee himself mentioned certificate in their accounts the turnover to claim benefit of Section 3 Kha, which according to the provisions of the Act were on the face of it not valid and this did not require any deep examination of the issue.

28. Section 4-B of the U.P. Trade Tax Act, 1948 provides special relief to certain manufacturers. The said section opens with a non-obstante clause and has precedence over sections 3, 3A, 3AAAA

and 3D of the Act. The State legislature has provided special relief to certain manufacturers upon the fulfillment of the conditions mentioned therein for manufacture of specified goods. A manufacturer holding the recognition certificate shall be liable to pay tax at the concessional rate or be wholly or partially exempted from tax on the purchase of raw material or packing material, as may be notified in the gazette of the State Government in that behalf. Clause (b) of section 4B (1) gives relief to a selling dealer to such manufacturers holding recognition certificate on furnishing by the selling dealer the prescribed form which is form 3-B.

29. The Rule 25-B is the relevant rule which prescribes the document 3-B the requisite form to be furnished by such manufacturer to its selling dealer to avail the benefit of concessional rate of tax or tax at nil rate, as the case may be. Rule 25-B is reproduced hereinbelow:-

*"**Rule 25**-B. Authority from which Declaration Forms may be obtained; use custody and maintenance of records of such Forms and matters incidental thereto.*

(1) Where a dealer holding a recognition certificate purchases any goods referred to in clause (b) of sub-section (1) of section 4-B, for use as raw material for the purpose of manufacture of any notified goods, he shall, if he wishes to avail of the concession referred to therein, furnish to the selling dealer a certificate in Form III-B (hereinafter called a "Declaration Form").

.....

(3) If the trade tax officer is satisfied that the demand that for blank declaration Form referred in sub-rule (1) is genuine and reasonable, he may issue such number of forms a he deems fit..... A form issued by the Trade Tax Officer in a financial year shall be valid for the transaction of purchase or sale made during the financial year as also made during two financial year immediately preceding and succeeding that finnancial year:"

30. It is pertinent to mention at this stage that the assessing authority in its order dated 4.2.2006 considered the facts with respect to filing of Form 3-B. It is mentioned that the respondent dealer filed the 44 number of Form 3-B against the sale of Rs.1,68, 82, 230/- and on investigation of the said 44 Forms, it is found that the same were issued on 5.3.2004 from the department hence these all the 44 forms were not valid for the financial year 2000-01 and were valid for financial year 2001-02. Hence, the tax at the rate of 10 per cent has been levied with respect to sale against which form 3-B were found invalid.

31. It is found that the respondent dealer himself filed the invalid Form 3 -B, contrary to provisions of the Act. It was well within the knowledge of the respondent dealer that 44 Form 3-B were not valid for the financial year 2000-01 and the respondent dealer is liable to pay the tax at full rate i. e. at the rate of 10 per cent but despite the fact, respondent dealer did not deposit the tax at full rate i.e at the rate of 10 per cent and deposited the tax at concessional rate at the rate of 2.5 per cent and deliberately claimed the exemption which was not admissible to him.

32. Hon'ble Supreme Court in ***Pepsico India Holdings Ltd. Vs. Commissioner of Trade Tax, Lucknow*** on

5th April, 2011 in Civil Appeal No.2926 of 2011 arising out of SLP (C) No.10522 of 2008 set at rest the dispute as under:-

"14.The appellant had taken the chance to get a judicial verdict on the said issue. Once it has been confirmed that the tax is payable under the Act, the same becomes payable from the date when it was due and not from th date when the judicial verdict was pronounced (unless and until, in a case, the court specifies a particular date from which it shall be payable). Thus, once it has been confirmed by the Court that the tax is payable under the Act it would be covered within the definition of the term "the tax admittedly payable" as defined in the explanation to section 8(1) and, in case, the tax had not been paid then the same becomes payable along with interest as mentioned in section 8(1)of the Act.

……

16. As in the present case the tax becomes admittedly payable once it has been held that the tax is payable under the Act, the interest would be payable in terms of sub-section (1) of section 8 of the Act and not in terms of sub-section (1B) of Section 8 of the Act.

17. This court in the case of Commissioner of Sales Tax v. Qureshi Crucible Centre, 1993 Supp (3) SCC 495 has held that where a dealer fails to pay tax at the correct rate because he claimed not to know the revision in the rate, the dealer remains liable to pay interest at a higher rate, penal rate under section 8(1) from the date when the tax became due and payable. In such a case, the dealer cannot claim that he is liable only from the date of the assessment order fixing the correct rate of tax.

Similarly, in case where the dealer has taken a chance and it has been held that the tax is payable under Act, the same becomes payable from the date when it was due."

33. On applying aforesaid principles to the facts of the present case, the Tribunal has wrongly granted relief to the assessee by deleting interest. After rejection of Form 3-b the amount of interest levied on admitted tax was liable to be paid by the assessee and the order of the Assessing Officer in this regard is in conformity with the statutory schemes as well as the judgments quoted hereinabove. The order of the Tribunal in this regard is set aside and the question of law No.(ii) is answered in favour of the revenue as against the assessee.

34. The revision is accordingly **partly allowed.**

(2020)02ILR A1413

REVISIONAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.01.2020

BEFORE
THE HON'BLE ALOK MATHUR, J.

Sales/Trade Tax Revision No. 211 of 2006

Triveni Engineering & Industries Ltd Naini Allahabad ...Revisionist
Versus
Commissioner Trade Tax, U.P., Lucknow ...Opposite Party

Counsel for the Revisionist:
Sri Kunwar Saksena, Sri Nishant Mishra

Counsel for the Opposite Party:
C.S.C.

A. Trade/Sales Tax - Rectification of mistakes - Section 22 - U.P. Trade Tax Act, 1948 - application should necessarily

demonstrate the mistake apparent in the order passed by the authority concerned

It is clear that the application under Section 22 of the Act, 1948 sought to rectify the mistake committed by the assessing authority who passed the assessment order in ignorance of the amendments made in Section 3F of the Act, 1948 by means of Amendment Act No. 11 of 2001 and therefore the said application was clearly not maintainable, inasmuch as, in exercise of power under Section 22 of the Act, 1948, only the mistake committed by the first Appellate Authority could have been rectified.(para 28)

The application moved by the revenue for correction of the mistake clearly indicates that there is no mention of any mistake having been committed by the First Appellate Authority, inasmuch as, the question of taxability of the lease rent was not an issue before the First Appellate Authority. It is clearly not possible to correct an order or issue which was neither raised nor considered by the First Appellate Authority. (para 29)

B. Doctrine of merger - on merger the merged order loses its existence

Before the appellate authority, the question of liability to tax the lease rent received by the revisionist was not in question and therefore in this regard the order of the assessing authority did not merge with the order of the first Appellate Authority. The issue regarding tax on lease rent became final when the same was duly accepted by the revisionist and the revenue did not chose to reopen the same by exercising powers relating to reopening the assessment and therefore, the order of the assessing authority attained finality and was not liable to be opened in the manner the revenue has sought to reopen, i.e. by moving an application under Section 22 of the Act, 1948. (para 30)

C. Scope - Appellate Authority - Section 9(3) of the U.P. Trade Tax Act, 1948 - appellate authority can not only confirm, vary or annul the order of the assessing authority but may enhance and assess the assessee to tax on the issue which was not taken up before the assessing authority

Revision Allowed. (E-10)

List of cases cited:-

1. V.K. Singhal Vs. State of U.P. 1995 UPTC 337

2. M.R. Soap (Pvt.) Ltd. V. Asstt. Commissioner 1991 UPTC 517 *(followed)*

3. Commissioner of Central Excise, Delhi V. Pearl Drinks Ltd. 2010 (255) E.L.T. 485(S.C.) *(followed)*

4. M/s Triveni Engg. Industries V. Commissioner of Trade Tax Sales Tax Revision No. 212 of 2006 *(distinuished)*

(Delivered by Hon'ble Alok Mathur, J.)

1. Heard Sri Nishant Mishra, learned counsel for the revisionist as well as Sri Bipin Kumar Pandey, learned Standing Counsel appearing on behalf of revenue.

2. This revision has been preferred against the judgment and order dated 18.01.2006, passed by the Commercial Tax Tribunal, whereby the Appeal No. 133 of 2003 has been allowed in part while the another Appeal No. 294 of 2005 for the same assessment year has been dismissed. This revision relates to the assessment year 1995-96.

3. The facts in brief of this case are that the revisionist is carrying on the business of manufacture and sale of sugar plant and machinery and has its head office situated at Naini, Allahabad. The revisionist firm is registered under Section 8A of the U.P. Trade Tax Act, 1948 *(hereinafter referred to as "the Act, 1948")* as well as under Section 7(1) and 7(2) of the Central Sales Tax Act.

4. During course of business the revisionist entered into lease agreement with a firm at New Delhi on 20.08.1993 and 24.08.1993, for the purpose of leasing out certain machinery such as turbine, turbo alternator and other machineries to the sugar unit of the lessee i.e. M/s Gangeshwer Limited at Deoband and Ram Kola, both situated in the State of U.P.

5. Contention of the revisionist is that the lease rent received by the revisionist from the lessee, was not amenable to levy of tax on the transfer of right to use the goods as per Section 3F of the Act, 1948 and therefore they were not liable for payment of any tax, as such.

6. The vires of Section 3F of the Act, 1948 were challenged before this High Court by way of writ petitions and by the this Court by means of judgment in the case of **V.K. Singhal Vs. State of U.P., 1995 UPTC 337** (decided on 11.01.1995), the provisions of Section 3F of the Act, 1948 were declared as ultra vires.

7. At the time of assessment for the year 1995-96, the amount received on account of lease rent from the lessee, was disclosed at Rs. 51,84, 382/-, but no liability of tax on the said amount was admitted. The assessing authority for the assessment year 1995-96, did not accepted the contention of the revisionist and levied tax on the aforesaid amount of lease rent at the rate of 5%. The revisionist being aggrieved by the aforesaid assessment order preferred appeal on the ground that this Court in the case of **V.K. Singhal (supra)** has declared Section 3F of the Act, 1948 ultra vires and therefore, they were not liable to be assessed to any tax on the same and therefore, the order of the assessing authority in this regard was arbitrary and illegal.

8. The appellate authority, considering the contention raised by the revisionist, remanded the matter to the assessing authority and thereafter, fresh assessment order was passed and the assessing authority accepted the contention of the revisionist regarding the fact that he was not liable to pay any tax under Section 3F of the Act, 1948. The revisionist thereafter filed an appeal against the assessment order passed in respect of the amount other than the amount representing the lease rent, which appeal was dismissed by means of order dated 01.01.2003.

9. It has been vehemently urged that the question of liability of tax on lease amount was neither canvassed nor decided by the Joint Commissioner (Appeals).

10. After the decision of the appeal on 01.01.2003, the assessing authority in exercise of power under Section 22 of the Act, 1948, moved an application before the Joint Commissioner (Appeals) on 17.05.2004, seeking to correct the mistake in the appellate order with regard to the fact that the provisions of Section 3F of the Act, 1948 which had been declared ultra vires by this High Court, were amended and introduced by means of U.P. Act No. 11 of 2000, published on 30.04.2001 and the said amendment further provided that all actions taken and assessment made during the period 01.05.1987 to 01.03.1997, were validated.

11. The Joint Commission (Appeals), issued notice to the revisionist and after hearing both the sides, allowed the said application on 25.07.2005 and rectified the

order passed earlier on 01.01.2003, thereby subjecting the revisionist to tax under Section 3F of the Act, 1948 for the amount of lease rent received by the revisionist from the lessee.

12. The revisionist being aggrieved by the said order, filed second appeal before the Trade Tax Tribunal, Allahabad *(hereinafter referred to as "the Tribunal")* being Second Appeal No. 294 of 2005, which has been rejected by means of order dated 18.01.2006, which has been impugned in the instant revision.

13. Learned counsel for the revisionist has raised following contentions :

(I) In exercise of power conferred under Section 22 of the Act, 1948, an application can be made for rectification of a mistake, where as in the present case there was no mistake committed in the order of the appellate authority and therefore the said application was itself not maintainable.

(II) The application seeking rectification of the order of appellate authority was not maintainable inasmuch as the order of the assessing authority stood merged with the order of the appellate authority and the order which is not in existence cannot be rectified and therefore the application filed by the revenue was misconceived.

(III) By means of impugned order the Tribunal has upheld the application for rectification which does not amount to rectification of mistake, instead it is a fresh imposition of tax liability which should have been done by the proper assessment and giving opportunity to the assessee, which is a matter of debate, hence fresh assessment could not have been done in the garb of rectification of mistake.

14. Learned counsel for the respondent-revenue on the other hand submits that the order of assessing authority merged with the appellate order and therefore the revenue had no option but to move an application for correction of mistake in the appellate order so as to bring the amount of lease rent to tax in the light of amended provisions of Section 3F of the Act, 1948.

15. In support of his contention, learned Standing Counsel appearing on behalf of revenue has placed reliance on the judgment in the case of **M.R. Soap (Pvt.) Ltd. Vs. Asstt. Commissioner, 1991 UPTC 517.**

16. Heard learned counsel for the parties and perused the record.

17. The questions of law which arise for consideration of this Court are :

(i) Whether the Tribunal was justified in up holding the applicability of Section 22 of the Act, 1948?

(ii) Whether the Tribunal was justified in up holding the order of the first appellate authority in allowing the application filed under Section 22 of the Act, 1948 and correcting the mistake thereby levying tax on the revisionist?

(iii) Whether the order of the assessing authority was amenable to any correction after it stood merged with the appellate order?

18. The undisputed facts of this case which emerge are that the revisionist leased out certain machinery to the sugar units of M/s Gangeshwar Ltd. at Deoband and Ramkola. An amount of

Rs.51,84,382/- was received by the revisionist during the assessment year 1995-96, towards lease rent, which was initially subjected to tax under Section 3F of the Act, 1948, but on remand by means of order dated 07.06.2002, it was not assessed to tax under the belief that Section 3F of the Act, 1948 had been held to be ultravires by this Court in the case of **V.K. Singhal (supra)**.

19. After the declaration of Section 3F of the Act, 1948 ultravires an amending Act was passed, reintroducing the provisions of Section 3F by means of U.P. Act No. 11 of 2001, published on 30.04.2001, validating all actions taken during the period 01.05.1987 to 01.05.1997.

20. The assessing authority while assessing the revisionist in remand proceedings made assessment on 07.06.2002 on which date the amended Section 3F had come into existence and it was open to the assessing authority to assess the revisionist in the light of amended provisions of the Act, 1948. The assessment order dated 07.06.2002, it seems was passed in ignorance of the aforesaid amendment and the amount of lease rent disclosed by the revisionist was not put to tax.

21. The issue regarding liability of tax under Section 3F with regard to lease rent was not carried by the revisionist to the appellate authority, rather appeal was preferred with regard to other issues from which the revisionist was aggrieved with and the issue regarding taxability of lease rent became final. The revenue also did not seek to reopen the assessment in this regard in exercise of powers as conferred by the provisions contained in Act, 1948. It is only after passing of the final order by the first Appellate Authority on 01.01.2003 that the application for rectification of the said order was moved on 17.05.2004, for rectification of the mistake in the appellate order dated 01.01.2003.

22. A perusal of the application dated 17.05.2004, which is part of the record of the instant revision, would indicate that it has been clearly stated that the assessing authority had assessed the revisionist by means of order dated 07.06.2002 for the assessment year 1995-96 did not imposed any tax with regard to the lease rent, despite the fact that U.P. Act No. 11 of 2001 had come into existence which provides that all the proceedings and assessments from 01.05.1987 to 01.05.1997 had been validated. The application further states that in the light of the judgment of Division Bench of this Court in the case of **M.R. Soap (Pvt.) Ltd. (supra)** the order of the assessing authority having merged in the order of the first Appellate Authority, the application under Section 22 of the Act, 1948, is being preferred.

23. Perusal of the entire application does not reveal as to what is the mistake committed by the first Appellate Authority which necessitated moving of an application for rectification of the mistake, rather, in the entire application it seems that actually the order of the assessing authority dated 07.02.2002 is being sought to the rectified in the garb of application for rectification of the order of the first Appellate Authority.

24. Learned Standing Counsel appearing on behalf of revenue could not point out as to the error in the order of the

first Appellate Authority which required any rectification for which the application has been moved.

25. Section 22 of the Act, 1948 provides for rectification of the mistakes, and states that the authority or the Tribunal or High Court may on its own motion or on application of the dealer or any other interested person, rectify any mistake in any order passed by him or it under the Act, apparent on record, within three years from the date of the order sought to be rectified.

26. The application for rectification would necessarily have to demonstrate that there is an apparent mistake in the order passed by the authority concerned on which the rectification is sought and such an application is to be moved within three years from the date of the order sought to be rectified.

27. Perusal of the provisions of Section 22 of the Act, 1948, also clearly indicate that the application is maintainable only where there is a mistake in the order of the authority itself before whom such an application is made. For ready reference, Section 22 of the Act, 1948 is reproduced herein below :

*"22. **Rectification of mistakes.-** (1) Any officer or authority or the Tribunal or the High Court may, on its own motion or on the application of the dealer or any other interested person rectify any mistake in any order passed by him or it under the Act, apparent on the record within three years from the date of the order sought to be rectified :*

Provided that where an application under this sub-section has been made within such period of three years, it may be disposed of even beyond such period :

Provided further that no such rectification as has the effect of enhancing the assessment, penalty, fees or other dues shall be made unless reasonable opportunity of being heard has been given to the dealer or other person likely to be affected by such enhancement.

(2) Where such rectification has the effect of enhancing the assessment, the authority concerned shall serve on the dealer a revised notice of demand in the prescribed form and therefrom all the provisions of the Act and Rule framed thereunder shall apply as if such notice had been served in the first instance."

28. Considering the arguments of learned counsel for the parties as well as perusal of the application under Section 22 of the Act, 1948 moved by the revenue, it is clear that the application under Section 22 of the Act, 1948 sought to rectify the mistake committed by the assessing authority who passed the assessment order in ignorance of the amendments made in Section 3F of the Act, 1948 by means of Amendment Act No. 11 of 2001 and therefore the said application was clearly not maintainable, inasmuch as, in exercise of power under Section 22 of the Act, 1948, only the mistake committed by the first Appellate Authority could have been rectified.

29. The application moved by the revenue for correction of the mistake clearly indicates that there is no mention of any mistake having been committed by the First Appellate Authority, inasmuch as, the question of taxability of the lease rent was not an issue before the First Appellate Authority. It is clearly not possible to correct an order or issue which was neither

raised nor considered by the First Appellate Authority.

30. Before the appellate authority, the question of liability to tax the lease rent received by the revisionist was not in question and therefore in this regard the order of the assessing authority did not merge with the order of the first Appellate Authority. The issue regarding tax on lease rent became final when the same was duly accepted by the revisionist and the revenue did not chose to reopen the same by exercising powers relating to reopening the assessment and therefore, the order of the assessing authority attained finality and was not liable to be opened in the manner the revenue has sought to reopen, i.e. by moving an application under Section 22 of the Act, 1948.

31. The situation would have been different had the issue regarding lease rent been considered and decided by the first appellate authority.

32. In the aforesaid circumstances, the *"doctrine of merger"* as canvassed by the learned counsel for the revenue would not apply. The "doctrine of merger" has been discussed by Hon'ble Apex Court in the case of **Commissioner of Central Excise, Delhi Vs. Pearl Drinks Ltd., 2010 (255) E.L.T. 485 (S.C.)**. The Court in para no. 14 has held as under :

"14. Applying the above test to the case at hand the doctrine would have no application for the plain and simple reason that the subject matter of the appeal filed by the assessee against the adjudicating authority's order in original was limited to disallowance of two out of eight deductions claimed by the assessee. The Tribunal was in that appeal concerned only with the question whether the adjudicating authority was justified in disallowing deductions under the said two heads. It had no occasion to examine the admissibility of the deductions under the remaining six heads obviously because the assessee's appeal did not question the grant of such deductions. Admissibility of the said deductions could have been raised only by the Revenue who had lost its case qua those deductions before the adjudicating authority. Dismissal of the appeal filed by the assessee could consequently bring finality only to the question of admissibility of deductions under the two heads regarding which the appeal was filed. The said order could not be understood to mean that the Tribunal had expressed any opinion regarding the admissibility of deductions under the remaining six heads which were not the subject matter of scrutiny before the Tribunal. That being so, the proceedings instituted by the Commissioner, Central Excise pursuant to the order passed by the Central Board of Excise and Customs brought up a subject matter which was distinctively different from that which had been examined and determined in the assessee's appeal no matter against the same order, especially when the decision was not rendered on a principle of law that could foreclose the Revenue's case. The Tribunal obviously failed to notice this distinction and proceeded to apply the doctrine of merger rather mechanically. It failed to take into consideration a situation where an order may be partly in favour and partly against a party in which event the part that goes in favour of the party can be separately assailed by them in appeal filed before the appellate Court or authority but dismissal on merits or otherwise of any such appeal against a part only of the order will not foreclose the

right of the party who is aggrieved of the other part of this order. If the doctrine of merger were to be applied in a pedantic or wooden manner it would lead to anomalous results inasmuch as a party who has lost in part can by getting his appeal dismissed claim that the opposite party who may be aggrieved of another part of the very same order cannot assail its correctness no matter the appeal earlier disposed of by the Court or authority had not examined the correctness of that part of the order."

33. Learned counsel for the revisionist has fairly placed the judgment in the case of **M/s Triveni Engg. Industries Ltd. Vs. Commissioner of Trade Tax** passed in **Sales Tax Revision No. 212 of 2006** (decided on 28.08.2017), The aforesaid judgment pertains to a similar dispute between the revisionist and the revenue for the assessment year 1996-97. The question considered by the court in **M/s Triveni Engg. Industries Ltd. (supra)** is whether the First Appellate Authority was within its jurisdiction in imposing tax upon the dealer under Section 3F in the proceedings under Section 22 of the Act, 1948?

34. The learned Single Judge in **M/s Triveni Engg. Industries Ltd. (supra)** considered various judgments of the Hon'ble Supreme Court and concluded as under :

"Thus, in my considered opinion, the mistake is apparent on the record of the order of the first appellate authority which was rightly rectified under Section 22 of the Act. The rectification and subsequent assessment to tax under Section 3F does not amount to review/revision but a rectification of mistake apparent on the record in the order of the fist appellate authority in view of retrospective application of Amendment Act, restoring Section 3F and validating all actions take thereunder.

The revision being devoid of merit is, accordingly dismissed."

35. Learned counsel for the revisionist has urged that the said judgment would not be binding to decide the controversy raised in the present revision which pertains to the assessment year 1995-96, and that principle of *res-judicata* are not applicable for subsequent assessment years, and also a binding judgment of the Division Bench of this Court in the case of **M.R. Soap (Pvt.) Ltd. (supra)** was not considered by the learned Single Judge. The Court in **M.R. Soap (Pvt.) Ltd. (supra)**, in para nos. 12, 13 and 14 observed as under :

"12. It will be seen that the jurisdiction of the Appellate Authority under Section 9(3) is of the widest possible amplitude. The Appellate Authority cannot only confirm, vary or annul the order of assessment but may even enhance the amount of assessment, irrespective of whether such enhancement arises from the points raised in the grounds of appeal or otherwise considered by the Assessing Authority. The appellate power under this provision, is, as observed by the learned Chief Justice Chagla in Narroandas Manordas (supra) in the nature of the power of revision, and, as observed by the Supreme Court in (1967) 66 ITR 443, 449 (supra), it would be wholly erroneous to compare such appellate powers with the narrow and restricted powers possessed by a court of appeal under the Code of Civil Procedure. That being so, the entire assessment order, whether challenged in

appeal as a whole or only in part, will merge in the appellate order irrespective of the points urged by the parties or decided by the Appellate Authority.

13. Once it is found that the order of assessment has merged in the appellate order, it follows as a matter of necessary corollary that the Assessing Authority shall not have the power to reopen the asssessment under Section 22 of the U.P. Sales Tax Act. The reason is obvious. The original order of assessment cease to exist, its identity having merged in the appellate order. That being so, the impugned notice issued by the Assessing Authority is plainly and manifestly without jurisdiction.

14. Some single Judge decisions have, however, been brought to our notice by the learned Standing Court in which a somewhat different view seems to have been expressed on theissue whether there is merger even with regard to the part of the order of the Assessing Authority which was not appealed against by the assessee. The learned Standing Counsel, however, vary candidly conceded that the contrary view expressed by the learned Single Judges runs counter to the decision of the Division Bench in J.K. Synthetics. We think that the learned Standing Counsel is clearly right in his submission."

36. Perusal of the aforesaid judgment clearly lays down the law in this regard that the order of the assessing authority merge with the order of appellate authority and thereby it ceases to exist as its identity stands merged with the appellate order and therefore any application under Section 22 of the Act, 1948, for correction of assessment order, would not be maintainable.

37. The Division Bench of this Court in **M.R. Soap (Pvt.) Ltd. (supra)** while considering the powers under Section 22 of the Act, 1948, took note of the jurisdiction of the appellate authority under Section 9(3) of the Act, 1948 where they have noticed that the appellate authority under the Act, 1948 is extremely wide and the appellate authority can not only confirm, vary or annul the order of the assessing authority but may enhance and assess the assessee to tax on the issue which was not taken up before the assessing authority and therefore concluded that in exercise of power under Section 22 of the Act, 1948, the assessment cannot be reopened as has been sought to be done in the present case.

38. It has further been contended by learned counsel for the revisionist that the order of assessment on remand was passed on 07.06.2002, thereby no tax was levied on the proceeds of lease rent taken from M/s Gangeshwar Limited under the belief that provisions of Section 3F of the Act, 1948 were declared ultra vires by this Court in the case of **V.K. Singhal (supra)**. An appeal was preferred by the revisionist on some other issues but the issue regarding lease rent attained finality. Even if the stand of the revenue is accepted that no tax was levied on the lease rent, taking into account the fact that same had been declared ultra vires and the assessing authority was ignorant about the reintroduction of the same provision by means of subsequent amendment in the Act, 1948, it was always open for the revenue to exercise the power contained under Section 21 of the Act, 1948 as the same would amount to escaped assessment to tax, but, a fresh assessment cannot be made in the garb of exercise of powers conferred under Section 22 of the Act, 1948, which only provides for rectification of mistakes.

39. The very words "rectification of mistake" includes due application of mind on a particular set of fact or law which are liable to be corrected under the powers

conferred under Section 22 of the Act, 1948. In the facts of the present case, I am of the considered opinion that where an issue was never raised before the Appellate Authority nor considered by it, it cannot be subject matter for correction of a mistake and therefore application under Section 22 of the Act, 1948, preferred by the revenue for correction of mistake in the order of Joint Commissioner (Appeals), was clearly misconceived.

40. Another aspect of the matter which has been considered in the discussion made above is with regard to the "doctrine of merger" as discussed in the case of **M.R. Soap (Pvt.) Ltd. (supra)**. According to the Division Bench of this Court in the aforesaid case, it is provided as under :

"12.....That being so, the entire assessment order, whether challenged in appeal as a whole or only in part, will merge in the appellate order irrespective of the points urged by the parties or decided by the Appellate Authority.

13. Once it is found that the order of assessment has merged in the appellate order, it follows as a matter of necessary corollary that the Assessing Authority shall not have the power to reopen the assessment under Section 22 of the U.P. Sales Tax Act. ....."

41. Taking into consideration the "doctrine of merger" as per the judgment of the Hon'ble Apex Court in the case of **Commissioner of Central Excise Vs. Pearl Drinks Ltd. (supra),** and applying it to the facts of the present case, it emerges that issue regarding taxability on the lease rent as provided under Section 3F of the Act, 1948, becomes final at the stage of the Assessing Authority and the same was not challenged by the revenue before the Joint Commissioner (Appeals) nor there was an order of reassessment and therefore, the said issue became final and even if the said issue did not merge with the order of the Appellate Authority, the same could not have been rectified by an application under Section 22 of the Act, 1948.

42. From the perusal of the record, the application for rectification under Section 22 of the Act, 1948 was moved by the revenue for rectification of the order of the Joint Commissioner (Appeals) but in the entire application there was no mention of the mistake sought to be rectified in the said order and therefore, such an application would not be maintainable and it would be a colourable exercise that under the garb of rectification of mistake of the order of first Appellate Authority, the order of the Assessing Authority is rectified/modified and fresh assessment is made in this regard.

43. In the light of above, the impugned order of the Tribunal is not sustainable and therefore the same is set aside.

44. The revision is **allowed.**

(2020)02ILR A1422

REVISIONAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 10.01.2020

BEFORE
THE HON'BLE ALOK MATHUR, J.

Sales/Trade Tax Revision No. 570 of 2013

The Commissioner, Commercial Tax, U.P., Lucknow ...Revisionist

Versus

S/S Deepak Trading Co. Ghaziabad ...Opposite Party

Counsel for the Revisionist:
S.C.

Counsel for the Opposite Party:
Sri Nishant Mishra

A. Trade/Sales Tax - Penalty - Section 54(1)(14) - UP Value Added Tax, 2008 - non-filling up of column 6 of Form 38 - inference that form may be reused for importing goods of same quantity, weight and value to evade payment of tax cannot be the sole ground to impose penalty - opportunity to be given to the assessee/dealer - reasons to be recorded after considering all the relevant materials/evidences on records - guilty mind is necessary to be established

Revision Rejected. (E-10)

List of cases cited:-

1. M/s Gulraj Industries V. Commercial Tax Officer 2007 NTN (Vol. 35) 61 *(distinguished)*

2. Jain Suddh Vanaspati Ltd. V. State of U.P. 1983 UPTC 198

3. I.C.I. India Ltd. V. Commissioner of Sales Tax (2003) 134 STC 286 (All) *(followed)*

4. The Commissioner, Commercial Tax, U.P. Lko V. S/S Dabur India Ltd. 22 Site-4, Ind. Area Sahibabad Sales/Trade Tax Revision No. 441 of 2014

(Delivered by Hon'ble Alok Mathur, J.)

1. Heard Sri Bipin Kumar Pandey, learned Standing Counsel for the revisionist as well as Sri Nishant Mishra, learned counsel for the respondent.

2. By means of this revision the revenue has assailed the order dated 25.02.2013, passed by the Trade Tax Tribunal in the Second Appeal No. 1183 of 2011, whereby the appeal preferred by the respondent has been allowed and the order passed by the first Appellate Authority has been set aside. This revision relates to assessment year 2009-10.

3. The revision has been admitted by order dated 12.07.2013, on the following question of law :

(i) Whether under the facts and circumstances of the case, the Commercial Tax Tribunal was legally justified in deleting the penalty levied under Section 54(1)(14) of U.P. Value Added Tax Act, 2008?

4. Brief facts giving rise to the present revision are that Vehicle No. HR-58/5439, was intercepted by the Mobile Squad Authority, Commercial Tax, Unit-3, Ghaziabad on 23.10.2009 and the dealer was found importing goods from outside the State and Form 38 had certain unfilled (blank) column, which gave rise to the apprehension of intention to evade tax. The Assessing Authority issued show cause notice to the revisionist/assessee for levying penalty under Section 54(1)(14) of the U.P. Value Added Tax Act, 2008 *(hereinafter referred to as "the Act, 2008")*. The assessee filed reply to the show cause notice. The Assessing Authority after considering the reply of the assessee, rejected the explanation and passed assessment order imposing penalty to the tune of Rs.1,80,000/- i.e. 40% of the value of the goods in question.

5. The assessee/revisionist aggrieved by the order of the Assessing Authority filed first appeal before the first appellate authority which was dismissed by order dated 04.03.2011. Aggrieved by the order passed by the first appellate authority the assessee/revisionist preferred second appeal before the Trade Tax Tribunal, and the Tribunal by means of impugned order allowed the appeal of the assessee/revisionist. Hence this revision preferred by the revenue.

6. Learned Standing Counsel appearing for the revisionist has submitted that the order of Tribunal is bad in law as well as on facts. The column no. 6 of Form-38 was left blank deliberately by the respondent with intention to use the same again so as to evade tax. The learned counsel for the revenue has relied upon the judgment of the Apex Court in the case of **M/s Guljag Industries Vs. Commercial Tax Officer, 2007 NTN (Vol. 35) 61**, wherein the Apex Court has held that if relevant column of forms have not been filled while importing the goods the presumption is that there is intention to evade payment of tax as the said forms can be used again.

7. Learned counsel for the respondent on the other hand has supported the judgment and order passed by the Tribunal stating that there is no error apparent in the same and no interference from this Court is required. The revision is devoid of merit and is liable to to be dismissed.

8. Heard learned counsel for the parties and perused the record.

9. The controversy involved in the present revision is in respect to the levy of penalty under Section 54(1)(14) of the Act, 2008 in contravention of the provisions of Section 50 of the Act, 2008. As per scheme of the Act, 2008 any person, who intends to bring, import or otherwise receive, into the State from any place outside the State any goods other than goods named, and described in schedule-I in such quantity or measure or of such value, as may be notified by the State Government in this behalf, in connection with business, shall either obtain the prescribed form of declaration, in such manner as may be prescribed, from the assessing authority having jurisdiction over the area, where this principal place of business is situated or in case there is no such place, where he ordinarily resides or shall down load from official website of the department in the manner as may be prescribed under Rule 58 or 59.

10. The driver or other person incharge of vehicle carrying goods referred to in sub Section (1) of Section 50 of the Act, 2008 is required to carry the declaration form along with other relevant documents and if on inspection he is found to transport or attempting or abetting to transport any goods to which this section applies without being covered by proper and genuine documents then for reasons to be recorded and after giving opportunity of being heard he may order for detention of such goods. The declaration form for import may be obtained by registered dealer for import of goods either from his assessing authority or he may download it from the official website of the department in the manner prescribed by the Commissioner. The aforesaid declaration form for import is Form 38. The Form is required to be

sent to the selling dealer or consignor of the other State in two copies.

11. In Form 38 the name and address of the dealer to whom form is to be issued, description of goods, weight / measure, quantity, value in figure, value in words, bill / cash memo / Chalan / tax invoice number and date, name and address of seller / consignor and certain particulars of transporters / carrier, namely, service provider number, truck number, name and address of driver and driving license number are to be filled up. Column no. 1 to 6 may be filled up only with the help of bill / cash memo / chalan / tax invoice. Recurring instances comes to light that column no. 6 is left blank due to which penalty under Section 54(1)(14) of the Act, 2008 is imposed by the assessing authority on the ground that non filling of this column facilitates tax evaders to evade tax by re-using the same form 38 for import of unaccounted goods. It is the case of the department that when entire informations in form XXXVIII are filled up with the help of the relevant bill / cash memo / chalan / tax invoice then there is no reason not to fill up column no. 6 i.e. bill / cash memo / chalan / tax invoice number and date. According to the department this clearly indicates import of goods to evade payment of tax which attracts penalty under Section 54(1)(14) of the Act, 2008 unless it is shown that even if details in column no. 6 have not been filled up yet there was no intention to evade payment of tax.

12. In the instant case it is admitted fact that the respondent had duly applied for and obtained Form 38 for import of goods and the Column 6 of the said Form was left blank on account of negligence of the respondent. It is only on account of non filling of Column 6, penalty has been imposed upon the respondent. It has been submitted on behalf of the respondent that there was no intention to evade tax and the driver of the vehicle carrying the goods was carrying all the relevant documents including the bill/challan/bilty etc. from which the details of goods being carried on the vehicle could have been verified by the officer concerned and therefore there was no occasion for the assessing officer to pass penalty order, inasmuch as there was no intention on the part of the assesee to evade tax.

13. Learned counsel for the assessee/respondent has also produced a copy of Circular dated 03.02.2009, passed by the office of the Commissioner, Commercial Tax U.P., which has been addressed to all the Zonal Additional Commissioners/Additional Commissioners Grade-II etc. wherein it has been provided that in case vehicle importing goods is accompanied with Form 38 and the goods being carried tallies with the said Form 38 and also that in case any column in Form 38 remains unfilled, then the Officer inspecting the vehicle at the Check Post is under duty to fill up the blank Form in accordance with the other documents alongwith his signature and stamp and release the goods thereafter.

14. In the case of **Jain Suddh Vanaspati Ltd. Vs. State of U.P., 1983 U.P.T.C. 198** a Division Bench of this Court considered the similar provisions of the U.P. Sales Tax Act, 1948 and held in paragraphs 23, 29 as under :-

"23. The provision contained in Section 28-A as it stands after enactment of U.P. Act No. 33 of 1979 are materially different. It cannot be said that there is

any assumption underlying therein that the goods to which the provision of Section 28-A applies have actually been sold inside the State and the section does not authorise the sales tax authorities either to seize the said goods or to penalise the importer thereof on any such assumption. Its present basis is the attempt to evade tax. The power to detain the goods and levy penalty in respect thereof cannot be exercised merely for the reason that the said goods were not accompanied by the requisite documents or that the documents accompanying them were false. This power can be exercised only if the goods detained are not accompanied by the requisite documents or that the documents accompanying them are false and if there is material before the detaining authority to indicate that the goods are being imported in an attempt to evade assessment or payment of tax due or likely to be due under the Act. The instant case, therefore, in our opinion, clearly falls outside the ratio of the case of Check Post Officer v. K. P. Abdulla & Bros. [1971] 27 STC 1 (SC) as decided by the Supreme Court.

29. The first question that arises for consideration is whether the expression "attempt to evade assessment or payment of tax due or likely to be due" can be said to be vague and whether the power conferred upon the Check Post Officer in this regard can be said to be arbitrary. In our opinion, the expression "attempt, to evade assessment or payment of tax due or likely to be due" cannot be said to be an expression conveying vague ideas. It is, in our opinion, an expression having a definite connotation. An attempt to evade assessment or payment of tax due or likely to be due can take place in so many different ways that it is not possible for any legislature to specify all such methods of evasion in the Act. The expression does not become vague merely because all the circumstances in which such an attempt to evade assessment or payment of tax due or likely to be due have not been enumerated therein."

15. Learned counsel for the respondent has placed reliance on the judgment passed by this Court in the case of **I.C.I. India Limited Vs. Commissioner of Sales Tax, (2003) 134 STC 286 (All),** wherein in similar circumstances the Court has held as under :-

"13. In the present case, dealer's books of account was accepted. Tribunal recorded the finding to this effect. Admittedly, bill and builty were produced at the time of the checking at the check-post and form XXXI had also been submitted along with bill and builty. The purpose of form XXXI is, to bring to the notice of the department about the import of the goods so that the imported goods may not be escaped from consideration at the time of assessment. Merely because some off the columns of form XXXI were not filled which was merely a procedural defect it cannot be said that the provisions of Section 28-A has not been complied. No finding whatsoever has been recorded by any of the authority that there was any attempt on the part of the applicant to evade the tax. Inasmuch as goods were not for resale and were not liable to tax in the hands of the applicant it cannot be said that there was any violation of Section 28-A. In the circumstances, the penalty under Section 15-A(1)(0) is not sustainable.

14. In the result, the revision

is allowed. The order of Tribunal dated September 3, 1990 is set aside and the penalty under Section 15-A(1)(o) is quashed."

16. Learned Single Judge of this High Court in **Sales/Trade Tax Revision No. 441 of 2014 - The Commissioner, Commercial Tax, U.P,. Lko Vs. S/S Dabur India Ltd. 22 Site-4, Ind. Area Sahibabad** and other connected revisions (decided on 25.09.2014), wherein similar controversy is involved, has taken same view in respect to unfilled Form-38.

17. Learned Standing Counsel for the revisionist has placed reliance on the judgment of Apex Court in the case of **M/s Guljag Industries (supra),** whereby he has invited attention of this Court towards the observations made by the Apex Court in para 22 of the judgment, wherein it has been recorded as under :

"22. ..... Section 78(2) is a mandatory provision. If the declaration Form 18A/18C does not support the goods in movement because it is left blank then in that event Section 78(5) provides for imposition of monetary penalty for non-compliance. Default or failure to comply with Section 78(2) is the failure/default of statutory civil obligation and proceedings under Section 78(5) is neither criminal nor quasi-criminal in nature. The penalty is for statutory offence. Therefore, there is no question of proving of intention or of mens rea as the same is excluded from the category of essential element for imposing penalty. ....."

18. Perusal sub Section 6 of Section 28A itself indicates that penalty can be imposed only after giving opportunity of being heard that the goods were being so transported in an attempt to evade payment of tax due or likely to be due under the Act and therefore *mens rea* becomes essential ingredient, and therefore the facts in the case of M/s **M/s Guljag Industries (supra)** are distinguishable in respect to the provisions of the Act, 2008 applicable in the State of Uttar Pradesh.

19. Non-filling up of column no. 6 i.e. not mentioning of bill / cash memo / chalan / invoice number may lead to an inference that in case of non-checking of goods the declaration form may be re-used for importing goods of same quantity, weight and value to evade payment of tax but it cannot be the sole ground to impose penalty under Section 54(1)(14) of the Act, 2008. Satisfaction has to be recorded after giving opportunity to the dealer / person and after considering all the relevant materials / evidences on record that there was an intention to evade payment of tax. The guilty mind is necessary to be established to impose penalty under Section 54(1)(14) of the Act, 2008. If the last fact finding authority i.e. the tribunal has recorded a finding of fact that there was no intention to evade payment of tax, same cannot be interfered with in revision under Section 58 of the Act, 2008 provided the finding is perverse or it is based on consideration of irrelevant material or non consideration of relevant material.

20. In the present case also the vehicle was accompanied by Form 38 and all other documents were being carried along with other documents and only due to human error column would remain unfilled. It was the duty of the Officer managing the Check Post who after discovering that some column of Form 38 found unfilled should have filled the same

himself in the light of Circular dated 03.02.2009 and should have allowed the vehicle to proceed alongwith the goods. It is undisputed that the goods transported were the same which were mentioned in the various documents (bill/builty/challan etc.) carried by the driver of the vehicle.

21. The judgment passed by this Court in the case of I.C.I. India Limited (supra) has clearly spelt out the law in this regard and a circular issued by the Revenue clearly indicates that the Officer managing the check post after verifying the goods on the basis of other documents available at that point of time and have filled up the blank column of Form 38 and there was no occasion for imposing penalty, as has been done by the Assessing Officer.

22. In the light of above, this Court finds no merit in the contention raised by learned Standing Counsel appearing on behalf of the revenue. The revision lacks merit and is accordingly **dismissed.**

23. The impugned order dated 25.02.2013, passed by the Tribunal is hereby affirmed.

24. The question of law is answered in favour of assessee and against the revenue.

(2020)02ILR A1428

REVISIONAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.01.2020

BEFORE
THE HON'BLE ALOK MATHUR, J.

Sales/Trade Tax Revision No. 1031 of 2006 Connected with Sales/Trade Tax Revision No.1032 of 2006

S/S Fakir Chand Hazari Lal ...Revisionist

Versus

Commissioner Trade Tax, U.P., Lucknow ...Opposite Party

Counsel for the Revisionist:
Sri Kunwar Saksena, Murari Mohan Rai, Sri Nitin Kesarwani

Counsel for the Opposite Party:
C.S.C.

A. Trade/Sales Tax - Certificate of registration - absence of items in the certificate of registration could not be imported under Form C - goods imported bonafidely need to be demonstrated else penalty is leviable under Section 10A read with Section 10(b) of the Central Sales Tax Act

The revisionist had full knowledge about the fate of his applications for addition of branch as well as items. He had commenced his business at the new branch which was added in the amended certificate of registration. Despite the fact that his application for addition of items was not allowed, he continued to import the aid goods under Form-C and therefore from the above facts it cannot be deciphered that the revisionist has acted in bonafide manner in importing the said goods. (Para 20)

Revision Rejected. (E-10)

List of case cited:-

Commissioner of Sales Tax, U.P. V. M/s Sajiv Fabrics, 2010 NTN (Vol. 44) 69 *(distinguished)*

(Delivered by Hon'ble Alok Mathur, J.)

1. Heard Sri Murari Mohan Rai, learned counsel for the revisionist as well as Sri Bipin Kumar Pandey, learned Standing Counsel appearing on behalf of respondent.

2. By means of aforesaid revisions challenge has been made to common judgment and order dated 24th July, 2006,

passed by the Trade Tax Tribunal in Second Appeal No. 43 of 2006 and Second Appeal No. 44 of 2006, whereby the appeals preferred by the revisionist were rejected. These revisions relate to assessment years 2001-02 and 2002-03.

3. The facts of the case in brief are that assessee/revisionist is a firm engaged in the business of buying and selling "Vanaspati, other edible oils, sugar etc.". The revisionist firm is registered under Section 8-A of U.P. Trade Tax Act as well as under Section 7 of the Central Sales Tax Act. The revisionist established a Cold Storage under the name and style of Shreenathji Cold Storage, Wazirganj, Budaun as a branch of the head office at Allahabad and accordingly moved an application for the amendment of the registration certificates under the U.P. Trade Tax Act as well as under the Central Sales Tax Act.

4. The assessing authority by order dated 09.01.2002, amended the registration certificate in Form-15, issued under the U.P. Trade Tax Act as also registration Certificate in Form-B issued under the Central Sales Tax Act showing the business of the revisionist at Budaun as a Branch Office, but no addition/amendment with regard to the items required to be imported by the revisionist was made in the registration certificate and for the that purpose revisionist moved another application for addition of items in Form-C, before the Assessing Authority.

5. In the meanwhile, the revisionist started importing machinery and parts. During the course of assessment proceedings for the year 2001-02, it came to be notice of the Assessing Officer that the items imported by the assessee-revisionist, did not find mention in the registration certificate and therefore issued a show cause notice to the revisionist stating that he had imported machinery and parts amounting to Rs.9,26,236/-, in respect of which permission not having been granted, and held that the revisionist had imported the items in question unauthorizedly and illegally.

6. In response to the show-cause-notice, the revisionist filed a detailed reply stating that his application for addition of machines and parts thereof was still pending and in any case the same had not been rejected by the Assessing Authority and nor any communication in this regard was made to the revisionist, thus, the applicant was under the bonafide belief that the applicant was authorized to import the goods in question against Form-C, and therefore no violation of any provision has been made by him for which he can be penalized under Section 10-A of the Central Sales Tax Act.

7. The Assessing Authority however did not accepted the explanation of the revisionist and imposed penalty in exercise of powers under Section 10-A of the Central Sales Tax Act, holding that the revisionist had imported machines and parts thereof on Form-C without having been duly authorized in this regard and imposed penalty to the tune of Rs.1,30,000.00 under Section 10-A of the Central Sales Tax Act by order dated 22.02.2005.

8. Aggrieved by the aforesaid order of penalty, the revisionist preferred appeals before the Joint Commissioner (Appeals), Trade Tax, Allahabad, which were dismissed vide judgment and order

dated 28.01.2006, mainly on the ground that in the certificate of registration only branch has been added and not the items. Against the order passed by the first appellate authority, the revisionist preferred Second Appeals before the Trade Tax Tribunal, Allahabad, which has also been dismissed by means of impugned judgment and order dated 24.07.2006. Hence present revisions.

9. Following substantial questions of law have been framed in these revisions for consideration :

(i) Whether on the facts and in the circumstances of the case, the applicant was liable for penalty U/s 10-A read with Section 10(b) of the Central Sales Tax Act?

(ii) Whether on the facts and in the circumstances of the case, the quantum of penalty fixed by the authorities below was excessive and arbitrary?

10. Learned counsel for the revisionist has submitted that he has made an application for addition of items in the certificate of registration, but the competent authority had only added the Branch, while the application regarding addition of items remained pending. He further submitted that he had issued form-C and only thereupon imported the goods and considering the aforesaid facts it can safely presumed that the revisionist was acting bonafidely and he had no intention to evade tax and therefore the orders passed by the Assessing Authority, the first Appellate Authority as well as Tribunal were arbitrary and have not considered the case of the revisionist in proper perspective and therefore the penalty imposed upon him is liable to be set aside.

11. Learned Standing Counsel appearing on behalf of Revenue on the other hand has submitted that under the scheme of the Central Sales Tax Act it is mandatory that certificate of registration should assign list of items which are purported to be dealt by the assessee. He further submitted that the application in this regard was preferred by the revisionist but no orders in this regard have been passed in favour of the revisionist and therefore in absence of the addition of items in the registration certificate the revisionist could not have imported the goods on Form-C which are not included in the certificate of registration. He further submits that the penalty imposed upon the revisionist was just and proper and that there is clear violation of statutory provisions under the scheme of the Act.

12. Heard learned counsel for the parties and perused the record.

13. The admitted facts of this case are that the revisionist had moved an application for adding of Branch of his firm and also for addition of items. The competent authority had only added the Branch but no order was passed with regard to addition of the items. It is true that Form-C was issued in respect to the items to be imported, which did not find mention in the certificate of registration and the revisionist is claiming that the said goods were imported under the bona-fide belief that the goods have been included in the amended certificate of registration.

14. It is also uncontroverted that application regarding addition of items was not allowed nor were the items entered on the certificate of registration. Without addition of items in the registration certificate, it is not permissible

for the revisionist to import the goods and in case such goods which are not included in the certificate of registration are imported, same would amount to penalty under the provisions of the Central Sales Tax Act.

15. Learned counsel for the revisionist has relied upon the Apex Court's judgment in the case of **Commissioner of Sales Tax, U.P. Vs. M/s Sanjiv Fabrics, 2010 NTN (Vol. 44) 69,** to canvass his submissions. In paragraph 22 of the said judgment, the Court has held as under :

"22. In view of the above, we are of the considered opinion that the use of the expression "falsely represents" is indicative of the fact that the offence under Section 10(b) of the Act comes into existence only where a dealer acts deliberately in defiance of law or is guilty of contumacious or dishonest conduct. Therefore, in proceedings for levy of penalty under Section 10-A of the Act, burden would be on the revenue to prove the existence of circumstances constituting the said offence. Furthermore, it is evidenct from the heading of Section 10-A of the Act that for breach of any provision of the Act, constituting an offence under Section 10 of the Act, ordinary remedy is prosecution which may entail a sentence of imprisonment and the penalty under Section 1-0A of the Act is only in lieu of prosecution. In light of the language employed in the Section and the nature of penalty contemplated therein, we find it difficult to hld that all types of omissions or commissions in the use of Form "C' will be embraced in the expression "false representation". In our opinion, therefore, a finding of mens rea is a condition precedent for levying penalty under Section 10(b) read with Section 10-A of the Act.

23. That takes us to the next question viz. Whether on the facts of the two cases before us it could be said that the dealers had purchased the goods in question and furnished Form "C' in respect of those goods knowing that the said goods were not covered by their certificates of registration and, therefore, the requirement of the mens rea was satisfied.

24. As regards, the first set of appeals, as afore-stated, the High Court has deleted the penalty on the ground that apart from the fact that on earlier occasions the department had not raised any objection while issuing Form ''C' to the dealer, the dealer filed an application for amendment of the registration certificate as soon as he learnt about his fault. It is evident from the impugned judgment that the High Court had lost sight of the fact tha the dealer had used Form ''C' to import items like sutli, tat etc., in addition to the cotton waste. Assuming that the dealer was of the bona fide belief that cotton included the cotton waste, it is hard to believe that there was some confusion in the mind of the dealer in so far as other items were concerned.

Similarly, in the second set of appeals, it is evident from the impugned judgment that the High Court has not examined the explanation furnished by the dealer that they were under a bona fide belief that they were authorized to purchase oil seeds against Form ''C' issued to them regularly by the department without any objection. It is manifest that the High Court proceeded to examine the case of the dealer on the premise that offence under Section

10(b) of the Act was an absolute offence."

16. Perusal of the aforesaid judgment clearly indicates that the assessee therein was able to demonstrate before the Court that he had imported the goods bonafidely and did not file any false returns, his intentions were further demonstrated by the fact that on coming to know that the items are not included in the registration certificate, he had immediately moved an application for amendment of the registration certificate to include the items.

17. In the instant case, the assessee despite coming to know that the goods/items have not been included in the list, he did not moved any application for disposal of pending application or moved a fresh application for including the goods in the certificate of registration.

18. The bonafides of the revisionist are also not made out in the instant case, inasmuch as, the certificate of registration after due amendment would have been returned to him alongwith endorsement of the authority concerned. On the strength of the aforesaid certificate of registration, the revisionist continued his business of importing the goods, therefore, the revisionist cannot plead ignorance of the certificate of registration wherein the list of goods is also mentioned.

19. The revisionist in the present case was fully aware of the amendments incorporated in his certificate of registration and from the list of items appended therein, he should have been aware of the fact that his application for addition of goods had not been allowed and this the items had not been included in the list of goods he intends to import on Form - C.

20. In the light of the above, the judgment of the Hon'ble Apex Court in the case of **M/s Sanjiv Fabrics (supra)** is distinguishable on facts. In the instant case, the revisionist had full knowledge about the fate of his applications for addition of branch as well as items. He had commenced his business at the new branch which was added in the amended certificate of registration. Despite the fact that his application for addition of items was not allowed, he continued to import the said goods under Form-C and therefore from the above facts it cannot be deciphered that the revisionist has acted in bonafide manner in importing the said goods.

21. In view of the discussion made above, this Court is of the considered opinion that there is no illegality or infirmity in the order of the Tribunal and therefore no interference in the same is required.

22. The revisions are **dismissed.**

23. The substantial questions of law raised in these revisions are answered in favour of the revenue and against the revisionist.

(2020)02ILR A1432

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 17.01.2020

BEFORE
THE HON'BLE NEERAJ TIWARI, J.

Matters Under Article 227 No. 404 of 2020

Kishan Singh ...Petitioner

Versus

Shashi Jain & Anr. ...Respondents

Counsel for the Petitioner:
Sri Vishal Khandelwal

Counsel for the Respondents:

A. Constitution of India, 1950 – Article 227 – jurisdiction - Maintainability- Code of Civil Procedure ,1908 - Section 21 of CPC – Objections to jurisdiction - Order 7 Rule 11 of CPC – Rejection of plaint – Order4 Rule 1,2 & 3 – Institution of suit – specific finding of the Revisional Court - dispute related to property & Tenancy - no jurisdiction under Article 227 of Constitution of India. (Para 14)

B. Code of Civil Procedure ,1908 - Section 21 of CPC and Order 7 Rule 11 of CPC - object and purpose - should be read conjointly and not separately – requirement - to raise objection at the earliest before the framing of issue - raised at a very belated stage during the pendency of Revision. (Para12)

SCC Suit filed by the plaintiff-respondent for eviction and arrears of rent – Petitioner-defendants not taken any objection under Order 7 Rule 11 CPC - Suit was decreed – Objection has never been raised either before the Small Causes Court or Revisional Court . (Para 7,13,)

Held:- Petitioner cannot be permitted to raise the issue of raising objection of jurisdiction at the belated stage. (Para-13)

Matters Under Article 227 dismissed.
(E-7)

(Delivered by Hon'ble Neeraj Tiwari, J.)

1. Heard Sri Vishal Khandelwal, learned counsel for the petitioners.

2. By way of present petition, petitioners are challenging impugned order dated 09.12.2019 passed by 7th Additional District & Sessions Judge, Agra in SCC Revision No. 14 of 2017 (Kishan Singh Vs. Shashi Jain).

3. Learned counsel for the petitioners submitted that plaintiff-respondent has filed SCC Suit No. 25 of 2011 against the petitioner no. 1 claiming herself to be the owner and landlord of Property No. 21/67 in which petitioner is the tenant of one room (described as Private Room No. 6) at the rent of Rs. 13.75/- per month besides taxes. It is alleged that petitioner is not paying rent from 1.1.1996, made material alteration and also sublet the said room. Relief claimed by the plaintiff-respondent is for eviction and arrears of rent. Petitioners-defendants have filed a detailed written statement with regard to the averment of plaint. Judge, Small Cause Court, Agra allowed the suit vide judgment and decree dated 30.03.2017 for eviction and payment of rents. Against the judgment and order of Judge, Small Cause Court, Agra dated 30.03.2017, petitioners preferred SCC Revision No. 14 of 2017, which is still pending for final decision.

4. During the pendency of the Revision, petitioners have filed Application- 67Ga under Order 7 Rule 11 read with Section 151 CPC on the ground that disputed rented room has not been sufficiently described in the Plaint because of which it is not identifiable and no site plan has been annexed along with Plaint. It is also stated in the application that mandatory provision of Order 4 Rule 1, 2 & 3 of CPC have not been complied with, therefore, Plaint is liable to be rejected. Additional District Judge, Court No. 7, Agra vide order dated 09.12.2019, rejected the application-67Ga of the petitioners. It was rejected on the ground of merits as well as on the ground that this objection

has never been raised by the petitioner-plaintiff in his written submission.

5. Learned counsel for the petitioners assailed the order on the ground that application under Order 7 Rule 11 of CPC can be filed at any time and at any stage as Order 7 Rule 11 of CPC does not provide any time limit and stage of legal proceeding. Order 7 Rule 11 of CPC provides ground of rejection of Plaint and it is required on the part of Court concerned to consider the same first and pass order even though it has not been raised by the defendant. It is next submitted that Section 21 of CPC provides that objection has to be taken with regard to jurisdiction at his first instance at the earliest possible opportunity and in Order 7 Rule 11 of CPC, there is no restriction or limitation, therefore, at any stage of legal proceeding, defendant can take objection and Court is bound to decide the same irrespective of limitation or stage of proceedings. It is also submitted that by the perusal of Plaint itself, it is absolutely clear that there is no disclosure or description of property and further it was in violation of Order 4 Rule 1, 2 & 3, therefore, it is required on the part of Court to reject the Plaint and allow the application, but the application 67 G was rejected, which is bad in the eye of law and is liable to be set aside.

6. I have considered the submissions made by learned counsel for the petitioners and perused the records.

7. There is no dispute on the point that when the suit was filed, the petitioners-defendants have not taken any objection under Order 7 Rule 11 of CPC. The suit was decreed vide order dated 30.3.2017 and even at the time of filing of revision, petitioners have not taken any such objection which was available to them, therefore, the issue is whether the application filed under Order 7 Rule 11 of CPC can be entertained at any stage of proceedings and without considering any limitation or not.

8. Order 7 Rule 11 of Civil Procedure Code, 1908 is quoted below:-

*"**11. Rejection of plaint**--The plaint shall be rejected in the following cases:--*

(a) where it does not disclose a cause of action;

(b) where the relief claimed is undervalued, and the plaintiff, on being required by the Court to correct the valuation within a time to be fixed by the Court, fails to do so;

(c) where the relief claimed is properly valued, but the plaint is returned upon paper insufficiently stamped, and the plaintiff, on being required by the Court to supply the requisite stamp-paper within a time to be fixed by the Court, fails to do so;

(d) where the suit appears from the statement in the plaint to be barred by any law :

[144] [Provided that the time fixed by the Court for the correction of the valuation or supplying of the requisite stamp-paper shall not be extended unless the Court, for reasons to be recorded, is satisfied that the plaintiff was prevented by any cause of an exceptional nature form correcting the valuation or supplying the requisite stamp-paper , as the case may be, within the time fixed by the Court and that refusal to extend such time would cause grave injustice to the plaintiff.]"

9. By the perusal of Order 7 Rule 11 of CPC, it is apparently clear that basic purpose of Order 7 Rule 11 of CPC is to raise objection at the earliest for immediate disposal of suit in case Plaint has been filed contrary to provisions of Order 7 Rule 11 of CPC otherwise there is no need of Order 7 Rule 11 of CPC and it may be left open for the defendant to raise objection along with his written statement.

10. Learned counsel for the petitioners has also relied upon Section 21 of C.P.C. The same is being quoted hereinbelow:-

*"**21. Objections to jurisdiction-** No objection as to the place of suing shall be allowed by any Appellate or Revisional Court unless such objection was taken in the Court of first instance at the earliest possible opportunity and in all cases where issues are settled at or before such settlement, and unless there has been a consequent failure of justice.*

(2) No objection as to the competence of a Court with reference to the pecuniary limits of its jurisdiction shall be allowed by any Appellate or Revisional Court unless such objection was taken in the Court of first instance at the earliest possible opportunity, and, in all cases where issues are settled, at or before such settlement, and unless there has been a consequent failure of justice.

(3) No objection as to the competence of the executing Court with reference to the local limits of its jurisdiction shall be allowed by any Appellate or Revisional Court unless such objection was taken in the executing court at the earliest possible opportunity, and unless there has been a consequent failure of justice."

11. Certainly, Section 21 of CPC deals with objection with regard to jurisdiction, but in spirit it cannot be isolated only for jurisdiction and principle of Section 21 of CPC would also be applicable for filing of application under Order 7 Rule 11 of CPC meaning thereby at the earliest objection should have been moved.

12. Section 21 of CPC and Order 7 Rule 11 of CPC should be read conjointly and not separately. It is required on the part of petitioners-defendants to raise objection at the earliest before the framing of issue and there is no dispute in the present matter that it has been raised at a very belated stage during the pendency of Revision, therefore, whatever argument is raised by learned counsel for the petitioners is not sustainable and allowing of such application would frustrate the object and purpose of Order 7 Rule 11 of CPC read with Section 21 of CPC. Even if there is no limitation prescribed, in the light of Section 21 of CPC, it is required on the part of petitioners to raise objection at the earliest immediately after receiving the Plaint and not at any stage of litigation as it is filed in present case.

13. Similar position is also about the violation of Order 4 Rule 1, 2 & 3 of CPC. This objection has never been raised either before the Small Causes Court or Revisional Court, therefore, in light of finding given hereinabove, petitioner cannot be permitted to raise this issue at this belated stage.

14. So far as the factual position of the plaint is concerned, there is specific finding of the Revisional Court that there is description of property in dispute which was duly accepted by the petitioners-defendants in its written submission. Tenancy is also accepted, therefore, that cannot be interfered by this Court while exercising the jurisdiction under Article 227 of Constitution of India.

15. Therefore, under such facts and circumstances, petition lacks merit and is, accordingly, **dismissed.** No order as to costs.

(2020)02ILR A1436

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 09.01.2020

BEFORE
THE HON'BLE MRS. MANJU RANI CHAUHAN, J.

Matters Under Article 227 No. 8511 of 2019

Rakesh Kumar ...Petitioner
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Petitioner:
Sri S. Sengar

Counsel for the Respondents:
A.G.A.

A. Code of criminal procedure, 1973 - Section 125 Cr.P.C - Order for maintenance of wives, children and parents - Section 421 Cr.P.C — Warrant for levy of fine - Issuance of non-bailable warrant by Magistrate against petitioner for not complying order directing to pay maintenance to respondent-wife and daughter - Validity - no jurisdiction - illegal and not warranted by law - order of issuance of non-bailable warrant, set aside. (Para 12,13,14)

Magistrate has issued warrant of arrest straightway against person liable for payment of maintenance allowance in event of non-payment of maintenance allowance within time fixed by court. (Para-13)

Held:- Magistrate has no jurisdiction to issue warrant of arrest straightway against person liable for payment of maintenance allowance in event of non-payment of maintenance allowance within time fixed by court without first levying amount due as fine and without making any attempt for realization that fine in one or both modes for recovery of that fine as provided for in clauses (a) or (b) of sub-Section (1) of Section 421 of Act. (Para-13)

Matters Under Article 227 allowed. (E- 7)

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

1. At the time of filing of the present petition, certified copy of the impugned order has not been annexed along with the present petition.

2. Today, a supplementary affidavit has been filed on behalf of the petitioner enclosing certified copy of the order impugned. The same is taken on record.

3. Heard Mr. S. Sengar, learned counsel for the petitioner and the learned A.G.A. for the State as also perused the material on record.

4. Learned counsel for the petitioner and the learned A.G.A for the State agree that the present petition may be disposed of at this stage without calling for counter affidavit in view of the order proposed to be passed today.

5. Normally this Court would have issued notice to opposite party no.2 to contest the matter by filing counter affidavit either by herself or through counsel, but no purpose would be served by keeping the application pending. However, it shall be open for opposite party no.2 to file an appropriate application, if she feels so aggrieved.

6. The present criminal revision has been filed to quash the judgment and order

dated 20th September, 2019 passed by the Principal Judge, Family Court, Auraiya in consequential proceedings of Case No. 397 of 2013 (Subodhani @ Saloni & Another Vs. Sukant @ Rakesh Kumar), under Section 125 (3) Cr.P.C., whereby the Principal Judge has issued non-bailable warrant against the petitioner.

7. Learned counsel for the petitioner submits that the petitioner married opposite party no.2 on 8th December, 2010. Out of the aforesaid wedlock, a baby girl was born. However, after some time, the relationship between the husband and wife i.e. petitioner and opposite party no.2 became strained and incompatible. Thereafter the opposite party no.2 has initiated several litigations against the petitioner. In connection with the same, she along with her daughter filed an application under Section 125 Cr.P.C. before the Family Court, Auraiya, which has been registered as Case No. 397 of 2013. The said application has been allowed by the Principal Judge, Family Court, Auraiya vide judgment and order dated 8th January, 2019 and the petitioner has been directed to pay Rs. 5,000/- per month to his wife i.e. opposite party no.2, namely, Subodhi @ Saloni and Rs. 7,000/- per month to his daughter, namely, Kumari Riya till the date of her majority as maintenance allowance. Thereafter the opposite party no.2 along with his daughter instituted Misc. Case Nos. 130 of 2018, 107 of 2019 and 83 of 2019 (Subodhani @ Saloni & Another Vs. Sukant @ Rakesh Kumar) under Section 125 (3) Cr.P.C. in the Court tof Principal Judge, Family Court, Auraiya. After notice being received, petitioner also filed his objection under Section 125 (4) Cr.P.C. in the aforesaid execution cases but the same has been rejected by the Principal Judge vide order dated 19th September, 2019 and on the next date i.e. 20th September, 2019 has straight-way issued Non-Bailable Warrant directing the petitioner to send him in jail. It is against this order that the present petition has been filed.

8. Learned counsel for the petitioner submits that the impugned order passed by the Principal Judge, Family Court, Auraiya dated 20th September, 2019 is wholly illegal as he has no jurisdiction to issue non-bailable warrant against the petitioner under Section 125 (3) Cr.P.C. for execution of his order awarding maintenance allowance to opposite party no.2 and his daughter Section 125 (3) Cr.P.C. specifically provides for issuance of a warrant for levying the amount issued in the manner provided for levying fines. Learned counsel for the petitioner has referred to Section 421 Cr.P.C., which enacts the provisions regarding issuance of warrant for levying of fine. Learned counsel for the petitioner further submits that when a specific procedure has been provided for execution of the order of maintenance of Family Court, the issuance of Non-Bailable Warrant by the Principal Judge, Family Court against the petitioner is illegal and, therefore, the impugned order is liable to be quashed. In support of his aforesaid submissions, learned counsel for the petitioner has placed reliance upon the following judgments of Gauhati High Court, Calcutta High Court and Punjab and Haryana High Court:

1. Hazi Abdul Khaleque Vs. Mustt. Samsun Nehar, 1991 CriLJ, 1843;

2. Dipankar BAnerjee Vs. Tanuja Banerjee reported in 1998 CriLJ 907; and

3. Om Prakash @ Parkash Vs. Vidya Devi reported in 1992 CriLJ 658.

9. Per contra, Mr. Prashant Kumar, learned A.G.A. for the State has opposed the submissions made by the learned counsel for the petitioner by contending that that the applicant is a defaulter and has not paid any amount as awarded by the Family Court under order dated 8th January, 2019 to opposite party no.2 and her daughter as interim allowance. Therefore, the Family Court has rightly passed the order issuing non-bailable warrant against the applicant for realization of the amount so due and there is no error in the order impugned.

10. I have considered the submissions made by the learned counsel for the parties and have gone through the records of the present criminal revision.

11. Before coming to the merits of the present case, it would be worthwhile to reproduce Sections 125 (3) and 421 Cr.P.C., which read as follows:

"125. Order for maintenance of wives, children and parents.

.....

(3) If any person so ordered fails without sufficient cause to comply with the order, any such Magistrate may, for every breach of the order, issue a warrant for levying the amount due in the manner provided for levying fines, and may sentence such person, for the whole or any part of each month' s allowances remaining unpaid after the execution of the warrant, to imprisonment for a term which may extend to one month or until payment if sooner made.

....."

"421. Warrant for levy of fine.

(1) When an offender has been sentenced to pay a fine, the Court passing the sentence may take action for the recovery of the fine in either or both of the following ways, that is to say, it may-

(a) issue a warrant for the levy of the amount by attachment and sale of any movable property belonging to the offender;

(b) issue a warrant to the Collector of the district, authorising him to realise the amount as arrears of land revenue from the movable or immovable property, or both, of the defaulter: Provided that, if the sentence directs that in default of payment of the fine, the offender shall be imprisoned, and if such offender has undergone the whole of such imprisonment in default, no Court shall issue such warrant unless, for special reasons to be recorded in writing, it considers it necessary so to do, or unless it has made an order for the payment of expenses or compensation out of the fine under section 357.

(2) The State Government may make rules regulating the manner In which warrants under clause (a) of sub- section (1) are to be executed, and for the summary determination of any claims made by any person other than the offender in respect of any property attached in execution of such warrant.

(3) Where the Court issues a warrant to the Collector under clause (b) of sub- section (1), the Collector shall realise the amount in accordance with the law relating to recovery of arrears of land revenue, as if such warrant were a certificate issued under such law: Provided that no such warrant shall be executed by the arrest or detention in prison of the offender."

12. On a plain reading of sub-section (3) of Section 125 Cr.P.C., it is apparently

clear that in the event of any failure on the part of any person to comply with an order to pay maintenance allowance, without sufficient cause, the Magistrate is empowered to issue warrant for levying the amount due to in manner provided for levying fines for every breach of the order. Section 421Cr.P.C. prescribes the manner for levying fine and clause (a) of sub-Section (1) of Section 421 provides for issuance of warrant for levy of the amount by attachment and sale of any movable property belonging to the offender. In other words, in the event of any failure without sufficient cause to comply with the order for maintenance allowance, the Magistrate is empowered to issue distress warrant for the purpose of realization of the amount, in respect of which default has been made, by attachment and sale of any movable property, that may seized in execution of such warrant. Sub-section (3) of Section 125 Cr.P.C. makes it further clear that the jurisdiction of the Magistrate for sentencing such person to imprisonment would arise only after the maintenance allowance, in whole or in part, remains unpaid after the maintenance allowance, in warrant. It is only after the sentence of imprisonment is awarded by the Magistrate under sub-section (3) of Section 125 that the occasion may arise for issuance of warrant of arrest for bringing the person concerned to Court for his committal to prison to serve out the sentence.

13. It is further apparent that the Magistrate has no jurisdiction to issue warrant of arrest straight way against the person liable for payment of maintenance allowance in the event of non-payment of maintenance allowance within the time fixed by the court without first levying the amount due as fine and without making any attempt for reaslization that fine in one or both the modes for recovery of that fine as provided for in clauses (a) or (b) of sub-Section (1) of Section 421 Cr.P.C. say by issuance of distress warrant for attachment and sale of movable property belonging to the defaulter as contemplated under Section 421 (1) (a) and without first sentencing the defaulter to imprisonment after the execution of the distress warrant.

14. In view of aforesaid, this Court finds that the Principal Judge, Family Court, Auraiya, it is apparently clear, has misdirected himself in providing for issuance of warrant of arrest in default of payment of arrears maintenance allowance within the time allowed by him in the execution case concerned. The order directing issuance of warrant of arrest is patently illegal and not warranted by law. Order dated 20th September, 2019 is hereby set aside. Let the Principal Judge pass a fresh order in the aforesaid execution cases filed by opposite party no.2 in light of the observations made herein above.

15. Subject to the observations made above, the present petition is allowed.

(2020)02ILR A1439

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 09.01.2020

BEFORE
THE HON'BLE NEERAJ TIWARI, J.

Matters Under Article 227 No. 9645 of 2019

Padam Chandra Sahu & Anr. ...Petitioners
Versus
Smt. Suman Sahu & Ors. ...Respondents

Counsel for the Petitioners:

Sri Kamlesh Kumar Tiwari

Counsel for the Respondents:
Sri Rishikesh Tiwari

A. Payment of rent and eviction - Registration Act, 1908 - Sections 17 - documents of which registration is compulsory – Section 47 - time from which registered document operates - Section 49 - Effect of non-registration of documents required to be registered - Section 49(b) - on the basis of unregistered document, no right can be created - Transfer of Property Act, 1882 - Section 109 – Section 17 as well as Section 49 of the Registration Act, 1908 - rescue of the petitioners - provided suit had been filed prior to registration of sale deed i.e. before 25.6.2011 - not the case of both the parties - accepted fact - suit was filed in the month of July, 2012 after registration of sale deed on 25.06.2011 - Small Causes Court rightly allowed the suit in favour of the plaintiff-respondents - Revisional Court dismissed the revision - held – no illegality.(Para 16,22)

For the house in question, sale deed was drafted and executed in the year 1995 - Sale deed was registered on 25.6.2011 under the provisions of Registration Act, 1908, after the decision in the suit No. 341 of 2000 filed for mandatory injunction vide order dated 24.7.2018 - on the date of filing of the suit, sale deed was duly registered - the petitioner-defendants are having the knowledge of execution of sale deed in favour of respondent-plaintiff no. 1. (Para 15)

Held:- In light of Section 47 of the Registration Act, 1908, it is very much clear that a registered document shall be given effect from the date of its execution and not from the date of registration, in case no registration is required and after registration, it will operate from the date of its execution – six months time granted to the petitioners to vacate the house in question subject to payment of rent at the rate of Rs. 500/- per month. (Para 20,24)

Matters Under Article 227 dismissed.(E-7)

List of cases cited :-

1. Yellapu Uma Maheswari and another Vs. Buddha Jagadheeswararao and others, 2015 LawSuit (SC) 998

2. Subraya M N Vs. Vittala M N and others, 2016 LawSuit (SC) 654

3. Ambica Prasad (Dr.) Vs. Md. Alam and another, 2015 (2) ARC 313

4. Gausul Azam Vs. State of U.P. through Secretary Revenue, Lucknow and others, 2019 (143) RD, 215

5. Kanhaiya Lal Sharma Vs. Dr. Sushil Kumar, 2015 (6) ALJ 284

(Delivered by Hon'ble Neeraj Tiwari, J.)

1. Heard Sri K.K. Tiwari, learned counsel for the petitioners and Sri Rishikesh Tripathi, learned counsel for the respondents.

2. Learned counsel for the petitioners submitted that the house in question was taken on rent by father of the petitioners from one Smt. Shanti Devi-landlady. After death of their father, petitioners inherited the tenancy. In the year 2002, S.C.C. Suit No. 45 of 2012 was filed by the plaintiff-respondents for payment of rent and eviction, which was decreed by Judge, Small Causes Court, Jhansi in favour of the plaintiff-respondents vide judgment and order dated 24.7.2018. Against the said judgment, Revision No. 41 of 2018 was filed by petitioner-defendants, which was dismissed vide judgment and order dated 27.11.2019 confirming the judgment and decree passed by the Judge, Small Causes Court, Jhansi.

3. The basic argument of the learned counsel for the petitioners is that earlier a sale deed was drafted and executed by husband of respondent-plaintiff no. 1 in

the year 1995, but the same was not registered. Ultimately, for registration of said sale deed, Case No. 341 of 2000 (Om Prakash Sahu Vs. Vinod Kumar Seth) was filed for mandatory injunction. The said suit was allowed and sale deed was registered on 25.6.2011. He next submitted that in the plaint rent was claimed by the plaintiff-respondents w.e.f. 3.7.2009 to 13.6.2012. He further submitted that as the sale deed was registered on 25.6.2011, therefore, prior to that, the plaintiff-respondents were not entitled to recover the rent and suit was not maintainable.

4. Learned counsel for the petitioners next submitted that the plaintiff-respondents were never the landlord of the petitioners. In fact Smt. Shanti Devi was the landlady of the house in question from whom tenancy was obtained by father of the petitioners, therefore, the suit is not maintainable.

5. In support of his contention, learned counsel for the petitioners has placed reliance upon Sections 17 and 49 of the Registration Act, 1908. Section 17 provides the list of documents of which registration is compulsory. Section 49 provides the effect of non-registration of documents required to be registered and according to Section 49(b) of the Registration Act, 1908, on the basis of unregistered document, no right can be created.

6. He has further placed reliance upon judgment of the Apex Court in the case of ***Yellapu Uma Maheswari and another Vs. Buddha Jagadheeswararao and others, 2015 LawSuit(SC) 998*** which interpreted the Section 17 read with Section 49 of the Registration Act, 1908 and provides that unregistered document cannot be admissible in evidence. Paragraphs 15, 17 and 18 of the said judgment are quoted below:-

"15. Section 17(1) (b) of the Registration Act mandates that any document which has the effect of creating and taking away the rights in respect of an immovable property must be registered and Section 49 of the Act imposes bar on the admissibility of an unregistered document and deals with the documents that are required to be registered u/s 17 of the Act.

17. It is well settled that the nomenclature given to the document is not decisive factor but the nature and substance of the transaction has to be determined with reference to the terms of the documents and that the admissibility of a document is entirely dependent upon the recitals contained in that document but not on the basis of the pleadings set up by the party who seeks to introduce the document in question. A thorough reading of both Exhibits B-21 and B-22 makes it very clear that there is relinquishment of right in respect of immovable property through a document which is compulsorily registerable document and if the same is not registered, becomes an inadmissible document as envisaged under Section 49 of the Registration Act. Hence, Exhibits B-21 and B-22 are the documents which squarely fall within the ambit of section 17 (i) (b) of the Registration Act and hence are compulsorily registerable documents and the same are inadmissible in evidence for the purpose of proving the factum of partition between the parties. We are of the considered opinion that Exhibits B 21 and B22 are not admissible in

evidence for the purpose of proving primary purpose of partition.

18. Then the next question that falls for consideration is whether these can be used for any collateral purpose. The larger Bench of Andhra Pradesh High Court in Chinnappa Reddy Gari Muthyala Reddy Vs. Chinnappa Reddy Gari Vankat Reddy, AIR 1969 (A.P.) 242 has held that the whole process of partition contemplates three phases i.e. severancy of status, division of joint property by metes and bounds and nature of possession of various shares. In a suit for partition, an unregistered document can be relied upon for collateral purpose i.e. severancy of title, nature of possession of various shares but not for the primary purpose i.e. division of joint properties by metes and bounds. An unstamped instrument is not admissible in evidence even for collateral purpose, until the same is impounded. Hence, if the appellants/defendants want to mark these documents for collateral purpose it is open for them to pay the stamp duty together with penalty and get the document impounded and the Trial Court is at liberty to mark Exhibits B-21 and B- 22 for collateral purpose subject to proof and relevance."

7. He has also placed reliance upon another judgment of the Apex Court in the case of ***Subraya M N Vs. Vittala M N and others, 2016 LawSuit(SC) 654*** and paragraph 16 of the said judgment also interpreted Section 17 read with Section 49 of the Registration Act, 1908 and says that the document which was not registered, is not admissible in evidence and therefore, cannot be produced for evidence, therefore, the respondent is not entitled to recover the rent from the petitioners prior to date of registration and plaint is liable to be dismissed and revision is liable to be allowed. Paragraph 16 of the said judgement is quoted below;

"16. Under Section 17 of the Registration Act, the documents which purport or operate to create, declare, assign, limit or extinguish any right, title or interest of the value of one hundred rupees and upwards, are to be registered. Under Section 49 of the Registration Act no document required by Section 17 or by any provision of the Transfer of Property Act to be registered shall be received as evidence of any transaction affecting an immovable property. As provided by Section 49 of the Registration Act, any document, which is not registered as required under the law would be inadmissible in evidence and cannot therefore be produced and proved under Section 91 of the Evidence Act."

8. Learned counsel for the respondents vehemently opposed the submissions made by learned counsel for the petitioners and placed reliance upon Section 47 of the Registration Act, 1908 which deals with time from which registered document operates. Section 47 of the Registration Act, 1908 is quoted below:-

"47. Time from which registered document operates.*-A registered document shall operate from the time from which it would have commenced to operate if no registration thereof had been required or made, and not from the time of its registration."*

9. He submitted that the present suit was filed in the month of July, 2012 whereas the said sale deed was registered on 25.6.2011, therefore, when the suit was filed, the sale deed was duly registered

under the provisions of Registration Act, 1908. He further submitted that once there is no dispute on the point that at the time of filing of the suit sale deed was registered, the arguments raised by learned counsel for the petitioners have no force and the writ petition is liable to be dismissed. He further submitted that by perusal of the written statement, it is very much clear that there is no dispute on the point that Smt. Shanti Devi was the landlady and thereafter the petitioners obtained sale deed of the house in question, which is duly registered against which no cancellation application is pending. Once this fact is not disputed that Smt. Shanti Devi is the landlady and sale deed was registered under the provisions of Registration Act, 1908, only information of change of landlord is required to the petitioners for tenancy purpose.

10. In support of his contention, learned counsel for the respondents has placed reliance upon the judgment of Apex Court in the case of ***Ambica Prasad (Dr.) Vs. Md. Alam and another, 2015 (2) ARC 313*** which provides that transferee of lessor's right in favour of the transferee, the latter gets all rights and liabilities of the lessor in respect of subsisting tenancy and Section 109 of the Transfer of Property Act, 1882 does not insist that transfer will take effect only when the tenant attorns. Paragraphs 9 and 10 of the said judgment are quoted below:-

"9. On the question of tenancy, both the trial court and the High Court have not considered the provision of Section 109 of the Transfer of Property Act.

"109. Rights of lessor's transferee.-If the lessor transfers the property leased, or any part thereof, or any part of his interest therein, the transferee, in the absence of a contract to the contrary, shall possess all the rights, and, if the lessee so elects, be subject to all the liabilities of the lessor as to the property or part transferred so long as he is the owner of it; but the lessor shall not, by reason only of such transfer cease to be subject to any of the liabilities imposed upon him by the lease, unless the lessee elects to treat the transferee as the person liable to him:

Provided that the transferee is not entitled to arrears of rent due before the transfer, and that, if the lessee, not having reason to believe that such transfer has been made, pays rent to the lessor, the lessee shall not be liable to pay such rent over again to the transferee.

The lessor, the transferee and the lessee may determine what proportion of the premium or rent reserved by the lease is payable in respect of the part so transferred, and, in case they disagree, such determination may be made by any Court having jurisdiction to entertain a suit for the possession of the property leased.

10. From perusal of the aforesaid Section, it is manifest that after the transfer of lessor's right in favour of the transferee, the latter gets all rights and liabilities of the lessor in respect of subsisting tenancy. The Section does not insist that transfer will take effect only when the tenant attorns. It is well settled that a transferee of the landlord's rights steps into the shoes of the landlord with all the rights and liabilities of the transferor landlord in respect of the subsisting tenancy. The section does not require that the transfer of the right of the landlord can take effect only if the tenant attorns to him. Attornment by the tenant is not necessary

to confer validity of the transfer of the landlord's rights. Since attornment by the tenant is not required, a notice under Section 106 in terms of the old terms of lease by the transferor landlord would be proper and so also the suit for ejectment."

11. He has also placed reliance upon judgment of this Court in the case of ***Gausul Azam Vs. State of U.P. through Secretary Revenue, Lucknow and others, 2019 (143) RD, 215*** in which it was held that once a sale deed is registered even at a later date, it will operate from the date of its execution. Paragraph 15 of the said judgment is quoted below:-

"15. There is no doubt or ambiguity in holding that a sale becomes complete only after its registration. Section 47 of the Registration Act quoted above, clearly states that a registered document operates from the time when it would have commenced to operate if no registration was required or made and not from the date of its registration. Mere execution of a sale deed without its registration does not make the sale complete, however, once a sale deed is registered even at a later date, it will operate from the date of its execution."

12. Learned counsel for the respondents has further placed reliance upon the judgment of this Court in the case of ***Kanhaiya Lal Sharma Vs. Dr. Sushil Kumar, 2015 (6) ALJ 284*** which provides that in view of Section 109 of the Transfer of Property Act, 1882, the attornment takes place by operation of law. There is no need of consensual attornment. Paragraph 7 of the said judgment is quoted below:-

"7. The trial court has held that Smt. Shivmurti Devi had executed a sale deed in favour of the plaintiff-respondent in September, 1990. This finding has not been assailed before this court. As such, even if for argument sake, the agreement for sale (Paper No. 47-Ga) and the possession memo (Paper No. 48-Ga) are ignored from consideration, it would have no effect on the title of the plaintiff-respondent over the demised premises. It has been held by the Supreme Court in the case of Mohar Singh v. Devi Charan that in view of section 109 of the Transfer of Property Act, 1882, the attornment takes place by operation of law. There is no need of consensual attornment. Same view has been taken by a three Judges bench judgment in Pramod Kumar Jaiswal v. Bibi Husn Bano. In Sk. Sattar Sk. Mohd. Choudhari v. Gundappa Amabadas Bukate, the Supreme Court has held that liability to pay rent to the assignee landlord is postponed till the knowledge of transfer is gained by the tenant, but it does not have the effect of postponing the assignment or transfer of property. A specific finding has been recorded by the trial court that the petitioner came to know about assignment on service of notice upon him in January 1997 and again in July 1997. It was not necessary for establishing relationship of landlord and tenant that there should have been payment of rent by the petitioner to the plaintiff, as the attornment had taken place by operation of law. On gaining knowledge of the transfer, the liability to pay rent comes into existence and the petitioner should have tendered rent to the plaintiff. However, having failed to do so, inspite of notice of demand admittedly served upon him in January, 1997 and again in July 1997, which notice has also been held to be served on the petitioner, there was a clear default in payment of rent. Concededly, no rent was deposited by

the petitioner under Section 30 or in the suit, on the date of first hearing. Thus, there was a clear default in payment of rent, within the meaning of Section 20(2)(a) of U.P. Act XIII of 1972. The trial court was fully justified in decreeing the suit for arrears of rent and for ejectment."

13. He also submitted that by perusal of the written statement filed by the petitioners, it is also clear that they had full knowledge about both the facts that earlier Smt. Shanti Devi was the landlady and the plaintiff-respondent had purchased the said house in question after taking loan of Rs. 10,000/- from the petitioners-defendant, therefore, in light of Section 109 of the Transfer of Property Act, 1882 as well as law laid down by Apex Court and this Court, tenancy is established between the petitioners and respondents, therefore, no separate agreement is required and under such facts, the writ petition is liable to be dismissed.

14. Learned counsel for the petitioners in his rejoinder argument could not dispute the factual position raised by the counsel for respondents, but reiterated the legal position as well as judgments relied upon.

15. I have considered the rival submissions of learned counsel for the parties and perused the record as well as judgments relied upon by them. Undisputed facts of the case are that Smt. Shanti Devi was the landlady of the house in question and further for the very same house in question, sale deed was drafted and executed in the year 1995. Sale deed was registered on 25.6.2011 under the provisions of Registration Act, 1908, after the decision in the suit No. 341 of 2000 filed for mandatory injunction vide order dated 24.7.2018. It is also undisputed that on the date of filing of the suit, sale deed was duly registered and further no dispute is pending in any court of law with regard to genuineness of the sale deed. It is also not disputed that the petitioner-defendants are having the knowledge of execution of sale deed in favour of respondent-plaintiff no. 1.

16. In light of undisputed facts, the arguments raised by learned counsel for the petitioners does not help him. Section 17 as well as Section 49 of the Registration Act, 1908 and its interpretation by the Apex Court might come to the rescue of the petitioners provided the suit had been filed prior to registration of sale deed i.e. before 25.6.2011, but here it is not the case of both the parties, it is accepted fact that the suit was filed in the month of July, 2012 after registration of sale deed.

17. The Apex Court in the matter of ***Ambica Prasad (supra)*** has considered the issue of tenancy after considering the provisions of Section 109 of Transfer of Property Act, 1882, the Court had held that after the transfer of lessor's right in favour of the transferee, the later gets all rights and liabilities of the lessor in respect of subsisting tenancy and Section does not insist that transfer will take effect only when the tenant attorns.

18. This Court in the case of ***Gausul Azam (supra)*** has clearly held that once the sale deed is registered even a later date, it will operate from the date of its execution. Similarly so far as the landlord and tenant relationship is concerned, this fact is not disputed in light of written statement filed by the petitioner-defendants that Smt. Shanti Devi was the

original owner of the house in question and the plaintiff-respondents have taken loan of Rs. 10,000/- to purchase the house in question from Smt. Shanti Devi. They have also full knowledge of execution of the sale deed, therefore, relationship of landlord and tenant is very well established from the date of knowledge and for that further attornment is not required.

19. This Court has considered the same issue in the matter of ***Kanhaiya Lal Sharma (supra)*** that in light of Section 109 of Transfer of Property Act, 1882, the attornment takes place by operation of law and given specific finding relying upon certain other judgments that liability to pay rent to the assignee landlord is postponed till the knowledge of transfer is gained by the tenant, but it does not have the effect of postponing the assignment or transfer of property.

20. In light of Section 47 of the Registration Act, 1908, it is very much clear that a registered document shall be given effect from the date of its execution and not from the date of registration, in case no registration is required and after registration, it will operate from the date of its execution. Meaning thereby, after registration there would be no ambiguity and document shall be treated very well valid from the date of execution and not from the date of registration. The same was interpretation by this Court also in the matter of ***Gausul Azam (supra).***

21. Section 109 of Transfer of Property Act, 1882 also provides that after transfer of rights of lessor to transferee, transferee shall possess all rights and liabilities of lessor for the purpose of existing tenancy and there is nothing in the section which provides that transfer will be given effect only tenant attorns the same.

22. In the present case too, once the facts are undisputed with regard to ownership of Smt. Shanti Devi, thereafter sale deed was executed in favour of respondent-plaintiff no. 1, its registration and further about the knowledge of transfer of right from Smt. Shanti Devi to plaintiff-respondent no. 1, in light of provision of Section 47 of Registration Act, 1908 read with Section 109 of Transfer of Property Act, 1882 as well as law laid down by this Court, the Judge Small Causes Court has rightly allowed the suit in favour of the plaintiff-respondents and Revisional Court dismissed the revision. Therefore, I find no illegality in the impugned orders dated 24.7.2018 and 27.11.2019 passed by the courts below. The writ petition lacks merit and is accordingly **dismissed.** No order as to cost.

23. At this stage, learned counsel for the petitioners requested that the petitioners may be granted some reasonable time to vacate the house in question.

24. Considering the request of learned counsel for the petitioners, six months time from today is granted to the petitioners to vacate the house in question subject to payment of rent at the rate of Rs. 500/- per month. They shall also file an undertaking before the court below to this effect. In case, undertaking is not filed by the petitioners, the plaintiff-respondents are free to proceed for eviction of the house in question

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(2020)02ILR A1447

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 27.01.2020

BEFORE
THE HON'BLE NAHEED ARA MOONIS, J.

Application U/S 482 No. 470 of 2020

Suhail Ahmad & Anr. ...Applicants
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicants:
Sri Rajiv Dwivedi, Sri Vimal Chandra Pathak

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

A. Criminal Law-Indian Penal Code-Sections 323, 504, 506 & 3(1) (Da) (Dha) of S.C./S.T Act,— Appeal against conviction.

The legal position for quashing of the proceedings at the initial stage. The test to be applied by the court is to whether uncontroverted allegation as made prima facie establishes the offence and the chances of ultimate conviction is bleak and no useful purpose is likely to be served by allowing criminal proceedings to be continue. The inherent powers of the High Court under Section 482 Cr.P.C. itself envisages three circumstances under which the inherent jurisdiction may be exercised:-(i) to give effect an order under the Code; (ii) to prevent abuse of the process of the court; (iii) to otherwise secure the ends of justice. The power of High Court is very wide but should be exercised very cautiously to do real and substantial justice for which the court alone exists. (Para 8)

The High Court would not embark upon an inquiry as it is the function of the Trial Court. The interference at the threshold of quashing of the criminal proceedings in case in hand cannot be said to be exceptional as it discloses prima facie commission of an offence. The applicants have ample opportunity to raise all the objections at the appropriate stage. (Para 9)

Application u/s 482 disposed of. (E-2)

List of cases cited:-

1. Gyan Singh Vs. St. of Punj. & others 2012 (10) SCC 303,

2. R. P. Kapoor Vs. St. of Punj., AIR 1960 S.C. 866,

3. St. of Har. Vs. Bhajanlal, 1992 SCC (Crl) 426,

4. St. of Bihar Vs. P. P. Sharma, 1992 SCC (Crl) 192,

5. S. W. Palanattkar & others Vs. St.of Bihar, 2002 (44) ACC 168,

(Delivered by Hon'ble Naheed Ara Moonis, J.)

1. Supplementary affidavit filed today on behalf of the applicants is taken on record.

2. Heard learned counsel for the applicants, the learned AGA for the State and perused the record.

3. The instant application has been filed by the applicant with a prayer to quash the proceeding pursuant to the charge sheet dated 10.10.2017 in S.T. No. 69 of 2018 arising out of Case Crime No. 1244 of 2017 (State of U.P. Vs. Suhail Ahmad) under Sections 323, 504, 506 IPC & 3(1) (Da) (Dha) of S.C./S.T Act at Police Station Dudhara, District Sant Kabir Nagar pending in the court of District and Sessions Judge, Sant Kabir Nagar.

4. It is submitted by the learned counsel for the applicants that the opposite

party no. 2 has lodged the First Information Report against the applicants under Section 354A, 323, 504 IPC and Section 3(1) (Da) (Dha) S.C./S.T Act after investigation no offence under Section 354A IPC was found and hence, the charge sheet has been submitted against the applicants under Section 323, 504 and 506 IPC and 3(1) (Da) (Dha) of S.C/S.T Act whereupon the court below has taken cognizance. The applicants are maliciously being prosecuted as opposite party no. 1 has now filed a compromise application dated 19.3.2019 (which has been appended as annexure-1 to the supplementary affidavit) and in view of the compromise arrived at between the parties the opposite part no 2 is not will to prosecute the applicants. Hence the entire proceeding is liable to be quashed.

5. Per contra, the learned AGA has contended that from the allegations made in the FIR prima facie offence is made out against the applicants. The innocence of the applicant cannot be adjudged at the pre trial stage. The offence under Sections 323, 504, 506 IPC is only compoundable whereas the charge sheet has also been submitted under Section 3(1) (Da) (Dha) of SC/ST Act. The S.C./S.T Act is a special law where there is no provision for compounding the offence. Therefore, the applicants do not deserve any indulgence on the basis of the compromise between the parties.

6. From the perusal of the materials on record and looking into the facts and circumstances of the case and after considering the arguments made at the bar, it does not appear that no offence has been made out against the applicants. The plea of compromise raised by the counsel for the applicants cannot be accepted as the compounding of offence is specified under Section 320 (1) (2) of the Cr.P.C in respect of specified penal offences, which are compoundable with the permission or without the permission of the Court. Since SC/ST Act, 1989 is a special statute, which has been enacted for the purpose of protecting the dignity and integrity of the members of the SC/ST community as such the offences mentioned therein are not compoundable. In ***Gyan Singh Vs. State of Punjab & others 2012 (10) SCC 303*** it has been held by the Hon'ble Supreme Court that offences punishable under special statute are not covered by Section 320 of the Code. From the perusal of the first information report the applicants have used the vituperative words with cast aspersion to the respondent no. 2 intentionally, while outraging her modesty and assaulting her. The applicant with evil intention touched the complainant who belongs to S.C/S.T community, hence it cannot be said that offence committed by the applicants and attack upon the victim in public view individual in nature and not against the society. No doubt the offence under Sections 323, 504 and 506 IPC is compoundable but merely on account of this reason that the parties have entered into compromise, the offence under the SC/ST Act cannot be quashed as the offences under the special statutes are not covered by Section 320 Cr.P.C.

7. At the stage of issuing cognizance or issuing process the court below is not expected to examine and assess in detail the material placed on record, only this has to be seen whether prima facie cognizable offence is disclosed or not. The Apex Court has also laid down the guidelines where the criminal proceedings could be interfered and quashed in exercise of its power by the High Court in the following

cases:- (i) R. P. Kapoor Vs. State of Punjab, AIR 1960 S.C. 866, (ii) State of Haryana Vs. Bhajanlal, 1992 SCC(Crl) 426, (iii) State of Bihar Vs. P. P. Sharma, 1992 SCC (Crl) 192.

8. From the aforesaid decisions the Apex Court has settled the legal position for quashing of the proceedings at the initial stage. The test to be applied by the court is to whether uncontroverted allegation as made prima facie establishes the offence and the chances of ultimate conviction is bleak and no useful purpose is likely to be served by allowing criminal proceedings to be continue. In S. W. Palanattkar & others Vs. State of Bihar, 2002(44) ACC 168, it has been held by the Hon'ble Apex Court, that quashing of the criminal proceedings is an exception than a rule. The inherent powers of the High Court under Section 482 Cr.P.C. itself envisages three circumstances under which the inherent jurisdiction may be exercised:-(i) to give effect an order under the Code; (ii) to prevent abuse of the process of the court; (iii) to otherwise secure the ends of justice. The power of High Court is very wide but should be exercised very cautiously to do real and substantial justice for which the court alone exists.

9. The High Court would not embark upon an inquiry as it is the function of the Trial Judge/Court. The interference at the threshold of quashing of the criminal proceedings in case in hand cannot be said to be exceptional as it discloses prima facie commission of an offence. In the result, the prayer for quashing of proceeding is refused. There is no merit in this application filed under Section 482 Cr.P.C., thus the same is accordingly dismissed. The applicants have ample opportunity to raise all the objections at the appropriate stage.

10. However, the applicants are directed to appear and surrender before the court below and apply for bail within a period of thirty days from today, the prayer for bail shall be considered expeditiously in accordance with law after hearing the Public Prosecutor.

11. In case the applicants fail to surrender within the stipulated period the court below shall take appropriate action against him.

(2020)02ILR A1449

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 29.01.2020

BEFORE
THE HON'BLE RAM KRISHNA GAUTAM, J.

Application U/S 482 No. 599 of 2012

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

Counsel for the Applicants:
Sri Satyam Narayan, Sri Adil Jamal, Sri Apurva Hajela

Counsel for the Opposite Parties:
A.G.A., Sri S.P. Mishra, Sri V.K. Jaiswal

A. Criminal Law-Code of Criminal Procedure,1973- Section 482- When earlier application u/s 482 Cr.Pc was rejected while granting an opportunity for moving a Discharge Application before Trial court at appropriate stage, means there was no ground for any indulgence, under exercise of inherent jurisdiction, u/s 482 of Cr.P.C.
Once relief for quashing of the chargesheet as well as entire proceeding was declined by the High Court in the previous Criminal Application,

then at the time of framing of charge, while dismissing Discharge Application, pre trial acquittal is not permissible.

B. Criminal Law - Code of Criminal Procedure,1973- Section 240 - At the time of framing of charge as well as disposal of Discharge Application, hair splitting analysis of evidence and fact is not needed.

Only the existence of a prima facie case is required to be seen at the time of framing the charge and Charge can even be framed on the basis of strong suspicion**.**

C. Criminal Law-Code of Criminal Procedure,1973 - Section 482- This Court, in exercise of inherent power, u/s 482 of Cr.P.C., is not expected to embark upon factual matrix because it may prejudice fair trial and it is not under the domain of this Court as held by the Hon'ble Supreme Court.

D. Criminal Law-Code of Criminal Procedure,1973 - Section 239, Section 245 (2)- Application for discharge moved, u/s 245 (2) of Cr.P.C, which is under Chapter XV of Cr.Pc, 1973, i.e., pertaining to complaint cases, whereas present case is a State case hence Application for discharge ought to have been rejected.

Application for Discharge in a warrant case case can only be filed under section 239 of the Cr.Pc and not under section 245 (2) Cr.Pc which provides for discharge in Complaint Cases. Hence, discharge application filed u/s 245 (2) Cr.Pc was not maintainable in the present case. (Para 9,10,11,12,14,15)

Criminal application rejected.

Case law discussed:-

1. Palwinder Singh Vs. Balwinder Singh & ors., (2008) 14 SCC 504

2. St. of A.P Vs. Gaurishetty Mahesh, JT (2010) 6 SC 588

3. Hamida Vs. Rashid, (2008) 1 SCC 474

4. Monica Kumar Vs. St. of U.P (2008) 8 SCC 781

5. Popular Muthiah Vs. St., Re. by Insp. of Police, (2006) 7 SCC 296

6. Dhanlakshmi Vs. R.Prasana Kumar, (1990) Cr LJ 320 (DB), AIR (1990) SC 494

7. St. of Bih. Vs. Murad Ali Khan, (1989) Cr LJ 1005: AIR (1989) SC 1

(Delivered by Hon'ble Ram Krishna Gautam, J.)

1. This Application, under Section 482 of Code of Criminal Procedure, 1973 (Hereinafter in short referred to as 'Cr.P.C.), has been filed by the Applicants, Idrish, Son of Sadik, Amna, Wife of Safakat, Haseena, Wife of Haseen, and Irfan, Son of Taushif, against State of U.P. and Majid Ali, with a prayer for setting aside impugned order, whereby, application moved for discharge was rejected by the Trial court, in Case No.361 of 2011, under Sections 420, 467, 468 and 471 of Indian Penal Code (Hereinafter in short referred to as 'IPC'), Police Station-Garh Mukteshwar, District Ghaziabad, pending in the court of Civil Judge (Junior Division)/Judicial Magistrate, Ghaziabad.

2. Learned counsel for applicants argued that applicant no.1, Idrish, is no more. Counter affidavit, filed by Opposite party no.2, is a defective counter because it has been written at Page No. 3 of the affidavit that the deponent is Opposite party no.2, whereas, deponent is not Opposite party no.2, as Opposite party no.2 is Majid Ali and he has not filed his counter affidavit. Hence, this counter

affidavit may not be taken into consideration.

3. A case crime number was got registered upon report of Idrish, present Applicant No.1, against Opposite party no.2 and others for kidnapping and getting deed regarding his land executed on the basis of fraud and fabrication, wherein, investigation had resulted in submission of chargesheet. Name of Smt. Bhuriya, who is wife of Idrish, was got mutated in the revue record, but, upon protest and investigation of Idrish, same was got deleted. Idrish was rightful owner of the property in question and he had executed alienation deed in favour of vendee, duly witnessed by Amna and Haseen, i.e., there is no commission of offence against any of the applicants. This accusation was under abuse of process of law for which a proceeding, under Section 482 of Cr.P.C., being Application U/S 482 No.8416 of 2011, Idrish and others vs. State of U.P. and another, was filed, wherein, vide order, dated 16.3.2011, an opportunity for filing of Discharge Application, before the Trial court, was given and for availing this opportunity, an application for discharge was moved before the Trial court, but, Trial court, in utter abuse of process of law, rejected same. Hence, for avoiding abuse of process of law, this Application, under Section 482 of Cr.P.C., has been filed, with above prayer.

4. Learned counsel, appearing for Opposite party no.2, has vehemently opposed this Application with this contention that the sale deed was obtained by Opposite party no.2 from Smt. Bhuriya. She was owner of the property in question. She had executed sale deed for a valid consideration and it was a registered document. Hence, informant, Opposite party no.2 was bonafide purchaser of the land in question and he was real owner of the same. Even after having knowledge of this fact, Idrish, got executed subsequent sale deed in favour of accused persons and it was witnessed by other accused persons. This was a fraud and fabrication by accused persons for which this case crime number was got registered and investigation resulted in submission of chargesheet, wherein, cognizance was taken.

5. A proceeding, under Section 482 of Cr.P.C., being Application U/S 482 No. 8416 of 2011, was filed with the prayer for setting aside entire proceeding, including, chargesheet, but this prayer was not accepeted by the Court, rather, an opportunity to file Discharge Application was granted and once relief, prayed for quashing of the chargesheet as well as entire proceeding, was declined, then, at the time of framing of charge, while dismissing Discharge Application, pre trial acquittal is not permissible. Hence, Trial court has rightly rejected Application, thus, this Application be dismissed.

6. Learned AGA, representing State of U.P., has also opposed this Application.

7. Having heard learned counsel for both parties and gone through materials placed on record, it is apparent that fact of death of Idrish is yet to be brought in the proceeding in trial that too for getting this fact verified as per Circulars of this Court, issued on administrative side, by way of recording statements of Police personnel, who executed process as well as of near relatives of the deceased. Hence, for disposal of present Application, above fact is of no relevance. However, it may be raised before the Trial court, where,

appropriate abatement order, while observing, appropriate procedure, will be passed.

8. So far as counter affidavit and averment made by the deponent is concerned, it may be mentioned that nowhere it has been mentioned that deponent is Opposite Party No.2. Hence, this very argument of learned counsel for applicants, on this very score, is against fact on record.

9. This Court, while disposing of Application U/S 482 No.8416 of 2011, has not granted reliefs, as payed for, on the ground of abuse of process of law, except an opportunity for moving a Discharge Application before Trial court at appropriate stage, while considering contentions raised by the applicants before the Court. Meaning thereby, there was no ground for any indulgence, under exercise of inherent jurisdiction, under Section 482 of Cr.P.C., as is being argued before this Court.

10. Admittedly, a civil suit is pending and the matter in question is pending before Civil court. Unless registered sale deed as well as registered power of attorney is being declared void ab-initio or is being cancelled by the competent court in above civil proceeding, the same exists and it was under the knowledge of Idrish, while executing subsequent sale deed, but, nowhere this was mentioned in the sale deed that there is previous sale deed, executed for the same land, and there is a civil suit pending for its cancellation. Hence, apparently, prima facie, there was sufficient ground for framing of charge. As was held by the Trial court pre acquittal trial is not permissible and at the time of framing of charge as well as disposal of Discharge Application, hair splitting analysis of evidence and fact is not needed. Charge can even be framed on the basis of strong suspicion as has been held by the Apex Court, in the case of **Palwinder Singh vs. Balwinder Sing and others, reported in (2008) 14 Supreme Court Cases 504.**

I1. In present case, this Court, too, in disposal of a proceeding, under Section 482 of Cr.P.C., has not given relief, prayed for. Meaning thereby, there was no ground for any indulgence, hence, there remained ground for proceeding and this ground was held to be sufficient for framing of charge.

12. Hence, under all above facts and circumstances, this Court, in exercise of inherent power, under Section 482 of Cr.P.C., is not expected to embark upon factual matrix because it may prejudice fair trial and, more so, it is not under the domain of this Court as has been held by the Apex Court, in **State of Andhra Pradesh v. Gaurishetty Mahesh, JT 2010 (6) SC 588: (2010) 6 SCALE 767: 2010 Cr. LJ 3844**, has propounded that *"While exercising jurisdiction under section 482 of the Code, the High Court would not ordinarily embark upon an enquiry whether the evidence in question is reliable or not or whether on a reasonable apprehension of it accusation would not be sustained. That is the function of the trial Judge/Court"*. In another subsequent judgment, in the case of **Hamida v. Rashid, (2008) 1 SCC 474,** Hon'ble Apex Court propounded that *"Ends of justice would be better served if valuable time of the Court is spent in hearing those appeals rather than entertaining petitions under Section 482 at an interlocutory stage which after filed with some oblique motive in order to*

circumvent the prescribed procedure, or to delay the trial which enable to win over the witness or may disinterested in giving evidence, ultimately resulting in miscarriage of Justice". In again yet another judgment, in the case of **Monica Kumar v. State of Uttar Pradesh, (2008) 8 SCC 781,** the Apex Court has propounded "Inherent jurisdiction under Section 482 has to be exercised sparingly, carefully and with caution and only when such exercise is justified by the tests specifically laid down in the section itself." While interpreting this jurisdiction of High Court Apex Court, in the case of **Popular Muthiah v. State, Represented by Inspector of Police, (2006) 7 SCC 296,** has propounded *"High Court can exercise jurisdiction suo motu in the interest of justice. It can do so while exercising other jurisdictions such as appellate or revisional jurisdiction. No formal application for invoking inherent jurisdiction is necessary. Inherent jurisdiction can be exercised in respect of substantive as well as procedural matters. It can as well be exercised in respect of incidental or supplemental power irrespective of nature of proceedings".*

13. Regarding prevention of abuse of process of Court, Apex Court, in the case of **Dhanlakshmi v. R.Prasana Kumar, (1990) Cr LJ 320 (DB): AIR 1990 SC 494,** has propounded *"To prevent abuse of the process of the Court, High Court, in exercise of its inherent powers under section 482, could quash the proceedings, but, there would be justification for interference only when the complaint did not disclose any offence or was frivolous vexatious or oppressive"* as well as in the case of **State of Bihar v. Murad Ali Khan, (1989) Cr LJ 1005: AIR 1989 SC 1,** Apex Court propounded *"In exercising jurisdiction under Section 482 High Court would not embark upon an enquiry whether the allegations in the complaint are likely to be established by evidence or not".*

14. Meaning thereby, exercise of inherent jurisdiction under Section 482 Cr.P.C. is within the limits, propounded as above.

15. One thing is also to be noted that it was a State case, wherein chargesheet was filed, whereas, application for discharge was moved, under Section 245 (2) of Cr.P.C, which is under Chapter XV of Code of Criminal Procedure, 1973, i.e., pertaining to complain cases. Thus, on this score, too, Application for discharge ought to have been rejected, but, the Trial court considered Application for discharge on the merit and not on took a technical view and on merit, too, Discharge Application was rejected.

16. Accordingly, there was no abuse of process of law.

17. In view of what has been discussed above, this Application, under Section 482 of Cr.P.C., merits dismissal and it stands **dismissed** accordingly.

(2020)02ILR A1453

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 10.01.2020

BEFORE
THE HON'BLE SURESH KUMAR GUPTA, J.

Application U/S 482 No. 738 of 2020

Smt. Dhanrawati Devi & Ors. ...Applicants
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicants:
Sri Narendra Deo Shukla, Sri Pankaj Kumar Tiwari

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

A. Criminal Law-Indian Penal Code-Sections 323, 504, 506, 354, 147 - Appeal against conviction.

In the present case detail cognizance order as well as summoning order is passed by the learned Magistrate with judicial application of mind as the same reflects that the learned Magistrate has applied his mind to material available on record and materials are sufficient to proceed against the applicants. The cognizable order is not a proforma order, every aspect is touched by the learned Magistrate and applicants failed to adduce any evidence which caused prejudice to them so cognizance order is perfectly valid and there is no occasion to quash the same.(Para 21)

From the perusal of the material on record and looking into the facts of the case at this stage it cannot be said that no offence is made out against the applicants. (Para 22)

Application u/s 482 disposed of. (Para 25)

List of cases cited:-

1. Fakhruddin Ahmad Vs. St. of Uttranchal [2008 (17) SCC 157]

2. Akash Garg Vs. St. of U.P. [2011 (11) ADJ 849],

3. Kanchan Vs. St. of U.P. (Application u/s 482 Cr.P.C. No. 45044 of 2019) ,

4. Mukund Lal Verma and another Vs. State of U.P. and another (Application u/s 482 Cr.P.C. No. 2307 of 2003),

5. R.P. Kapur Vs. St. of Punj., A.I.R. 1960 S.C. 866,

6. St. of Har. Vs. Bhajan Lal, 1992 SCC (Cr.) 426,

7. St. of Bihar Vs. P.P. Sharma, 1992 SCC (Cr.) 192

8. Zandu Pharmaceutical Works Ltd. Vs. Mohd. Saraful Haq and another (Para-10) 2005 SCC (Cr.) 283.

(Delivered by Hon'ble Suresh Kumar Gupta, J.)

1. Vakalatnama filed today by Sri Rajesh Kumar Pandey Advocate on behalf of the informant, is taken on record.

2. This application has been filed by the applicants to quash the chargesheet dated 29.10.2019 being criminal case No. 119 of 2019 (State of U.P. Vs. Prashant Tiwari and others) under Sections 323, 504, 506, 354, 147 IPC, P.S. Sujanganj, District Jaunpur, arising out of case crime No. 115 of 2019 and also to quash the cognizance as well as summoning order dated 18.11.2019 passed by Judicial Magistrate-Ist, Jaunpur.

3. Heard learned counsel for the applicants, learned counsel for the informant and the learned AGA.

4. Learned counsel for the applicants submitted that the learned Judicial Magistrate passed the impugned cognizance as well as summoning order on 18.11.2019 without application of mind. Thus, the order dated 18.11.2019 is unreasoned, unspecific, illegal and arbitrary and, thus, not sustainable in the eye of law. Learned trial court passed the order in very mechanical manner and in a routine way without discussion of allegation contained in the FIR and statement under Section 161 Cr.P.C. of the prosecution witness. Hence, the cognizance order passed by the Magistrate is an abuse of the process of the Court so cognizance order, is likely to be quashed.

5. Learned counsel for the applicants submitted that no offence at all under sections 323, 504, 506, 354, 147 IPC is made out against the applicants and the statement under Section 164 Cr.P.C. of the opposite party No. 2 is inherently, improbable and absolutely false and fabricated. In fact, she has not received any injury in the alleged occurrence but she has alleged that she was beaten by the applicants and further submitted that there is no any direct or indirect evidence and no any documentary evidence with regard to objectionable photograph of the opposite party No. 2 and others to support the prosecution version. It is further submitted that the husband of the opposite party N. 2, namely, Vivek Kumar Tiwari is a practising Advocate in Civil Court, Jaunpur and police official of the P.S. Sujanganj are under influence of him. On the influence of the husband of PW-2 Sujanganj Police registered the false and frivolous cases against the applicant. Further submits that the applicant used to live in Bombay to earn his livelihood and opposite party No. 2 and her husband lives in village and want to grab entire movable and immovable property of the applicants and further submitted that there is also civil dispute between applicant-side and opposite party No. 2-side. On account of civil dispute, the relation between both the parties are restrained and shower and on account of these reasons, impugned FIR has been lodged only for harassment of the applicants. On this ground learned counsel for the applicants submitted that charge sheet against the applicants is false and frivolous and vexatious so the charge sheet submitted by the Investigating Officer, is liable to be quashed.

6. First of all, I considered whether the cognizance order is passed by the Magistrate is liable to be quashed or not in this regard learned counsel for the applicants submitted that learned Magistrate passed the cognizance order without application of his mind.

7. Learned counsel for the petitioner relied upon paragraph Nos. 14 and 15 of the judgement of the Apex Court in the case of ***Fakhruddin Ahmad Vs. State of Uttranchal*** decided on ***5th September, 2008*** reported in [2008 (17) SCC 157] which are quoted below:-

"14.From the afore-noted judicial pronouncements, it is clear that being an expression of indefinite import, it is neither practicable nor desirable to precisely define as to what is meant by `taking cognizance'. Whether the Magistrate has or has not taken cognizance of the offence will depend upon the circumstances of the particular case, including the mode in which the case is sought to be instituted and the nature of the preliminary action.

15.Nevertheless, it is well settled that before a Magistrate can be said to have taken cognizance of an offence, it is imperative that he must have taken notice of the accusations and applied his mind to the allegations made in the complaint or in the police report or the information received from a source other than a police report, as the case may be, and the material filed therewith. It needs little emphasis that it is only when the Magistrate applies his mind and is satisfied that the allegations, if proved, would constitute an offence and decides to initiate proceedings against the alleged offender, that it can be positively stated that he has taken cognizance of the offence. Cognizance is in regard to the offence and not the offender."

8. Learned counsel for the applicant also relied upon ***paragaraph Nos. 6 and 12*** of the judgement passed by Hon'ble Allahabad High Court in the case of ***Akash Garg Vs. State of U.P.*** reported in ***[2011 (11) ADJ 849].***

"6. It is well settled that the Magistrate is not bound by the conclusion of the Investigating Officer. He is competent under law to form his own independent opinion on the basis of the materials collected during the investigation. The Magistrate may or may not agree with the conclusion of the Investigating Officer. If the Investigating Officer submits charge sheet, in that eventuality the Magistrate may differ from the charge sheet and refuse to take cognizance by holding that no case is made out. In a case where the final report is submitted the Magistrate may on perusal of the materials placed in support of the final report opine that the conclusion of the Investigating Officer is not correct and the offence is made out. In that eventuality, the Magistrate may reject the final report and take cognizance of the offence.

12. It is also well settled that at the stage of taking cognizance of an offence, the Magistrate is not required to examine thoroughly the merits and demerits of the case and to record a final verdict. At that stage he is not required to record even reasons, as expression of reasons in support of the cognizance may result in causing prejudice to the rights of the parties (complainant or accused) and may also in due course result in prejudicing the trial. However, the order of the Magistrate must reflect that he has applied his mind to the facts of the case. In other words at the stage of taking cognizance what is required from the Magistrate is to apply his mind to the facts of the case including the evidence collected during the investigation and to see whether or not there is sufficient ground (prima facie case) to proceed with the case. The law does not require the Magistrate to record reasons for taking cognizance of an offence."

9. The present case need to be examined in the light of the aforesaid settled principal given by Hon'ble Apex Court as well as another cases cited by the learned counsel for the applicants namely, ***Kanchan Vs. State of U.P. (Application u/s 482 Cr.P.C. No. 45044 of 2019) and Mukund Lal Verma and another Vs. State of U.P. and another (Application u/s 482 Cr.P.C. No. 2307 of 2003).***

10. What is meant by 'taking cognizance' in regard to an offence by a competent Magistrate is not defined or described in the Code of Criminal Procedure, 1973 (Cr.P.C.) or any other act. However the term has acquired a definite connotation through well settled judicial pronouncements.

11. The term 'taking cognizance' actually means 'become aware of', but in reference to a Court or a Judge, it means 'to take notice of judicially'. The term has no mystic significance in criminal law. In practice 'taking cognizance' means taking notice of an offence for initation of proceedings under Section 190 Cr.P.C.

12. 'Cognizance' refers to the point when the court first takes judicial notice of an offence by not only applying its mind to the contents of the complaint/police report, but also proceeding further as provided further in Chapter XIV of the Cr.P.C.

13. Taking cognizance includes either taking steps to see whether there is basis for initiating a judicial proceeding or initiating a judicial proceeding against an offender by the Magistrate.

14. Ordinarily, a citizen can initiate criminal proceedings against an offence by two means. He may either lodge an FIR before the Police Officer (Station House Officer) if the offence is a cognizable one, or he may lodge complaint before a competent Judicial Magistrate irrespective of whether the offence is cognizable or non-cognizable. Any Magistrate of the first class and the duly empowered second class Magistrate may take cognizance of any offence for further proceedings.

15. As per Section 190(1) an empowered Magistrate may take cognizance of any offence-

a). Upon receiving a complaint of facts which constitute such an offence.

b). Upon a police report of such facts.

c). Upon information received from any person other than a police officer, or upon his own knowledge, that such an offence has been committed."

16. Thus the cognizance is taken when the Magistrate applies his judicial mind to the facts mentioned in a complaint or to a police report or upon information received from any person regarding an offence.

17. The issuance of process by the court occurs at a subsequent stage duly after considering the materials placed before it. It happens when the Magistrate decides to proceed against the offender whom a prima facie case is clearly made out. Taking cognizance of an offence is not equivalent to issuance of process: issuance of process takes place only after taking cognizance of the offence. When a Magistrate applies his mind for issue of process, he must be held to have taken cognizance of the offences the complaint put forth.

18. The cognizance and summoning order passed by learned Magistrate dated 18.11.2019 is read as under:-

"न्यययायालय जज0एम 0 प्रथम जजौनपपुर , अ 0सस0 115/19, मपु 0नस0 119 स्टजट बनयाम प्रशयान्त ततवयारर थयानया सपुजयान गसज, तदिनयासक 18.11.19- आज आररोप पत्र प्रयाप्त हहआ। सम्बनन्धित प्रकरण मम तववजचक दयारया वयादि तववजचनया अतभियपुक्तगण प्रशयासत ततवयारर उरर जम्मम , मनरोज कपु मयार ततवयारर , प्रमरोदि कपु मयार ततवयारर , सन्तरोष कपु मयार दिपुबज कज तवरुद्ध अन्तगरत न्धियारया 147, 323, 504, 506, 354 आई 0पर 0सर 0 व अतभियपुक्तया न्धिनरयावतर दिजवर कज तवरुद्ध अन्तगरत न्धियारया 147, 323, 504, 506 आई 0पर 0सर 0 मम आररोप पत्र प्रस्तपुत तकयया गययया। ममनज समस्त पपुललस प्रपत्रत्रों कया सम्यक पररशरलन तकययया। अतभियक्तपु गण उपयरक्तपु कज तवरुद्ध उपररोक्त न्धियारयाओस मम अपरयान्धि कया प्रससजयान ललयज जयानज कया आन्धियार पययारप्त हहै। तदिनपुसयार प्रससजयान ललययया जयातया हहै। दिजर रलजस्टर हरो। अतभियपुक्तगण 17.12.19 कज जररयज सम्मन तलब हरो। "

19. So all the case laws relied by the learned counsel for the applicants, are not applicable in the present case.

20. At the stage of taking congnizance, Magistrate can simply form an opinion as to whether the case is fit for taking and committing the matter for trial or not. In this present case, learned trial court clearly express his opinion that he perused all the records and clearly

indicated that the material placed before him are sufficient to proceed with the case.

21. In the present case detail cognizance order as well as summoning order is passed by the learned Magistrate with judicial application of mind as the same reflects that the learned Magistrate has applied his mind to material available on record and materials are sufficient to proceed against the applicants. The cognizable order is not a proforma order, every aspect is touched by the learned Magistrate and applicants failed to adduce any evidence which caused prejudice to them so cognizance order is perfectly valid and there is no occasion to quash the same.

22. From the perusal of the material on record and looking into the facts of the case at this stage it cannot be said that no offence is made out against the applicants. All the submission made at the bar relates to the disputed question of fact, which cannot be adjudicated upon by this Court in exercise of power conferred under Section 482 Cr.P.C. At this stage only prima facie case is to be seen in the light of the law laid down by Supreme Court in cases of ***R.P. Kapur Vs. State of Punjab, A.I.R. 1960 S.C. 866, State of Haryana Vs. Bhajan Lal, 1992 SCC (Cr.) 426, State of Bihar Vs. P.P.Sharma, 1992 SCC (Cr.) 192 and lastly Zandu Pharmaceutical Works Ltd. Vs. Mohd. Saraful Haq and another (Para-10) 2005 SCC (Cr.) 283.*** The disputed defence of the accused cannot be considered at this stage. Moreover, the applicants have got a right of discharge according to the provisions prescribed in Cr.P.C. as the case may be through a proper application for the said purpose and he is free to take all the submissions in the said discharge application before the Trial Court.

23. The prayer for quashing the cognizance order as well as summoning order and charge sheet hereby refused.

24. However, it is provided that if the applicants appear and surrender before the court below within **15 days** from today and apply for bail, then the bail application of the applicant be considered and decided expeditiously in view of the settled law laid by ***Hon'ble Supreme Court.*** For a period of **15 days** from today or till the disposal of the application for grant of bail whichever is earlier, no coercive action shall be taken against the applicants. However, in case, the applicants do not appear before the Court below within the aforesaid period, coercive action shall be taken against them.

25. With the aforesaid directions, this application is finally **disposed of.**

(2020)02ILR A1458

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 20.01.2020

BEFORE
THE HON'BLE SURESH KUMAR GUPTA, J.

Application U/S 482 No. 1329 of 2020

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

Counsel for the Applicant:
Sri Manish Tiwary, Sri Syed Imran Ibrahim, Sri Manas Bhargava

Counsel for the Opposite Parties:
A.G.A., Sri Muktesh Kumar Singh

A. Criminal Law - Code of Criminal Procedure,1973 – Section 190(1)(b) - Protest petition allowed on basis of affidavits filed by witnesses which are extraneous to the

case diary- Cognizance and summoning orders passed by the court below by considering the affidavit filed by the named eye witnesses is not legally sustainable.

Consideration of material extraneous to the case diary is not permissible while summoning the accused on a Protest Petition.

It is the incumbent duty of the Investigating Officer to record the statement under Section 161 Cr.P.C. of named witnesses cited in the FIR.

B. Criminal Law - Code of Criminal Procedure,1973 - Section 190(1)b - Obligatory upon the Magistrate either to direct the Investigating Officer to further investigate the matter under Sections 156(3) Cr.P.C. or adopt the procedure of Complaint Case as per law laid down by *Pakhandu Vs. State of U.P.* Where affidavits and material extraneous to the Case Diary are relied upon, along with the Protest Petition, by the First Informant, then the two courses open to the Magistrate are either to direct the police to conduct further investigation u/s 173(8) or to treat the Protest Petition as a Complaint and proceed under Chapter XV of the Cr.Pc. (Para 13, 14)

Application u/s 482 Cr.Pc allowed

Case law discussed:-

1. Crl. Misc. Application No. 3264 of 2000 (Pakhandu Vs. State of U.P.), J.I.C (20020 1 104, A.C.C 2001 (43) 1096.

2. Crl. Revision No. 1210 of 2000 (Harkesh and others Vs. State of U.P. and others) decided on 31.8.2001

(Delivered by Hon'ble Suresh Kumar Gupta, J.)

1. This application u/s 482 Cr.P.C. has been filed by the applicant with a prayer to quash the summoning order dated 7.12.2019 passed by Civil Judge, (SD/FTC), Jaunpur, in case No. 24 of 2019 (Rinki Singh Vs. State of U.P.) arising out of case crime No. 168 of 2019, under Sections 354, 504, 506 IPC, P.S. Newaria, District Jaunpur.

2. The brief facts of this case are that the opposite party No. 2 lodged FIR by means of Application under Section 156(3) Cr.P.C. dated 17.5.2019 with the allegations that on 7.5.2019 the opposite party No. 2 who is an 'Asha-Sangini', at that time was invited by the applicant to participate in a meeting that was presided over by the applicant (Medical Superintendent) and when the meeting was over, the applicant allegedly called the prosecutrix in his room and made sexual overtures at her and also the applicant tried to establish physical contact with her which was resisted by the opposite party No. 2. Being aggrieved with applicant's molestation, hurling abuses and intimating with her, on the basis of 156(3) Cr.P.C., FIR was lodged by the opposite party No. 2 against the applicant under Sections 354, 504 and 506 IPC.

3. Subsequently, the statement of the victim has been recorded under Section 164 Cr.P.C. before the learned Magistrate and under Section 164 Cr.P.C. she elaborated version as brought forward by her in the FIR and in the statement under Section 161 Cr.P.C. Investigating Officer had recorded the statement of three independent witnesses, namely, Devendra Kumar Singh, Ankit Kumar Maurya and Rekha Rani Pandey. On 29.9.2019, Investigating Officer incorporated the statements of 13 independent witnesses. All of them have specifically stated that the proceedings have been initiated by the prosecutrix against the applicant are false, malafide and only in order to exert pressure upon him as the applicant recommended the cancellation of vaccination centre of opposite party No. 2.

Investigating Officer after considering the statement of independent witnesses submitted the final report in favour of the applicant.

4. Being aggrieved by the final report, opposite party No. 2 moved a Protest Petition before the learned court below on 22.11.2019 alongwith the affidavit of three witnesses, namely, Bhawana Singh, Rekha Maurya and Kamlesh, a copy of the Protest Petition is annexed as annexure-7 of this application.

5. After considering the protest petition which includes the affidavit of the above named witnesses, learned court below rejected the final report and passed the cognizance order to face the trial under Sections 354, 504 and 506 IPC. Learned counsel for the applicant submitted that the learned court below relied the Protest Petition only on the basis of the affidavit which comes under the category of extraneous material. This affidavit is not the part of the case diary.

6. Learned counsel for the applicant relied upon the following judgements passed in ***Crl. Misc. Application No. 3264 of 2000 (Pakhandu Vs. State of U.P.) decided on 9.13.2001; Application U/s 482 Cr.P.C. No. 882 of 2019 (Rishipal and others Vs. State of U.P.) decided on 20.2.2019; Application u/s 482 Cr.P.C. No. 4314 of 2005 and Application U/s 482 Cr.P.C. No. 6652 of 2005 (V.V. Shree Khande and others Vs. State of U.P. and another) both decided on 14.3.2019.***

7. Learned AGA and learned counsel for the opposite party No. 2 vehemently opposed the prayer made by the applicant and submitted that the learned trial court rightly accepted the Protest Petition filed by the opposite party No. 2 and submitted that the order passed by Civil Judge (Senior Division) Fast Track Court, Jaunpur dated 17.12.2019 is perfectly legal and there is no irregularity or illegality in the order passed by the learned court below. Learned court below clearly submitted that the Investigating Officer did not bother to record the statement of cited witnesses in the FIR. Investigating Officer only recorded the statement of another so-called independent witness. Since, the complainant clearly stated in the Protest Petition that the Investigating Officer did not consider the affidavit filed by the cited witnesses-Kamlesh Yadav, Rekha Maurya and Bhawna Singh which is earlier submitted by him before the S.P. concerned. Learned trial court opined that the offence relating to sexual assault, is solely based on the solitary evidence of the victim. On this conclusion, learned court below rightly summoned the accused under Section 190(1)b as a State case. There is no infirmity in the order passed by the learned Magistrate.

8. Learned counsel for the applicants contended that where police submits final report, though it is open to the Magistrate to take cognizance under S. 190 (1) (b) Cr. P. C. on the basis of investigation records but in that event he cannot take any external aid of any other piece of evidence or material which does not form part of police papers. If he decides to take into account any material or evidence other than police papers prepared during investigation, he is bound to comply with the requirement of Ss. 200 and 202 of the Code. It was argued that since in the present case the learned Magistrate has taken into consideration the affidavits of the complainant and other witnesses filed along with the protest petition, he was

bound to follow procedure laid down for complaint cases. It was also contended that if the Magistrate felt that the investigating officer failed in his duty in collecting relevant material, he should have directed further investigation instead of issuing process against the applications on the basis of material brought on record in the form of affidavits.

9. Chapter XIV of the Code of Criminal Procedure deals with the conditions requisite for initiation of proceedings. For the purpose of this case we are concerned with S. 190 (1) alone which is reproduced below.

"190. Cognizance of offences by Magistrates :- (1) Subject to the provisions of this Chapter, any Magistrate of the first class, and any Magistrate of the second class specially empowered in this behalf under sub-sec. (2), may take cognizance of any offence - (a) upon receiving a complaint of facts which constitute such offence; (b) upon a police report of such facts; (c) upon information received from any person other than a police officer, or upon his own knowledge, that such offence has been committed."

10. I have heard the learned counsel for the applicant, learned AGA and perused the record.

11. Learned counsel for the appellant relied upon paragraph 15 and 16 of the Judgement passed in ***Crl. Misc. Application No. 3264 of 2000 (Pakhandu Vs. State of U.P.) decided on 9.13.2001*** which is quoted hereunder-

"(15) From the aforesaid decisions, it is thus clear that where the Magistrate receives final report the following four courses are open to him and he may adopt any one of them as the facts and circumstances of the case may require :- (I) He may agreeing with the conclusions arrived at by the police, accept the report and drop the proceedings. But before so doing, he shall give an opportunity of hearing to the complainant; or (II) He may take cognizance under Section 190 (1) (b) and issue process straightway to the accused without being bound by the conclusions of the investigating agency, where he is satisfied that upon the facts discovered or unearthed by the police, there is sufficient ground to proceed; or (III) he may order further investigation, if he is satisfied that the investigation was made in a perfunctory manner, or. (IV) he may, without issuing process or dropping the proceedings decide to take cognizance under Section 190 (1) (a) upon the original complaint or protest petition treating the same as complaint and proceed to act under Sections 200 and 202, Cr. P. C. and thereafter decide whether complaint should be dismissed or process should be issued.

(16) Where the Magistrate decides to take cognizance of the case under Section 190 (1) (b) of the Code ignoring the conclusions arrived at by the investigating agency and applying his mind independently to the facts emerging from the investigation records, in such a situation the Magistrate is not bound to follow the procedure laid down in Sections 200 and 202 of the Code, and consequently the proviso to Section 202 (2), Cr. P. C. will have no application. It would however be relevant to mention that for forming such an independent opinion the Magistrate can act only upon the statements of witnesses recorded by the police in the case diary and other material

collected during investigation. It is not permissible for him at that stage to make use of any material other than investigation records, unless he decides to take cognizance under Section 190 (1) (a) of the Code and calls upon the complainant to examine himself and the witnesses present if any under Section 200."

12. On perusal of the Judgement of this Court passed in ***Crl. Revision No. 1210 of 2000 (Harkesh and others Vs. State of U.P. and others) decided on 31.8.2001*** which is quoted hereunder-

"(16.) The position is thus clear that when Magistrate receives police report under Section 173 (2), he is entitled to take cognizance of an offence even if the police report is to the effect that no case is made out against the accused. The Magistrate can take into account the statements of the witnesses examined by the police during investigation and other material collected during investigation and form his own opinion independently without being bound by the conclusions arrived at by the investigating agency and take cognizance under Section 190 (1) (b) of the Code and direct the issue of process to the accused. However the Magistrate cannot make use of any material or evidence other than the investigation records while acting under Section 190 (1) (b) of the Code. If he chooses to make use of any materials other than the investigation records, he will have to follow the procedure laid down in relation to complaint cases, on the basis of original complaint or application moved under Section 156 (3) Cr. P. C. which otherwise tantamount to complaint or the Protest petition filed against acceptance of final report treating the same as complaint. This proposition would be in consonance with the provision of Section 207 which inter-alia provides for supply of copy of statements recorded under sub-section (3) of Section 161 of all persons whom the prosecution proposes to examine as its witnesses and any other document or relevant extract thereof forwarded to the Magistrate with the police report under sub-section (5) of Section 173.

(17.) In the present case the learned Magistrate while taking cognizance under Section 190(1)(b) of the Code has taken into consideration the affidavits of complainant and other witnesses filed alongwith Protest Petition which was not permissible in law. He could take cognizance on the basis of the Protest Petition or the original compliant but in that event he was bound to follow procedure laid down for complaint cases. The distinction between two types of cognizance is apparent in as much as cognizance under Section 190(1(b) is taken only on the basis of papers forwarded by police under Section 173(2)Cr.P.C. but when the magistrate makes up his mind to take into consideration other material or evidence would be a case of taking cognizance under Section 190(1)(a) of the Code and for that matter procedure prescribed for complaint cases under Sections 200 and 202 Cr.P.C. has to be followed. If the Magistrate was of the opinion that the investigating officer had failed to record statements of material witnesses, it was open for the learned Magistrate to have sent back the case to police for a further investigation."

13. On considering the rulings cited by learned counsel for the appellant, cognizance and summoning orders passed by the learned Civil Judge (Senior

Division), is by considering the affidavit filed by the named eye witnesses is not legally sustainable. It is true that the statement of the cited witness was not recorded by the Investigating Officer. Investigating Officer committed the gross negligence in this matter. It is incumbent duty of the Investigating Officer to record the statement under Section 161 Cr.P.C. of named witnesses cited in the FIR, it is obligatory upon the Magistrate either to direct the Investigating Officer to further investigate the matter under Sections 156(3) Cr.P.C. or adopt the procedure of complaint case as per law laid down by ***Pakhandu Vs. State of U.P. (Supra).***

14. Considering the rival submissions made by learned counsel for the parties and perused the record, I am of the view that the impugned order dated 7.12.2019 which clearly indicates that the Magistrate considered the affidavit filed alongwith Protest Petition which cannot be sustained and summoning order is liable to be set aside.

15. The present application u/s 482 Cr.P.C. is **allowed.**

16. The impugned order dated 7.12.2019 is hereby **set aside** and the case is remanded back to the Magistrate, concerned with the direction to pass fresh order in light of the settled legal position as discussed above.

(2020)02ILR A1463

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 23.01.2020

BEFORE
THE HON'BLE SURESH KUMAR GUPTA, J.

Application U/S 482 No. 1594 of 2020

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

Counsel for the Applicants:
Sri Garun Pal Singh

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

A. Criminal law - Indian Penal Code, 1860- Section 504/ 506 - Criminal Law Amendment Act, 1932- Section 10- Cr.P.C, 1973- Section 2(d) - Offence under Section 506 I.P.C. can not be treated as non-cognizable since the offence under Section 506 I.P.C. has been made, cognizable, non-bailable and non-compoundable vide U.P. Govt. vide *Notification No. 777/VIII-94(2)-87 dated July 31, 1989* the provisions of Section 2 (d) of Cr.P.C. will not be applicable to the present case.

The U.P. Govt. vide *Notification No. 777/VIII-94(2)-87 dated July 31, 1989* made the offence u/s 506 I.P.C. as cognizable and non-bailable in accordance with the power conferred by virtue of Section 10 of Criminal Law Amendment Act, 1932. The legality and validity of the notification was upheld by the Full Bench of this Court in the case of *Mata Sewak Upadhyay and another versus State of U.P. and others* . Later, in the case of *Virendra Singh and others Vs. State of U.P. and others,* a Division Bench of this court declared the above notification as illegal since the earlier Full Bench decision was not brought before the Division Bench and it was not considered. Subsequently, in the case of *Parveen Kumar and others Vs. State of U.P. and another,* it was observed that since the Full Bench decision of this Court in *Mata Sevak Upadhyaya* has not been over-ruled or set-aside by any larger Bench of this Court or by the Apex Court, so the decision of Division Bench in Virendra Singh Vs. State of U.P. and others (supra) case cannot be given effect to. Judgment of this Court passed in *Application U/S 482 No. 1212 of 2020, Charan Singh and 3 others vs. State of U.P. and another* - held not

applicable in facts of the present case. (Para 7,8,9)

Application u/s 482 Cr.Pc rejected.

Case law discussed:-

1. Mata Sewak Upadhyaya vs. St. of U.P. & ors., reported in (1995) AWC 2031

2. Virendra Singh . & ors. Vs. St. of U.P. & ors., (2002) 45 ACC 609

3. Parveen Kumar . & ors. Vs. St. of U.P. & anr., ADJ (2011) 5 418

4. Application U/S 482 No. 1212 of 2020, Charan Singh & 3 ors. Vs. St. of U.P. & anr., (Distinguished on facts)

(Delivered by Hon'ble Suresh Kumar Gupta, J.)

1. Heard learned counsel for the appellant and learned A.G.A.

2. The present 482 Cr.P.C. application has been filed to quash the entire proceedings of case No. 771/IX of 2015 (State vs. Charan Singh & others), arising out of case crime No. 393 of 2014, under sections 504, 506 IPC, Police Station Raya, District Mathura, pending in the court of Additional Chief Judicial Magistrate, Court No. 1, Mathura.

3. Brief facts of this case are as follows-:

4. On 17.09.2014 a First Information Report was lodged by opposite party no. 2 against the applicants and 15 other persons, under sections 147, 148, 149, 307, 504, 506, 452, 354, 431, 352, 434 IPC, alleging therein that on 10.07.2014 the applicants along with other co-accused persons entered into his house and accused persons also carrying country made pistol, rifle and other dangerous weapons in their hands and not only abused his family members but also brutally beaten them and also tried to kill them by opening fire from the weapons carrying in their hands. The FIR was lodged on 17.09.2014 at 15.30 hours. During investigation the statement of first informant and witnesses were recorded by investigating officer. During investigation about 50 villagers gave their affidavits to the S.S.P. Mathura and also the investigating officer in the present case, stating therein that just to achieve his ulterior motive the opposite party no. 2 lodged the present FIR while no such incident was taken place in the village. After conclusion of the investigation, investigating officer submitted charge sheet dated 31.12.2014, under sections 504, 506 IPC, against present applicants and exonerated the rest other named accused persons. It is also submitted that on 19.06.2015, cognizance was taken by learned court below and summons were issued against the applicants and thereafter applicants were surrendered before the court below and got themselves bailed out on 06.09.2016. Thereafter on 18.01.2018 the charges were framed against the applicants in an arbitrary and mechanical manner and thereafter on 27.06.2019 statement of P.W. 1 was recorded. It is further submitted that the applicants have been falsely implicated in the present case and he also submitted that the alleged incident had taken place on 10.07.2014 and its FIR was lodged on 17.09.2014 by the opposite party no. 2 after delay of more than two months without explaining any reason of delay.

5. Mere contention of learned counsel for the applicants is that the charge-sheet under sections 504, 506 IPC was submitted by investigating officer and no offence under section 506 (part -2) is

made out against the applicants and the essential ingredients was also missing in the FIR and in the statements recorded under section 161 Cr.P.C. as such the proceedings of present case is barred by Section 2 (d) of Cr.P.C. Section 2 (d) Cr.P.C. provided that a report made by police officer in a case, which discloses after investigation, the commission of a non-cognizable offence, so the proceedings of present case only be proceeded only by making the complaint and procedure of the complaint case should be adopted by the court below.

6. Learned AGA has vehemently opposed the application by contending that the case relied upon the applicants is not applicable to the present case by means of ***Notification No. 777/VIII-94(2)-87 dated July 31, 1989*** has made the offence under section 506 I.P.C. as cognizable and non-bailable offence, whereas in the present case under section 506 I.P.C. is also involved, which according to U.P. Amendment is cognizable and non-bailable. Learned AGA has placed reliance reliance on the full Bench judgment of this Court rendered in the case of ***Mata Sewak Upadhyaya vs. State of U.P. and others, reported in 1995 AWC 2031*** wherein validity of notification making section 506 IPC as a cognizable offence has been upheld.

7. Considered the rival submissions of the parties.

The offence under section 506 I.P.C. was made cognizable and non-bailable vide ***U.P. Government Notification No. 777/VIII-94(2)-87 dated July 31, 1989*** but later on in the case of ***Virendra Singh and others Vs. State of U.P. and others, 2002(45) ACC 609*** a Division Bench of this court declared the above notification making the offence under section 506 I.P.C. cognizable and non-bailable as illegal.

Section 10 of Criminal Law Amendment Act, 1932, gives power to the State Government to declare certain offences cognizable and non-cognizable by issuing notification in the official Gazette. The U.P. Government vide ***Notification No. 777/VIII-94(2)-87 dated July 31, 1989*** has made the offence under section 506 I.P.C. as cognizable and non-bailable. The legality and validity of this notification came up for consideration before the Full Bench of this Court in the case of ***Mata Sewak Upadhyay and another versus State of U.P. and others*** (supra) wherein the Full Bench of this Court held the aforesaid notification as valid.

The above matter again came for consideration of this Court, in the case of ***Parveen Kumar and others Vs. State of U.P. and another, ADJ 2011 (5) 418,*** wherein it was observed that since the Full Bench decision of this Court in Mata Sevak Upadhyaya and another Vs. State of U.P. and others (supra) has not been over-ruled or set-aside by any larger Bench of this Court or by the Apex Court, so the decision of Division Bench in Virendra Singh Vs. State of U.P. and others (supra) case cannot be given effect to.

A perusal of judgment of **Virendra Singh Vs. State of U.P. and others** (supra) makes it clear that the Full Bench decision of this Court rendered in the case of **Mata Sevak Upadhyaya and another Vs. State of U.P. and others** (supra) was not brought before the Division Bench and it was neither considered nor discussed nor distinguished by the Division Bench.

8. In view of the discussions made above, I am of the considered view that offence under Section 506 I.P.C. can not be treated as non-cognizable as per

submissions made by the learned counsel for the applicants and since the offence under Section 506 I.P.C. has been made, cognizable, non-bailable and non-compoundable vide above mentioned notification in the State of U.P., the provisions of Section 2 (d) of Cr.P.C. will not be applicable to the present case.

Accordingly, the impugned charge sheet and the impugned order of cognizance passed by Judicial Magistrate are not liable to be quashed and the prayer for quashing the same is refused.

9. Learned counsel for the applicants relied upon the judgment of this Court passed in ***Application U/S 482 No. 1212 of 2020, Charan Singh and 3 others vs. State of U.P. and another,*** in which initially the NCR No. 104 of 2013, under sections 427, 504, 506 IPC was lodged at P.S. Raya, District Mathura. After investigation, the police has submitted charge sheet against the applicants under sections 427, 504, 506 IPC before the concerned court below and this Court has held that since the report of the police officer after investigation, disclosing commission of no-cognizable offence is to be deemed to be a complaint and the police officer, who submitted the report has been deemed to be a complaint. In other words, the charge-sheet submitted by the police in a non-cognizable offence shall be treated to be a complaint and the procedure prescribed for hearing of the complaint case shall be applicable to that case. Since, in this case charge-sheet submitted under setions 504, 506 IPC. The judgment of this Court in Charan Singh and 3 others (supra) relied by the learned counsel for the applicants is not applicable to the present case in that judgment neither the U.P. Notification No. ***Notification No. 777/VIII-94(2)-87 dated July 31, 1989*** nor the Full Bench judgment of this Court in Mata Sevak Upadhyaya and another Vs. State of U.P. and others (supra) was discussed in which the validity of above Notification held valid and affirm that the offence under section 506 IPC is a cognizable and non-bailable.

10. With the above observations, the application under Section 482 Cr.P.C. is devoid of merit and is liable to be dismissed.

11. Accordingly, the application is dismissed.

(2020)02ILR A1466

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 21.01.2020

BEFORE
THE HON'BLE RAM KRISHNA GAUTAM, J.

Application U/S 482 No. 1720 of 2020

Sukhvanti Devi & Anr. ...Applicants
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicants:
Sri Nagendra Bahadur Singh, Sri Abhishek Kumar Saroj

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

A. Criminal Law-Indian Penal Code-Sections-498-A and 304-B - Appeal against conviction.

Death, being an unnatural death, within seven years of marriage, coupled with accusation of demand of dowry and cruelty with regard to it against accused in-laws was there in the first information report. The same was also there in

the statement, recorded, under Section 161 of Cr.P.C. Autopsy examination report as well as inquest proceeding reveal that the death was owing to ante mortem hanging and asphyxia as a result of it. (Para 5)

Application u/s 482 rejected. (E-2)

List of cases cited:-

1. Amrawati and another Vs. St. of U.P. 2004 (57) ALR 290,

2. Lal Kamlendra Pratap Singh Vs. St. of U.P. 2009 (3) ADJ 322 (SC)

(Delivered by Hon'ble Ram Krishna Gautam, J.)

1. This Application, under Section 482 of Code of Criminal Procedure, 1973 (In short 'Cr.P.C.'), has been filed by the Applicants, Shakuntla Devi and Vijay Shankar Patel, with a prayer for setting aside entire proceeding of Case No. UPSN040069602019 of 2019 (Sate vs. Vijay Shankar Patel and others), arising out of Case Crime No.0069 of 2019, under Sections-498-A and 304-B of Indian Penal Code (In short 'IPC'), read with Section 3/4 of Dowry Prohibition Act, Police Station-Aurai, District-Bhadohi, pending in the court of Chief Judicial Magistrate, Bhadohi at Gyanpur, alongwith Charge Sheet No.90A of 2019, dated 13.10.2019, as well as cognizance taking order, dated 16.11.2019.

2. Learned counsel for applicants argued that in this very case crime number, , ingredients, required for constituting offence of dowry death, were lacking. A suicidal note was there and it was held to be written by the deceased herself, under her own handwriting by Forensic Science Laboratory, even then, this charge sheet has been filed and cognizance has been taken, whereas, this Court in Criminal Misc. Bail Application No.44601 of 2019, Manish Kumar Patel vs. State of U.P, vide orderm, dated 23.10.2019, has held that ingredients of offence of dowry death were not there and suicidal note was there, which revealed that deceased had committed suicide because she wanted to be Hermit, but, to respect wish of her parents, she got married, though never resumed her married life. Hence, for this accusation, with full evidence of no offence, even then, charge sheet has been filed and cognizance has been taken upon it. Hence, this Application, with above prayer.

3. Learned AGA, representing State of U.P., has vehemently opposed this Application.

4. From very perusal of the order, dated 23.10.2019, passed by a Coordinate Bench of this Court, in Criminal Misc. Bail Application No.44601 of 2019, Manish Kumar Patel vs. State, it is apparent that learned counsel for applicant had argued before that Court that suicidal note is a question to be seen during trial and it was there that the deceased had committed suicide upon her own volition and it was made part of Case Diary, hence, bail was claimed and the Court, while granting bail, had specifically mentioned that it was a bail order, without commenting on merit of case and observations made over suicidal note was with no reflection on the merit of the case. Meaning thereby, in that order, Coordinate Bench has not commented on merits of the case. Fact of suicidal note and suicidal death is a question of fact to be seen during trial and this Court, in exercise of inherent jurisdiction, under Section 482 of Cr.P.C., is not to embark upon factual

matrix because the same is under the domain of Trial court.

5. Death, being an unnatural death, within seven years of marriage, coupled with accusation of demand of dowry and cruelty with regard to it against accused in-laws was there in the first information report. The same was also there in the statement, recorded, under Section 161 of Cr.P.C. Autopsy examination report as well as inquest proceeding reveal that the death was owing to ante mortem hanging and asphyxia as a result of it, the size, situation and other internal situation of organs were indicative that though it was shown to be a suicidal death, but, it was manipulated to be a suicidal death. But, it is to be seen during trial by the Trial court. It was very well there at the time of objection in response to Bail Application and mentioned in the order passed, while deciding Bail Application. Hence, at this juncture, there is no ground for granting any indulgence for reliefs prayed for.

6. Accordingly, this Application, being devoid of merits, deserves dismissal and it stands **dismissed** accordingly.

7. However, it is directed that if the applicants appear and surrender before the court below within 30 days from today and apply for bail, their prayer for bail shall be considered and decided in view of the settled law laid by this Court in the case of **Amrawati and another Vs. State of U.P. reported in 2004 (57) ALR 290** as well as judgement passed by Hon'ble Apex Court reported in **2009 (3) ADJ 322 (SC) Lal Kamlendra Pratap Singh Vs. State of U.P.**

8. For a period of 30 days from today, no coercive action shall be taken against the applicants.

9. In case, if the applicants do not appear before the Court below within the aforesaid period, coercive action shall be taken against them.

(2020)02ILR A1468

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 23.01.2020

BEFORE
THE HON'BLE SURESH KUMAR GUPTA, J.

Application U/S 482 No. 1950 of 2020

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

Counsel for the Applicants:
Sri Shahroze Khan

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

A. Criminal Law-Indian Penal Code-Sections 419, 420, 406, 504, 506, 352 - Appeal against conviction.

At the stage of charge the court is not required to consider pros and cons of the case and to hold an enquiry to find out truth. Even in a case of grave or strong suspicion charge has been framed. The court has to consider broad probabilities of the case, total effect of the evidence and the documents produced including basic infirmities, if any. (para 5)

It is settled law that the Magistrate, at the stage of taking cognizance and summoning, is required to apply his judicial mind only with a view to taking cognizance of the offence, or. The learned Magistrate is not required to evaluate the merits of the material or evidence in support of the complaint, because the Magistrate must not undertake the exercise to find out whether the materials would lead to a conviction or not. (para 7)

Criminal complaints cannot be quashed only on the ground that the allegations made therein appear to be a civil nature. If the ingredients of the offence alleged against the accused are prima facie made out in the complaint, the criminal proceedings shall not be interdicted.(para 7)

From the perusal of the material on record and looking into the facts of the case at this stage it cannot be said that no offence is made out against the applicants. (para 8)

Application u/s 482 rejected. (E-2)

List of cases cited:-

1. Criminal Appeal No. 255 of 2019 Sau Kamal Shivaji Pokarnekar vs. The St. of Mah. & others.

2. R.P. Kapur Vs. State of Punj., A.I.R. 1960 S.C. 866,

3. St. of Har. Vs. Bhajan Lal, 1992 SCC (Cr.) 426,

4. St. of Bihar Vs. P.P.Sharma, 1992 SCC (Cr.) 192,

5. Zandu Pharmaceutical Works Ltd. Vs. Mohd. Saraful Haq and another (Para-10) 2005 SCC (Cr.) 283.

(Delivered by Hon'ble Suresh Kumar Gupta, J.)

1. Heard learned counsel for the applicants and learned AGA for the State.

2. The present 482 Cr.P.C. application has been filed to quash the order dated 16.09.2016, passed by Chief Judicial Magistrate, Bansi, District Siddharth Nagar, in criminal case No. 975 of 2015, arising out of case crime No. 274 of 2015,1. as well as the order dated 02.03.2019, passed by Additional Session Judge, Bansi, District Siddharth Nagar, in Criminal Revision No. 183 of 2016 (State vs. Haddish and others), P.S. Mishraulia, District Siddharth Nagar. It is further prayed that to stay the further proceedings of Criminal Case No. 975 of 2015, case crime No. 274 of 2015 (State vs. Haddish and others), under Sections 419, 420, 406, 504, 506, 352 IPC, pending in the court of Judicial Magistrate, Bansi, District Siddharth Nagar.

3. Learned counsel for the applicants submits that the learned Judicial Magistrate, Bansi, District Siddharth Nagar, has rejected the discharge application filed by the applicants on 16.09.2016, under section 239 Cr.P.C. seeking discharge under section 419, 420, 406, 504, 506, 352 IPC, and against the impugned order of learned magistrate rejected the application of discharge from charge levelled against the applicants being aggrieved, the applicants has filed criminal revision before the Additional Sessions Judge, Bansi, District Siddharth Nagar, and the Session Judge has also dismissed the revision vide order dated 02.03.2019 filed by the applicants. He further submits that no case is made out against the applicants and the Investigating Officer without collecting sufficient evidence submitted charge sheet against them. He also submitted that the applicants filed complaint case against Station House Officer as well as opposite party no. 2, they have been summoned to face the trial and due to this reason opposite party no. 2 lodged the FIR against the applicants and charge sheet was submitted by the investigating officer against the applicants. He next submitted that money dispute is involved between the applicant and the opposite party no. 2. It is also submitted that the allegations made in the FIR appears to be civil in nature. Facts and circumstances of the case do not constitute

the criminal charge against the applicants, hence the whole proceeding is liable to be quashed.

4. Learned AGA vehemently opposed and submitted that the evidence collected by the investigating officer is sufficient to frame the charge against the applicants, hence there is no occasion to quash the proceeding and application under section 482 Cr.P.C. is liable to be rejected.

5. It is almost settled the legal position that at the stage of charge the court is not required to consider pros and cons of the case and to hold an enquiry to find out truth. Marshalling and appreciation of evidence is not in the domain of the court at that point of time; what is required from the court is to sift and weigh the materials for the limited purpose of finding out whether or not a prima facie case for framing a charge against the accused has been made out. Even in a case of grave or strong suspicion charge has been framed. The court has to consider broad probabilities of the case, total effect of the evidence and the documents produced including basic infirmities, if any. If on the basis of the material on record, the court could form an opinion that the accused might have committed offence, it can frame the charge, but the court should not weigh the evidence as if it were holding trial. Accused can be discharged only when the charge is groundless.

6. In my opinion, the learned Additional Chief Judicial Magistrate as well as Session Court has taken into account all the relevant materials and passed the impugned order in accordance with law. So far as the contention of learned counsel for the applicants is that the criminal prosecution against the applicants could not launch because the allegation imputed against the applicants is civil in nature.

7. Hon'ble Supreme Court in Criminal Appeal No. 255 of 2019 ***Sau Kamal Shivaji Pokarnekar vs. The State of Maharashtra & others*** held that:-

" It is settled law that the Magistrate, at the stage of taking cognizance and summoning, is required to apply his judicial mind only with a view to taking cognizance of the offence, or in other words, to find out whether a prima facie cas has been made out for summoning the accused persons. The learned Magistrate is not required to evaluate the merits of the material or evidence in support of the complaint, because the Magistrate must not undertake the exercise to find out whether the materials would lead to a conviction or not.

A perusal of the complaint discloses that prima facie, offences that are alleged against the respondents. The correctness or otherwise of the said allegations has to be decided only in the Trial. At the initial stage of issuance of process it is not open to the Courts to stifle the proceedings by entering into the merits of the contentions made on behalf of the accused. Criminal complaints cannot be quashed only on the ground that the allegations made therein appear to be a civil nature. If the ingredients of the offence alleged against the accused are prima facie made out in the complaint, the criminal proceedings shall not be interdicted.".

8. From the perusal of the material on record and looking into the facts of the case at this stage it cannot be said that no offence is made out against the applicants. All the submission made at the bar relates

to the disputed question of fact, which cannot be adjudicated upon by this Court in exercise of power conferred under Section 482 Cr.P.C. At this stage only prima facie case is to be seen in the light of the law laid down by Supreme Court in cases of ***R.P. Kapur Vs. State of Punjab, A.I.R. 1960 S.C. 866, State of Haryana Vs. Bhajan Lal, 1992 SCC (Cr.) 426, State of Bihar Vs. P.P.Sharma, 1992 SCC (Cr.) 192 and lastly Zandu Pharmaceutical Works Ltd. Vs. Mohd. Saraful Haq and another (Para-10) 2005 SCC (Cr.) 283.*** The disputed defence of the accused cannot be considered at this stage.

9. On aforesaid reason, the application under section 482 Cr.P.C. is devoid of merit and hence the same is dismissed.

10. However, it is provided that if the applicants appear and surrender before the court below within one month from today and apply for bail, then the bail application of the applicants be considered and decided expeditiously in view of the settled law laid by ***Hon'ble Supreme Court***. For a period of one month from today or till the disposal of the application for grant of bail whichever is earlier, no coercive action shall be taken against the applicants. However, in case, the applicants do not appear before the Court below within the aforesaid period, coercive action shall be taken against them.

(2020)02ILR A1471

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 27.01.2020

BEFORE
THE HON'BLE SURESH KUMAR GUPTA, J.

Application U/S 482 No. 2071 of 2020

Kaju & Anr. ...Applicants
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicants:
Sri Brij Raj, Sri Ram Sagar Yadav

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

A. Criminal Law-Code of Criminal Procedure,1973- Section 190(1) - "Cognizance" is taken when the Magistrate applies his judicial mind to the facts mentioned in a complaint or to a police report or upon information received from any person regarding an offence.

At the stage of taking congnizance, Magistrate can simply form an opinion as to whether the case is fit for taking and committing the matter for trial or not.

B. Criminal Law-Code of Criminal Procedure, 1973 - Section 204- Issuance of process takes place only after taking cognizance of the offence when, after application of mind, the Magistrate finds a prima facie case made out against the offender.

C. Criminal Law-Code of Criminal Procedure, 1973- Section 482- Scope- Disputed questions of fact cannot be adjudicated upon by this Court in exercise of power conferred u/s 482 Cr.P.C.

At this stage only prima facie case is to be seen and the disputed defence of the accused cannot be considered which can only be adjudicated upon in the course of trial**.**

Prayer for quashing refused- Applicants directed to surrender before the court within 30 days**.**

(Para 6,7,8,11,12,14,15,17)

Application u/s 482 Cr.Pc disposed of.

Case law discussed: -

1. Akash Garg Vs. St. of U.P. (2011) 11 ADJ 849.

2. R.P. Kapur Vs. St. of Punj., A.I.R. (1960) S.C. 866,

3. St. of Har. Vs. Bhajan Lal, (1992) SCC (Cr.) 426,

4. St. of Bih. Vs. P.P.Sharma, (1992) SCC (Cr.) 192

5. Zandu Pharmaceutical Works Ltd. Vs. Mohd. Saraful Haq & anr. (Para-10) (2005) SCC (Cr.) 283

(Delivered by Hon'ble Suresh Kumar Gupta, J.)

1. Heard learned counsel for the applicants and learned A.G.A. for the State.

2. This application under Section 482, Cr.P.C. has been filed for quashing the entire criminal proceedings of complaint case No. 2018 of 2018 arising out of case crime No. 163 of 2017, under Sections 308, 504 IPC, police station-Kotwali Katra, district Mirzapur as well as charge sheet dated 17.12.2017 and cognizance order dated 6.4.2018, pending in the court of Chief Judicial Magistrate, District Mirzapur.

3. The contention of the counsel for the applicants is that the applicants have been falsely implicated in this case and the learned trial court without disclosing the words that the prima facie no case is made out against the applicants, cognizance order is passed by the learned Magistrate without application of mind and on this basis the learned counsel for the applicant submitted that the congizance order is bad in the eye of law and is liable to quash.

4. Learned counsel for the applicant also relied upon ***paragaraph Nos. 6 and 12*** of the judgement passed by ***Hon'ble Allahabad High Court in the case of Akash Garg Vs. State of U.P. reported in [2011 (11) ADJ 849].***

"6. It is well settled that the Magistrate is not bound by the conclusion of the Investigating Officer. He is competent under law to form his own independent opinion on the basis of the materials collected during the investigation. The Magistrate may or may not agree with the conclusion of the Investigating Officer. If the Investigating Officer submits charge sheet, in that eventuality the Magistrate may differ from the charge sheet and refuse to take cognizance by holding that no case is made out. In a case where the final report is submitted the Magistrate may on perusal of the materials placed in support of the final report opine that the conclusion of the Investigating Officer is not correct and the offence is made out. In that eventuality, the Magistrate may reject the final report and take cognizance of the offence.

12. It is also well settled that at the stage of taking cognizance of an offence, the Magistrate is not required to examine thoroughly the merits and demerits of the case and to record a final verdict. At that stage he is not required to record even reasons, as expression of reasons in support of the cognizance may result in causing prejudice to the rights of the parties (complainant or accused) and may also in due course result in prejudicing the trial. However, the order of the Magistrate must reflect that he has applied his mind to the facts of the case. In other words at the stage of taking cognizance what is required from the Magistrate is to apply his mind to the facts of the case including the evidence collected during the investigation and to see whether or not there is sufficient ground (prima facie case) to proceed with the case. The law does not require the Magistrate to record reasons for taking cognizance of an offence."

5. What is meant by 'taking cognizance' in regard to an offence by a competent Magistrate is not defined or described in the Code of Criminal Procedure, 1973 (Cr.P.C.) or any other act. However the term has acquired a definite connotation through well settled judicial pronouncements.

6. The term 'taking cognizance' actually means 'become aware of', but in reference to a Court or a Judge, it means 'to take notice of judicially'. The term has no mystic significance in criminal law. In practice 'taking cognizance' means taking notice of an offence for initiation of proceedings under Section 190 Cr.P.C.

7. 'Cognizance' refers to the point when the court first takes judicial notice of an offence by not only applying its mind to the contents of the complaint/police report, but also proceeding further as provided further in Chapter XIV of the Cr.P.C.

8. Taking cognizance includes either taking steps to see whether there is basis for initiating a judicial proceeding or initiating a judicial proceeding against an offender by the Magistrate.

9. Ordinarily, a citizen can initiate criminal proceedings against an offence by two means. He may either lodge an FIR before the Police Officer (Station House Officer) if the offence is a cognizable one, or he may lodge complaint before a competent Judicial Magistrate irrespective of whether the offence is cognizable or non-cognizable. Any Magistrate of the first class and the duly empowered second class Magistrate may take cognizance of any offence for further proceedings.

10. As per Section 190(1) an empowered Magistrate may take cognizance of any offence-

a). Upon receiving a complaint of facts which constitute such an offence.

b). Upon a police report of such facts.

c). Upon information received from any person other than a police officer, or upon his own knowledge, that such an offence has been committed."

11. Thus the cognizance is taken when the Magistrate applies his judicial mind to the facts mentioned in a complaint or to a police report or upon information received from any person regarding an offence.

12. The issuance of process by the court occurs at a subsequent stage duly after considering the materials placed before it. It happens when the Magistrate decides to proceed against the offender whom a prima facie case is clearly made out. Taking cognizance of an offence is not equivalent to issuance of process: issuance of process takes place only after taking cognizance of the offence. When a Magistrate applies his mind for issue of process, he must be held to have taken cognizance of the offences the complaint put forth.

13. The cognizance and summoning order passed by learned Magistrate dated 18.11.2019 is read as under:-

आज वविविवेचक दद्वारद्वा अपरद्वाध ससं० 163/2017 कवे दद्वारद्वा अवभिययक्तगण कद्वाजज

वि ववविकद्वास पद्वाण्डवेय कवे ववविरूद्ध धद्वारद्वा -308,504 भिद्वा.द.ससं. कवे अपरद्वाध मम
आररोप पत्र प्रस्तयत वकयद्वा गयद्वा हहै।
आररोप पत्र एविसं समस्त कवे स डद्वायररी कद्वा
अविलरोकन वकयद्वा। अपरद्वाध कद्वा प्रससंजद्वान ललए जद्वानवे कवे ललए आधद्वार पयद्वार्याप्त हहै।
अततः अपरद्वाध कद्वा प्रससंजद्वान ललयद्वा जद्वातद्वा हहै।
दद्वाणण्डक विद्वाद पसंजरीककत हरो।
वविविवेचक दद्वारद्वा अवभिययक्तगण करो आररोप पत्र कवे समय न्यद्वायद्वालय उपणस्स्थित हरोनवे
हवेतय सजचनद्वा प्रवेलसत ककी स्थिरी , अवभिययक्तगण न्यद्वायद्वालय मम उपणस्स्थित नहहीं आयद्वा।
अततः अवभिययक्तगण वदनद्वासंक 06-07-2018 कवे ललए दद्वारद्वा अजमद्वानतरीय
अलधपत्र तलब हरो।

14. At the stage of taking congnizance, Magistrate can simply form an opinion as to whether the case is fit for taking and committing the matter for trial or not. In this present case, learned trial court clearly express his opinion that he perused all the records and clearly indicated that the material placed before him are sufficient to proceed with the case.

15. In the present case detail cognizance order as well as summoning order is passed by the learned Magistrate with judicial application of mind as the same reflects that the learned Magistrate has applied his mind to material available on record and materials are sufficient to proceed against the applicants. The cognizance order is not a proforma order, every aspect is touched by the learned Magistrate and applicants failed to adduce any evidence which caused prejudice to them so cognizance order is perfectly valid and there is no occasion to quash the same.

16. So the case law relied by the learned counsel for the applicants, is not applicable in the present case.

17. From the perusal of the material on record and looking into the facts of the case at this stage it cannot be said that no offence is made out against the applicants. All the submission made at the bar relates to the disputed question of fact, which cannot be adjudicated upon by this Court in exercise of power conferred under Section 482 Cr.P.C. At this stage only prima facie case is to be seen in the light of the law laid down by Supreme Court in cases of ***R.P. Kapur Vs. State of Punjab, A.I.R. 1960 S.C. 866, State of Haryana Vs. Bhajan Lal, 1992 SCC (Cr.) 426, State of Bihar Vs. P.P.Sharma, 1992 SCC (Cr.) 192*** and lastly ***Zandu Pharmaceutical Works Ltd. Vs. Mohd. Saraful Haq and another (Para-10) 2005 SCC (Cr.) 283.*** The disputed defence of the accused cannot be considered at this stage. Moreover, the applicants have got a right of discharge according to the provisions prescribed in Cr.P.C. as the case may be through a proper application for the said purpose and he is free to take all the submissions in the said discharge application before the Trial Court.

18. The prayer for quashing the entire proceedings of criminal case, cognizance order as well as charge sheet is **refused.**

19. However, it is provided that if the applicants appear and surrender before the court below within **30 days** from today and apply for bail, then the bail application of the applicant be considered and decided expeditiously in view of the settled law laid by **Hon'ble Supreme Court.** For a period of **30 days** from today or till the disposal of the application for grant of bail whichever is earlier, no coercive action shall be taken against the applicants. However, in case, the applicants do not appear before the Court below within the aforesaid period, coercive action shall be taken against them.

20. With the aforesaid directions, this application is finally **disposed of.**

(2020)02ILR A1475

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 21.01.2020

BEFORE
THE HON'BLE RAJENDRA KUMAR-IV, J.

Application U/S 482 No. 2984 of 2020

Satish & Anr. ...Applicants
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicants:
Sri Shishir Kumar Tiwari

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

A. Criminal Law-Code of Criminal Procedure,1973- Section 319- In order to summon a person under Section 319 Cr.P.C., mere taking of name is not sufficient but there must be something more to show implication of person who has been sought to be summoned.

In view of the law settled by the Hon'ble Supreme Court, the degree of satisfaction required for summoning an accused u/s 319 Cr.Pc is more than that required at the time of framing of Charge**.**

B. Criminal Law-Code of Criminal Procedure,1973- Section 482- At the stage of summoning of the applicants on the basis of statements for trial, probable defence of accused-applicants summoned under Section 319 Cr.P.C. cannot be examined for the first time under the jurisdiction of 482 Cr.P.C. by this Court-

Defence of the accused can only be appreciated in the trial by leading evidence. Disputed questions of fact cannot be considered by the Court u/s 482 Cr.Pc.

On facts, It cannot be said that there is no material whatsoever and also that on mere probability of complicity the applicants have been summoned , rather there is appropriate material and evidence to justify summoning of applicants under Section 319 Cr.P.C. (Para 15, 16, 18)

Application u/s 482 rejected.

Case law discussed:-

1. Anil Arya Vs. St. of U.P. & ors., Crl. Rev. No. 1216 of 2005, decided on 09.09.2016

2. Hardeep Singh Vs. St. of Punj. & ors. (2014) 3 SCC 92

3. Dharam Pal & ors. Vs. St. of Har. & anr. (2004) 13 SCC 9

4. Brijendra Singh & ors. Vs. State of Raj. (2017) 7 SCC 706

5. Shiv Prakash Mishra Vs. St. of U.P & ors. (2019) 7 SCC 806

6. Kailash Vs. St. of Raj. & anr. (2008) 14 SCC 51

7. St. of Har. & Ors Vs. Bhajan Lal & ors., (1992) Supp. (1) SCC 335

(Delivered by Hon'ble Rajendra Kumar-IV, J.)

1. Heard Sri S. K. Tiwari, learned counsel for applicants, learned AGA for State and perused the material available on record.

2. Applicants have invoked jurisdiction of this Court under Section 482 of the Code of Criminal Procedure, 1973 (hereinafter referred to as "Cr.P.C.") challenging the order dated 07.09.2017, passed by Additional District Judge (FTC-1), Gautam Budh Nagar, in Sessions Trial No. 377 of 2016, Crime No. 791 of 2015, State v. Titu and Another, under Sections 307, 325, 323 IPC, Police Station Surajpur, District Gautam Budh Nagar, whereby applicants have been summoned to face the trial under the aforesaid Sections and the order has been passed on the application under Section 319 Cr.P.C.

3. Learned counsel for applicants submits that applicants have been falsely implicated in the present case, they have committed no offence and prosecution story is false and fake. It has been further submitted that although applicants are named in the FIR but during investigation, Investigating Officer collected the evidence and found no offence against the applicant and submitted charge sheet against other accused exonerating the applicants; Trial Court wrongly appreciated and summoned the accused invoking jurisdiction under Section 319 Cr.P.C. without proper application of mind. It has been further submitted that one day prior to this incident Informant teased the wife of the applicant, for which, applicants lodged an FIR against him in the Police Station concerned, therefore, in reaction thereof present FIR was lodged against the applicants. It has been further submitted that CCTV footage, involvement of applicants of commission of crime was not found only they were found standing there at the time of incident on the spot and without active participation in the crime is not an offence. He showed some documents and statement in support of his contention.

4. Learned AGA opposed the submission made by learned counsel for applicant and submitted that PW-1 and 2 supported the prosecution case during trial and on the application of PW-1 made under Section 319 Cr.P.C., Trial Court considered the evidence of PW-1 and 2 and rightly passed the impugned order.

5. Brief facts giving rise to present case are that: -

PW-1, Pinki, lodged an FIR in Police Station concerned stating that on 19.11.2015 at about 9:30 pm, his husband was returning after his duty when he reached at the gate of .. accused Satish, Mukesh, Titu and Dinesh assaulted him with their respective weapons. Satish and Mukesh having Iron Rod while Titu was having Lathi and knife, Dinesh was also having Lathi. They were also assaulting with fits and kicks. On hearing the alarm raised by one Hakim, she reached on the spot at once and saw that her husband Surendra was lying on the earth and all those four persons were assaulting him; his husband received serious head injury; his leg and hand was also fractured; she called Police making phone to 100 number; her husband was taken to Government Hospital, NOIDA by Police for treatment

where he was admitted and remained about 10 days in the hospital. Matter was investigated by Investigating Officer who filed charge sheet against Titu and Dinesh exonerating the present applicants.

During trial, PW-1 and 2 were examined in the Court. PW-1 and 2 supported the prosecution case as narrated in FIR and told the involvement of present applicants in the commission of crime.

Informant, PW-1, moved an application No. 22-B before the Trial Court to summon the present accused-applicants under Section 319 Cr.P.C.

6. PW-1, Pinki, in his statement that on 19.11.2015, at about 9:30 pm, on hearing the alarm made by one Hakim, she reached at once on the spot and saw that his husband was lying on the earth and all the four persons namely Satish, Mukesh, Titu and Dinesh were assaulting his husband with their respective weapons; her husband received serious injury in his head and leg with fracture; her husband was taken to hospital by Police where he remained admitted in the hospital about 10 days. She lodged the FIR. PW-2, Surendra Singh, injured, stated in his statement that on 19.11.2015 at about 9:00 pm, when he entered in the gate of Colony, Satish, Mukesh, Titu and Dinesh assaulted him with their respective weapon like iron rods and knives causing serious injuries on his head and other parts of the body. He was admitted to Government Hospital, NOIDA where he was medically treated. Report of incident was lodged by his wife.

7. Court below has summoned the applicants to face the trial under the aforesaid Sections, vide impugned order, relying on FIR as well as statement of PW-1 and 2.

8. Section 319 of The Code Of Criminal Procedure, 1973 reads as under :-

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

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

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

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

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

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

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

9. In **Anil Arya v. State of U.P. and Others, Criminal Revision No. 1216 of 2005, decided on 09.09.2016,** this Court held as under :-

"Whether evidence is correct or not or credible enough or not to sustain conviction and punishment is a matter which would be seen after revisionist put in appearance, lead evidence and thereafter Trial Court examine the entire evidence and record its finding thereon, but at the stage of summoning of revisionist on the basis of aforesaid statement in Trial under Section 319 Cr.P.C., the probable defence of accused summoned under Section 319 Cr.P.C. cannot be examined for the first time in a revisional jurisdiction by this Court."

10. In **Hardeep Singh Vs. State of Punjab and others 2014 (3) SCC 92,** Court examined following five questions:

"(i) What is the stage at which power under Section 319 Cr.P.C. can be exercised?

(ii) Whether the word "evidence" used in Section 319 (1) Cr.P.C. could only mean evidence tested by cross-examination or the court can exercise the power under the said provision even on the basis of the statement made in the examination-in-chief of the witness concerned?

(iii) Whether the word "evidence" used in Section 319(1) Cr.P.C. has been used in a comprehensive sense and includes the evidence collected during investigation or the word "evidence" is limited to the evidence recorded during trial?

(iv) What is the nature of the satisfaction required to invoke the power under Section 319 Cr.P.C. to arraign an accused? Whether the power under Section 319(1) Cr.P.C. can be exercised only if the court is satisfied that the accused summoned will in all likelihood be convicted?

(v) Does the power under Section 319 Cr.P.C. extend to persons not named in the FIR or named in the FIR but not charged or who have been discharged?"

11. The aforesaid questions have been answered in para 117 of judgment as under :-

Question Nos. (i) and (iii)

*A. I**n Dharam Pal and Ors. v. State of Haryana and Anr. 2004 (13) SCC 9,** the Constitution Bench has already held that after committal, cognizance of an offence can be taken against a person not named as an accused but against whom materials are available from the papers filed by the police after completion of investigation. Such cognizance can be taken under Section 193 Cr.P.C. and the Sessions Judge need not wait till 'evidence' under Section 319 Cr.P.C. becomes available for summoning an additional accused.*

Section 319 Cr.P.C., significantly, uses two expressions that have to be taken note of i.e. (1) Inquiry (2) Trial. As a trial commences after framing of charge, an inquiry can only be understood to be a pre-trial inquiry. Inquiries under Sections 200, 201, 202 Cr.P.C.; and under Section 398 Cr.P.C. are species of the inquiry contemplated by Section 319 Cr.P.C. Materials coming before the Court in course of such enquiries can be used for corroboration of the evidence recorded in the court after the trial commences, for the exercise of power under Section 319 Cr.P.C., and also to add an accused whose name has been shown in Column 2 of the charge-sheet.

In view of the above position the word 'evidence' in Section 319 Cr.P.C. has to be broadly understood and not literally i.e. as evidence brought during a trial.

Question No. (ii)

A. Considering the fact that under Section 319 Cr.P.C. a person against whom material is disclosed is only

summoned to face the trial and in such an event under Section 319(4) Cr.P.C. the proceeding against such person is to commence from the stage of taking of cognizance, the Court need not wait for the evidence against the accused proposed to be summoned to be tested by cross-examination.

Question No. (iv)

A. Though under Section 319(4)(b) Cr.P.C. the accused subsequently impleaded is to be treated as if he had been an accused when the Court initially took cognizance of the offence, the degree of satisfaction that will be required for summoning a person under Section 319 Cr.P.C. would be the same as for framing a charge. The difference in the degree of satisfaction for summoning the original accused and a subsequent accused is on account of the fact that the trial may have already commenced against the original accused and it is in the course of such trial that materials are disclosed against the newly summoned accused. Fresh summoning of an accused will result in delay of the trial therefore the degree of satisfaction for summoning the accused (original and subsequent) has to be different.

Question No. (v)

A. A person not named in the FIR or a person though named in the FIR but has not been charge-sheeted or a person who has been discharged can be summoned under Section 319 Cr.P.C. provided from the evidence it appears that such person can be tried along with the accused already facing trial. However, insofar as an accused who has been discharged is concerned the requirement of Sections 300 and 398 Cr.P.C. has to be complied with before he can be summoned afresh.

12. The aforesaid judgment in fact lay down very clearly that power under Section 319 Cr.P.C. can be exercised by Court against a person not named in First Information Report or no charge-sheet is filed by Police against him and the accused can be summoned only on the basis of examination-in-chief of witness and need not wait for cross-examination etc. With regard to degree of satisfaction of Court for summoning the accused under Section 319 Cr.P.C, Court has said that test are same as applicable for framing charge.

13. The above view was followed in **Brijendra Singh and others Vs. State of Rajasthan (2017) 7 SCC 706** holding:

" ... since it is a discretionary power given to the court Under Section 319 Code of Criminal Procedure and is also an extraordinary one, same has to be exercised sparingly and only in those cases where the circumstances of the case so warrant. The degree of satisfaction is more than the degree which is warranted at the time of framing of the charges against others in respect of whom charge-sheet was filed. Only where strong and cogent evidence occurs against a person from the evidence led before the court that such power should be exercised. It is not to be exercised in a casual or a cavalier manner. The prima facie opinion which is to be formed requires stronger evidence than mere probability of his complicity."

14. Recently in **Shiv Prakash Mishra Vs. State of Uttar Pradesh and others (2019) 7 SCC 806,** Court relying on the above authorities as also **Kailash Vs. State of Rajasthan and another (2008) 14 SCC 51,** held as under:

"The standard of proof employed for summoning a person as an Accused person under Section 319 Code of Criminal Procedure is higher than the standard of proof employed for framing a

charge against the Accused person. The power Under Section 319 Code of Criminal Procedure should be exercised sparingly. As held in Kailash Vs. State of Rajasthan and another (2008) 14 SCC 51, "the power of summoning an additional Accused Under Section 319 Code of Criminal Procedure should be exercised sparingly. The key words in Section are "it appears from the evidence"."any person"."has committed any offence". It is not, therefore, that merely because some witnesses have mentioned the name of such person or that there is some material against that person, the discretion Under Section 319 Code of Criminal Procedure would be used by the court." (emphasis added)

15. In view of above, it is clear that in order to summon a person under Section 319 Cr.P.C., mere taking of name is not sufficient but there must be something more to show implication of person who has been sought to be summoned.

16. Aforesaid statement of Informant and Injured clearly show that applicants and other co-accused were involved in the commission of crime and they also participated in Marpeet. Whether evidence of witnesses is correct or not, credible enough or not to sustain conviction, is a matter which would be seen after applicants put in appearance, lead evidence and thereafter, Trial Court examines the entire evidence and records its finding thereon. At the stage of summoning of the applicants on the basis of aforesaid statements for trial, probable defence of accused-applicants summoned under Section 319 Cr.P.C. cannot be examined for the first time under the jurisdiction of 482 Cr.P.C. by this Court.

17. Facts of the present case does not fall under any circumstances mentioned in Para No. 102 of **State of Haryana, and Others v. Bhajan Lal and Others, 1992 Supp. (1) SCC 335** which reads as under :-

"In the backdrop of the interpretation of the various relevant provisions of the Code under Chapter XIV and of the principles of law enunciated by this Court in a series of decisions relating to the exercise of the extraordinary power under Article 226 or the inherent powers under Section 482 of the Code which we have extracted and reproduced above, we give the following categories of cases by way of illustration wherein such power could be exercised either to prevent abuse of the process of any court or otherwise to secure the ends of justice, though it may not be possible to lay down any precise, clearly defined and sufficiently channelised and inflexible guidelines or rigid formulae and to give an exhaustive list of myriad kinds of cases wherein such power should be exercised.

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

(2) Where the allegations in the first information report and other materials, if any, accompanying the FIR do not disclose a cognizable offence, justifying an investigation by police officers under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code.

(3) Where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of

any offence and make out a case against the accused.

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

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

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

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

18. Looking to the facts of this case and in the light of exposition of law, as discussed above, I find that here is not a case where mere name of applicants has been taken but details of incident have been given showing the manner in which applicants have acted and committed crime. Hence, it cannot be said that there is no material whatsoever and also that on mere probability of complicity they have been summoned but there is appropriate material and evidence to justify summoning of applicants under Section 319 Cr.P.C. and I find no manifest error in the order passed by Court below.

19. The application lacks merit and is accordingly dismissed.

(2020)02ILR A1481

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 09.01.2020

BEFORE
THE HON'BLE MANISH KUMAR, J.

Application U/S 482 No. 4526 of 2009

Omkeshwar Nath Verma & Anr.
...Applicants
Versus
State of U.P. **...Opposite Party**

Counsel for the Applicants:
Sri Atul Mehra

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

A. Criminal Law - Code of Criminal Procedure,1973 - Section 190(1) - Section 41/411- Basis of applying Section 420 of I.P.C. is that the applicants have acted in contravention of Section 28-A of the U.P. Trade Tax Act therefore the person is liable to be penalised under Section 15A(1)(o) of the Act- The applicants had preferred a Sales/ Trade Tax Revision u/s 11 of the Act before the High Court, against the order of the Tribunal whereby the order confirming the penalty u/s 15 A (1)(o) of the Act was confirmed, and since the said Revision was allowed by the High Court, the allegations against the applicants stood negated and nothing remained for which they would be made liable to face the criminal proceedings and no offence of cheating can be said to be made out against the applicants under Section 420 I.P.C.

B. Criminal Law-Code of Criminal Procedure,1973- Section 190(1) - Section 41- U.P.Trade Tax Act- Section 14(3), Section 28-A- The reference of Special Law under Section 41 IPC in the present case is U.P. Trade Tax Act and Section 14(3) of U.P. Trade Tax Act, provides that no court shall take cognizance of any offence under this Act, or the Rules made thereunder except with the previous sanction of the [Commissioner] whereas, there is no previous sanction of the Commissioner.

The previous sanction of the Commissioner is mandatory before taking cognizance of any offence under the Act and absence of sanction by the Commissioner would render the prosecution illegal.

C. Criminal Law - Code of Criminal Procedure, 1973- Section 5 - The perusal of Section 5 Cr.P.C., which is saving clause and protects the procedure provided under the provisions of U.P. Trade Tax Act, which is a Special Law, for initiation of prosecution against the person who contravenes any of the provisions of U.P. Trade Tax Act. By virtue of the provisions of Section 5 of the Cr.Pc, the Special Law, e.i U.P Trade Tax Act, shall prevail over the General Law and the procedure under the Cr.Pc stands ousted.

D. Criminal Law - Code of Criminal Procedure, 1973 - Section 482- The continuation of the criminal prosecution of the applicants after the judgement passed by the High Court, whereby the Sales/Trade Tax Revision of the applicants was allowed, would be illegal and nothing but an abuse of the process of the Court.
(Para 18,19,20,22,24,28,29,31)

Application u/s 482 allowed.

Case law discussed:-

1. Zandu Pharmaceutical Works Ltd. Vs. Mohd. Saraful Haq & ors., (Para-10) (2005) SCC (Cri.) 283

2. Parbatbhai Aahir @ Parbatbhai Bhimsinhbhai Karmur & ors. Vs. St. of Guj. & anr. (2018) 1 SCC (Cri) 1 & K. C. Builder Vs. Assistant Commissioner of Income Tax (2004) 2 SCC 731. [followed]

3. R.P. Kapur Vs. St. of Punjab, AIR (1960) SC 866 (FB) [followed]

(Delivered by Hon'ble Manish Kumar, J.)

1. Heard Shri Atul Mehra, learned counsel for the applicants, learned A.G.A. for the State and examined the record.

2. The present application under Section 482 Cr.P.C. has been preferred by the applicants for quashing the charge-sheet dated 26.05.1995, order dated 17.1.2007 passed by Additional Chief Judicial Magistrate, Court No.2, Allahabad by which the the learned court below rejected the discharge application moved by the applicants in Criminal Case No.294 of 2004 registered under Sections 41/411 I.P.C. at Police Station Daraganj, District Allahabad and the revisional order dated 07.10.2008 passed by Additional Sessions Judge/Fast Track Court, by which the revision was dismissed on the ground that against the interlocutory order revision is not maintainable.

3. The brief facts of the case are that on 02.06.1994, the police had intercepted the applicants' Maruti Car No. U.P.-82A-0144 at Shastri Bridge Chungi at Allahabad and after the search, 151 kg. of Silver, 4.5 kg. silver ornaments and Rs.2,73,000/- cash were recovered from the possession of the applicants. On the very same day i.e. on 02.06.1994, an FIR has been lodged at P.S. Daraganj, District Allahabad under Sections 41/411 I.P.C. and applicants were arrested.

4. During the investigation, the statements of nine persons have been recorded under Section 161 Cr.P.C. and

except one Trade Tax Officer all the remaining witnesses were the Police personnels and the charge-sheet was filed against the applicants under Section 41/411 I.P.C.

5. From the perusal of the statement of Trade Tax Officer, it has come out that after lodging of the FIR, the matter has been referred to the Trade Tax Department for initiation of proceedings under the provisions of U.P. Trade Tax Act.

6. The applicants moved a bail application before the Sessions Court and there the applicants had stated that the goods in question belonged to M/s Sarvshri Chardeva Abhushan Bhandar, Buxar (Bihar) and the silver and cash seized were entered in the books of account of the firm and the said documents were filed with the bail application. Learned trial court had released the car and the cash in favour of the applicants.

7. On the intimation by the police to the Trade Tax Department, a notice dated 02.06.1994 was issued by the Sales Tax Officer, Allahabad.

8. The contention of the learned counsel for the applicants is that the applicants are not liable to pay any tax on goods seized by the police under the Trade Tax Act for the reason, the applicants are not the importer as per the definition of importer provided under Section 2E of the U.P. Trade Tax Act and contesting the matter before the authorities.

9. Reliance has been placed upon Section 15A(1)(o) and Section 28-A of U.P. Trade Tax Act to show that the goods seized do not fall within the purview of above-noted provisions.

10. Learned counsel for the applicants has further contended that Sales/Trade Tax Revision No.597 of 2002 was preferred before this Court,under Section 11 of the U.P. Trade Tax Act against the order of the Tribunal dated 26.08.2002, by which the Tribunal has confirmed the penalty imposed on the assessee/applicants for a sum of Rs.1,50,000/- under Section 15A(1)(o) and the said revision was allowed by this Court by setting aside the order of the Tribunal vide it order dated 09.08.2010. It will be useful to quote the relevant part of the order absolving the applicants from imposition of any penalty under the Act. It reads as follows:-

"The present revision has been filed by the assessee under Section 11 of the U.P. Trade Tax against an order of the Tribunal dated 26.08.02, by which the Tribunal has confirmed the penalty imposed on the assessee for a sum of Rs.1,50,000/- under Section 15A(1)(o).

The facts of the case are that the goods of the assessee were seized at Allahabd. He was carrying his goods from Agra to Indore. After the seizure was made, a penalty was also imposed on the assessee under Section 15A(1)(o).

It is the contention of the learned counsel for the assessee that at the relevant time the assessee had applied before the authority that the goods which were seized were entered into the books of accounts of the assessee at his place of registration in Bihar and were duly cleared by the Income Tax Authorities also in the regular course of business. This contention is stated by the assessee in paragraph-10 of the revision.

Thereafter, the assessee filed a supplementary affidavit in support of this contention and placed before this Court

photocopies of the registration certificates under the Bihar Sales Tax Act and Central Sales Tax Act. In response to the contentions made in the supplementary affidavit, the State has filed a supplementary counter affidavit and has not in any manner doubted the veracity of the tax clearances filed by the assessee from Bihar. Thus, in view of the facts as stated in the supplementary counter affidavit, it becomes abundantly clear that the averments made by the applicant in the revision were correct. Since the entries of the items were duly accounted for in the books of accounts at his original place of business, the imposition under Section 15A(1)(o) is not justified.

The penalty imposed upon the assessee is deleted.

This revision is allowed.

The order of the Tribunal is set aside.

Dated:9.8.10"

11. Under these circumstances, now no material is in existence against the applicants which may further compel them to face the criminal proceedings. It is further contended that Section 5 Cr.P.C. bars the simultaneous proceedings. It is further contended that if any proceedings could be initiated against the applicants that too with the previous sanction of the Commissioner as per Sub-section 3 of Section 14 of the U.P. Trade Tax Act, which is also not taken and hence the proceedings are barred by Section 5 of Cr.P.C.

12. Learned counsel for the applicants placed reliance upon the decisions of the Hon'ble Supreme Court in ***Parbatbhai Aahir @ Parbatbhai Bhimsinhbhai Karmur And Ors. Vs. State of Gujarat And another 2018 (1) SCC (Cri) 1 and K. C. Builder Vs. Assistant Commissioner of Income Tax 2004 (2) SCC 731.***

13. Learned A.G.A. has vehemently opposed the contentions raised on behalf of the applicants and apprise this Court about the scope of interference by the High Court under Section 482 Cr.P.C. He has further contended that there is no illegality in the order dated 17.01.2007 passed by Additional Chief Judicial Magistrate, for the reason by that time the order of Sales/Trade Tax Revision No.597 of 2002 was not in existence and the revisional authority has rightly rejected the said revision vide its order dated 07.10.2008 as not maintainable against the interlocutory orders and there is no illegality or perversity in the orders.

14. After hearing the counsel for both the parties and examining the records, the questions which arise for consideration are as follows:-

(i) whether after the judgment dated 09.08.2010 passed by this Court in Sales/Trade Tax Revision No.597 of 2002 any criminal proceedings or prosecution could be continued against the applicants.

(ii) whether the applicants are not entitled for the benefit of Section 482 Cr.P.C. to prevent the abuse of the process of any court or otherwise to secure the ends of justice.

15. The order dated 17.1.2007 passed by Additional Chief Judicial Magistrate, rejecting the discharge application held that the applicants for evading the tax did not disclosed the possession of the silver, silver ornaments which is in contravention of Section 28-A of U.P. Trade Tax Act and

hence the seized goods of the applicants fall under Section 420 of I.P.C.

16. The Trade Tax Department initiated the proceedings against the applicants under Section 15A(1)(o) of the U.P. Trade Tax Act, which is quoted below:-

[15-A. Penalties in certain cases.- *(1) If the assessing authority is satisfied that any dealer or other person-*

[(o) imports or transports, or attempts to import or transport or abets the import or transport of any goods in contravention of the provisions of Section 28-A ;]

17. While rejecting the discharge application vide impugned order dated 17.01.2007 passed by the learned A.C.J.M. held that applicants just to evade tax liability under Section 28-A of the U.P. Trade Tax Act had not disclosed the silver and silver ornaments while entering in the State of U.P. committed offence under Section 420 of I.P.C.

18. The conjoint reading of Section 28-A and Section 15A(1)(o) clearly provides that in case of contravention of the provisions of Section 28-A of U.P. Trade Tax Act, the person is liable to be penalised under Section 15A(1)(o).

19. From the perusal of the FIR and the impugned order dated 17.01.2007 passed by the learned trial court clearly establishes that the basis of applying Section 420 of I.P.C. is that the applicants have acted in contravention of Section 28-A of the U.P. Trade Tax Act.

20. Though at the time of passing of the impugned order dated 17.01.2007 by the trial court, the judgment of the High Court was not there, it was passed subsequently, when the the High Court in its judgment dated 09.08.2010 has held that the imposition of penalty under Section 15-A(1)(o) was not justified and set aside the order of the Tribunal and setting aside the order of penalty imposed upon the assessee/applicants and allowed the revision, then the very basis of the reason assigned in the order impugned dated 17.01.2007 itself goes and thereafter no occasion of continuation of the prosecution.

21. The FIR was lodged under Section 41 I.P.C., the provision is quoted below:-

41. "Special law" *.-A "special law" is a law applicable to a particular subject.*

22. The reference of Special Law under Section 41 in the present case is U.P. Trade Tax Act and under Sub-section 3 of Section 14 of U.P. Trade Tax Act, provides that no court shall take cognizance of any offence under this Act, or the Rules made thereunder except with the previous sanction of the [Commissioner] whereas, there is no previous sanction of the Commissioner. Section 14(3) is quoted below:-

14. Offences and penalties. *- (1) Any person who -*

(3) No court shall take cognizance of any offence under this Act, or the Rules made thereunder except with the previous sanction of the [Commissioner], and no court inferior to that of a Magistrate of the 1st class shall try any such offence.

23. The applicants are also entitled for the benefit of Section 5 Cr.P.C. Section 5 Cr.P.C. is quoted below:-

***5. Saving**.- Nothing contained in this Code shall, in the absence of a specific provision to the contrary, affect any special or local law for the time being in force, or any special jurisdiction or power conferred, or any special form of procedure prescribed, by any other law for the time being in force.*

24. The perusal of Section 5 Cr.P.C., which is saving clause and protects the procedure provided under the provisions of U.P. Trade Tax Act for initiation of prosecution against the person who contravenes any of the provisions of U.P. Trade Tax Act.

25. The Hon'ble Supreme Court in the Case ***R.P. Kapur Vs. State of Punjab, AIR 1960 SC 866 (FB)*** has held that jurisdiction under Section 482 Cr.P.C. can be exercised - either to prevent abuse of process of any court or otherwise to secure the ends of justice. Ordinarily criminal prosecution instituted against an accused person must be tried under the provisions of the Code and the High Court would be reluctant to interfere with the said proceedings at an interlocutory stage.

26. The Hon'ble Supreme Court in the Case of ***Zandu Pharmaceutical Works Ltd. Vs. Mohd. Saraful Haq and another, (Para-10) 2005 SCC (Cri.) 283*** has held that the High Court should not assume the role of a trial court and embark upon enquiry as to reliability of evidence and sustainability of accusation on a reasonable appreciation of evidence where it appears to the contrary, interference by High Court would be justified. The inherent power under Section 482 Cr.P.C. must be exercised sparingly, carefully and with the caution and only when such exercise is justified by the tests specifically laid down in Section 482 Cr.P.C. The power to be exercised *ex debito justi tiae* to prevent abuse of process of Court.

27. After hearing both the parties and examining the record, I am of the considered view while exercising the inherent power of the High Court has a wide ambit and plenitude it has to be exercised;-

(i) to secure the ends of justice or

(ii) to prevent an abuse of the process of any court.

28. After the judgment dated 09.08.2010 in Sales/Trade Tax Revision No.597 of 2002 passed by this Court, the allegations against the applicants stood negated and nothing remained for which they would be made liable to face the criminal proceedings and no offence of cheating can be said to be made out against the applicants under Section 420 I.P.C.

29. As far as the revisional order dated 07.10.2008 is concerned there is no illegality or perversity in the same for the reason, the revision is not maintainable against the interlocutory orders.

30. Learned A.G.A. has not disputed this fact that after the judgment dated 09.08.2010 in Sales/Trade Tax Revision No.597 of 2002 passed by this Court, now nothing remains for which the applicants made liable to face prosecution/criminal proceedings.

31. For the facts and reasons, the continuation of the prosecution against the applicants would be illegal and nothing but an abuse of the process of the Court.

32. In view of the above observations, the application under Section 482 is, accordingly, ***allowed.***

33. Under these circumstances, charge-sheet dated 26.05.1995, order dated 17.01.2007 as well as the criminal proceedings in Criminal Case No. 294 of 2004, under Sections 41/411 I.P.C., pending in the Court of Additional Chief Judicial Magistrate, Court No.2, Allahabad, are hereby quashed.

(2020)02ILR A1487

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 28.01.2020

BEFORE
THE HON'BLE HARSH KUMAR, J.

Application U/S 482 No. 9348 of 2018
&
Application U/S 482 No. 11224 of 2018

Mohammad Ibrahim ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Sri Sharib Salaman Ahmad Ansari, A/V0429

Counsel for the Opposite Parties:
A.G.A., Sri Vinod Singh

A. Criminal Law-Code of Criminal Procedure,1973 - Section 482- Disputed questions of fact, which require evidence, cannot be adjudicated upon under Section 482 Cr.P.C. At this stage only prima facie case is to be seen in the light of the law laid down by Supreme Court.

Application u/s 482 Cr.Pc rejected. (Para 7,8)

Case law discussed:-

1. R.P. Kapur Vs. St. of Punj., A.I.R. (1960) S.C. 866,

2. St. of Har. Vs. Bhajan Lal, (1992) SCC (Cr.) 426,

3. St. of Bih. Vs. P.P.Sharma, (1992) SCC (Cr.) 192

4. Zandu Pharmaceutical Works Ltd. Vs. Mohd. Saraful Haq & anr. (Para-10) (2005) SCC (Cr.) 283.

(Delivered by Hon'ble Harsh Kumar, J.)

1. Photo copy of Nikahnama of applicant Siftain Khan Qadri @ Sonu filed by learned counsel for applicants today in the Court is taken on record.

2. The two applications u/s 482 Cr.P.C. have been moved by two accused (father and son) separately, which were heard together and are being disposed of by one and the same order.

3. Heard Sharib Salaman Ahmad Ansari learned counsel for applicants, Shri Vinod Singh learned counsel for opposite party no.2, learned A.G.A. for State and perused the record.

4. The application under Section 482 Cr.P.C. No. 9348 of 2018 has been filed for quashing the entire proceedings of Case No.3084 of 2016 (State vs. Mohammad Ibrahim Khan) and application under Section 482 Cr.P.C. No. 11224 of 2018 has been filed for quashing the entire proceedings of Case No.3356 of

2017 (State vs. Siftain khan Qadri @ Sonu) both arising out of Case Crime No.3249 of 2014, under Sections 420, 406 I.P.C. P.S. Kotwali Orai, District Jalaun pending in the Court of C.J.M. Jalaun at Orai.

5. Learned counsel for applicants contends that applicant Mohammad Ibrahim is father and applicant Siftain Khan Qadri @ Sonu is his son; that marriage of Siftain Khan Qadri @ Sonu was settled with opposite party no.2 Smt. Shazia Begum and engagement ceremony was performed on 10.3.2013 with the understanding that marriage/Nikah will be solemnized on 27.10.2013; that as per averments made in complaint filed by Mohd. Usman, the father of opposite party no.2, applicant Siftain Khan Qadri @ Sonu and his family members made demand of Car or Rs.3.00 lacs cash which was accepted by him and Rs.2.00 lacs were paid in cash on 21.4.2013 before Salim Ahmad and Rs.1.00 lac was agreed to be paid on the day of marriage; that after a period of two months demand of INDIGO Car was also made, and he was unable to comply so dissolved the proposed Nikah with agreement that both parties will return the money/articles given by each of them, but in August, 2013 Siftain khan Qadri @ Sonu denied to return the money and articles on which complainant moved application before S.S.P. Jalaun and sent notice to applicants on 4.9.2013 through counsel which was correctly replied by applicants through their counsel Shri V.K. Srivastava, Advocate on 15.9.2013 and in the meantime complainant allegedly settled marriage (Nikah) of his daughter Smt. Shazia Begum opposite party no.2 with Mohd. Umar Khan resident of Kabir Nagar, Orai on 27.10.2013 as Radha Palace Guest House had been earlier booked for Nikah of Shazia and upon getting knowledge of above development, applicant with an intention to usurp the money and articles allegedly prepared a forged Nikahnama of marriage between Smt. Shazia Begum and Siftain khan Qadri @ Sonu and with mala fide intention also filed a petition for restitution of conjugal rights in the Principal Judge Family Court, Lucknow, apart from which he also moved an application for obstructing Nikah between Smt. Shazia Begum and Mohd. Umar Khan and in order to misguide Mohd. Umar Khan sent him a copy of forged Nikahnama; that all the allegations made in complaint case are absolutely false and incorrect; that in complaint case, Magistrate passed summoning order on 18.9.2015 and in the meantime opposite party no.2 also lodged F.I.R. against applicant Siftain khan Qadri @ Sonu on 30.8.2014 with similar allegations at Case Crime No.3249 of 2014 upon which applicants seeking quashing of proceedings of summoning order dated 18.9.2015 under Sections 406, 467, 468 and 471 I.P.C. moved an application under Section 482 Cr.P.C. No.1953 of 2016, copy at A-8 which was disposed of on 10.2.2016 by refusing to quash summoning order or proceedings of the complaint case and directing the Magistrate for taking recourse of the provisions of Section 210 Cr.PC.; that in furtherance of above order dated 10.2.2016 passed by this Court, the learned Magistrate exercising powers under Section 210 Cr.P.C. merged the proceedings complaint case in case crime no.3249 of 2014 in which separate charge sheets have been submitted against applicants under Section 420 and 406 I.P.C. on the basis of which upon taking of cognizance by Magistrate on 8.9.2016 and 31.7.201`7, at A-12 in each application

Criminal Case No.3084 of 2016 and Criminal Case No.3356 of 2017 is pending against applicants; that the real fact is that opposite party no.2 made a proposal to applicants that Nikah ceremony should be performed on 21.8.2013 because his son was going out of country for earning livelihood, so that relationship may become firm between two families and accordingly Nikah was performed between Smt. Shazia Begum and Siftain khan Qadri @ Sonu on 21.8.2013 with the understanding that Vidai would be done after return of applicant Siftain Khan Qadri @ Sonu from foreign and if Siftain khan Qadri @ Sonu could not go out of country for any reason whatsoever Vidai of opposite party no.2 would be performed on 27.10.2013; that since the parents of opposite party no.2 turned dishonest, they kept all valuables and made a complaint to S.P. Jalaun with regard to demand of dowry so the applicant Siftain khan Qadri @ Sonu had to file a petition for restitution of conjugal rights in the Court of Principal Judge Family Court, Lucknow on 11.10.2013, copy at A-1; that the Nikahnama between applicant Siftain khan Qadri @ Sonu and opposite party no.2 Smt. Shazia Begum, Mohammad Ibrahim is genuine one & not forged on which Mohammad Ibrahim the father of Siftain khan Qadri @ Sonu is not a witness, so in any case he may not be considered to be involved in fabricating forged Nikahnama of marriage between applicant Siftain khan Qadri @ Sonu and opposite party no.2 Smt. Shazia Begum; that no offence under Section 420 is made out against applicants or in any case against applicant Mohammad Ibrahim; that applicants have not committed any criminal breach of trust and have not usurped any money of opposite party no.2 or her father so no offence under Section 406 I.P.C. is made out against them; that in fact applicants had paid Rs.1,85,000/- and Rs.10,000/- to father of opposite party no.2 for getting it prepared jewelry for opposite party no.2; that even if for the sake of arguments all the allegations made by opposite party no.2 are accepted no offence is made out against applicants and at the most of only offence under Section 4 of D.P. Act may be made out against applicants; that otherwise also in case of preparation of forged Nikahnama provisions of Sections 467, 468 and 471 I.P.C. must be attracted but no charge sheet has been filed under above Sections; that the prosecution of applicants is totally unwarranted and is liable to be quashed.

6. Per contra learned A.G.A. and learned counsel for opposite party no.2 vehemently opposed the prayer made in two applications u/s 482 Cr.P.C. The learned counsel for opposite party no.2 contended that complaint case was filed with absolutely correct allegations and the applicants may have no grievance with regard to lodging of F.I.R. by opposite party no.2 because in furtherance of order of this Court dated 10.2.2016; that on application u/s 482 Cr.P.C. two proceedings have been merged and there is no apprehension of double jeopardy to applicants; that the forgery committed by applicants is very much clear from the fact that on 4.9.2013 the father of opposite party no.2 sent a notice to two applicants Mohammad Ibrahim and Siftain khan Qadri @ Sonu, through counsel Shri R.K. Shukla copy at page 17 of CA-2 of which reply was sent by applicants through their counsel Shri V.K. Srivastava, Advocate on 15.9.2013 copy at page 19, A-CA-2; that in above reply of notice dated 15.9.2013 in paragraph nos.6 and 7 applicants have not made any whisper about the alleged Nikah

or Nikahnama dated 21.8.2013 between Siftain khan Qadri @ Sonu and Smt. Shazia Begum which has been claimed by applicant Siftain khan Qadri @ Sonu in paragraph 12 of petition for restitution of conjugal rights, A-1 rather has tried to make a counter claim by making counter allegations of making payment of a sum of Rs.1,85,000/- to father of opposite party no.2 for getting jewelry prepared for Smt. Shazia Begum apart from Rs.10,000/- for ring on 25.1.2013; that it is wrong to say that no offences under Sections 406, 420, 467, 468 and 471 I.P.C. is made out against applicants; that in complaint case the learned Magistrate after considering the statements under Sections 200 and 202 Cr.P.C. had passed summoning order under Section 204 Cr.P.C. summoning the applicants for offences under Sections 406, 467, 468 and 471 I.P.C.; that if the charge sheet has been submitted under Sections 406 and 420 I.P.C. it will not be correct to say that applicants may not be considered for other offences because it is settled principle of law that at the time of framing of charges upon hearing parties counsel, it may also frame charges for offences under Sections mentioned in charge sheet or for different offences under other sections; that the applications have been moved with absolutely false and incorrect allegations and are liable to be dismissed.

7. Upon hearing parties counsel and perusal of record and particularly the copy of reply of notice given by applicants in reply to notice of father of opposite party no.2, which is at page 19 of CA-2, it is very much clear that in the entire reply there is no averment about alleged Nikahnama dated 21.8.2013 between applicant Siftain khan Qadri @ Sonu and opposite party no.2 Smt. Shazia Begum. The contention that Nikahnama dated 21.8.2013 does not bear signature of Mohd. Ibrahim so he may not be held guilty for offence under Section 420 I.P.C. has no force in view of fact that he is none other than father of Siftain and, whether he played any role in fabrications of forged Nikahnama (if the same is found to be forged), is a matter based on evidence to be adduced before trial.

8. From the perusal of the material on record and looking into the facts of the case at this stage it cannot be said that no offence is made out against the applicants. All the submissions made at the bar relate to the disputed questions of fact, which require evidence and cannot be adjudicated upon by this Court under Section 482 Cr.P.C. At this stage only prima facie case is to be seen in the light of the law laid down by Supreme Court in cases of **R.P. Kapur Vs. State of Punjab, A.I.R. 1960 S.C. 866, State of Haryana Vs. Bhajan Lal, 1992 SCC (Cr.) 426, State of Bihar Vs. P.P.Sharma, 1992 SCC (Cr.) 192 and lastly Zandu Pharmaceutical Works Ltd. Vs. Mohd. Saraful Haq and another (Para-10) 2005 SCC (Cr.) 283,** and the applicants have failed to prove any prima facie case.

9. In view of discussions made above, I have come to the conclusion that learned counsel for the applicants has failed to show that there is any abuse of process of court or likelihood of miscarriage of justice for prevention of which the exercise of inherent powers by this Court is required. Both the applications are devoid of merits and are liable to be rejected.

10. Both applications u/s 482 Cr.P.C. are rejected accordingly.

11. However, if the applicants appear before the court below and move

applications for bail, the same shall be disposed of expeditiously in accordance with law.

12. Interim order, if any, stands vacated.

(2020)02ILR A1491

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 14.01.2020

BEFORE
THE HON'BLE ANIL KUMAR-IX, J.

Application U/S 482 No. 10193 of 2010

Pulloo @ Shiv Pratap ...Applicant
Versus
State of U.P. ...Opposite Party

Counsel for the Applicant:
Sri Rakesh Prasad

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

A. Criminal law - Code of Criminal Procedure,1973 - Section 300(1) - Is based on maxim "nemo debet bis vexari", which means that a person cannot be a convicted on second time for an offence which was involved in the offence with which he was previously charged. In both the trials incident is the same and they are based on same prosecution story and facts. Previous offence was tried by a competent court in which applicant was acquitted and the acquittal is in force. Second trial of the applicant for the same offence in which he has been acquitted is barred by Section 300 Cr.P.C.

Where a person has been acquitted in a trial and a supplementary chargesheet is again submitted against him on the same facts, then Section 300 Cr.P.C. bars the trial of that person again not only for the same offence but also for any other offence on the same facts and also applies to offence for which charges might have been framed at the previous trial. (Para 10, 13, 15)

Application u/s 482 allowed.

Case law discussed-

1. Thakur Ram Vs. St. of Bih. AIR (1966) SC 911

2. Inguva Mallikarjun Vs. St. of A.P. (1978) Cr.LJ 392 (DB)

(Delivered by Hon'ble Anil Kumar-IX, J.)

1. Heard learned counsel for the applicant and learned AGA for the State as well as perused the record.

2. This application u/s 482 Cr.P.C. has been moved by the applicant Pullo @ Shiv Pratap with prayer to quash the entire proceedings of Criminal Case No.1048 of 2005 (State Vs. Pullo @ Shiv Pratap), under Sections 147, 148, 323, 504, 325, 308, 324 IPC, arising out of Case Crime No.99 of 2002, Police Station- Handia, District- Allahabad.

3. Brief facts relating to the case are that on 18.02.2002 First Information Report was lodged by the informant Vijayi as Case Crime No.99 of 2002 in Police Station- Handia, District- Allahabad against the accused Ram Raj son of Sri Nath, Indramani son of Gangaram Chauhan, Shiv Mangal son of Indramani, Pulloo son of Indramani, Indrajeet son of Gangaram, Dayaram son of Shrinath, Ram Shiromani son of Shankar, Ramdhani son of Indraraj and Ramsajivan son of Indraraj. It was alleged in the said FIR that all the named accused came at the door of the informant with weapons in their hands and assaulted the informant and his family

members. After investigation charge sheet was filed by the I.O. on 02.8.2002 agaisnt Ramraj, Indramani, Dayaram, Ram Shiromani, Ramdhani and Ramsajivan, under Sections 147, 148, 149, 323, 324, 325, 504, 308 IPC. No charge sheet was submitted against the named accused Shiv Mangal because allegedly he was murdered in cross case of this offence. No charge sheet or any report was submitted against the named accused Pulloo son of Indramani and Indrajeet. After the case was committed to Sessions on 07.07.2003 by the Magistrate. It was registered as Sessions Trial No.775 of 2003 and later on transferred to Additional Sessions Judge, Court No.13, Allahabad. Charges were framed on 11.11.2003 against the accused Ramraj, Indramani, Dayaram, Ram Shiromani, Ramdhani and Ram Sajivan, under Sections 147, 148, 324/149, 308/149 IPC.

4. Trial of the aforesaid Session Trial No.775 of 2003 started after recording of the statement of PW-1. Applicant accused Pulloo @ Shiv Pratap and Indrajeet were also summoned under Section 319 Cr.P.C. to face this trial. Against the applicant-accused and Indrajeet charges under Sections 147, 148, 324/149 and 308/149 IPC were framed on 04.05.2005. After full trial all the charged accused of this trial including the applicant were acquitted by judgement and order dated 25.11.2005 passed by Additional Sessions Judge, Court No.13, Allahabad.

5. A supplementary charge sheet dated 20.10.2002 was filed by the I.O. in aforesaid Case Crime No.99 of 2002 against the applicant Pulloo @ Shiv Pratap and Indrajeet, under Sections 147, 148, 323, 504, 325, 308, 324 IPC. This supplementary charge sheet was sent to the Court of ACJM for further proceeding, which was numbered as Case No.1048 of 2005. Proceedings were started by the concerned Magistrate and warrant was issued against the applicant for his appearance. Against the second trial this application u/s 482 Cr.P.C. has been filed by the applicant.

6. Learned counsel for the applicant contended that in the same crime number and for the charged sections, the applicant has been acquitted vide judgement and order of the Additional Sessions Judge, Court No.13, Allahabad dated 25.11.2005. Copy of which has been filed as Annexure No.1 to the affidavit and in the same crime number and charged sections subsequently charge sheet has been submitted by the prosecution and now the warrant has been issued against the applicant. Learned counsel for the applicant further argued that once the person has been tried and acquitted, he cannot be tried for the same offence again as per the provisions of Section 300 Cr.P.C. and therefore the proceedings

7. Learned AGA has filed his counter affidavit on behalf of the State. In paragraphs 4 and 5, it is categorically stated that in this case FIR was lodged against the applicant and co-accused persons, which was registered as Case Crime No.99 of 2002, under Section 147, 148, 149, 323, 324, 308 IPC, Police Station- Handia, District- Allahabad, in which charge sheet was submitted against Ramraj, Indramani, Dayaram, Ram Shiromani, Ramdhani and Ram Sajivan. In that case, cognizance was taken by Magistrate and trial started after committal. During the trial applicant-accused Pulloo @ Shiv Pratap and Indrajeet were summoned under Section

319 Cr.P.C. They were also tried along with other charged accused persons and ultimately all the accused including applicant were acquitted by judgement and order dated 25.11.2005. It is also stated in the counter affidavit that a supplementary charge sheet No.164A dated 20.10.2002 was submitted against accused applicant Pulloo @ Shiv Pratap and Indrajeet. Learned AGA further argued that the matter should be brought by the applicant before the court concerned for appropriate relief and he has wrongly filed this application u/s 482 Cr.P.C.

8. I have considered the submissions of learned counsel for the applicant, learned AGA and perused the record.

9. Section 300 Cr.P.C. provided that a person once convicted or acquitted cannot be tried for the same offence. Section 300(1) of Cr.P.C. is as under:-

"Person once convicted or acquitted not to be tried for same offence-

(1) A person who has once been tried by a Court of competent jurisdiction for an offence and convicted or acquitted of such offence shall, while such conviction or acquittal remains in force, not be liable to be tried again for the same offence, nor on the same facts for any other offence for which a different charge from the one made against him might have been made under sub-section (1) of Section 221, or for which he might have been convicted under sub-section (2) thereof."

10. Above provision is based on maxim "nemo debet bis vexari", which means that a person cannot be a convicted on second time for an offence which was involved in the offence with which he was previously charged. In order to bar the trial of the any offence already tried it must be shown-

(i) that he has been tried by a competent court for the same offfence or one for which he might have been charged or convicted at that trial on the same facts.

(ii) that he has been convicted or acquitted at the trial and

(iii) that such conviction or acquittal is in force.

11. In case at hand the applicant-accused was summoned under Section 319 Cr.P.C. in Sessions Trial No.755 of 2003 (Case Crime No.99 of 2002) Police Station- Handia, District- Allahabad and was charged under Sections 147, 148, 324/149, 308/149 IPC and after complete trial he has been acquitted by judgement and order dated 25.11.2005 of Additional Sessions Judge, Court No.13, Allahabad, which was a competent court to try the offence.

12. Learned AGA raised an objection that in previous case applicant was charged under Sections 147, 148, 324/149, 308/149 IPC and supplementary charge sheet dated 20.10.2002 has been filed under Section 147, 148, 323, 504, 325, 308, 324 IPC. Learned AGA also submitted that some additional sections have been added in the charge sheet.

13. It is relevant that in both the trials incident is the same. They are based on same prosecution story and the facts. In previous trial i.e, S.T. No.775 of 2003 charge sheet against the six accused were submitted under Sections 147, 148, 149, 323, 504, 325, 308, 324 IPC and applicant was also summoned in that case but

charges against them were framed in only Section 147, 148, 324/149, 308/149 IPC. Charge against the applicant was also framed under the above sections of Indian Penal Code. In **Thakur Ram vs. State of Bihar AIR 1966 SC 911,** it has been observed by Hon'ble Apex Court that Section 300 Cr.P.C. bars the trial of a person again not only for the same offence but also for any other offence on the same facts **Inguva Mallikarjun Vs. State of A.P. 1978 Cr.LJ 392 (DB),** it was observed that Section 300 Cr.P.C. also applies to offence for which charges might have been framed at previous trial.

14. It is not disputed by the learned AGA that previous offence was tried by a competent court in which applicant was acquitted. This fact is also stated in the counter affidavit of the State. Third necessary point to apply the bar of Section 300 Cr.P.C. is such acquittal or conviction is in force. Learned counsel for the applicant submitted that the acquittal order dated 25.11.2005 is still in force. Learned AGA has not disputed this fact.

15. In view of the above facts and discussion, second trial of the applicant for the same offence in which he has been acquitted is barred by Section 300 Cr.P.C.

16. Consequently, entire proceedings of Criminal Case No.1048 of 2005 arising from Case Crime No.99 of 2002, under Section 147, 148, 323, 504, 325, 308, 324 IPC against the applicant is hereby quashed.

17. This application u/s 482 Cr.P.C. is, accordingly, **allowed.**

(2020)02ILR A1494

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 09.09.2019

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

Application U/S 482 No. 15919 of 2013
connected with
Application U/S 482 No. 11756 of 2013

Smt. Saroj Mishra ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Ms. Amrita Mishra

Counsel for the Opposite Parties:
A.G.A., Sri Firoz Haider

A. Criminal Law - Code of Criminal Procedure, 1973- Section 195- There is specific bar for a Court to take cognizance for any offence punishable under Sections 172 to 188 Cr.P.C. (both inclusive) as per provision quoted u/s 195 (a) (i) Cr.P.C.

B. Criminal law - Indian Penal Code, 1860 - Section 340- section 419, 420, 468, 471, *177, 181* IPC.- The false testimony of an imposter before the Court would be covered in the category of offence under Sections 177 and 181 I.P.C. and the bar of Section 195 Cr.P.C. would be operational .

C. Criminal law - Code of Criminal Procedure, 1973 - Section 340-Only court had the jurisdiction to lodge a complaint after enquiry having been held under Section 340 Cr.P.C. which process does not appear to have been resorted to in the present case- No private complainant can be allowed to initiate any Criminal proceeding in his individual capacity - No court can take cognizance of the offences punishable under Section 172 to 188 I.P.C. except on written complaint by the public servant concerned-Even if the other sections 419, 420, 408 and 471 I.P.C. are found to be

made out despite their being not mentioned in Section 195 Cr.P.C., it cannot be held that the proceedings in the present case would not stand barred under Section 195 Cr.P.C. as the offences under the said sections appear to be connected and to have been committed in course of the same offence i.e. under Sections 177 and 188 I.P.C.-Entire criminal proceedings quashed. (Para 8,9,13,14,19,21)

Application u/s 482 Cr.Pc disposed of.

Case law discussed:-

1. St. of U.P. Vs. Mata Bhik & ors. (1994) 4 SCC 95
2. Abdul Rehman & anr Vs. K.M. Anees-Ul-Haq 2011 (10) SCC 696

3. Soni Dinesh Kumar Dahyalal Vs. St. of Guj. Crl. Misc. Appl. No. 17270 of 2012

4. Govardhan Kumar Thakoredas Vs. St. of Guj. in Crl. Misc. Application No. 24632 of 2015 decided on 13.04.2017

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

1. Heard Ms. Amrita Mishra, learned counsel for the applicant and Sri G.P. Singh, learned A.G.A. appearing for the State.

2. These applications have been moved for quashing of the order dated 2.1.2013 passed by the Additional Chief Judicial Magistrate, Court No. 2, Budaun in Criminal Case No. 3 of 2013 (State vs. Satyaveer and others) arising out of case crime no. 592 of 2012 under section 419, 420, 468, 471, 177, 181 IPC, P.S. Faizganj Behta District Budaun.

3. The case as mentioned in the FIR is that the opposite party no. 2 Kishori Lal came to know on 10.4.2012 about the case of Smt. Saroj Mishra (accused-applicant)) where-after he tried to find out about the same and came to know that Satyaveer (accused-applicant), Saroj Mishra (accused-applicant) and Mahendra had committed forgery in several papers in collusion with each other and had made the opposite party no. 2 an accused in a false case, because in the complaint and the statement under section 200 Cr.P.C., the occurrence is shown to have taken place on 27.7.2011 by Mahendra while Mahendra son of Saligram was detained in jail from 19.7.2011 to 28.7.2011 in case crime no. 664 of 2011 and hence how could he have seen the occurrence as he was detained in prison which was at a distance of 50 km. Either he gave false statement or some other person would have been sent to jail by forged name of the said accused. The opposite party no. 2 annexed documentary evidence relating to case no. 1226 of 2011 pertaining to Case Crime No.664 of 2011 and mentioned in the said written report that all the accused named-above had committed forgery in various documents by which they had misled the court as well as the police and gave false statement. It is also mentioned in the written application moved under section 156 (3) Cr.P.C. that concerning this occurrence, on 28.4.2012, an application was given to the police to register the case against the accused person but no action was taken.

4. On the said application the present case crime no. 592 of 2012 appears to have been registered under section 419, 420, 468, 471 IPC at P.S. Faizganj Behta, District Buadaun on 7.11.2012 at 6.10 A.M. and after investigation by the Investigating Officer, charge-sheet has been submitted against the Satyaveer, Smt. Saroj Mishra (applicant) and Mahendrapal under

section 419, 420, 468, 471, 177 and 181 IPC.

5. Contention of the learned counsel for the applicant is that on 25.8.2011 the applicant had filed a complaint before the CJM, Budaun against the opposite party no. 2 under sections 323, 504, 506, 427 IPC which was registered as a Complaint Case No. 1226 of 2011 which is at page-52 as Annexure-9 stating therein that on 27.7.2011 at about 8.00 A.M. when she was going to attend her duty as Aganbari Karyakarti, near Devi temple the accused persons namely Yad Ram @ Santosh, Raja Ram and Kishori Lal came in her way armed with illegal weapon and demanded Rs.10,000/- as illegal gratification giving threats to face dire consequence in case the same was not given. They also used abusive language against her. In the said case statement of applicant was recorded before Magistrate on 25.8.2011 under section 200 Cr.P.C. and that of witness Satyaveer under section 202 Cr.P.C as PW2 on 5.12.2011. In her statement, the applicant had fully corroborated the allegation made in the complaint. However, it was made clear by the applicant that no other witness was present at the time of incident on the spot. Statement of Mahendrapal was also recorded under section 202 Cr.P.C as PW1 on 3.11.2011, in which he also stated that along with other persons, Mahendrapal too was present there. After considering the entire evidence, learned Magistrate summoned the opposite party no.2 and two others in the said complaint case no. 1226 of 2011 to face trial under section 323, 504, 506, 429 IPC. On 7.11.2012 opposite party no.. 2 lodged an FIR at P.S. Faizganj Behta of the present case against the applicant Saroj Mishra, Satyaveer and Mahendrapal by moving application under section 156 (3) Cr.P.C. alleging that after summoning order in the Complaint Case No.1226 of 2011, she verified the record and found that the statement made by Mahendrpal was not possible to have been made because he was in jail since 19.7.2011 to 28.7.2011 in relation to case crime no. 664 of 2011 while the complainant of complaint case no. 1226 of 2011 had shown Mahendrapal to be present at the time of occurrence of the said case. The police without making proper investigation, filed charge-sheet on 28.11.2012 against the applicant Saroj Mishra and Mahendnrapal in case crime no. 592 of 2012 under section 419, 420, 468, 471, 177 and 181 IPC, on which ACJM, Court no. 2, Budaun has taken cognizance on 2.1.2013 and has issued summons to the applicant and others to appear before it on 28.2.2013 without applying his judicious mind. The entire charge-sheet as well as order dated 2.1.2013 in pursuance thereof, is ex-facie illegal because cognizance taken by the Magistrate is barred under section 195 of Cr.P.C. Even if Mahendrapal has given false statement, the remedy is available to opposite party no. 2 to move application under section 340 Cr.P.C before the court concerned. Even from the perusal of the FIR, no case is made out under the above-mentioned sections and whole proceedings have been initiated only to harass the applicant because opposite party no. 2 had been summoned in complaint case no. 1226 of 2011 and therefore, the present proceedings is nothing but a counter-blast initiated by malafide intention and ulterior motive, which were liable to be quashed. The co-accused Satyaveer had filed an application u/s 482 No.11756 of 2013 which was disposed of by this Court directing that no coercive action shall be taken against him, copy of which is

annexed, therefore, it is prayed that the summoning order dated 2.1.2013 passed by ACJM, Court No. 2 Budaun should be quashed. Reliance has been placed on behalf of the applicant in the case of **State of U.P. vs. Mata Bhik and others (1994) 4 SCC 95.** In this case it is held by Apex Court that the court is barred from taking cognizance of offence under section 195 (1) (a) except on a written complaint by public servant concerned. Private complaint is not maintainable. The successor in the office of the public servant concerned in law is eligible to file a complaint against wrongdoers .

6. On behalf of opposite party no. 2 by filing counter affidavit it is submitted that the summoning order dated 2.1.2013 is absolutely legal. It is wrong to say that Mahendrapal son of Saligram named as witness, was in jail since 19.7.2011 to 28.7.2011 in case Crime No.664 of 2011. It was evident from FIR that the complainant lodged the same wherein he has mentioned that Mahendrapal son of Saligram was detained in jail from 19.7.2011 to 28.7.2011 in case crime no. 664 of 2011, the deponent was deliberately giving false evidence just to obtain favourable order in his favour. It is further mentioned that the applicant Saroj Mishra has filed frivolous and concocted complaint before the CJM, misrepresented and committed fraud. She has alleged that the incident had occurred on 27.7.2011 at about 8.00 A.M. in the morning when she was going to attend official duty as Aganbari Kariyakarti. It is evident on record that Mahendrapal son of Saligram was detained in jail on 27.7.2011 and was released on 28.7.2011 which belies the story of the applicant. Statement recorded under section 200 Cr.P.C of Saroj Devi on 25.8.2011, in that she has clearly mentioned that on hearing hue and cry, several people came which included Latoori son of Sri Dev, Mahendrapal son of Saligram and her husband Satyaveer and rescued her and in the process, she has received several internal injuries. It was evidently clear that the complainant repeatedly mentioned presence of Mahendrapal on the scene of occurrence. The witness Satyaveer has also mentioned that several other persons had reached on the spot. It is evident that in the statement given by Mahendrapal that the applicant has committed forgery and hence an offence under sections 419, 420, 468, 471, 477 and 481 IPC were made out. There is no infirmity in the impugned order.

7. I have perused the record of the case and have heard argument of both the sides. In the present case, it is apparent that the accused applicant has been summoned for offences under sections 419, 420, 468, 471, 177 and 181 IPC pursuant to the charge-sheet having been filed on a complaint made by opposite party no.2 Kishori Lal. The allegations against the accused-applicant and other co-accused are that one complaint, case no. 1226 of 2011 (Saroj MIshra vs. Yad Ram and others) was filed by the accused-applicant against opposite party no. 2 and two others in which it was mentioned by the complaint (accused-applicant in the present case) that on 27.7.2011 at about 8.00 A.M. when she was going to attend duty of Aganbari, the accused opposite party no. 2 along with co-accused had stopped her near the Devi Temple and co-accused Yad Ram had abusingly told her that if she wanted to continue with the job, she would have to give Rs.10,000/- to him. His brother was driver with a M.L.A. and that he would not allow here to do the job and would continue to make police

complaint against her and thereafter started dragging her after holding her hand. Other co-accused Kishori, Raja Ram, companions of opposite party no. 2 in the present case, started beating the complainant (applicant-accused) by which she received internal injury. Her mobile was also snatched away and the said occurrence was seen by Latoori, Mahendrapal and her husband Satyaveer and when they came there, the accused had fled from there giving life threat to her. When she went to lodge the complaint, same was not written, hence out of compulsion, she gave an application to SSP, Budaun but even then nothing was done, then she lodged the present complaint. In this case, the statements of complainant Saroj Devi accused-applicant were recorded under section 200 Cr.P.C. on 25.8.2011 and statements of Satyaveer as PW2 and Mahendrapal as PW1 were recorded. On the basis of these statements, summoning order had been passed in the said complaint case of the accused-applicant and other co-accused under section 323, 504, 506 and 420 IPC and regarding this it is being stated from the side of opposite party no. 2 that the trial court has been misled and false statement of PW1 Mahendrapal has been got recorded by the accused-applicant while this witness was in jail on the date when he is stated to have given evidence before the court below in the said case. Therefore, he could not have been present there and this the forgery has been committed by the applicant in getting the opposite party no. 2 and his companions summoned. Regarding this, forgery, present case has been lodged by opposite party no. 2 being case crime no. 592 of 2012 under section 419, 420, 468, 471, 177 and 181 IPC and it is being argued that this case could not have been filed by opposite party no. 2 Kishori Lal as complainant because this was forgery committed before the court as by getting examined a person who was on the said date stated to be in jail, is shown to have stated before the said court, which would be an impostor. In this regard, the argument made by the learned counsel for the applicant is that in such a case the proceedings of criminal case would be barred by section 195 Cr.P.C. because in such a case it was the court before which false evidence was adduced, which only could have lodged a complaint following procedure laid down under section 195 read with 340 Cr.P.C. and no private (person opposite party no. 2) could have been permitted to lodge an FIR, hence the proceedings being barred by section 195 Cr.P.C, the prosecution of the accused-applicant needs to be quashed.

8. It transpires from the above facts that Saroj Mishra W/o Satyaveer (applicant) had filed a Complaint Case no. 1226 of 2011 wherein Saroj Mishra was examined as complainant under Section 200 Cr.P.C., her husband, Satyaveer was examined as P.W.2 under Section 202 Cr.P.C. and Mahendra Pal was examined as P.W.1 under Section 202 Cr.P.C. and, thereafter the trial court had summoned the O.P. No.2 as an accused to face trial under Sections 323, 504, 506 and 527 I.P.C. According to the O.P. No.2, the said summoning was based on false/forged evidence adduced before the trial court because P.W.1, Mahendra Pal was in jail in Crime No. 664 of 2011 under Sections 323, 324, 504, 506 and 3(i)(10) S.C./S.T. Act with effect from 19.07.2011 to 28.07.2011 while date of occurrence of the said complaint was reported to be 27.07.2011, hence it was the version of the O.P. No.2 that some imposter was made to stand before the trial court to make false

statement that the O.P. No.2 had caused the occurrence which was witnessed by him, as he could not be present due to his being in jail on the date of occurrence and to prove that, question/answer have been obtained by him which is annexed by O.P. No.2 with Counter-Affidavit as C.A.-I in which it is recorded that the said witness was lying in jail during that period. On the basis of the said evidence, O.P. No.2 has lodged F.I.R. in the present case which is registered as Crime No. 592 of 2012 in which occurrence is shown of 27.07.2011 at 6:10 p.m. with the aid of application under Section 156 (3) Cr.P.C. and after the investigation in the said matter, the charge-sheet has been submitted against the accused applicant along with two others under Sections 419, 420, 168, 471, 177 and 181 I.P.C. It is argued on behalf of accused applicant that cognizance cannot be taken by the trial court on the said charge-sheet because the same is barred by the provisions of Section 195 Cr.P.C., therefore, this Court has to see as to what is provided under the said section and for the sake of convenience the same is reproduced herein below:

*"**Section 195- Prosecution for contempt of lawful authority of public servants, for offences against public justice and for offences relating to documents given in evidence***

(1) No Court shall take cognizance-

(a) (i) of any offence punishable under sections 172 to 188 (both inclusive) of the Indian Penal Code (45 of 1860), or

(ii) of any abetment of, attempt to commit, such offence, or

(iii) of any criminal conspiracy to commit, such offence,

Except on the complaint in writing of the public servant concerned or of some other public servant to whom he is administratively subordinate;

(b) (i) of any offence punishable under any of the following section of the Indian Penal Code (45 of 1860), namely, sections 193 to 196 (both inclusive), 199, 200, 205 to 211 (both inclusive) and 228, when such offence is alleged to have been committed in, or in relation to, any proceeding in any Court, or

(ii) of any offence described in section 463, or punishable under section 471, 475 or section 476, of the said Code, when such offence is alleged to have been committed in respect of a document produced or given in evidence in a proceeding in any Court, or

(iii) of any criminal conspiracy to commit, or attempt to commit, or the abetment of, any offence specified in sub-clause (i) or sub-clause (ii),

[except on the complaint in writing of that Court or by such officer of the Court as that Court may authorise in writing in this behalf, or of some other Court to which that Court is subordinate].

(2) Where a complaint has been made by a public servant under clause (a) of Sub-Section (1) any authority to which he is administratively subordinate may order the withdrawal of the complaint and send a copy of such order to the Court; and upon its receipt by the Court, no further proceedings shall be taken on the complaint:

Provided that no such withdrawal shall be ordered if the trial in the Court of first instance has been concluded.

(3) In clause (b) of Sub-Section (1), the term "Court" means a Civil, Revenue or Criminal Court, and includes

a tribunal constituted by or under a Central, provincial or State Act if declared by that Act to be a Court for the purposes of this section.

(4) For the purposes of clause (b) of Sub-Section (1), a Court shall be deemed to be subordinate to the Court to which appeals ordinarily lie from appealable decrees or sentences of such former Court, or in the case of a civil Court from whose decrees no appeal ordinarily lies, to the principal Court having ordinary original civil jurisdiction within whose local jurisdiction such Civil Court is situate:

Provided that-

(a) where appeals lie to more than one Court, the Appellate Court of inferior jurisdiction shall be the Court to which such Court shall be deemed to be subordinate;

(b). where appeals lie to a civil and also to a Revenue Court, such Court shall be deemed to be subordinate to the civil or Revenue Court according to the nature of the case or proceeding in connection with which the offence is alleged to have been committed."

9. It is apparent from the above provision that there is specific bar for a Court to take cognizance for any offence punishable under Sections 172 to 188 Cr.P.C. (both inclusive) as per provision quoted above under Section 195 (a) (i) Cr.P.C. In the case at hand, the two sections out of these are mentioned which are Sections 177 and 181 I.P.C.

10. Now we have to see as to whether as per allegations made in the F.I.R., the offences under those sections are made out or not.

11. Necessary ingredients of Section 177 I.P.C. are as follows:

(i) that the accused was legally bound to furnish information;

(ii) that such an information was to be furnished to a public servant;

(iii) that the accused furnish such information as true, knowing that it was false (or having believed that it was false);

(iv) and that such information was required for the purpose of preventing the commission of an offence or in order to the apprehension of an offender.

12. The necessary ingredients to constitute an offence under Section 181 I.P.C. are that it must be shown that the person giving information knew or believed it to be false or that the circumstances in which the information was given were such that the only reasonable inference is that the person giving the information knew or believed it to be false. That information is shown to be false does not caste upon the party, who is charged with an offence under section, the burden of showing that, when he made it, he believed it to be true.

13. If I analyse the facts of the present case, I find that according to prosecution version, P.W.1, Mahendra Pal of the Complaint Case No. 1226 of 2011 was found to be in prison on the date of occurrence of the said case i.e. on 27.07.2011, therefore, he could not be present on the scene of occurrence on the said date as according to the documentary evidence given from the side of O.P. No.2 mentioned above, he was reported to be lying in jail from 19.07.2011 to 28.07.2011 and probably, based on this documentary evidence, the charge-sheet has been submitted in the present case that some other person may have been made to stand before the said court at the time when evidence under Section 202 Cr.P.C. was being recorded allegedly as Mahendra Pal. It would be presumed that on the said date,

the person who stated before the said court as P.W.1, Mahendra Pal could not be the person who was lying in jail on the said date, hence, some imposter might have stated before the court deposing that he had seen the occurrence of the said case on 27.07.2011, therefore, this statement would be covered in the category of false statement given before the said court and would be covered under the ingredients of offence under Sections 177 and 181 I.P.C., therefore, apparently it appears that the bar of Section 195 Cr.P.C. would be operational in the present case as. In such a matter O.P. No.2 had a course open before him to approach the trial court which had recorded the said evidence and to bring to its notice that some imposter had given statement as P.W.1 in the said case and hence said court should have conduct an enquiry under Section 340 Cr.P.C. and if the said allegation was found to be correct, the said court could have moved a complaint before appropriate forum but instead of this procedure being followed in the present case, O.P. No.2 has straight-way approached the police and lodged an F.I.R. against the accused applicants whereon after investigation, charge-sheet has been submitted and cognizance has been taken by the trial court which appears to be erroneous in view of the said provision of Section 195 Cr.P.C. It may be made clear that however investigation on such a written report of the O.P. No.2 could have been conducted by the police but once charge-sheet was submitted, cognizance could be taken by the trial court only on a complaint made by Court in this matter. I am also of the opinion that whatever evidence has been collected by the I.O. during investigation would only be piece of evidence which could be taken into consideration if in the present case, the prosecution deemed it proper to approach the court concerned to get an enquiry held under Section 340 Cr.P.C. into this matter and, thereafter request the court to lodge a complaint before appropriate forum. It is absolutely clear law that in such a matter only court had the jurisdiction to lodge a complaint after enquiry having been held under Section 340 Cr.P.C. which process does not appear to have been resorted to in the present case. Further reliance has been placed by the learned counsel for the applicant upon **State of U.P. Vs. Mata Bhikh Singh and others (1994) 4 SCC 95** of which Para 5 and 6 are quoted hear-in-below:

"5. The relevant provisions of Section 195(1)(a)(i) of the Code reads thus:

"No Court shall take cognizance --

(a)(i) of any offence punishable under Sections 172 to 188 (both inclusive) of the Indian Penal Code (45 of 1860), or

(ii) ....

(iii) ....

except on the complaint in writing of "the public servant concerned' or of some other public servant to whom he is administratively subordinate."

6. The object of this section is to protect persons from being vexatiously prosecuted upon inadequate materials or insufficient grounds by person actuated by malice or ill-will or frivolity of disposition at the instance of private individuals for the offences specified therein. The provisions of this section, no doubt, are mandatory and the Court has no jurisdiction to take cognizance of any of the offences mentioned therein unless there is a complaint in writing of "the public servant concerned' as required by the section without which the trial under

Section 188 of the Indian Penal Code becomes void ab initio. SeeDaulat Ram v. State of Punjab [1962 Supp 2 SCR 812 : AIR 1962 SC 1206 : 1962 Cri LJ 286] . To say in other words a written complaint by a public servant concerned is sine qua non to initiate a criminal proceeding under Section 188 of the IPC against those who, with the knowledge that an order has been promulgated by a public servant directing either "to abstain from a certain act, or to take certain order, with certain property in his possession or under his management' disobey that order. Nonetheless, when the court in its discretion is disinclined to prosecute the wrongdoers, no private complainant can be allowed to initiate any criminal proceeding in his individual capacity as it would be clear from the reading of the section itself which is to the effect that no court can take cognizance of any offence punishable under Sections 172 to 188 of the IPC except on the written complaint of "the public servant concerned' or of some other public servant to whom he (the public servant who promulgated that order) is administratively subordinate."

14. It is evident from the above cited case that no private complainant can be allowed to initiate any Criminal proceeding in his individual capacity as it would be clear from the reading of above sections that no court can take cognizance of the offences punishable under Section 172 to 188 I.P.C. except on written complaint by the public servant concerned. In this case, it has been held that the public servant concerned would include his successor also.

15. Reliance is also placed by the learned counsel for the applicant upon **Abdul Rehman and another Vs. K.M. Anees-Ul-Haq 2011 (10) SCC 696** para nos. 23 and 25 are quoted herein below.

"23. As noticed above, a charge-sheet has already been filed against the respondent by CAWC before the competent court. The respondent would, therefore, have a right to move the said court for filing a complaint against the appellants for an offence punishable under Section 211 IPC or any other offence committed in or in relation to the said proceedings at the appropriate stage. It goes without saying that if an application is indeed made by the respondent to the court concerned, it is expected to pass appropriate orders on the same having regard to the provisions of Section 340 of the Code. So long as the said proceedings are pending before the competent court it would neither be just nor proper nor even legally permissible to allow parallel proceedings for prosecution of the appellants for the alleged commission of the offence punishable under Section 211 IPC.

25. The substance of the case set up by the respondent is that the allegations made in the complaint lodged with CAWC accusing him of an offence punishable under Section 406 IPC and Sections 3 and 4 of the Dowry Prohibition Act were false which according to the respondent tantamounts to commission of an offence punishable under Section 211 IPC apart from an offence punishable under Section 500 IPC. The factual matrix for both the offences is however one and the same. Allowing the respondents to continue with the prosecution against the appellants for the offence punishable under Section 500 IPC would not, in our opinion, subserve the ends of justice and may result in the appellants getting vexed twice on the same facts. We are doubtless conscious of the

fact that any complaint under Section 500 IPC may become time-barred if the complaint already lodged is quashed. That is not an insurmountable difficulty and can be taken care of by moulding the relief suitably."

16. In the above-mentioned case, the question involved was as to whether a complaint filed by the respondent/complainant against the appellants, alleging commission of offences punishable under Section 211, 500, 109 and 114 I.P.C. read with Section 34 I.P.C. was barred by provisions of Section 195 Cr.P.C., 1973. The appellant in this case had lodged a complaint with regard to crime with Women Cell (C.A.W.C.), accusing the respondent and four others for the offence punishable under Section 406 I.P.C. read with Section 34 I.P.C. and the D.P. Act. Upon filing of the complaint by the appellants with C.A.W.C., the respondent/complainant had sought an order of anticipatory bail from the Sessions Judge and an order granting bail was passed in favour of the respondents. The respondent's/complainant case under Section 211 I.P.C. was that accusations made by the appellant in the report lodged with C.A.W.C. were totally false and fabricated. The Magistrate entertained the complaint under Section 211 I.P.C. and came to the conclusion that a complaint for commission of an offence punishable under Section 211 I.P.C. is maintainable even at the stage of investigation. The Sessions Judge, dismissed the Criminal Revision there-against as barred by limitation. The High Court by the impugned order dismissed the Application under Section 482 Cr.P.C. there-against holding that since no Judicial Proceedings were pending in any court at the time when the complaint under Section 211 and 500 I.P.C. was filed by the respondent/complainant, the bar contained in Section 195 Cr.P.C. was not attracted. The question for determination before the Hon'ble Supreme Court was as to whether the anticipatory bail proceedings would constitute judicial proceedings, and if so, whether the offence allegedly committed by the appellants could be said to have been committed in relation to any such proceedings. The Hon'ble Supreme Court had allowed the appeal and gave finding that bail proceeding conducted by the court of Sessions Judge in connection with the case which the appellants had lodged with C.A.W.C. were judicial proceedings and offence punishable under Section 211 I.P.C. alleged to have been committed by the appellants related to the said proceedings. Such being the case, the bar contained in Section 195 Cr.P.C. was clearly attracted to the complaint filed by respondent under Section 211 I.P.C. against the appellants.

17. The facts of the above case are not identical to the present case though the accused appears to have been summoned for offences under Sections 419, 420, 468 and 471 I.P.C. also but this Court does not appear to have expressed any opinion with respect to the fact as to whether the allegations made in the present case would constitute offences under the aforementioned sections also or not as the full fledged evidence does not appear to have been filed, moreover in the present case, none had appeared from the side of O.P. No.2 when the case was called out and in his absence, this order is being passed only on the strength of the Counter-Affidavit filed from his side but I have already expressed above that the allegations prima-facie constitute offences under Sections 177 and 181 Cr.P.C. which

definitely find mention in the provisions under Section 195 Cr.P.C. cited above.

18. Next reliance has been placed by learned counsel for the applicants upon para 14 of the Judgement of **Soni Dinesh Kumar Dahyalal Vs. State of Gujarat** CRIMINAL MISC.APPLICATION NO. 17270 of 2012, which is as follows:

"14.Though, in our judgment, section 195 does not bar the trial of an accused person for a distinct offence disclosed by the same facts and which is not included within the ambit of that section, it has also to be borne in mind that the provisions of that section cannot be evaded by resorting to devices or camouflages. The test whether there is evasion of the section or not is whether the facts disclose primarily and essentially an offence for which a complaint of the court or of the public servant is required. In other words, the provisions of the section cannot be evaded by the device of charging a person with all offence to which that section does not apply and then convicting him of an offence to which it does, upon the ground that such latter offence is a minor offence of the same character, or by describing the offence as being one punishable under some other section of the Indian penal Code,, though in truth and substance the offence falls in the category of sections mentioned in section 195,Criminal Procedure Code. Merely by changing the garb or label of an offence which is essentially all offence covered by the provisions of section 195 prosecution for such an offence cannot be taken cognizance of by mis-describing it or by putting a wrong label on it."

19. The above ruling seems to suggest that it has to be borne by the court in mind that the bar of provision under Section 195 Cr.P.C. should not be evaded by resorting to devices or camouflages and it has been specified that the main test as to whether there is evasion of the section or not, is whether the facts disclose primarily and essentially an offence for which a complaint of the Court or of the public servant is required. In the present case, I find that though other offences under Sections 419, 420, 468 and 471 I.P.C. are also mentioned to have been committed by the accused applicant although these offences do not find mention in Section 195 Cr.P.C. which bars the cognizance to be taken unless complaint is filed in the matter by the public servant concerned. I have already expressed my opinion above that the main allegation appears to be covered under Section 177 and 181 I.P.C. while other sections which have been mentioned, I have not expressed my opinion as to whether they also stand constituted in the present case or not due to the lack of evidence at this stage but even if they are found to be constituted, it would not mean that the proceedings in the present case would not be barred by Section 195 Cr.P.C. as the main offence appears to fall under Section 181 Cr.P.C. as the witness Mahendra Pal who was examined as P.W.1 is stated to have deliberately made a false statement as his presence was not possible to be there on the date of occurrence as he was reported to be lying in jail on the said date of occurrence.

20. Lastly reliance is placed upon by the learned counsel for the applicant upon **Govardhan Kumar Thakoredas Vs. State of Gujarat** in Crl. Misc. Application No. 24632 of 2015 and connected matters decided on 13.04.2017 in which in para nos. 28, 29 and 52, following is held:

"28. Section 195(1)(a)(i) Cr.PC bars the court from taking cognizance of any offence punishable under Section 188 IPC or abetment or attempt to commit the same, unless, there is a written complaint by the public servant concerned for contempt of his lawful order. The object of this provision is to provide for a particular procedure in a case of contempt of the lawful authority of the public servant. The court lacks competence to take cognizance in certain types of offences enumerated therein. The legislative intent behind such a provision has been that an individual should not face criminal prosecution instituted upon insufficient grounds by persons actuated by malice, ill-will or frivolity of disposition and to save the time of the criminal courts being wasted by endless prosecutions. This provision has been carved out as an exception to the general rule contained under Section 190 Cr.P.C. that any person can set the law in motion by making a complaint, as it prohibits the court from taking cognizance of certain offences until and unless a complaint has been made by some particular authority or person. Other provisions in the Cr.PC like sections 196 and 198 do not lay down any rule of procedure, rather, they only create a bar that unless some requirements are complied with,the court shall not take cognizance of an offence described in those Sections. (vide Govind Mehta v.The State of Bihar, AIR 1971 SC 1708; Patel Laljibhai HC-NIC Page 32 of 41 Created On Fri Apr 14 01:03:33 IST 2017 Somabhai v. The State of Gujarat, AIR 1971 SC 1935; Surjit Singh & Ors. v. Balbir Singh, (1996) 3 SCC 533; State of Punjab v. Raj Singh & Anr., (1998) 2 SCC 391; 2 K. Vengadachalam v. K.C. Palanisamy & Ors., (2005) 7 SCC 352; and Iqbal 29. The test of whether there is evasion or non- compliance of Section 195 Cr.PC or not, is whether the facts disclose primarily and essentially an offence for which a complaint of the court or of a public servant is required. In Basir-ul-Haq & Ors. v. The State of West Bengal, AIR 1953 SC 293; and Durgacharan Naik & Ors v. State of Orissa, AIR 1966 SC 1775, this Court held that the provisions of this Section cannot be evaded by describing the offence as one being punishable under some other sections of IPC, though in truth and substance, the offence falls in a category mentioned in Section 195 Cr.PC. Thus, cognizance of such an offence cannot be taken by mis-describing it or by putting a wrong label on it.Singh Marwah & Anr. v. Meenakshi Marwah & Anr., AIR 2005 SC 2119).

29. The test of whether there is evasion or non- compliance of Section 195 Cr.PC or not, is whether the facts disclose primarily and essentially an offence for which a complaint of the court or of a public servant is required. In Basir-ul-Haq & Ors. v. The State of West Bengal, AIR 1953 SC 293; and Durgacharan Naik & Ors v. State of Orissa, AIR 1966 SC 1775, this Court held that the provisions of this Section cannot be evaded by describing the offence as one being punishable under some other sections of IPC, though in truth and substance, the offence falls in a category mentioned in Section 195 Cr.PC. Thus, cognizance of such an offence cannot be taken by mis-describing it or by putting a wrong label on it.

52. The Supreme Court, in the case of M. Narayandas vs. State of Karnataka & Ors., AIR 2004 SC 555 considered its earlier decision in the case of Raj Singh (supra) referred to HC-NIC Page 37 of 41 Created On Fri Apr 14 01:03:33 IST 2017 above, and observed as under;

"8. We are unable to accept the submissions made on behalf of the Respondents. Firstly it is to be seen that the High Court does not quash the complaint on the ground that Section 195 applied and that the procedure under Chapter XXVI had not been followed. Thus such a ground could not be used to sustain the impugned judgment. Even otherwise there is no substance in the submission. The question whether Sections 195 and 340 of the Criminal Procedure Code affect the power of the police to investigate into a cognizable offence has already been considered by this Court in the case of State of Punjab v. Raj Singh, reported in [1998] 2 SCC 391. In this case it has been that as follows :

"2. We are unable to sustain the impugned order of the High Court quashing the FIR lodged against the respondents alleging commission of offences under Sections 419, 420, 467, and 468 IPC by them in course of the proceeding of a civil suit, on the ground that Section 195(l)(b)(ii) CrPC prohibited entertainment of and investigation into the same by the police. From a plain reading of Section 195 CrPC it is manifest that it comes into operation at the stage when the court intends to take cognizance of an offence under Section 190(1) Cr. PC; and it has nothing to do with the statutory power of the police to investigate into an FIR which discloses a cognizable offence, in accordance with Chapter XII of the Code even if the offence is alleged to have been committed in, or in relation to, any proceedings in court. In other words, the statutory power of the police to investigate under the Code is not in any way controlled or circumscribed by Section 195 Cr.PC. It is of course true that upon the charge-sheet (challan), if any, filed on completion of the investigation into such an offence the court would not be competent to take cognizance thereof in view of the embargo of Section 195(1)(b) CrPC, but nothing therein deters the court from filing a complaint for the offence on the basis of the FIR (filed by the aggrieved private party) and the materials collected during investigation, provided it forms the requisite opinion and follows the procedure laid down in Section 340 CrPC. The judgment of this Court in Gopalkrishna Menon v. Raja Reddy, [1983] 4 SCC 240 : [1983] SCC (Cri) 822 : AIR (1983) SC 1053 on which the High Court HC-NIC Page 38 of 41 Created On Fri Apr 14 01:03:33 IST 2017 relied, has no manners of application to the facts of the instant case for there cognizance was taken on a private complaint even though the offence of forgery was committed in respect of a money receipt produced in the civil court and hence it was held that the court could not take cognizance on such a complaint in view of Section 195 Cr.PC." Not only are we bound by this judgment but we are also in complete agreement with the same. Sections 195 and 340 do not control or circumscribe the power of the police to investigate under the Criminal procedure Code. Once investigation is completed then the embargo in Section 195 would come into play and the Court would not be competent to take cognizance. However, that Court could then file a complaint for the offence on the basis of the FIR and the material collected during investigation provided that procedure laid down in Section 340 Criminal Procedure Code is followed. Thus no right of the Respondents, much less the right to file an appeal under Section 341, is affected. "

21. In view of the above citation, I am of the view that even if the other

sections 419, 420, 408 and 471 I.P.C. are found to be made out despite their being not mentioned in Section 195 Cr.P.C., it cannot be held that the proceedings in the present case would not stand barred under Section 195 Cr.P.C. as the offences under the said sections appear to be connected and to have been committed in course of the same offence i.e. under Sections 177 and 188 I.P.C., therefore, I am of the view that the proceedings in the present case appear to be barred by provision of Section 195 Cr.P.C. and are liable to be set-aside/quashed.

22. It will be open for the State/prosecution to initiate fresh proceedings by following the procedure prescribed by law as mentioned above and that the State/prosecution need not seek permission of this Court in that regard, therefore, the proceedings in the present case are quashed with liberty to the State/prosecution to initiate fresh proceedings by following procedure prescribed under law. Whatever investigation has been carried out so far, the same will not be rendered invalid. For the purposes of initiating fresh proceedings in accordance with law, the same very material can be used.

23. With the aforementioned direction, these Applications under Section 482 Cr.P.C. are accordingly disposed of.

(2020)02ILR A1507

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 10.02.2020

BEFORE
THE HON'BLE RAM KRISHNA GAUTAM, J.

Application U/S 482 No. 20016 of 2019

Kamal Singh & Anr. ...Applicants
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicants:
Sri Rahul Sahai, Sri Nirvikar Gupta

Counsel for the Opposite Parties:
A.G.A., Sri Brijesh Sahai, Sri Rahul Singh, Sri Bhavya Sahai, Sri Naveen Srivastava

A. Criminal law - Indian Penal Code,1860- Sections 467, 468, 471 I.P.C-The fact and prima-facie conclusion that since the beginning and initiation of contract for agreement to sell, there was presence of intention to cheat or deception has not been mentioned in impugned order.

Presence of intention to cheat or cause deceit since the very beginning is a sine qua non to make out an offence of cheating and the Magistrate was required to mention the said fact in the impugned order.

B. Criminal law - Code of Criminal Procedure ,1973- Section 204 - Magistrate is not required to pass a reasoned and elaborate order while making a summoning order under section 204 Cr.P.C.

It is however mandatory that the summoning order must reflect the application of judicial mind to the facts of the case and ought to be a reasoned and speaking order. The Magistrate was required to record what offences were made out prima-facie on the basis of evidence collected in enquiry by Magistrate as well as the litigations between the parties in different courts

The very ingredients necessary for making out an offence of forgery or fraud were wholly missing from the statements recorded by the Magistrate in the Inquiry contemplated under Sections 202/204 Cr.Pc. (Para 8,18,19)

Application u/s 482 Cr.Pc allowed.

Case law Discussed:-

1. Anil Mahajan Vs. Bhor Ind. Ltd., (2004) Law Suit (SC) 1204

2. Hridaya Ranjan Prasad Verma & ors Vs. St. of Bih.& anr., AIR (2000) SC 2341

3. B. Suresh Yadav Vs. Sharifa Bee & anr., (2007) 4 RCR (Criminal) 870

4. Mahadeo Prasad Vs. St. of Bengal, AIR (1954) SC 724

5. Suresh Vs. Mahadevappa Shivappa Danannava, AIR (2005) SC 1047

6. B. Suresh Yadav Vs. Sharifa Bee & anr., (2007) 13 SCC 107

(Delivered by Hon'ble Ram Krishna Gautam, J.)

1. Heard Sri Nirvikar Gupta, learned counsel for the applicants, Sri Brijesh Sahai, learned Senior Advocate, assisted by Sri Bhavya Sahai, learned counsel for O.P. No. 2 and learned A.G.A. representing the State. Perused the records.

2. This application under Section 482 Cr.P.C. has been filed by applicants Kamal Singh and Ramesh Chandra against State of U.P. and Brahm Kumar Agarwal with prayer to quash entire proceedings of Complaint Case No. 1339 of 2019, Brahm Kumar Vs. Kamal Singh and another, arising out of Case Crime No. 10 of 2015, under Sections 420, 467, 468, 471, 120B I.P.C., P.S. Vrindavan, district Mathura, pending in court of A.C.J.M., Court No. 5, Mathura, including order dated 30.7.2018 passed by the A.C.J.M., Mathura, whereby protest petition has been treated as a complaint case and summoning order dated 26.4.2019 passed in above mentioned Complaint Case.

3. Learned counsel for the applicants argued that applicant no. 1 was recorded tenure holder of Chak No. 115 Gata No. 477 area 0.893 hectare situate at village Jait, P.S. Vrindavan, District Mathura. He entered into an agreement with O.P. No. 2 for sale of his plot in dispute for a total sale consideration of Rs. 1,32,29,630/-. But complainant requested for mentioning of lower amount of sum because if entire sale consideration is mentioned in the agreement to sell, the same would entail a heavy stamp duty. In such circumstances and notwithstanding with the fact that the earnest money of Rs. 33,07,407/- was received by applicant no. 1, agreement to sell was executed mentioning earnest money to be Rs. 20 lacs and total sale consideration to be Rs. 50 lacs despite the fact that the complainant was required to pay balance sale consideration as against Rs. 1,32,29,630/-. But after payment of Rs. 20 lacs the informant-complainant failed to pay above balance consideration resulting lapse of sum in term of agreement entered in between in form of forfeiture clause. The earnest money paid by first informant stood forfeited. A supplementary agreement was also executed in between parties on 29.5.2013 and the time for execution of sale deed was extended. Even then on account of failure on the part of first informant of being able to pay balance sale consideration and being ready and willing to have the sale deed executed, the applicant no. 1 was not bound by above agreement to sell dated 29.6.2012. Applicant no. 1 executed a sale deed for the same land in favour of applicant no. 2, Ramesh Chandra, on 1.9.2014 for a total sale consideration of Rs. 1,15,00,000/-, which was a valid transaction entered in between. The first informant instituted O.S. No. 913 of 2014 for a decree of relief of specific performance of contract/ agreement to sell dated 29.6.2012 with a contention that the applicant no. 1, being bhumidhar of plot in dispute, had entered into a registered agreement to sell with plaintiff/ first informant for a total sale consideration of Rs. 50 lacs for which Rs. 20 lacs was paid by way of earnest money and deed of agreement to sell was executed on 29.6.2012 with a condition of limitation of one year for execution of sale

deed for it. Time and again payment was being made to applicant no. 1, but he did not show his willingness to have sale deed executed. Hence a supplementary agreement was also executed in between parties on 29.5.2013. But it revealed to the plaintiff- first informant that applicant no. 1 had fraudulently executed sale deed of land in question in favour of applicant no. 2, hence, cause of action had arisen for this civil suit and it was filed for above relief. An application under Order 39 Rule 1 C.P.C. for ad-interim injunction was filed with above contention of plaint. Written statement and objection over above application were also filed by present applicants and after hearing on merit the ad-interim injunction application was rejected by court of Civil Judge (Senior Division), Mathura, vide order dated 21.7.2016. Against this order a First Appeal From Order No. 2685 of 2016 was filed before this court and it was dismissed vide order dated 24.10.2016. Against this order a Special Leave Petition No. 3110 of 2017 was filed before Apex Court, but the same was rejected vide order dated 6.3.2017. In between a first information report with same contention, as of plaint, was filed at P.S. Vrindavan, District Mathura, on 19.12.2014 vide Case Crime No. NIL of 2014, which was renumbered as Case Crime No. 10 of 2015 against applicants. This was with false contention of fact having no merit and was with ulterior motive of blackmailing and harassing the applicants, who are poor illiterate farmers. Investigation resulted in submission of final report on 14.3.2015. Protest petition was filed, which was treated as a complaint case vide order dated 28.5.2015. This order was challenged before this court in Criminal Misc. Application u/s 482 Cr.P.C. No. 20145 of 2015, Brahm Kumar Agarwal Vs. State of U.P. and others, challenging the order of the Magistrate for treating the protest petition as a complaint case. This order of Magistrate dated 21.7.2015 was set aside by this court vide order dated 21.7.2015. Matter was remanded back and it was further investigated. But as there was no substance in the assertion, second round of investigation also resulted in submission of final report on 8.4.2016. Investigating officer concluded that the dispute between the parties was of civil nature, regarding which civil suit is pending for disposal. Again protest petition was filed and vide order dated 9.11.2017 again a direction for further investigation was made. In the third round of investigation again final report dated 30.3.2018 was filed. Hence despite final report being submitted thrice in the matter, the contesting respondent again filed a protest petition, which was treated to be a complaint case, wherein statement of complainant was recorded u/s 200 Cr.P.C. and of his witnesses Vivek Agarwal and Bharat Pal were recorded u/s 202 Cr.P.C. On the basis of recording of statements, learned A.C.J.M., Court No. 5, Mathura, passed summoning order dated 26.4.2019 whereby applicants have been summoned to face trial for the offences punishable under Sections 420, 467, 468, 471, 120B I.P.C. Whereas from the bare perusal of the impugned order of summoning as well as order dated 30.7.2018 treating the protest petition as a complaint case, it is apparent that the same suffer from manifest error apparent on the face of record. Sale deed was rightly executed by applicant no. 1 in favour of applicant no. 2. It was executed after lapse of agreement for sale entered in between applicant no. 1 and informant. The informant- O.P. No. 2 was not ready and willing to perform his part of contract and to have sale deed executed for a

residual consideration. Entire fact in dispute on the basis of which this F.I.R. was lodged or protest petition was taken cognizance of by Magistrate were subjudice before Civil Court in above previously instituted O.S. No. 913 of 2014. Initially prima-facie case was held to be missing in dispute while deciding ad-interim injunction application by learned Civil Court and this order was confirmed till Apex Court. Civil suit is still pending. Unless those facts are being decided by civil court, it can never be held that there was any fraud or fabrication on the part of applicant no. 1. Learned Magistrate, in impugned order, has observed that there is in fact a dispute between parties and as such summoning of applicants was made. It was in utter disregard of the laws propounded by this court as well as Apex Court that purely a civil nature dispute for which Original Suit No. 913 of 2014 pending in between was there and for the facts mentioned therein disputed by written statement, pending for disposal by civil court in above suit has been taken, as a basis and reason for summoning of accused-applicants for offences, as above. Criminal Court may never adjudicate that informant was ready and willing to get sale deed executed or it was informant, who failed to perform his obligation under above registered agreement to sell. The payment of earnest money being said by informant- plaintiff has been admitted by applicants- defendants. It has been said to have lapsed in view of forfeiture clause written in the admitted agreement. This fact may also be adjudicated only and exclusively by civil court. This too may not be adjudicated by a criminal court. Hence no offence was made out against applicants. Applicant no. 2 is a bonafide purchaser, who has purchased the land in dispute through registered sale deed after making valid and legal consideration for the plot in dispute. He can never be held for any offence of fraud, deceit or fabrication or false and fictitious security, to summon them. Hence this application with above prayer.

4. Sri Brijesh Sahai, learned Senior Advocate, assisted by Sri Bhavya Sahai, learned counsel for O.P. No. 2, argued that this court in exercise of inherent jurisdiction u/s 482 Cr.P.C. is not to embark upon factual matrix and the Magistrate, at the stage of passing an order of summoning u/s 204 Cr.P.C., need not to write reasoning in detailed and elaborate order justifying its summoning order. Rather existence of prima-facie case for further proceeding and summoning is to be seen by the Magistrate, as has been held in catena of judgment of Apex Court as well as of this court. In the present case, admittedly, applicant no. 1 entered into an agreement to sell of his bhumidhari land for sale consideration of Rs. 50 lacs, out of which earnest money of Rs. 20 lacs was received. Registered agreement to sell was with limitation of one year for execution of sale deed. There was charge of bank over above land. It was incumbent upon applicant no. 1 to get the land free from above charge and obtain procedure for getting the same alienated, which he could not complete, even after receipt of subsequent part of major consideration in maximum parts elaborated in plaint as well as counter affidavit filed by O.P. No. 2. Owing to failure of applicant no. 1 for getting above formalities completed, subsequent agreement to sell with further limitation was got executed in between. Even after this and receipt of huge amount of sale consideration, the deed was not executed. A notice with false fact was issued by applicant no. 1 to O.P. No. 2

mentioning therein the sale consideration of Rs. 1,32,29,630/-. This was replied by a notice with correct assertion and mentioned for getting dues cleared and formalities fulfilled for getting sale deed executed within the above limitation. Subsequently, a notice was issued and on that date O.P. No. 2 was present at the office of Sub Registrar for getting deed executed, but applicant no. 1 did not turn up. Rather applicant no. 1 executed a sale deed in favour of applicant no. 2, which was a collusive deed, just to defeat the earlier agreement to sell. This was a fraud and deception with O.P. No. 2 for which first information report was got lodged and even after repeated directions for further investigation, final report was submitted under influence of accused-applicants. Ultimately protest petition was filed over final report, which was treated as a complaint case, wherein the Magistrate decided to proceed under Chapter XV of the Code or Criminal Procedure. Statements of complainant and of his two witnesses were recorded by the Magistrate under sections 200 and 202 Cr.P.C. There was sufficient prima-facie evidence for offences punishable under Sections 420, 467, 468, 471, 120B I.P.C. Accordingly, the impugned summoning order was passed against the applicant, against which this proceeding u/s 482 Cr.P.C. has been filed. Whereas applicant no. 1 is in possession of huge amount of money paid by O.P. No. 2 to applicant no. 1 and it has yet not been returned. Thus, execution of agreement to sell was with intention to deceit O.P. No. 2. Hence the same was not complied with. Neither money was paid back nor deed was executed in favour of O.P. No. 2. Rather land in dispute was transferred under a collusive transaction and deed to applicant no. 2, who is enjoying the above land and O.P. No. 2 is running from pillar to post. Civil suit is for decree of specific performance of contract and adjudication of civil right of plaintiff. Whereas this criminal proceeding was for punishment of applicants for forgery and fraud committed by them under a fraudulent intention since the beginning of above transaction and execution of registered agreement to sell and there are catena of judgments of Apex Court as well as of this court that pendency of Civil Suit will not bar criminal proceeding. Hence this application is to be dismissed.

5. Apex Court in ***Anil Mahajan Vs. Bhor Industries Limited, 2004 Law Suit (SC) 1204,*** has propounded that in a case of fraud defined under section 415 I.P.C. and punishable u/s 420 I.P.C., offence of cheating requires criminal intention since very inception of contract. Consideration of substance of complaint should reveal that criminal intention was from very inception of contract. If subsequent disobedience of contract is there, then distinction has to be kept in mind between mere breach of contract and offence of cheating. Subsequent conduct is not sole test. Mere breach of contract cannot give rise to criminal prosecution for cheating unless fraudulent, dishonest intention is shown at beginning or inception of transaction and if it is lacking then substance of complaint will be a simple case of civil dispute in between parties.

6. This has also been laid down by Apex Court in ***Hridaya Ranjan Prasad Verma and others Vs. State of Bihar and another, AIR 2000 SC 2341,*** that mere breach of contract or agreement to sell cannot give rise to criminal prosecution for cheating unless fraudulent or dishonest intention is shown right at the beginning of

transaction. Relevant paragraph no. 16 of judgment reads as under:

"Mere breach of contract cannot give rise to criminal prosecution for cheating unless fraudulent or dishonest intention is shown right at the beginning of transaction, that is the time when the offence is said to have been committed. Therefore, it is the intention which is the gist of the offence. To hold a person guilty of cheating it is necessary to show mere failure to keep up promise subsequently such a culpable intention right to the beginning that is, when he made the promise cannot be presumed."

7. In ***B. Suresh Yadav Vs. Sharifa Bee and another, 2007(4) RCR (Criminal) 870,*** the Apex Court has held that criminal proceedings are not short cut of other remedies available in law to get the agreement to sell executed. In paragraph no. 13 of the aforesaid judgment the Apex Court has observed as under:

"13. For the purpose of establishing the offence of cheating, the complainant is required to show that the accused had fraudulent or dishonest intention at the time of making promise or representation."

8. Applying above principles of law stated in the ratio and judgments to the facts of the present case, it is not disputed between the parties that applicant no. 1 entered in agreement to sell of his bhumidhari land for a valid consideration through a registered sale deed and took earnest money of Rs. 20 lacs against it. Limitation was of one year. Subsequently supplementary agreement to sell by way of a registered document was executed, wherein this limitation period was extended and part of remaining amount was paid. Meaning thereby till then there was no intention to cheat or cause deceit nor this deed was result of above deception. Another agreement on a Stamp paper was executed in between parties having signature and identification with attestation of witnesses on the same day wherein amount of consideration was written to be Rs.1,32,29,630/- for the same land and this collateral document was written to be executed in between in civil proceeding as well order rejecting ad-interim injunction application by Presiding Judge of Civil Court and it was held that this collateral agreement to sell, though not registered, was actionable between parties as a collateral transaction because of not being opposed by them and this finding was not altered even up to stage of Apex Court. Meaning thereby on the inception of above agreement to sell, admittedly, there was no question of any deception or cheating. Subsequently there arisen a dispute that complainant-informant was not willing and ready to get sale deed executed or present applicant no. 1 failed to execute deed because of his fraudulent intention and failure to get terms and conditions fulfilled regarding clearance of bank dues and demarcation of chak in question. These things are questions of facts to be decided on the basis of evidence in a civil proceeding, which has already been filed by complainant - O.P. No. 2 prior to institution of this criminal proceeding. These facts have been mentioned and denied in pleadings. Hence determination of those things are to be made by civil court in above civil proceeding. Learned Magistrate in its impugned order has written so. Hence the fact and prima-facie conclusion that since the beginning and initiation of contract for agreement to sell,

there was presence of intention to cheat or deception has not been mentioned in impugned order. Whereas Magistrate is not required to pass a reasoned and elaborate order while making a summoning order under section 204 Cr.P.C. But it is mandatory that from the perusal of order of summoning, it must appear that application of judicial mind is there.

9. In the present case summoning is for offences punishable under Section 420 I.P.C. The essential ingredients of offence of fraud enumerated u/s 415 I.P.C. is to be apparent making offence punishable u/s 420 I.P.C. Section 415 of I.P.C. provides:

415. Cheating.--Whoever, by deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver any property to any person, or to consent that any person shall retain any property, or intentionally induces the person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property, is said to "cheat".

10. This cheating is punishable u/s 417 I.P.C. with imprisonment of either description for a term, which may extend to one year, or with fine, or with both.

11. Section 420 I.P.C. provides cheating and dishonestly inducing delivery of property.--Whoever cheats and thereby dishonestly induces the person deceived to deliver any property to any person, or to make, alter or destroy the whole or any part of a valuable security, or anything which is signed or sealed, and which is capable of being converted into a valuable security, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

12. Apex Court in ***Mahadeo Prasad Vs. State of Bengal, AIR 1954 SC 724,*** has propounded that the offence of cheating is established when the accused thereby induced that person to deliver any property or to do or to omit to do something, which he could otherwise not have done or omitted.

13. Apex court in ***Suresh Vs. Mahadevappa Shivappa Danannava, AIR 2005 (SC) 1047,*** quashed the complaint case, wherein, the allegations of cheating was made by the complainant against the petitioner on the ground that the accused had executed an agreement to sell her house but subsequently backed out. The Apex Court held that it is a dispute of civil nature and there was no allegation that the accused had fraudulent or dishonest intention at the time of making the promise.

14. In ***B. Suresh Yadav Vs. Sharifa Bee and another, 2007(13) SCC 107,*** the Apex Court has held that the power of the High Court for quashing of the criminal proceeding can be exercised where a civil suit is also pending between the parties in respect of the same subject matter and the criminal proceedings in such like cases amounting to abuse of process of law.

15. In the present case the summoning includes offences punishable u/s 467, 468, 471 I.P.C. whereas no accusation of forgery provided u/s 463 I.P.C. is there. There is no allegation of making of a false document or false electronic record or part of a document or

electronic record, with intent to cause damage or injury to the public or to any person, or to support any claim or title, or to cause any person to part with property, or to enter into any express or implied contract or with intent to commit fraud or that fraud may be committed, which is a condition precedent for offence punishable u/s 467 I.P.C., which provides whoever forges a document, which purports to be a valuable security or a will etc.

16. Section 468 I.P.C. provides punishments for offence of forgery for the purpose of cheating.

17. Section 471 I.P.C. provides punishment for use as genuine any document or electronic record, which he knows or has reason to believe to be a forged document or electronic record.

18. But no ingredients of for forgery or offences, as above, is there in the statements recorded u/s 200 and 202 Cr.P.C. The mere accusation is that the applicant no. 1 entered into an agreement to sell. He received heavy amount as earnest money. Subsequently he did not execute sale deed. A Civil Suit was filed and in between before filing of civil suit, above property was transferred to applicant no. 2 through a registered sale deed for a valid consideration. This applicant no. 2 has been summoned for above offence. Whereas he is admitting to purchase the land under bonafide belief for a valid consideration through a registered sale deed of a land, which was with no defective title of vendor. Even if civil suit is decreed then either specific performance of above registered agreement to sell may be or return of earnest money with interest may be permitted. But the facts being mentioned were admitted by applicant no. 1 before Civil Court and even in this proceeding. Execution of sale deed in favour of applicant no. 2 was said to be made after expiry of period of limitation mentioned in the registered agreement to sell and retention of earnest money is being claimed under bonafide belief of forfeiture of earnest money agreed in the agreement to sell. Hence, apparently this ought to be considered by the Magistrate, while summoning applicants for offences, as above. What offences were made out prima-facie on the basis of evidence collected in enquiry by Magistrate, what were pending before civil court and were decided up to Apex Court were needed to be there in the order of summoning passed by the Magistrate revealing application of judicial mind for passing summoning order, if any. Whereas impugned order reveals that Magistrate has summoned in one line that both sides are litigating over issue of property and this may be adjudged by evidence laid by parties. Hence, prima-facie there appears ground for summoning, which never reveals application of judicial mind by Magistrate in passing impugned summoning order. Hence, it is apparently an abuse of process of law. Accordingly, this application merits its allowance.

19. Admittedly, this registered deed of agreement to sell was executed on 29.5.2013 wherein sale consideration was shown to be Rs. 50 lacs. At the same time another agreement in between parties, duly attested by witnesses for the same land for sale, was got executed, wherein sale consideration was written to be Rs. 1,32,29,630/-. This subsequent agreement has been in the pleading before Civil Judge in civil suit filed by informant-complainant and it was held to be admissible for collateral purpose in between parties because of being not

denied in the order of the Civil Judge (Senior Division) in disposal of interim injunction application, which order has been upheld up to Apex Court. In this proceeding u/s 482 Cr.P.C. learned counsel for applicants has vehemently argued and has written in the application that this agreement to sell, which was not a registered one, was got executed in between. But upon request this sale consideration was shown to be Rs. 50 lacs and this was with a view to have saving from objections from Income Tax Department and other formalities and this agreement was got registered. Meaning thereby knowing this fact that this contention in the agreement to sell was against fact, but it was presented as a factual one and this was got registered with knowledge and belief that it was a sham document. The real consideration to be paid and the real agreement entered in between was an unregistered document. According to which remaining sale consideration was to be given i.e. the registry officials were deceived for getting the deed registered, which was with incorrect mention of consideration and getting the same registered to be believed to be true and correct one. This offence will amount deception apparently fulfilling the ingredients of a cognizable offence punishable u/s 420 I.P.C. It will be against both the would be vendee and the would be vendor i.e. the parties to above agreement including applicant no. 1. This aspect was also required to be inquired under section 202 Cr.P.C. then after summoning order, if any, against accused, against whom offences were made out, was to be passed.

20. Accordingly, application u/s 482 Cr.P.C. is allowed. Impugned summoning order is being set aside. The file is remanded back to the Magistrate concerned for making adequate and proper enquiry under sections 200 and 202 Cr.P.C. for hearing complainant and passing order, if any, within the parameter of law and precedents showing prima-facie application of judicial mind.

(2020)02ILR A1515

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 08.01.2020

BEFORE
THE HON'BLE RAM KRISHNA GAUTAM, J.

Application U/S 482 No. 22966 of 2019

I.P.S. Yadav ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Sri Pradeep Kumar, Sri Rajnish Kumar Rai, Sri Shri Krishan Yadav

Counsel for the Opposite Parties:
A.G.A., Deepti Tiwari, Ms. Monica Vaish

A. Criminal law - Code of Criminal Procedure,1973- Section 204- Though Magistrate need not to pass an elaborate and reasoned order, while passing summoning order u/s 204 Cr.P.C. but it is also there that it must appear that there is application of judicial mind and upon this application a prima-facie commission of offence for which cognizance is to be taken and summoning is to be made, is made out.

Although the Learned Magistrate treated the Protest Petition as a Complaint but the order taking cognizance of the offences and summoning the accused must reflect application of judicial mind to the facts of the case**.**

B. Criminal law - Code of Criminal Procedure, 1973- Section 197- A court is

precluded from entertaining a complaint or taking notice of it or exercising jurisdiction if it is in respect of a public servant who is accused of an offence alleged to have committed during discharge of his official duty.

It is settled law that prior sanction from the competent authority under section 197 Cr.Pc, in respect of a Public Servant having committed the alleged offence in the purported exercise of his official duty, is a sine qua non for taking cognizance of the offence, in absence of which the very cognizance is barred. (Para 6,7)

Application u/s 482 Cr.Pc allowed.

Case law discussed:-

1. St. of U.P. Vs. Paras Nath Singh, (2009) 6 SCC 372

2. Crl. Appeal Nos. 1590, 1591 of 2013 (in S.L.P. Criminal No. 6652, 6653 of 2013), M. K. Ayappa Vs. State. [Anil Kumar Vs. M.K.Ayappa, (2013) 10 SCC 705]

(Delivered by Hon'ble Ram Krishna Gautam, J.)

1. Heard Sri Pradeep Kumar, learned counsel for the applicant, Ms. Monica Vaish, learned counsel for O.P. No. 2 and learned A.G.A. representing the State. Perused the records.

2. This application, under Section 482 Cr.P.C., has been filed by applicant I.P.S. Yadav against State of U.P. and Amit Vaish with prayer to quash the summoning order dated 21.2.2019 as well as order issuing N.B.W. and entire proceedings of Complaint Case No. 1099 of 2019, Amit Vaish Vs. I.P.S. Yadav, under Sections 392, 427, 447 I.P.C., P.S. Naini, district Prayagraj, pending in court of A.C.J.M., Court No. 2, Allahabad.

3. Learned counsel, for the applicant, argued that accused-applicant is an officer in Indian Railways and was performing his official duties, in view of letters previously written to the District Magistrate, Prayagraj, as well as concerned Station Officer of P.S. Naini, Prayagraj, regarding encroachment done over land in question belonging to Indian Railways and performance of official duties. Above act was performed in discharge of official duty for which this F.I.R. was got lodged, wherein a proceeding u/s 482 Cr.P.C. was filed before this court, but as final report was submitted in the above case crime number, hence above proceeding u/s 482 Cr.P.C. was held to be infructuous and was dismissed. Subsequently a protest petition was filed and over this petition, cognizance was taken, but summoning order was not there. Rather the Magistrate opined for proceeding as a complaint case, thereby recorded statements of complainant u/s 200 Cr.P.C. and of his two witnesses u/s 202 Cr.P.C. Then after by a cryptic order, without applying judicial mind, passed the impugned order of summoning, for which, there required a sanction, as per section 197 Cr.P.C. This was abuse of process of law and no Public officer will perform his official duty because of such threat being given by Land Mafias and others. Hence this application with above prayer.

4. Learned A.G.A. has vehemently opposed the above submission.

5. Learned counsel for O.P. No. 2 argued that it was not the land of Indian Railways. Rather it was land of complainant, purchased vide registered sale deed from its erstwhile owners and inherited by the complainant, being grandson of Late Somnath Vaish. He was owner in possession having construction over it and this construction was destroyed and damaged and belongings of complainant were looted by accused-applicant under his individual capacity, for which there required no sanction. Even

D.R.M. had not passed any order for such demolition or taking of property of complainant. Hence this conclusion of Investigating Officer for submission of final report was against fact on record, because the property was acquired in a proceeding for which a proceeding by way of a writ was filed before this court, wherein a reply was submitted by the Revenue Department by way of counter affidavit, wherein it was admitted that above disputed plot nos. 133 and 134 were not required. Rather those plots were released for which a Government Order was passed and it was filed along with counter affidavit. Hence, above land was neither acquired nor belonged to Indian Railways. Even then this act has been done by the accused-applicant in his personal vengeance. Hence this matter may be raised before the Magistrate, where applicant is appearing through counsel, for making appreciation by the Magistrate, for consideration over discharge, if any, and sanction may be taken at any stage subsequent to it also. Hence this proceeding be dismissed.

6. Having heard learned counsel for both sides and gone through the material placed on record, it is apparent that cognizance taking order is on the basis of final report, submitted by the Investigating Officer, in above case crime number, after investigation and then after a decision regarding proceeding as a complaint case was there. Hence in above investigation and in the final report, submitted in above case crime number, it was specifically mentioned that the land belonged to Indian Railways and it was entered in the name of Indian Railways along with G.E.C. Company. A proceeding for declaration of right before Revenue Court u/s 229B of U.P.Z.A.L.R. Act, filed by complainant, was dismissed mentioning therein that it was a land belonging to Indian Railways. Nowhere it is apparent that after release the land was entered in the name of its erstwhile owners or compensation paid was returned back and what was the situation of land?, in possession as well as title. Though, order of status quo is said to be in operation granted by Board of Revenue. Accordingly, this final report was submitted on the basis of the fact that the land in dispute belongs to Indian Railways and alleged occurrence was committed by an officer of Indian Railways in performance of his official duty. Hence this fact was there on record before the Magistrate concerned and while considering on protest petition, this final report was accepted, but cognizance for offence was taken. The Magistrate did not summon accused on the basis of cognizance taken by him. Rather he decided to proceed as a complaint case. Subsequently, statements u/s 200 and 202 Cr.P.C. were got recorded and then after impugned summoning order was passed. But neither reason for absence of sanction nor ownership of land of Indian Railways nor performance of official duty by a public officer in assistance of public force i.e. R.P.F. was there in the summoning order. Though Magistrate need not to pass an elaborate and reasoned order, while passing summoning order u/s 204 Cr.P.C. But it is also there that it must appear that there is application of judicial mind and upon this application a prima-facie commission of offence for which cognizance is to be taken and summoning is to be made, is made out. But in the present case, there was mention that property in question and construction raised there at were an encroachment over Railways land and it was an act by a Railway officer in performance of his

official duty with assistance of Railway Police Force and the Magistrate failed to take note of this circumstance or to make any discussion over this point in the summoning order.

7. Apex Court in ***State of U.P. Vs. Paras Nath Singh, (2009) 6 SCC 372*** by a three Judges Bench has propounded that 'no court shall take cognizance of such offence except with the previous sanction'. Use of the words 'no' and 'shall' make it abundantly clear that the bar on the exercise of power of the court to take cognizance of any offence is absolute and complete. Very cognizance is barred. That is the complaint cannot be taken notice of. According to Black's law Dictionary the word 'cognizance' means 'Jurisdiction' or 'the exercise of jurisdiction' or 'power to try and determine causes'. In common parlance it means taking notice of. A court, therefore, is precluded from entertaining a complaint or taking notice of it or exercising jurisdiction if it is in respect of a public servant who is accused of an offence alleged to have committed during discharge of his official duty. This has been reiterated by Apex Court in Criminal Appeal Nos. 1590, 1591 of 2013 (in S.L.P. Criminal No. 6652, 6653 of 2013), M. K. Ayappa Vs. State. Hence, in the present case, all these requirements were needed, while passing a summoning order and taking of cognizance. But no iota is there. Hence it is completely abuse of process of law.

8. Accordingly, this application merits to be allowed.

9. This application u/s 482 Cr.P.C. is allowed and the impugned summoning order is hereby quashed. The file is being remanded back to the Magistrate Court concerned for making an enquiry afresh u/s 200 and 202 Cr.P.C. and then after pass a fresh reasoned order in view of requirement of sanction and legal precedents.

(2020)02ILR A1518

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 21.01.2020

BEFORE
THE HON'BLE HARSH KUMAR, J.

Application U/S 482 No. 25818 of 2018

Dr. Sushil Kumar Gupta ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Sri Rajesh Kumar Chitragupt, Sri Kamal Kishor Mishra

Counsel for the Opposite Parties:
A.G.A., Sri Anil Kumar Mishra, Sri Om Prakash Pandey, Sri Rajesh Kumar Dubey

A. Criminal Law-Indian Penal Code, 1860-Sections 419, 420, 338, 504, 506 and 201 – In order to make out a prima facie offence of Cheating , the necessary averments constituting the said offence have to be made in the FIR O.P no.2 allegedly operated for stone in gallbladder and surgery was unsuccessful- Applicant was anaesthesiologist - No case that after getting the money deposited, her surgery was not conducted and money was usurped and thus any fraud was played on her by applicant, or anybody else. Hence from averments made in F.I.R., no prima facie evidence of offence under sections 419 and 420 IPC made out.

B. Criminal Law-Indian Penal Code, 1860-Section 338 IPC – Merely administering the required dosage of anaesthesia without endangering the life of the patient or causing any grievous hurt would not make out an

offence under section 338 IPC or be considered as an act of Negligence in the performance of his duties Applicant allegedly gave O.P.No.2 dose of anaesthesia and he is not alleged to have conducted any operation by cutting any part of her body, internally or externally- No whisper that dose of anaesthesia given by applicant was excessive or caused any problem or damage to opposite party no.2.

C. Criminal Law-Indian Penal Code, 1860- Section 201- F.I.R. does not speak of disappearance of any evidence by applicant - No prima facie evidence of offence under section 201 IPC.

Medical Negligence- Even if for any negligence at the Hospital, the same may be liable under civil law, but applicant cannot be held liable for negligence and endangering life of opposite party no.2 constituting any offence under section 338 IPC against applicant. (Para 10,11, 12)

Criminal Application Allowed.

Case law relied upon/ Discussed:-

1. Jacob Mathew Vs. St. of Punj. & anr., (2005) 3 JIC 320 (SC)

(Delivered by Hon'ble Harsh Kumar, J.)

1. Rejoinder affidavit filed by learned counsel for applicant, is taken on record.

2. Heard Sri Kamal Kishor Mishra, learned counsel for applicant, Sri Anil Kumar Mishra, learned counsel for opposite party no.2, learned A.G.A. for State and perused the record.

3. This application under Section 482 Cr.P.C. has been filed for quashing the entire proceedings of Criminal Case No.2136 of 2018 (State Vs. Dr. Sushil Kumar Gupta), relating to Case Crime No.338 of 2017, under sections 419, 420, 338, 504, 506 and 201 IPC, P.S. Sidharth Nagar, District Sidharth Nagar pending in the Court of C.J.M., Sidharth Nagar as well as for quashing the impugned charge sheet dated 21.3.2018.

4. Learned counsel for applicant contends that applicant has been falsely implicated in the F.I.R. lodged by opposite party no.2 on account of unsuccessful surgery; that as per averments made in F.I.R. lodged against applicant and Dr. Skand Mishra, "opposite party no.2 was admitted in Aryan Hospital, Tharauli, Siddharth Nagar for operation of stone in gallbladder and during surgery applicant and Dr. Skand Mishra together, opposite party no.2 got a cut over her nerve of liver on 8.1.2016, causing further complications and in order to save her life, she had to rush to Gorakhpur and undergone further surgery at Gorakhnath Hospital, Gorakhpur and S.G.P.G.I. Centre, Lucknow and upon getting of bit well informed District Magistrate, Siddharth Nagar, on whose direction C.M.O. recorded her statement while applicant on getting knowledge of above complaint allegedly threatened her for life and the doctors on the pretext of operation usurped a sum of Rs.14,000/- by cheating her".

5. He submitted that the entire prosecution story is absolutely false and incorrect; that father of applicant Dr. J.P. Gupta, M.B.B.S. retired from the post of Chief Medical Officer in 2014 established and run Aryan Hospital and unfortunately died on 12.11.2016, after about 10 months of surgery of opposite party no.2; that applicant is M.B.B.S. Doctor and at the time of alleged surgery on 8.1.2016, was posted as Medical Officer at C.H.C., Brijmanganj and was on his duty and neither conducted surgery of opposite

party no.2 nor was at all present or working in Aryan Hospital at the time of surgery of opposite party no.2; that in any case, according to statements of opposite party no.2 and her witnesses, applicant allegedly played role of an Anesthetist and administered dose of anesthesia to opposite party no.2 during operation; that the surgery of gallbladder is technical one and since the internal organs are connected with each other, possibility of cut over the adjoining nerve, may not be ruled out, despite due care and caution by expert doctor; that Dr. Skand Mishra is an expert surgeon; that though surgery of opposite party no.2 with regard to gallbladder was successfully conducted but since complaint of pain sustained for considerable time, so opposite party no.2 sought premature discharge and preferred treatment at Gorakhnath Hospital, Gorakhpur and thereafter at S.G.P.G.I., Lucknow and is alleged to have been further operated at Gorakhnath Hospital, Gorakhpur as well as at S.G.P.G.I., Lucknow; that on the complaint made by opposite party no.2, an inquiry was ordered by C.M.O., Siddharth Nagar and the committee submitted it's report to C.M.O.(Annexure No.9) with the conclusion that surgery of gallbladder was performed by expert doctor and since she (opposite party no.2) did not get relief, she was again operated by expert at Gorakhpur and, thereafter, in super specialty hospital S.G.P.G.I., Lucknow which took enough time in complete recovery and that such complications are part of surgery and it will not be correct to say that doctor did not conduct the operation sincerely; that the report of S.G.P.G.I., Lucknow at Annexure No.10 also does not indicate any negligence on the part of applicant; that even if the allegations made by opposite party no.2 and her witnesses are taken to be correct, for the sake of arguments, since applicant was assigned only with the role of anesthetist and had nothing to do with surgery of gallbladder, resulting in cut over nerve of her liver, during removal of gallbladder, (providing anesthesia is a pre-surgery stage and nothing beyond it); that medical negligence, if any, could have been occurred only by the person, who applied knives etc. during surgery for removal of gallbladder; that no case of medical negligence is or can be made out against applicant; that applicant neither usurped any money nor committed any offence of cheating and no offence under sections 419 and 420 IPC is made out against him; that Rs.14,000/- or any amount was admittedly deposited by opposite party no.2 was towards operation charges and since admittedly operation of her gallbladder was conducted, no case of cheating or usurping her money can be made out; that the case of applicant is distinguishable from co-accused Dr. Skand Mishra, who is an expert surgeon and conducted surgery very sincerely and correctly; that applicant never abused opposite party no.2 or her family members and never threatened them of life; that under wrong impression of opposite party no.2 about alleged medical negligence, the applicant may not be held responsible; that applicant did not do anything to make the evidence disappear; that in view of the material on record even if the evidence remains same, there is no possibility of conviction of applicant; that applicant either intentionally or otherwise did not cause any grievous hurt to opposite party no.2 rashly or negligently to endanger her life; that the prosecution of applicant is noting but abuse of process of Court and in order to secure the ends of justice, charge sheet as well as proceedings of criminal case are liable to be quashed.

6. In support of his arguments, learned counsel for applicant has paid reliance on the law laid down by the Apex Court in the case of ***Jacob Mathew Vs. State of Punjab and another, 2005 (3) JIC 320 (SC),***

7. Per contra, learned AGA and learned counsel for opposite party no.2 vehemently opposed the application for quashing of charge sheet and proceedings against applicant and contended that it is clear from the material on record that applicant was present at the time of surgery of opposite party no.2 at Aryan Hospital and the allegations that he was on duty in Medical Hospital at CHC, Brijmanganj indicates that his presence in Aryan Hospital was unauthorized; that if the applicant was posted at C.H.C. Brijmanganj, he had no business to provide anesthesia to opposite party no.2, which indicates that he is not loyal to his duties also; that since the applicant has played active role in surgery of gallbladder of opposite party no.2, he is equally liable for negligence in unsuccessful surgery and cut over her liver nerve; that the matter of negligence, is a matter to be decided upon evidence and mere reports of the committee constituted by C.M.O. at Annexure No.9 or of S.G.P.G.I. at Annexure No.10, are not sufficient to hold the applicant not guilty for medical negligence; that it is wrong to say that no offence under sections 419, 420, 338, 504, 506 and 201 IPC is made out against applicant; that application has been moved with false allegations and malafide intention and is liable to be dismissed.

8. Upon hearing parties counsel and perusal of record, I find that cheating has been defined under section 415 IPC as under :-

*"**415. Cheating.**--Whoever, by deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver any property to any person, or to consent that any person shall retain any property, or intentionally induces the person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property, is said to "cheat"."*

9. In the case of *Jacob Mathew (supra),* where a patient with acute breathing problem brought to hospital and admitted and died due to immediate non-availability of oxygen cylinder, quashing prosecution of accused doctor under section 304A/34 IPC, the 03 Judges Bench of Apex Court held that

"(i) Medical Negligence

(ii) Since patient died due to non-availability of Oxygen in time, hence no case of criminal negligence is made out against doctor - Hospital may be liable under civil law but doctors cannot be prosecuted under Section 304-A IPC.

(iii) To prosecute a doctor for negligence under criminal law it must be shown that he did something or failed to do something which no doctor in his ordinary senses and prudence would have done or failed to do so.

(iv) Negligence is the breach of a duty caused by omission to do something which a reasonable man guided by those considerations which ordinarily regulate the conduct of human affairs would do, or doing something which a prudent and reasonable man would not do.

(v) Negligence in the context of medical profession necessarily calls for a

treatment with a difference. To infer rashness or negligence on the part of a professional, in particular a doctor, additional considerations apply. A case of occupational negligence is different from one of professional negligence. A simple lack of care an error of judgment or an accident, is not proof of negligence on the part of medical professional. So long as a doctor follows a practice acceptable to the medical profession of that day, he cannot be held liable for negligence merely because a better alternative course or method of treatment was also available or simply because a more skilled doctor would not have chosen to follow or resort to that practice or procedure which the accused followed."

10. In the instant case, opposite party no.2 is alleged to have been operated for stone in gallbladder at Aryan Hospital, Tharauli, Siddharth Nagar after depositing Rs.14,000/-. The case of opposite party no.2 is that her surgery was done by applicant and Dr. Skand Mishra, which was not successful on account of their medical negligence. There is no case that after getting the money deposited, her surgery was not conducted and money was usurped and thus any fraud was played on her by applicant, or anybody else. Hence from averments made in F.I.R., I find that there is no prima facie evidence of offence under sections 419 and 420 IPC.

11. As far as offence under section 338 IPC is concerned according to opposite party no.2 during surgery of her gallbladder, applicant allegedly given her dose of anesthesia and he is not alleged to have conducted any operation by cutting any part of her body, internally or externally. There is no whisper that dose of anesthesia given by applicant was excessive or caused any problem or damage to opposite party no.2. So if applicant, the Anesthetist, who was posted at C.H.C. Brijmanganj and was not present on duty in C.H.C. or was unauthorizedly present at Aryan Hospital even then he may not be considered to be negligent for alleged cut of liver nerve of opposite party no.2 or of causing any grievous hurt to her. The averments with regard to offences under sections 504 and 506 IPC are ornamental in nature in absence of any specific allegations in F.I.R. or in statement of opposite party no.2. It is also pertinent to mention that F.I.R. does not speak of disappearance of any evidence by applicant and so there is no prima facie evidence of offence under section 201 IPC against applicant.

12. In view of discussions made above and the law laid down by Apex Court in the case of ***Jacob Mathew (supra)*** since applicant even if provided anesthesia to opposite party no.2, prior to her surgery of removal of gallbladder stone at Aryan Hospital, Tharauli, Siddharth Nagar, he is not alleged to have committed any breach of duty in providing inadequate dose of anesthesia and there is no whisper of any lack of care on his part or of cutting the nerve of liver of opposite party no.2 endangering her life, he may not be considered to be negligent in performing his duties. Even if for any negligence at the Aryan Hospital, Siddharth Nagar, the same may be liable under civil law, but applicant Dr. S.K. Gupta may not be held liable for negligence and endangering life of opposite party no.2 constituting any offence under section 338 IPC against applicant. The averments made in F.I.R. with regard to deposit of Rs.14,000/- towards operation charges do not constitute

any offence under sections 419, 420 IPC and there are no specific averments with regard to offences under sections 504, 506 and 201 IPC. Hence I am in full agreement with the arguments advanced on behalf of applicant that his prosecution for offences under sections 419, 420, 338, 504, 506 and 201 IPC is unwarranted and amounts to abuse of process of Court and if permitted to continue will cause unnecessary harassment of a M.B.B.S. Doctor. There is sufficient ground for quashing the proceedings of criminal case for preventing abuse of process of Court and to secure the ends of justice. Therefore, the application is liable to be allowed and proceedings of Criminal Case No.2136 of 2018 (State Vs. Dr. Sushil Kumar Gupta), relating to Case Crime No.338 of 2017, under sections 419, 420, 338, 504, 506 and 201 IPC as well as charge sheet dated 21.3.2018, are liable to be quashed as against applicant.

13. The application U/s 482 Cr.P.C. is **allowed** and the proceedings of Criminal Case No.2136 of 2018 (State Vs. Dr. Sushil Kumar Gupta), relating to Case Crime No.338 of 2017, under sections 419, 420, 338, 504, 506 and 201 IPC as well as charge sheet dated 21.3.2018 are quashed, accordingly.

14. However, it is made clear that any observation made in the body of judgment will not prejudice the rights of opposite party no.2 in the case pending as against co-accused person or in civil proceedings, if any, filed by her.

(2020)02ILR A1523

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 22.01.2020

BEFORE
THE HON'BLE RAM KRISHNA GAUTAM, J.

Application U/S 482 No. 30776 of 2012

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

Counsel for the Applicants:
Sri Akhil Kumar Shukla

Counsel for the Opposite Parties:
A.G.A., Sri Radha Mohan Pandey, Sri Rajendra Kumar Ojha

A. Criminal Law - Code of Criminal Procedure, 1973- Section 190 (1)(a) - Section 190 (1)(b) - At the time of summoning and taking cognizance, under Section 190 of Cr.P.C., material placed on case diary, is to be taken in consideration and once the same is insufficient and further evidence is being taken, then, procedure under Chapter XV of Cr.P.C. was required and Magistrate was to make inquiry under Section 200 and 202 of Cr.P.C. The Magistrate can ignore the conclusion arrived at by Investigating Officer and independently apply his judicial mind to the facts emerging from the investigation and take cognizance of the case, if he thinks fit and exercise his power under Section 190 (1)(b). The Magistrate is not bound in such situation to follow the procedure laid down in Section 200 and 202 of Cr.P.C. for taking cognizance of the case under Section 190 (1)(a), though, it is open to him to act under Section 200 and 202 of Cr.P.C. also.

The magistrate cannot take into account material extraneous to the case diary while considering a Protest Petition and either the Magistrate can summon the accused u/s 190(1)(b) ignoring the Final Report or proceed under Chapter XV of the Code treating the matter as a Complaint Case. (Para 5)

Criminal Application allowed.

Case law discussed:-
1. Minu Kumari & anr. Vs. St. Of Bihar, (2006) 4 SCC 359

(Delivered by Hon'ble Ram Krishna Gautam, J.)

1. The applicants namely, Shyam Babu, Sri Kant and Ram Niwas, by means of this application, under Section 482 Cr.P.C., have invoked the inherent jurisdiction of the Court with prayer to set aside impugned summoning order with entire proceeding of Complaint Case No. 5/11/2005 (State Vs. Ram Babu and others), under Sections 419, 420, 467, 468, 471 I.P.C., P.S. Chibramau, District Kannauj, wherein, summoning order dated 28.8.2012, has been passed by learned Judicial Magistrate, Chibramau, Kannauj, against applicants.

2. Heard learned counsel for the applicants and learned A.G.A. for the State.

3. Learned counsel for the applicants argued that this case crime number was got registered, by way of an application moved under Section 156(3) of Cr.P.C., wherein, investigation resulted in submission of final report. Against final report, a protest petition was filed, annexing therewith certain affidavits and documents. On the basis of these documents, order dated 28.8.2012, was passed by Judicial Magistrate, Chibramau, District Kannauj, wherein, final report was rejected and applicants were summoned for offences punishable under Sections 419, 420, 467, 468, 471 I.P.C. No statements under Section 200 of Cr.P.C. or inquiry under Section 202 of Cr.P.C. was made. Rather, summoning was passed, on the basis of documents, filed with protest petition. Hence, without following the procedure given for complaint cases, under Chapter XV of Code of Criminal Procedure, impugned order was passed. Though, it has been written in this order that Investigating Officer has not recorded statement of witnesses under Section 161 of Cr.P.C. in accordance with their contentions and this was specifically said in protest petition that no such recording of statement of informant and his witnesses were made, by Investigating Officer. Meaning thereby, no statement under Section 161 of Cr.P.C. was got recorded, by Investigating Officer and it was complained by informant itself. Hence, on the basis of statements recorded under Section 161 of Cr.P.C. and evidence collected in case diary, final report was submitted. Meaning thereby, till then, there was no material for summoning of applicants. On the basis of protest petition and documents annexed therewith, this impugned summoning order was passed. Hence, these evidence were with no option for any rebuttal by applicants and a procedure given under Chapter XV of Cr.P.C. was also not obeyed. Hence, for ensuring end of justice, this application has been filed with above prayer.

4. Learned counsel for opposite party No. 2 as well as learned AGA, has vehemently opposed that this cognizance was taken under Section 190 of Cr.P.C. and this summoning was there as a State case. A procedure of complaint case given under Chapter XV of Cr.P.C. was not acted by trial court concerned, hence, no question of recording of statement under Sections 200 or 202 of Cr.P.C. ever arisen. Hence, this application be dismissed.

5. Having heard learned counsels for both sides, it is apparent that a question of fact is not to be seen and appreciated, in exercise of inherent jurisdiction under Section 482 of Cr.P.C., by this Court, rather it is within the domain of

Magistrate, concerned. A legal aspect is there and the legal position is very well clear that if informant himself had complained that his statement was not recorded as per his own contention, in statement under Section 161 of Cr.P.C., his witnesses were, too, not examined and recorded under Section 161 of Cr.P.C., the evidence in case diary was not in support of submission of charge-sheet and final report was submitted. Hence, on the basis of final report and investigation annexed therewith, there was no ground for taking any cognizance or summoning of applicants for those offences nor Magistrate has written so, i.e., impugned summoning has been passed, on the basis of material annexed with protest petition and it is settled law that at the time of summoning and taking cognizance, under Section 190 of Cr.P.C., material placed on case diary, is to be taken in consideration and once the same is insufficient and further evidence is being taken, then, procedure under Chapter XV of Cr.P.C. was required and Magistrate was to make inquiry under Section 200 and 202 of Cr.P.C. Then after, those documents, which were filed with protest petition, may be taken into consideration. Accordingly, as per law, the Magistrate can ignore the conclusion arrived at by Investigating Officer and independently apply his judicial mind to the facts emerging from the investigation and take cognizance of the case, if he thinks fit and exercise his power under Section 190 (1)(b). The Magistrate is not bound in such situation to follow the procedure laid down in Section 200 and 202 of Cr.P.C. for taking cognizance of the case under Section 190 (1)(a), though, it is open to him to act under Section 200 and 202 of Cr.P.C. also, as Apex Court held in **Minu Kumari And Anr vs The State Of Bihar, (2006) 4 SCC 359**. Meaning thereby, the material to be taken into consideration, at the time of taking cognizance under Section 190 (1)(a) or (b) of Cr.P.C., must be the material emerging from the investigation i.e. within the case diary and not out of the case diary, filed by way of protest petition and affidavit. Hence, this application deserves merit.

6. Accordingly, it is being allowed.

7. Impugned cognizance taking order as well as summoning order with entire proceeding of Complaint Case No. 5/11/2005 (State Vs. Ram Babu and others), under Sections 419, 420, 467, 468, 471 I.P.C., P.S. Chibramau, District Kannauj, is being set aside.

8. File is remanded back to Magistrate concerned, for having recourse under Chapter XV of Cr.P.C. and proceed in accordance with law.

9. With above directions, the application is finally disposed of.

(2020)02ILR A1525

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 05.02.2020

BEFORE
THE HON'BLE RAM KRISHNA GAUTAM, J.

Application U/S 482 No. 34825 of 2012

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

Counsel for the Applicant:
Sri Amit Krishan

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

A. Pre-conceptional Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994- Object and Scope- Parliament of Republic of India has legislated this Act with a view of above prohibition of misuse of those techniques, which were being misused for determination of sex of the foetus, leading to female foeticide and other related medical problems.

The object of the Act is to prohibit prenatal sex determination and prevent the misuse of prenatal diagnostic technique for sex selective abortions.

B. Pre-conceptional Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994-Sections 6, 23 and 25 - Unauthorized sex determination-This Section does not provide for presence of the owner of the Clinic, alongwith the person, and do determination is liable for punishment, under this Act, rather, if he caused or allows to do this determination, then, also he is liable for punishment under sub-sections (1), (2), (3) of Section 23 and Section 25 of the Act - If there is implied authority or situation for misuse of Sonogrophy Machine, to be used by any of the employees of the Clinic of which applicant is the owner, against terms of license of registration of such Clinic, it will amount offence, punishable, under Sections 6, 23 and 25 of the Act.

The presence of the applicant is not required at the place and time of sex determination by misuse of Sonography technique. Any misuse of Sonogrophy Machine by any employees of the Clinic of which applicant is the owner, against terms of license of registration of such Clinic, will amount to an offence punishable under Sections 6, 23 and 25 of the Act.
(Para 7,8,9,10)

Criminal Application rejected.

(Delivered by Hon'ble Ram Krishna Gautam, J.)

1. This Application, under Section 482 of Code of Criminal Procedure, 1973 (Hereinafter, in short, referred to as 'Cr.P.C.'), has been filed by the applicant, Rishi Kumar Sharma, with a prayer for setting aside cognizance taking order, alongwith entire proceeding, of Criminal Complaint Case No.8801/9 of 2012, State vs. Rishi Kumar Sharma and others, under Sections- 6, 23, 25 and 28 of the Pre-conceptional Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994 (Hereinafter, in short, referred to as PCPNDT Act), Police Station-Mawana, District Meerut.

2. Learned counsel for the applicant argued that the applicant is the owner of Mawana Diagnostic Centre, Mawana, District Meerut. As per the inspection report, he was not present on the spot at the time of alleged sex determination made by Jitendra, under assistance of Anuj. Both of those employees were neither authorised nor entitled for making any Ultrasonogrohy or sex determination. They were said to have received Rs.3,000/-, as fee, for making above diagnostic test, which was not under authority of the applicant and applicant was of no concern with above occurrence. In first information report as well as in complaint, it has been specifically mentioned that Dr. Mahesh Kumar Sharma and the applicant, Rishi Kumar Sharma, were not present on the spot. Mere allegation of gross negligence for keeping open the Ultrasonography Portable Machine is against the applicant for which no criminal liability can be fastened. There may be gross negligence, but, that too, may not be with any criminal intention or offence. Hence, this complaint, alongwith cognizance taking order, passed over it, is

under abuse of process of law. Thus, this Application, with above prayer.

3. Learned AGA, representing State of U.P., has vehemently opposed this Application, moved, under Section 482 of Cr.P.C., with this contention that admittedly applicant is the owner of above Diagnostic Centre, from where, information of sex determination test, being conducted, has been received and a raid by an authorised team was made, wherein, Jitendra and Anuj were apprehended, while making sex determination test of a foetus for which money was paid and the same was also recovered instantly. This Clinic was of the applicant and applicant, alongwith his employees, were beneficiary of this illegal act. Hence, this complaint was filed, under correct perspective of law and this Court, in exercise of inherent jurisdiction, under Section 482 of Cr.P.C., is not to embark upon factual matrix. Prima facie there was sufficient evidence for passing of impugned summoning order. Hence, this Application be rejected.

4. From very perusal of the object of this Act, Pre-conceptional Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994, it is apparent that it was an Act, passed by the Legislature, to provide for prohibition of sex selection, before or after conception, and for regulation of pre-natal diagnostic techniques for the purposes of detecting genetic abnormalities or metabolic disorder or chromosomal abnormalities or certain congenital malformation or sex-linked disorders and for the prevention of their misuse for sex determination leading to female foeticide and for matters connected therewith or incidental thereto.

5. Meaning thereby, Parliament of Republic of India has legislated this Act with a view of above prohibition of misuse of those techniques, which were being misused for determination of sex of the foetus, leading to female foeticide and other related medical problems. This Act is with Rules and there is also a Rule for grant of license for registration of a Clinic under this Act.

6. Admittedly, applicant is the owner of Mawana Diagnostic Centre, Mawana, District Meerut, and is registered, under this Act, with Chief Medical Officer, Meerut. Hence, he was bound to obey by the terms of license, which were there at the time of registration of above Clinic and getting license for use of Ultrasound Machine for medical tests, in accordance with provisions of law, on the advice of the Doctors.

7. Further, admittedly, it was Jitendra and Anuj, who were employees of the Clinic, were present on the spot, at the time of occurrence, and they did sex determination and upon raid by an authorised Team, thereat, receipt of Rs.3,000/- was recovered and the money was also recovered. They were not authorised to use that Ultrasound Machine, which was a portable machine, used by those employees, without any authority or specification for use of it, as authorised under the Rules, but, the applicant, being the owner and licensee of above Clinic, was having utmost duty to take care of that Machine, installed in his Clinic, and to esnure that the Machine may not be misused by any other employee or persons causing sex determination. But, those employees did so. Hence, this occurrence, immediately, was reported in the first information report. Subsequently, for breach of terms of license and negligence, allowing those employees for using above Sonogrophy Machine,

this complaint against present applicant was filed.

8. Section 6 of the Act No.57 of 1994 (As above), for prohibition of determination of sex, provides that on and from commencement of this Act, i.e., from the date of its enforcement, 20th September, 1994, if anyone conducts or cause to be conducted any pre-natal diagnostic technique, including ultrasonography, for the purposes of determining the sex of a foetus, then, he is to be punished, under this Section, read with Section 23 of the Act, and for contraventions of the provisions of the Act or rules for which no specific punishment is provided, the punishment shall be awarded under Section 25 of the Act.

9. In present case, owing to negligence of the applicant, Jitendra and Anuj caused to make sex determination of the foetus. This Section does not provide for presence of the owner of the Clinic, alongwith the person, and do determination is liable for punishment, under this Act, rather, if he caused or allows to do this determination, then, also he is liable for punishment under sub-sections (1), (2), (3) of Section 23 and Section 25 of the Act.

10. Hence, very argument of learned counsel for applicant that at the time of occurrence, applicant was not present on the spot, is not tenable. There is no need of presence of applicant on the spot of occurrence, where, sex determination of foetus is made, at the time of occurrence. If there is implied authority or situation for misuse of Sonogrophy Machine, to be used by any of the employees of the Clinic of which applicant is the owner, against terms of license of registration of such Clinic, it will amount offence, punishable, under Sections 6, 23 and 25 of the Act.

11. Hence, in view of what has been discussed above, the complaint was, in accordance with the provisions of law and cognizance taking order was also in accordance with the provisions of law.

12. Accordingly, this Application, being devoid of merits, deserves dismissal and it stands dismissed accordingly.

(2020)02ILR A1528

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 07.02.2020

BEFORE
THE HON'BLE MRS. MANJU RANI CHAUHAN, J.

Application U/S 482 No. 39535 of 2019

Mohammad Azam Khan & Ors.
...Applicants
Versus
State of U.P. & Ors. ...Opposite Parties

Counsel for the Applicants:
Sri G.S. Chaturvedi, Sri Saiful Islam Siddiqui, Tahira Kazmi, Sri S. Safdar Ali Kazmi

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

A. Registration of Birth and Death Act,1969 -Section 13 - Only the official issuing authority may legally make changes to a birth certificate once it's issued - Further, any alterations, more likely than not, render the certificate invalid.

Only the Authority who has issued the Birth Certificate can do any alterations in the same , once issued, and the said requirement cannot be bypassed by obtaining different birth certificates from different local Authorities.

B. Juvenile Justice (Care and Protection of Children) Act, 2015 (Act No. 2 of 2016)- Section 94 - Medical opinion from Medical Board should be sought only when matriculation certificate or school certificate or any birth certificate issued by a corporation or by any panchayat or municipality is not available. In the instant case, the matriculation certificate is available to ascertain the date of birth of the petitioner.

The requirement under law is that where the Matriculation Certificate is available, then only the same shall be taken into account for the purpose of ascertaining the date of birth.

Regulation "69.2 of the Examination-Bye-laws of the Central Board of Secondary Education, New Delhi- Three Birth Certificates- Forgery and Manipulation- No correction/rectification or change in the date of birth can be made if the same has already been recorded in the Board's records. Only typographical errors can be corrected. The aforesaid regulation also prohibits that no correction can be made on application submitted after expiry of a period of five years

When applicant no.3 already possessed a birth certificate of secondary school/high school examination certificate there was no occasion for getting two birth certificates of different dates from the local Municipal Authorities without getting the entry in the Secondary school Biirth Certificate corrected/rectified.

C. Criminal Law- Indian Penal Code 1860- Sections 420, 467, 468 and 471 I.P.C - On the basis of the changed new birth certificate, applicant no.3 participated in the legislative assembly election and was elected as member of legislative assembly in the year 2017 and has drawn salary from the public exchequer till today, which prima facie, amounts to cheating, deception and mens rea.

In the facts of the case the ingredients of Sections 463 and 464 I.P.C. are prima facie attracted against the applicants.

D. Criminal law - Code of Criminal Procedure 1973- Sections 37, 38 and 43 - Locus of informant to lodge F.I.R against the applicant- Every person has a right to lodge a first information report against a person, who in his presence, commits a non-bailable or cognizable offence.

There are no restrictions on the criminal prosecution of a Public Servant by a private person and the question of locus standi of a private person does not arise in cases of criminal prosecution.

E. Criminal law - Code of Criminal Procedure 1973- Section 482- Scope- Adjudication on pure questions of fact can only be done by the trial court and while doing so even the submissions made on points of law can also be more appropriately gone into by the trial court.

Under the exercise of it's inherent jurisdiction under section 482 of the Cr.Pc , the High Court cannot look into disputed questions of fact or the defence of the accused which can only be adjudicated in a trial after evidence is led.

Criminal Application rejected.

Case Law Discussed:-

1. Hridaya Ranjan Prasad Verma & Ors. Vs. St. of Bih. & anr, (2000) 4 SCC 168

2. S.W. Palanitkar & Ors. Vs. St. of Bih. & anr, (2002) 1 SCC 241

3. Hira Lal Hari lal Bhagwati Vs. CBI, New Delhi, (2003) 5 SCC 257

4. Devender Kumar Singla Vs. Baldev Krishan Singh, (2004) 2 JT 539 (SC)

5. I.O.C Vs. NEPC India Ltd.,2006(6) SCC 736

6. Vir Prakash Sharma Vs. Anil Kumar Agarwal & Anr, 2007(7) SCC 373

7. Sh. Suneel Galgotia & Anr. Vs. St. of U.P. & Ors., 2016 (92) ACC 40

8. United India Insurance Company Ltd. Vs. B.Rajendra Singh & Ors, JT 2000(3)SC.151

9. Vice Chairman, Kendriya Vidyalaya Sangathan & Anr. Vs. Girdhari Lal Yadav, 2004 (6) SCC 325

10. Ram Chandra Singh Vs. Savitri Devi & Ors., 2003(8) SCC 319

11. S.P. ChengalVaraya Naidu (dead) by L.Rs Vs. Jagannath (dead) by L.Rs & Ors, AIR 1994 SC 853

12. State of MH. Vs. Mayer Hans George, AIR 1965 SC 722 (V 52 C 123),

13. Kartar Singh Vs. St. of Punj. (1994) 3 SCC 569

14. Eastern Coal Fields Limited & Ors. Vs. Bajrangi Rabidas, (2014) 13 SCC 681

15. Manoj Kumar Vs. Govt. of NCT of Delhi & Ors. (2010) 11 SCC 702

16. Shah Nawaz Vs. St. of U.P & Anr, (2011) 13 SCC 751

17. Board of Secondary Education of Assam Vs. Md. Sarifuzzaman & Ors. (2003) 12 SCC 408

18. Sheo Nandan Paswan Vs. St. of Bih. & Ors. AIR 1987 SC 877

19. Subramanian Swamy Vs. Manmohan Singh & Anr. (2012) 3 SCC 64

20. R.P. Kapur Vs. St. of Punj., AIR 1960 SC 866

21. St. of Bih. & Anr. Vs. P.P. Sharma & Anr.; 1992 Supp (1) SCC 222

22. St. of Har. & Ors. Vs. Ch. Bhajan Lal & Ors.;1992 Supp.(1) SCC 335

23. Zandu Pharma. Works Ltd. & Ors. Vs. Md. Shariful Haque & Anr.; 2005 (1) SCC 122

24. M. N. Ojha Vs. Alok Kumar Srivastava; 2009 (9) SCC 682

25. Nallapareddy Sridhar Reddy Vs. The St. of A.P & Ors. 2020 0 Supreme (SC) 45

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

1. This application under Section 482 Cr.P.C. has been filed to quash the charge-sheet dated 1st April, 2019, cognizance taking order dated 19th August, 2019, summoning order dated 19th August, 2019 as well as entire proceedings of Criminal Case No. 1453 of 2019 (State Vs. Mohd. Azam Khan & Others) under Sections 420, 467, 468 and 471 I.P.C., arising out of Case Crime No. 04 of 2019, Police Station-Ganj, District-Rampur pending in the Court of Additional Chief Judicial Magistrate, Court No.3, Rampur.

2. Perused the material available on record.

3. I have heard Mr. Gopal Swaroop Chaturvedi, learned Senior Advocate assisted by Mr. Saiful Islam Siddiqui, Mr. S. Safdar Ali Kazmi and Mrs. Tahira Kazmi, learned counsel appearing for the applicants and Mr. Ratnendu Kumar Singh and Mr. Amit Singh Chauhan, learned Additional Government Advocates for the State.

4. The facts, as borne out from the records of the present application under Section 482 Cr.P.C., which are relevant for deciding the present application, are as follows:

One Mr. Akash Saxena, who is alleged to be Regional Convener has made an application before the Station House Officer, Police Station-Ganj, District-Rampur under Section 154 Cr.P.C. for lodging of first information report on 3rd January, 2019 at 12:22 hrs. against Mohd. Azam Khan, Smt. Danjin Fatima/Tanjim Fatma, which has been registered on the same day i.e. 3rd January, 2019 at 13:10 hrs. as Case Crime No. 0004 of 2019, under Sections 471, 468, 467, 420 and 193

I.P.C., Police Station-Ganj, District-Rampur. In the said first information report, it has been alleged that Mohd. Azam Khan son of late Mumtaz Khan and Smt. Tanzim Fatima, wife of Mohd. Azam Khan by creating a code and plotting a well-planned conspiracy, for personal interest, had got issued two date of birth certificates of their son, namely, Abdullah Azam Khan, son of Mohd. Azam Khan, resident of Gher Meer Baaj Kha, Jail Road, Rampur of two different districts. The date of birth certificate dated 28th June, 2012 had been got issued from Nagar Palika Parishad, Rampur bearing Registration No. RNPB2012-03857, which has been registered on the basis of affidavit given by Mohd. Azam Khan and Smt. Tanzim Fatima. In the said date of birth certificate, the place of birth has been shown as "Rampur". The second date of birth certificate dated 21st January, 2015 bearing Registration No. NNLK0-B-2015-29261, had been got issued from Nagar Nigam, Lucknow, which has been registered on the basis of duplicate date of birth certificate, serial no. 718 dated 21st April, 2015 issued by Queen Mery Hospital, Lucknow. In the said date of birth certificate, the place of birth has been shown as "Lucknow". It has further been alleged that Mohd. Abdullah Azam Khan had visited foreign countries by illegally using the date of birth certificate issued by Nagar Palika Parishad, Rampur. He had obtained government documents by using second date of birth certificate issued by Nagar Nigam, Lucknow. He had also used the same at various places. The aforesaid two date of birth certificates of Mohd. Abdullah Azam Khan had been got issued by Mohd. Azam Khan and Smt. Tanzim Fatima by creating a code and plotting a well-planned conspiracy, for personal benefit and the same had been used, for which the present first information report has been lodged.

5. The issue of two different date of birth certificates of Mohd. Abdullah Azam Khan was also up for consideration by means of Election Petition No. 08 of 2017 (Nawab Kazim Ali khan Vs. Mohammad Abdullah Azam Khan). The said election petition has been allowed by a Coordinate Bench of this Court vide judgment and order dated 16th December, 2019 and election of Mohd. Abdullah Azam Khan has been declared void. The said judgment and order of the Coordinate Bench has been challenged by Mohammad Abdullah Azam Khan before the Apex Court by means of Civil Appeal No(s). 104 of 2020, wherein the Apex Court vide order dated 17th January, 2020 has called for counter affidavit. A copy of the judgment and order dated 16th December, 2019 and order dated 17th January, 2020 have been brought on record by means of supplementary affidavit filed today, which is taken on record.

6. For quashing of the aforesaid first information report, the applicants have approached this Court by means of Criminal Misc. Writ Petition No. 11979 of 2019 (Mohammad Azam Khan & Others VS. State of U.P. & Others). The Writ Court, on the request of learned A.G.A., has called for counter affidvit vide order dated 14th May, 2019 and the same is still pending before the Writ Court.

7. After registration of the aforesaid first information report, the Investigating Officer has recorded statements of following witnesses:

1. Akash Saxena, Regional Convener/first informant,

2. Tejpal Verma, Deputy Registrar,

3. Mohd. Naseem, Passport Officer,

4. Vijay Kumar, Income Tax Officer,

5. Rai Singh, Chief Assistant,

6. Saleem, Record Keeper

7. Sudheer Kumar Singh, Principal,

8. Head Constable Police-15, Rishipal, Giri

9. Sub-Inspector, Kishor Mishra, and

10. Station House Officer, Narendra Tyagi.

8. After completing statutory investigation under Chapter XII Cr.P.C., the Police has submitted the charge-sheet against the applicants under Sections 420, 467, 468 and 471 I.P.C. in the Court of Additional Chief Judicial Magistrate, Court No.3, Rampur on which the concerned Magistrate has taken cognizance vide order dated 19th August, 2019 and has directed registration of the case which has been registered as Criminal Case No. 1453 of 2019 (State Vs. Mohd. Azam Khan & Others) under Sections 420, 467, 468 and 471 I.P.C.

9. Mr. Chaturvedi, learned Senior Advocate appearing for the applicants has made following submissions on behalf of the applicants:

i. That from the perusal of the entire material collected by the Investigating Officer during the course of investigation, it is apparently clear that no iota of evidence is available on record to establish any of the ingredients of Sections 420, 467, 468 and 471 I.P.C. against the applicants.

ii. As on date, no material has been collected by the Investigating Agency to show that the ingredients given in Sections 463 and 464 I.P.C. are attracted in the present case.

iii. The Investigating Agency has not brought on record any document to prove that the 30th September, 1990 is an incorrect date of birth of applicant no.3.

iv. From perusal of entire material collected by the Investigating officer during the course of investigation, it is apparently clear that there is nothing on record to show any dishonest intention on the part of any of the applicants in submitting incorrect information with regard to the date of birth of applicant no.3 and as to what benefit/gain he would have received by doing so.

v. Even assuming the prosecution case to be true, the offences as alleged will not travel beyond the purview of Section 23 of the Registration of Births and Deaths Act, 1969 and Section 27 of Birth, Death and Marriage Registration Act, 1886.

vi. From the material evidence collected by the Investigating officer during the course of investigation, it is clear that there is no iota of evidence available on record to establish the element of mens rea on the part of the accused applicants in the present case.

vii. There is also no document or material evidence collected by the Investigating Officer on the basis of which it is established that birth certificate dated 21st January, 2015 showing the date of birth of applicant no.3 as 30th September, 1990 is a forged document.

viii. No endeavour was made by the Investigating Officer to record the statement of Rajiv Rajpoot under Section 161 Cr.P.C., who issued birth certificate dated 28th June, 2012 during the course of investigation.

ix. There was no basis for the Investigation Officer to file charge-sheet against the applicants as the witnesses of charge-sheet have themselves stated that the entire records got destroyed in the fire which took place on 8th May, 2015 and have also stated that the birth certificate of applicant no.3 has also got cancelled on 30th January, 2015 by Registrar, Birth and Death, Nagar Paliak Parishad, Rampur.

x. Applicant no.3 got his previous passport cancelled and applied for new passport in accordance with law, as is evident from the statement of Mohammad Nasim, Passport Officer, Bareilly recorded under Section under Section 161 Cr.P.C., a copy of which has been enclosed as Annexure-14 to the affidavit accompanying the present application and that the applicant no.3 was issued new passport in accordance with law on the basis of birth certificate dated 21st January, 2015 and after police verification of the same.

xi. On the basis of birth certificate dated 21st January, 2015, a new PAN card bearing number DFOPK6164K has also been issued in favour of the applicant no.3 in accordance with law as is evident from the statement of Vijay Kumar, Tax Officer, Rampur recorded under Section 161 Cr.P.C.

xii. After issuance of birth certificate dated 21st January, 2015 the applicant has also applied for change of date of birth from 1st January, 1993 to 30th September, 1990 in the official records of the school and high school certificate which is still pending consideration.

xiii. The judgment and order dated 16th December, 2019 passed by the Hon'ble Court in Election Petition No. 8 of 2017 (Nawab Kazim Ali Khan Vs. Mohammad Abdullah Azam Khan) is not applicable and relevant and is not bar on the present case in view of Sections 40 to 44 of the Indian Evidence Act, 1872.

xiv. The informant of the present case has no locus standi to lodge the present first information report against the applicants as he has no relation with the facts and circumstances of the case.

xv. The informant Akash Saxena is a pawn created by the rulling government just with the intention to harass and tarnish the image of the applicants in society.

xvi. No complaint has been filed by the competent authority against the alleged offences committed by the applicants.

xvii. The elements of cheating and forgery are completely missing in the present case as the birth certificate dated 21st January, 2015 is a genuine document as it has been issued by Lucknow Municipal Corporation being a competent authority under the procedure established by law.

xviii. No offence whatsoever as alleged by informant and prosecution in the present case is made out against the applicants and the present proceedings is a sheer misuse and abuse of process of law.

xix. It is noteworthy to mention here that at the time of lodging of the first information report on 3rd January, 2019, the birth certificate dated 28th June, 2012 issued by Nagar Palika Parishad Rampur was no longer in existence as the same stood canclled vide order dated 30th January, 2015 in accordance with law.

xx. The entire prosecution story is completely politically motivated, backed with mala fides

and the instant matter has no substance available against the applicants.

10. Per contra, learned A.G.As. for the State has vehementally opposed the submissions made by the learned counsel for the applicants. In reply, they have submitted as follows:

i. A genuine question arises in the mind of a prudent person as to why applicant no.1 and applicant no.2 have given affidavit in order to obtain a birth certificate of applicant no.3 before Nagar Palika Parisahd, Rampur and thereafter applicant no.2 had given an application supported by an affidavit before the Municipal Corporation, Lucknow, specially in the circumstance that the applicant no.3 was already having the legal proof of age or date of birth in the shape of certificate of secondary school examination (Class-X) of the year 2007 issued by the Central Board of Secondary Education, without any legal requirement, in fact *mens rea* was behind it from the very beginning in the mind of applicants.

ii. It was within the knowledge of applicants that on the basis of certificate of secondary school examination (Class-X) of the year 2007 issued by the Central Secondary Board of Secondary Education containing therein the date of birth as "1st January, 1993", the applicant no.3 is not even in a position to participate in the Uttar Pradesh Legislative Assembly Election of the year 2017, therefore, in the year 2015 they approached the Nagar Palika Parishad, Rampur for cancellation of certificate dated 28th June, 2012 and the Municipal Cooperation, Lucknow for issuance of another birth certificate showing therein the date of birth as "30th September, 1990, so that applicant no.3 may participate in the forth coming Legislative Assembly elections.

iii. It was within the knowledge of applicant nos. 1 to 3 that as per the High School Certificate the date of birth of applicant no.3 is "1st January, 1993" and in order to deceive the Lucknow Municipal Corporation, Lucknow, an application supported by an affidavit has been moved by applicant no.2 for issuance of third date of birth certificate of different date of birth as "30th September, 1990", whereas the real and true date of birth of applicant no.3 was "1st January, 1993" and ultimately, they obtained the manipulated birth certificate and applicant no.3 used the same in the Uttar Pradesh Legislative Assembly Election of the year 2017. The applicant no.3 won the election and was elected as a Member of Legislative Assembly, U.P., thereafter he enjoyed the financial benefits of M.L.A., which is wrongful gain on behalf of the applicants and wrongful loss of the other contesting participants of 34-Suar Constituency, Rampur, Uttar Pradesh in the Legislative Assembly Election of the year 2017 as well as of the society, thus, offence as alleged has been committed by the applicants for personal gain.

iv. During the course of investigation, the investigating Officer examined and recorded the statement of Sub-Registrar Tejpal Verma the then Sub-Registrar, Birth and Death Certificate, Nagar Palika Parishad, Rampur under Section 161 Cr.P.C. Except the statements of Vijay Kumar, Income Tax officer, who has issued PAN card in favour of applicant no.3, Sudheer Kumar Singh, St. Paul School, Civil Lines, Rampur, who has verified the secondary school examination (Class-X) of the year 2007 of applicant no.3 mentioning his date of birth as "1st January, 1993", Raj Singh, Principal

Assistant, District Election Office, Rampur, who has stated that along with the nomination paper, the applicant no.3 has submitted his date of birth certificate dated 21st January, 2015 issued by the Municipal Corporation, Lucknow in which the date of birth of applicant no.3 was mentioned as "30th September, 1990" recorded under Section 161 Cr.P.C., the learned A.G.As. have referred to the statement of Salim, Record Keepker, Nagar Palika Parishad, Rampur in which he has stated that from year 2012 he is posted in Birth and Death Certificate Section of Nagar Palika Parishad, Rampur as Record Keeper. He takes care of all the records. He has submitted that in relation to the record of date of birth certificate of applicant no.3, an affidavit of applicant nos. 1 and 2 had been enclosed and on the basis of which the date of birth certificate of applicant no.3 has been prepared and registered. The Investigating Officer has also recorded second statement of Tejpal Verma. v. Referring to the aforesaid statements recorded under Section 161 Cr.P.C., it has been submitted by the learned A.G.As. that it is not disputed that at the relevant point of time, applicant no.1 was Cabinet Minister in the U.P. Government holding portfolio of "Urban Planning and Development and Local Bodies" and the Nagar Palika Parishad, Rampur was within the control of his ministry, therefore, prima facie he is responsible for the sudden burning of documents related with the affidavit of applicant nos. 1 and 2 and even no first information report has been lodged qua the burning of documents in the year 2015.

vi. The applicant no.3 was having three certificates regarding his age or date of birth, the first being the Secondary School Examination (Class-X) certificate showing his date of birth as "1st January, 1993", the second being the date of birth certificate issued by the Nagar Palika Parishad, Rampur dated 28th June, 2012 showing his date of birth as "1st January, 1993" and the third being date of birth certificate issued by the Municipal Corporation, Lucknow dated 21st January, 2015 showing the date of birth as "30th September, 1990". The second date of birth certificate issued by the Nagar Palika Parisahd, Rampur was cancelled on 30th January, 2015 and prior to it's cancellation, third date of birth certificate was issued on 21st January, 2015 by the Municipal Corporation, Lucknow. Thus at the same point of time i.e. between the period 21st January, 2015 to 30th January, 2015", applicant no.3 was having three birth certificates of two different date of birth i.e. "1st January, 1993 and 30th September, 1990". The applicant no.3 is having five criminal antecedents to his credit except the present one.

vii. At the relevant point of time, applicant no.1 was Cabinet Minister in the U.P. Government holding portfolio of "Urban Planning and Development and Local Bodies" and the Nagar Palika Parishad, Rampur and Municipal Corporation, Lucknow were within the control of his ministry. Applicant no.1 is having 53 criminal antecedents to his credit except the present one.

viii. The certificate of secondary school examination/high school examination certificate issued by a recognized board like Central Board of Secondary Education is a most authentic, reliable and legal proof of age or date of birth, within the territory of India and no authority either Government or Private is permitted by law to deny the same and can ask for another proof of age or date of birth of any person like applicant no.3.

ix. One Nawab Kazim Ali Khan moved an election petition before this Court bearing Election Petition No. 8 of 2017 (Nawab Kazim Ali Khan Vs. Mohammad Abdullah Azam Khan), the same has been decided by a Bench of this Court on 16th December, 2019 and the Hon'ble Single Judge was pleased to give concurrent finding regarding the date of birth certificate issued by the Lucknow Municipal Corporation, Lucknow dated 21st January, 2015 and cancellation of old date of birth certificate issued by Nagar Palika Parishad, Rampur dated 30th January, 2015. In view of the aforesaid judgment, learned A.G.As. have submitted that the birth certificate so issued is a complete nullity particularly in view of the provisions of Section 13 of the Registration of Birth and Death Act. The birth certificate issued by the Municipal Corporation, Lucknow dated 21st January, 2015 is a manipulated and bogus document. The copy of the EOT register and MLR register as well as oral evidence led by the applicants before the Hon'ble Single Judge have been found untrustworthy and did not prove that date of birth of applicant no.3 is "30th September, 1990" and the Hon'ble Single Judge has observed that these evidences are the result of manipulations and fabrication of record. The Hon'ble Single Judge has also observed that the birth certificate issued by the Lucknow Municipal Corporation, Lucknow and cancellation order of the old birth certificate issued by the Nagar Palika Parishad, Rampur are false, fabricated and procured manipulated piece of papers. This paper has been procured in breach of the provisions of the Act i.e. the Registration of Birth and Death Act.

x. The above judgment relates to matters of a public nature, as the same has been delivered in a election petition and therein public documents (the date of birth certificate issued by the Lucknow Municipal Corporation, Lucknow dated 21st January, 2015 and cancellation order of the old date of birth certificate issued by the Nagar Palika Parishad, Rampur dated 30th January, 2015) have been considered and concurrent finding has been recorded that both the documents are manipulated, fabricated, bogus and false and at this juncture, the judgment delivered on 16th December, 2019 in the election petition is conclusive proof against the applicants unless or until the same has been stayed or quashed by the Apex Court.

xi. The learned A.G.As. have also relied upon the judgment of the Apex Court in the case of **State of Haryana and Others Vs. Chaudhari Bhajan Lal and Others,** reported in *1992 Supp.(1) SCC 335.* On the cumulative strength of the aforesaid, learned A.G.As. urge that offence under Sections 420, 467, 468, 471 I.P.C. is made out against the applicants. The present application under Section 482 Cr.P.C. is devoid of merit and the same is liable to be dismissed by this Court.

11. I have considered the submissions made by the learned counsel for the parties and have gone through the records of the present application under Section 482 Cr.P.C.

12. Though in the prayer clause, the applicants have prayed for quashing of the summoning order dated 19th August, 2019 along with other prayers, but perusal of the record shows that there is no summoning order passed on 19th August, 2019. After submission of the charge-sheet, the concerned Magistrate has only taken cognizance and directed to register the case only. However, seeing the nature of

this case, this Court wishes to examine the legality, veracity or otherwise of the impugned charge-sheet submitted against the applicants under Sections 420, 467, 468 and 471 I.P.C. without examining the summoning order.

13. Now this Court comes on the issue of any cheating, fraud, deception, dishonesty being committed by the applicants in getting two extra date of birth certificates of applicant no.3, while he already possessed a birth certificate i.e. matriculation/high school examination certificate.

14. In paragraph 22 of the affidavit accompanying the present application under Section 482 Cr.P.C., it has been stated that the reason of wrong date of birth in the school register was a bona fide one, as one Shri Sahzeb Khan, S/o Munna Khan, R/o Mohalla Chauk Mohammed Sayeed Khan, Rampur, District-Rampur, a family friend of the applicants had gone to St. Paul School, Rampur at the time of the admission of applicant no.3 in Nursery Class in the year 1995, who had completed the formalities of the admission and somehow on his own, inadvertently furnished the date of birth of applicant no.3 as "1st January, 1993" in place of "30th September, 1990", which was carried in further educational records of applicant no.3.

15. In paragraph 23 of the said affidavit, it has been stated that the applicant no.3 completed his High School Examination in the year 2007 and Intermediate Examination in the year 2009 from St. Paul School, Rampur and thereafter, completed his B.Tech. Degree course in the year 2013 and the M.Tech. Degree course in the year 2015 from Galgotias College of Engineering and Technology, Greater Noida and the Galgotias University, Greater Noida, District-Gautam Budh Nagar respectively and the date mentioned, as the date of birth of the applicant no.3, is "1st January, 1993", was still continuing in all his above educational certificates.

16. Further in paragraph-24 of the aforesaid affidavit, it has been stated that in the year 2015, while the applicant no.3 was pursuing his studies of M.Tech. (final year) and was forwarding towards his career/job and scrutinized his educational records, he came to know that his date of birth is incorrectly recorded as "1st January, 1993" in place of "30th September, 1990", then he took immediate steps for correction in the same by filing an application on 23rd March, 2015 under the provisions of Examination Bye-Laws of the Central Board of Secondary Education, New Delhi before the Regional Officer, C.B.S.E. Allahabad through Principal, St. Paul's School Rampur, which is still pending consideration.

17. Paragraph-25 of the aforesaid affidavit also indicates that a date of birth certificate has also been issued in favour of applicant no.3 mentioning the date of birth as **"1st January, 1993"** on 28th June, 2012 by the Nagar Palika Parishad, Rampur. As per the statement of Tej Pal Verma, the then Deputy Registrar, Birth and Death, Nagar Palika Parishad, Rampur recorded under Section 161 Cr.P.C., a copy of which has been brought on record at page-88 of the paper book , it has been recorded that the date of birth certificate dated **28th June, 12** has been registered by Mr. Rajeev Rajpoot, the then Registrar, Nagar Palika Parishad, Rampur on the basis of affidavit filed by applicant nos. 1

and 2. He has also stated that since the same has been registered and issued illegally, Mr. Tejpal had subsequently cancelled the same. Mr. Tejpal has also stated that due to fire the entire original records had been destroyed. From the record it appears that the said date of birth certificate issued by the Nagar Palika Parishad, Rampur had been cancelled on **31st January, 2015,** a copy of which has been enclosed as Annexure-6 to the affidavit accompanying the present application. In the judgment and order passed by the Hon'ble Single Judge dated 16th December, 2019 in Election Petition No. 8 of 2017, a copy of which has been brought on record by means of supplementary affidavit filed today, it has been recorded as follows:

"His parents got registered his birth with the Registrar of Birth Nagar Palika Parishad, Rampur, mentioning his date of birth as 01.01.1993. When the Officer-in-charge/Sub-Registrar, Birth and Death, Nagar Palika Parishad, Rampur, appeared in witness box as P.W.4, he did not produce the original records on the basis of which the birth certificate of the respondent bearing Registration No. RNPB-03857, dated 28.06.2012 Rampur was issued and instead merely produced the computer generated copy of birth certificate of the respondent. He stated that the entire record of the aforesaid birth certificate has burnt in fire on 08.05.2015 after the Registrar Birth and Death, Nagar Palika Parishad, Rampur, cancelled it on 30.01.2015."

18. From the record, it is also apparent that while having two date of birth certificates of applicant no.3, the first being matriculation certificate of the year 2007 and the second being date of birth certificate dated 28th June, 2012 issued by Nagar Palika Parishad, Rampur, a third date of birth certificate dated **21st January, 2015** had been issued by Municipal Corporation, Lucknow mentioning the date of birth of applicant as **"30th Sepember, 1990"**. The said certificate has been registered on the basis of the application dated 17th January, 2015 supported by an affidavit of applicant no.2, namely, Smt. Tanzim Fatima. At page-31 of the judgment and order of the Hon'ble Single Judge dated 16th December, 2019, scanned copy of the letter made by applicant no.2 has been pasted. In the said letter, It has been stated that her son, namely, Mohd. Abdullah Azam Khan was born on 30th September, 1990 in Queen Mery's Hospital (King George Medical University", Lucknow Mahanagar. Due to unavoidable urgency and requirement, she needs date of birth certificate of her son. She also prays that date of birth certificate of his son be issued on the basis of that application and affidavit filed along with the same. She also states that verification from Queen Mery's Hospital may also be done. She lastly prays to issue date of birth certificate of her son at the earliest.

19. What is important to note here is that in the application along with affidavit dated 17th January, 2015, the applicant no.2 has concealed the issuance of second date of birth certificate of her son i.e. applicant no.3 dated 28th June, 2012 issued by the Nagar Palika Parishad, Rampur and she has also committed illegality in moving the application along with affidavit dated 17th January, 2015 for issuance of third birth certificate of her son i.e. applicant no.3, which has been registered on 21st January, 2015 mentioning the date of birth of applicant no.3 as "30th September, 1990". When as

matter of fact, the second date of birth of the applicant no.3 dated 28th June, 2012 has been cancelled only on 31st January, 2015, therefore, between the period 21st January, 2015 to 31st January, 2015, applicant no.3 had three date of birth certificates i.e. matriculation examination certificate, date of birth certificate dated 28th June, 2012 and birth certificate dated 21st January, 2015. This fact has also not been disputed by the learned counsel for the applicants.

20. About the correctness or genuineness of the third date of birth certificate of applicant no.3 dated 21st January, 2015, the Hon'ble Single Judge in its judgment and order dated 16th December, 2019 has discussed in detail and observed that the said date of birth certificate has been obtained on the basis of manipulation and fabrication pf the relevant records. The relevant paragraph nos. 25 to 33 are being quoted herein-below:

"Birth Certificate issued by Nagar Nigam, Lucknow

25. Now, I proceed to examine whether birth certificate bearing Registration No.NNLKO - B-2015-292611 and date of registration 21.01.2015, issued by Registrar Birth and Death, Lucknow, on 21.01.2015 showing date of birth of the respondent as 30.09.1990, is a valid piece of paper/reliable evidence?

26. D.W.-2 - Dr. Archana Dwivedi, Additional Municipal Commissioner, Municipal Corporation, Lucknow, produced the complete original file relating to issuance of birth certificate of the respondent dated 21.01.2015 which contains merely the application of the respondent's mother and her affidavit both dated 17.01.2015 and a computerised sheet bearing particulars of registration of birth of the respondent. Copy of the aforesaid application and affidavit both dated 17.01.2015 submitted by the mother of the respondent before the Nagar Nigam Lucknow and filed in evidence as Ex.R-12 are pasted below (scanned copy):-

27. The D.W. -2 Dr. Archana Diwedi, Additional Municipal Commissioner, Municipal Corporation, Lucknow produced a birth register which is neither authenticated nor certified by any competent Officer nor paginated. In her cross examination she stated that the birth register is maintained by a clerk which is not in prescribed form as provided in the Registration of Birth and Death Act, 1969. She stated that list of Queen Mary's Hospital on the basis of which entry of the respondent's birth has been made in the birth register is not available. She stated that birth of the respondent was registered on 21.01.2015. Copy of the relevant two pages of the aforesaid birth register filed and attested by the D.W.-2 has been marked as Ex.12 (paper No.A-96/4-5) which are pasted below (scanned copy):-

28. The entry made in the aforesaid birth register of Nagar Nigam, Lucknow (Ex. R-12 - paper No. A 96/4-5) is a clear case of manipulation and interpolation. The entry of the respondent's birth has been inserted in the very little space at the bottom of the page showing it to have been made on 30.09.1990 mentioning the name of the respondent Mohd. Abdullah Azam Khan as HINDU male baby of Mrs. Tazeen Fatima, wife of Mohd. Azam Khan. Just one entry above the aforesaid entry of the respondent, is the entry in the name of one Sangeeta wife of Pankaj Gupta which as per endorsement of some officer, was made on 25.06.1993. Above the aforesaid entry

dated 25.06.1993 is another entry in the name of one Vandana wife of R.N. Srivastava, made on 24.07.1992. The entries subsequent to the entry of the respondent's birth, appearing on the next page are the entries dated 02.10.1990, 03.10.1990, 26.09.1990 and 27.09.1990. The entries of the respondent's birth made in the aforesaid alleged birth register does not bear signature or order of any authority of the Nagar Nigam, Lucknow, or a Sub-Divisional Magistrate. Thus, entry in the aforesaid birth register in the name of the respondent was not made on 30.09.1990.

29. In paragraph No.5 of her affidavit (Ex. R-12) the D.W. -5 Mrs. Tazeen Fatima (mother of the respondent) herself stated that the birth of the respondent may be got verified from Hospital record of Queen Mary's Hospital. This clearly indicates that as on 17.01.2015 there was no entry in the name of the respondent in the alleged birth register of Nagar Nigam Lucknow (Ex. R-12 - paper No. A-96/4-5), otherwise she would have merely asked to issue birth certificate on the basis of the alleged entry in the birth register.

30. These facts leave no manner of doubt that the entry of respondent's birth in the alleged Birth Register of Nagar Nigam, Lucknow, showing his birth on 30.09.1990, was inserted much after 25.06.1993 and in all probabilities in the year 2015.

31. Facts aforestated leave no manner of doubt that the entry of the respondent's birth in the aforesaid birth register (Ex. R-12 - Paper No. A-96/4-5), was made by interpolation at the instance or under pressure of the interested parties. It was manipulation and fabrication. It shall not be out of place to mention that when the birth certificate dated 21.01.2015 of the respondent was got issued from Nagar Nigam, Lucknow, at that time the respondent's father was the Cabinet Minister of the Department of Urban Development and Local Bodies. Nagar Nigam, Lucknow, was under his ministry. Thus, the evidence of D.W.-5 - Mrs. Tazeen Fatima (mother of the respondent) and D.W. 10 (respondent) are false and wholly untrustworthy in so far as it relates to the entries of birth of the respondent on 30.09.1990.

32. That apart the respondent's mother Mrs. Tazeen Fatima (D.W.-5) moved the aforesaid application dated 17.01.2015, supported by an affidavit of the same date (Ex. R-12) to obtain birth certificate of the respondent from Nagar Nigam, Lucknow, in which she very conveniently concealed the fact of the then existing birth certificate of the respondent issued by the Registrar Birth and Death, Nagar Palika Parishad, Rampur (Ex. P-3 paper No.A-80/1), which she got cancelled subsequently on 30.01.2015.

33. The aforesaid application dated 17.01.2015 for issuance of birth certificate of the respondent was submitted by the mother of the respondent before the Nagar Swastha Adhikari, Nagar Nigam, Lucknow, after about 25 years of the alleged date of birth of the respondent which was endorsed by the some Officer of the Nagar Nigam, Lucknow, on 19.01.2015 and a day thereafter birth certificate was issued to the respondent by the Registrar (Birth & Death) Nagar Nigam, Lucknow, without observance of mandatory provisions of Section 13 of the Registration of Births and Deaths Act, 1969 (hereinafter referred to as the Act, 1969) and Rule 9 of the U.P. Registration of the Birth and Death Rules 2002 (hereinafter referred to as the U.P. Rules 2002). Copy of the computer generated

sheet of birth registration filed by the D.W.-2 and marked as Ex. R-12 (Paper No.A-96/3) is pasted below (scanned copy):-"

21. This Court may also record that on the basis of third date of birth certificate dated 21st January, 2015 in which the date of birth of the applicant no.3 has been mentioned as "30th September, 1990, the applicant no.3 has participated in the election of Legislative Assembly and has been declared elected as the Member of Legislative Assembly on 11th March, 2017. The election of applicant no.3 was challenged by one Nawab Kazim Ali Khan by means of filing of Election Petition No.8 of 2017 on the ground that on the date of filing of nomination paper i.e. 24th January, 2017, the applicant no.3 was less than 25 years of age, which is the minimum age prescribed for filing nomination paper for election of member of legislative assembly. The said election petition has been allowed by the Hon'ble Single Judge by means of the judgment and order dated 16th December, 2019 declaring the election of applicant no.3 as void and setting aside the same.

22. Before coming to the merits of the submissions and replies on the issue of applicants on committing cheating, deception, fraud, it would be worthwhile to reproduce Section 420 I.P.C., which is cheating and defined in Section 415 I.P.C. and the same are being quoted herein-below:

*"**415. Cheating.**- Whoever, by **deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver any property to any person, or to consent that any person shall retain any property,** or intentionally induces the person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property, is said to "cheat".*

*Explanation.--**A dishonest concealment of facts is a deception** within the meaning of this section."*

*"420. **Cheating and dishonestly inducing delivery of property.- Whoever cheats and thereby dishonestly induces the person deceived to deliver any property to any person,** or to make, alter or destroy the whole or any part of a valuable security, or anything which is signed or sealed, and which is capable of being converted into a valuable security, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine."*

23. In order to attract allegations of "cheating", following things must exist:

(i) deception of a person;

(ii) (A) **fraudulent or dishonest inducement of that person,**

(a) to deliver any property to any person; or,

(b) to consent that any person shall retain any property,

(B) **intentional inducing that person to do or omit to do any thing,**

(a) which **he would not do or omit if he was not so deceived,** and,

(b) such act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property. (Emphasis added)

24. Then in order to attract Section 420 I.P.C., essential ingredients are:

(I) cheating;

(ii) dishonest inducement to deliver property or to make or destroy any valuable security or any thing which is sealed or signed or is capable of being converted into a valuable security; and,

(iii) mens rea of accused at the time of making inducement and which act of omission.

25. In **Mahadeo Prasad Vs. State of West Bengal,** reported in *AIR 1954 SC 724* it was observed that to constitute offence of cheating, intention to deceive should be in existence at the time when inducement was offered.

26. In **Jaswantrai Manilal Akhaney Vs. State of Bombay,** reported in *AIR 1956 SC 575,* Court said that a guilty intention is an essential ingredient of the offence of cheating. For the offence of cheating, "mens rea" on the part of that person, must be established.

27. In **G.V. Rao Vs. L.H.V. Prasad and others,** reported in *2000(3) SCC 693,* Court said that Section 415 has two parts. While in the first part, the person must *"dishonestly"* or *"fraudulently"* induce the complainant to deliver any property and in the second part the person should intentionally induce the complainant to do or omit to do a thing. In other words in the first part, inducement must be dishonest or fraudulent while in the second part, inducement should be intentional.

28. In **Hridaya Ranjan Prasad Verma and others Vs. State of Bihar and another,** reported in *2000(4) SCC 168,* Court said that in the definition of 'cheating', there are set forth two separate classes of acts which the person deceived may be induced to do. In the first place he may be induced fraudulently or dishonestly to deliver any property to any person. The second class of acts set forth in the section is the doing or omitting to do anything which the person deceived would not do or omit to do if he were not so deceived. In the first class of cases, inducement must be fraudulent or dishonest. In the second class of acts, the inducement must be intentional but not fraudulent or dishonest. It was pointed out that there is a fine distinction between mere breach of contract and the offence of cheating. It depends upon the intention of accused at the time to inducement which may be judged by his subsequent conduct but for this, subsequent conduct is not the sole test. Mere breach of contract cannot give rise to criminal prosecution for cheating unless fraudulent or dishonest intention is shown right at the beginning of the transaction, that is the time when the offence is said to have been committed. Therefore it is the intention which is the gist of the offence. In order to hold a person guilty of cheating it would be obligatory to show that he had fraudulent or dishonest intention at the time of making the promise. Mere failure to keep up promise subsequently such a culpable intention right at the beginning, i.e, when he made the promise cannot be presumed.

29. In **S.W. Palanitkar and others Vs. State of Bihar and another,** reported in *2002(1) SCC 241,* while examining the ingredients of Section 415 IPC, the aforesaid authorities were followed.

30. In **Hira Lal Hari lal Bhagwati Vs. CBI, New Delhi,** reported in *2003(5) SCC 257,* Court said that to hold a person guilty of cheating under Section 415 IPC it is necessary to show that he has

fraudulent or dishonest intention at the time of making promise with an intention to retain property. The Court further said:

"Section 415 of the Indian Penal Code which defines cheating, requires deception of any person (a) inducing that person to: (i) to deliver any property to any person, or (ii) to consent that any person shall retain any property OR (b) intentionally inducing that person to do or omit to do anything which he would not do or omit if he were not so deceived and which act or omission causes or is likely to cause damage or harm to that person, anybody's mind, reputation or property. In view of the aforesaid provisions, the appellants state that person may be induced fraudulently or dishonestly to deliver any property to any person. The second class of acts set forth in the Section is the doing or omitting to do anything which the person deceived would not do or omit to do if he were not so deceived. In the first class of cases, the inducing must be fraudulent or dishonest. In the second class of acts, the inducing must be intentional but not fraudulent or dishonest." (Emphasis added)

31. In **Devender Kumar Singla Vs. Baldev Krishan Singh** reported in *2004 (2) JT 539 (SC)*, it was held that making of a false representation is one of the ingredients of offence of cheating.

32. In **Indian Oil Corporation Vs. NEPC India Ltd.**, reported in *2006(6) SCC 736* in similar circumstances of advancement of loan against hypothecation, the complainant relied on Illustrations (f) and (g) to Section 415, which read as under:

"(f) A intentionally deceives Z into a belief that A means to repay any money that Z may lend to him and thereby dishonestly induces Z to lend him money, A not intending to repay it. A cheats."

"(g). A intentionally deceives Z into a belief that A means to deliver to Z a certain quantity of indigo plant which he does not intend to deliver, and thereby dishonestly induces Z to advance money upon the faith of such delivery. A cheats; but if A, at the time of obtaining the money, intends to deliver the indigo plant, and afterwards breaks his contact and does not deliver it, he does not cheat, but is liable only to a civil action for breach of contract."

33. The Court said that crux of the postulate is intention of the person who induces victim of his representation and not the nature of the transaction which would become decisive in discerning whether there was commission of offence or not. Court also referred to its earlier decisions in Rajesh Bajaj Vs. State NCT of Delhi, reported in 1999(3) SCC 259 and held that it is not necessary that a complainant should verbatim reproduce in the body of his complaint all the ingredients of the offence he is alleging. Nor is it necessary that the complainant should state in so many words that the intention of the accused was dishonest or fraudulent.

34. In **Vir Prakash Sharma Vs. Anil Kumar Agarwal and another,** reported in *2007(7) SCC 373* it was held that if no act of inducement on the part of accused is alleged and no allegation is made in the complaint that there was any intention to cheat from the very inception, the requirement of Section 415 read with Section 420 IPC would not be satisfied.

The Court relied on the earlier decisions in **Hridaya Ranjan Prasad Verma (supra) and Indian Oil Corporation Vs. NEPC India Ltd.(supra).**

35. The aforesaid authorities have been referred to and relied on in reference to offence under Section 420 I.P.C. by a Division Bench of this Court in **Sh. Suneel Galgotia and another Vs. State of U.P. and others** reported in *2016 (92) ACC 40.*

36. Apart from the above, this Court has also noticed the other judgments of the Apex Court, reiterating the aforesaid laws.

37. In the case of **United India Insurance Company Ltd. V. B.Rajendra Singh and others,** reported in *JT 2000(3)SC.151,* considering the fact of fraud, the Apex Court held in paragraph 3 as under :

"Fraud and justice never dwell together". (Frans et jus nunquam cohabitant) is a pristine maxim which has never lost its temper overall these centuries. Lord Denning observed in a language without equivocation that "no judgment of a Court, no order of a Minister can be allowed to stand if it has been obtained by fraud, for fraud unravels everything"(Lazarus Estate Ltd. V. Beasley 1956(1)QB 702)."

38. In the case of **Vice Chairman, Kendriya Vidyalaya Sangathan and Another Vs. Girdhari Lal Yadav,** reported in 2004 (6) SCC 325, the Apex Court considered the applicability of principles of natural justice in cases involving fraud and held in paragraph 12 and 13 as under :

"12. Furthermore, the respondent herein has been found guilty of an act of fraud. In opinion, no further opportunity of hearing is necessary to be afforded to him. It is not necessary to dwell into the matter any further as recently in the case of Ram chandra Singh v. Savitri devi this Court has noticed:

"15. Commission of fraud on court and suppression of material facts are the core issues involved in these matters. Fraud as is well-known vitiates every solemn act. Fraud and justice never dwells together.

16.Fraud is a conduct either by letter or words, which induces the other person, or authority to take a definite determinative stand as a response to the conduct of former either by word or letter.

It is also well settled that misrepresentation itself amounts to fraud. Indeed, innocent misrepresentation may also give reason to claim relief against fraud.

18. A fraudulent misrepresentation is called deceit and consists in leading a man into damage by willfully or recklessly causing him to believe and act on falsehood. It is a fraud in law if a party makes representations which he knows to be false, and injury ensues therefrom although the motive from which the representations proceeded may not have been bad."

39. In the case of ***Ram Chandra Singh Vs. Savitri Devi and others,*** reported in 2003(8) SCC 319, the Apex Court held in paragraphs 15, 16, 17, 18, 25 and 37 as under :

"15. Commission of fraud on court and suppression of material facts are the core issues involved in these matters. Fraud as is well-known vitiates every solemn act. Fraud and justice never dwells together.

16. Fraud is a conduct either by letter or words, which induces the other person, or authority to take a definite

determinative stand as a response to the conduct of former either by word or letter.

17. It is also well settled that misrepresentation itself amounts to fraud. Indeed, innocent misrepresentation may also give reason to claim relief against fraud.

18. A fraudulent misrepresentation is called deceit and consists in leading a man into damage by willfully or recklessly causing him to believe and act on falsehood. It is a fraud in law if a party makes representations which he knows to be false, and injury ensues therefrom although the motive from which the representations proceeded may not have been bad.

25. Although in a given case a deception may not amount to fraud, fraud is anathema to all equitable principles and any affair tainted with fraud cannot be perpetuated or saved by the application of any equitable doctrine including res-judicata.

37. It will bear repetition to state that any order obtained by practising fraud on court is also non-est in the eyes of law."

40. In the case of **S.P. ChengalVaraya Naidu (dead) by L.Rs Vs. Jagannath (dead) by L.Rs and others,** reported in AIR 1994 SC 853, the Apex Court held in para 7 as under:

"7. The High Court, in our view, fell into patent error. The short question before the High Court was whether in the facts and circumstances of this case, Jagannath obtained the preliminary decree by playing fraud on the court. The High Court, however, went haywire and made observations which are wholly perverse. We do not agree with the High Court that "there is no legal duty cast upon the plaintiff to come to court with a true case and prove it by true evidence". The principle of "finality of litigation" cannot be pressed to the extent of such an absurdity that it becomes an engine of fraud in the hands of dishonest litigants. The courts of law are meant for imparting justice between the parties. One who comes to the court, must come with clean hands. We are constrained to say that more often than not, process of the court is being abused. Property-grabbers, tax-evaders, bank-loan-dodgers and other unscrupulous persons from all walks of life find the court-process a convenient lever to retain the illegal-gains indefinitely. We have no hesitation to say that a person, who's case is based on falsehood, has no right to approach the court. He can be summarily thrown out at any stage of the litigation."

41. **In State of Maharastra Vs. Mayer Hans George** reported in AIR 1965 SC 722 (V 52 C 123), the Apex Court specially in paragraph-10, has observed as follows:

*"10. In Russell on Crime, 11th edn. Vol. 1, it is stated at p. 64:..... **there is a presumption that in any statutory crime the common law mental element, mens rea, is an essential ingredient."***

***On the question how to rebut this presumption,** the learned author points out that the policy of the courts is unpredictable. I shall notice some of the decisions which appear to substantiate the author's view. In Halsbury's Laws of England, 3rd edn. Vol. 10, in para, 508, at p. 273, the following passage appears:*

"A statutory crime may or may not contain an express definition of the necessary state of mind. A statute may

require a specific intention, malice, knowledge, wilfulness. or recklessness. On the other hand, it may be silent as to any requirement of mens rea, and in such a case in order to determine whether or not mens rea is an essential element of the offence, it is necessary to look at the objects and terms of the statute." This passage also indicates that the absence of any specific mention of a state of mind as an ingredient of an offence in a statute is not decisive of the question ***whether mens rea is an ingredient of the offence or not:*** *it depends upon the object and the terms of the statute. So too, Archbold in his book on "Criminal Pleading, Evidence and Practice", 35th edn., says much to the same effect at p. 48 thus:*

"It has always been a principle of the common law that mens rea is an essential element in the commission of any criminal offence against the common law In the case of statutory offences it depends on the effect of the statute..... *There is a presumption that mens era is an essential ingredient in a statutory offence, but this presumption is liable to be displaced either by the works of the statute creating the offence or by the subject matter with which it deals."*

The leading case on the subject is Sherras v. De Rutzen(1). Section 16(2) of the Licensing Act, 1872, prohibited a licensed victualler from supplying liquor to a police constable while on duty. It was held that section did not apply where a licensed victualler bona fide believed that the police officer was off duty Wright J., observed ***"There is a presumption that mens rea, an evil intention, or a knowledge of the wrongfulness of the act, is an essential ingredient in every offence; but that presumption is liable to be displaced either by the words of the statute creating the offence or by the subject-matter with which it deals, and both must be considered."....."***

42. In **Kartar Singh Versus State of Punjab** reported in *(1994) 3 SCC 569,* the Apex Court specifically in paragraph nos. 115 to 119 has observed as follows:

"115. In a criminal action, the general conditions of penal liabilities are indicated in old maxim "actus non facit reum, nisi mens sit rea" i.e. the act alone does not amount to guilt, it must be accompanied by a guilty mind. But there are exceptions to this rule and the reasons for this is that the legislature, under certain situations and circumstances, in its wisdom may think it so important, in order to prevent a particular act from being committed, to forbid or rule out the element of mens rea as a constituent part of a crime or of adequate proof of intention or actual knowledge. However, unless a statute either expressly or by necessary implication rules out 'mens rea' in cases of this kind, the element of 'mens rea' must be read into the provisions of the statute. The question is not what the word means but whether there are sufficient grounds for infer-ring that the Parliament intended to exclude the general rule that mens rea is an essential element for bringing any person under the definition of 'abet'.

116. There are judicial decisions to the effect that it is generally necessary to go behind the words of the enactment and take other factors into consideration as to whether the element of 'mens rea' or actual knowledge should be imported into the definition. See (1) Brand v. Wood (2) Sherras v. De Rutzen, (3) Nicholls v. Hall, and (4) Inder Sain v. State of Punjab.

117. This Court in State of Maharashtra v. M.H. George while

examining a question as to whether mens rea or actual knowledge is an essential ingredient of the offence under Section 8(1) read with Section 23(1)(a) of the Foreign Exchange Regulation Act, 1947, when it was shown that the respondent (accused) in that case voluntarily brought gold in India without the permission of Reserve Bank, held by majority that the Foreign Exchange Regulation Act is designed to safeguarding and conserving foreign exchange which is essential to the economic life of a developing country and the provisions have therefore to be stringent aiming at eliminating smuggling. Hence, in the background of the object and purpose of the legislation, if the element of mens rea is not by necessary implication invoked, its effectiveness as an instrument for preventing smuggling would be entirely frustrated.

118. But Subba Rao, J. dissented and held thus : (SCR p.

139) "... the mere fact that the object of a statute is to promote welfare activities or to eradicate grave social evils is in itself not decisive of the question whether the element of guilty mind is excluded from the ingredients of the offence. It is also necessary to enquire whether a statute by putting a person under strict liability helps him to assist the State in the enforcement of the law : can he do anything to promote the observance of the law? Mens rea by necessary implication can be excluded from a statute only where it is absolutely clear that the implementation of the object of a statute would otherwise be defeated and its exclusion enables those put under strict liability by their act or omission to assist the promotion of the law. The nature of mens rea that will be implied in a statute creating an offence depends upon the object of the Act and the provisions thereof."

119. Thereafter, a similar question arose in Nathulal v. State of M.P. as regards the exclusion of the element of mens rea in the absence of any specific provision of exclusion. Subba Rao, J. reiterated his earlier stand taken M.H. George and observed thus : (AIR p. 45) ***"Mens rea is an essential ingredient of a criminal offence. Doubtless a statute may exclude the element of mens rea, but it is a sound rule of construction adopted in England and also accepted in India to construe a statutory provision creating an offence n conformity with the common law rather than against it unless the statute expressly or by necessary implication excluded mens rea.*** *The mere fact that the object of the statute is to promote welfare activities or to eradicate a grave social evil is by itself not decisive of the question whether the element of guilty mind is excluded from the ingredients of an offence. Mens rea by necessary implication may be excluded from a statute only where it is absolutely clear that the implementation of the object of the statute would otherwise be defeated."*

43. It is not disputed by the learned counsel for the applicants that as per the date of birth certificate recorded in the secondary examination certificate of the year 2007 and date of birth certificate issued by the Nagar Palika Parishad, Rampur, wherein the date of birth certificate of applicant no.3 has been mentioned as "1st January, 1993, applicant no. 3 was below 25 years of age when he filed nomination to contest the legislative assembly election. It is also not disputed that on scrutinising his Educational records, only in the year 2015 applicant no.3 came to know that his date of birth is incorrectly recorded as 1st January, 1993 in place of 30th September, 1990. The applicant no.3 and his parents i.e. applicant nos. 1 and 2 are highly educated and socially and politically active. His father i.e. applicant no.1 was Cabinet

Minister in the U.P. State Government, His mother i.e. applicant no.2 has been Professor and is sitting Member of Rajya Sabha. He himself is M.Tech. He has travelled to foreign countries several times on the basis of his passport obtained in the year 2006 and 2012 and visa in the year 2014 in which his date of birth was recorded as 1st January, 1993 as disclosed by him. He obtained the pass port by moving an application under his own signature in the year 2006 and thereafter in the year 2012 in which he himself mentioned his date of birth as 1st January, 1993. He obtained visa and travelled to foreign countries prior to and subsequent to the year 2015 and always mentioned his date of birth as 1st January, 1993. Despite having a date of birth certificate like secondary examination certificate of the year 2007 mentioning the date of birth of applicant no.3 as "1st January, 1993", his parents (applicant nos. 1 and 2) got registered his date of birth with the Registrar of Birth Nagar Palika Parishad, Rampur, mentioning his date of birth as 1st January, 1993. When the Officer-in-charge/Sub-Registrar, Birth and Death, Nagar Palika Parishad, Rampur as well as the concerned Record Keeper, have stated in their statements that on the basis of affidavit filed by applicant nos. 1 and 2, date of birth certificate dated 28th June, 2012 mentioning the date of birth as "1st January, 1993" has been prepared and issued in favour of applicant no.3. However, they also stated that the entire record of the aforesaid birth certificate has burnt in fire on 8th May, 2015. The Registrar Birth and Death, Nagar Palika Parishad, Rampur, however, cancelled the same on 30th January, 2015. Thereafter on the basis of an application of applicant no.1, which has dully been supported by an affidavit, the third date of birth certificate dated 21st January, 2015 showing the date of birth of applicant no.3 as "30th September, 1990" has been obtained from Lucknow Municipal Corporation, Lucknow. On the basis of this third date of birth certificate, the applicant no.3 participated in election of Legislative Assembly in the year 2017 and elected as Member of Legislative Assembly.

44. This Court has also taken note of the fact that the applicant no.3 has passed his secondary school/high school examination in the year 2007 in which his date of birth has been mentioned as **"1st January, 1990",** thereafter for the reasons best known to the applicants, applicant nos. 1 and 2 got obtained a new birth certificate of applicant no.3 from Nagar Palika Parishad, Rampur in which the date of birth of applicant no.3 has also been mentioned as "1st January, 1993" and later instead of making efforts to correct or rectify the date of birth of applicant no.3 in his secondary school/high school certificate or in the birth certificate issued by Nagar Palika Parishad, Rampur, they have obtained a third, new birth certificate of applicant no.3 on the basis of an application made by applicant no.2 supported by her affidavit from Lucknow Municipal Corporation Lucknow in which the date of birth of applicant no.3 has been mentioned as **"30th September, 1990.** It is on this very basis of the changed new birth certificate, applicant no.3 participated in the legislative assembly election and was elected as member of legislative assembly in the year 2017 and has drawn salary from the public exchequer till today, which prima

facie, in the opinion of the Court, amounts to cheating, deception and mens rea.

45. In view of the aforesaid facts, this Court finds some substance in the submissions made by the learned Additional Government Advocates that case for the offences under Sections 420, 467, 468 and 471 I.P.C. is made out against the applicants and the ingredients of Sections 463 and 464 I.P.C. are prima facie attracted against the applicants.

Now this Court comes on the issue of rectification or correction in the date of birth of applicant no. 3.

46. Birth certificates are one of the most important certified documents we'll ever obtain. Not only does it prove age of any person, but it proves his/her identity, citizenship, and location of birth. Any one needs his birth certificate to get numerous different legal documents including passports, but it's also used as a form of Identity when being hired for a new job, enrolled in school, or signed up for any military division. It's not uncommon that when a person first views his/her birth certificate, whether the original or a certified copy and if he finds that there is an error or any kind of mistake, in that cases, it's imperative that the persons is able to change or modify his birth certificate to reflect all of the pertinent details that identify who is he.

47. When for some reason, a person needs to change or modify his birth certificate including changing his age in his birth certificate or changing the date in his birth certificate, as mistakes can happen and are relatively easy to rectify, simple contacting the vital records department that was responsible for issuing the original certificate, will get him the information, the person need to proceed.

48. When it comes to changing a birth certificate after a name change or after adoption, the process is a little more involved. If the individual is under 1 year of age, a person may be able to submit paperwork allowing him to change his child's name without a court order. Each State's regulations will vary. If a person is 1 year of age and his name change is not due to marriage, he may be required to have a court order to successfully change his name. This just means he will be required to prove who he is, and in most cases he will have to include why he has decided to rename himself.

49. If the persons has been married and he is concerned about a change of birth certificate after marriage, he does not need to be as concerned. A name change due to marriage doesn't require a legal name change on his/her birth certificate.

50. Only the official issuing authority may legally make changes to a **birth certificate** once it's issued. Further, any alterations, more likely than not, render the **certificate** invalid.

51. For determining the correct age of a person, what is required to be examined as the evidence by a board/tribunal/court etc., it would be worthwhile to reproduce Section 94 of the Juvenile Justice (Care and Protection of Children) Act, 2015 (Act No. 2 of 2016), which has been introduced by the Government of India on 31st December, 2015. For ready reference, Section of the said Act reads as follows:

"94. (1) Where, it is obvious to the Committee or the Board, based on the appearance of the person brought before it under any of the provisions of this Act (other than for the purpose of giving evidence) that the said person is a child, the Committee or the Board shall record such observation stating the age of the child as nearly as may be and proceed with the inquiry under section 14 or section 36, as the case may be, without waiting for further confirmation of the age.

(2) In case, the Committee or the Board has reasonable grounds for doubt regarding whether the person brought before it is a child or not, the Committee or the Board, as the case may be, shall undertake the process of age determination, by seeking evidence by obtaining--

(i) the date of birth certificate from the school, or the matriculation or equivalent certificate from the concerned examination Board, if available; and in the absence thereof;

(ii) the birth certificate given by a corporation or a municipal authority or a panchayat;

(iii) and only in the absence of (i) and (ii) above, age shall be determined by an

ossification test or any other latest medical age determination test conducted on the orders of the Committee or the Board:

Provided such age determination test conducted on the order of the Committee or the Board shall be completed within fifteen days from the date of such order.

(3) The age recorded by the Committee or the Board to be the age of person so brought before it shall, for the purpose of this Act, be deemed to be the true age of that person."

52. In **Eastern Coal Fields Limited and others vs Bajrangi Rabidas,** reported in *(2014) 13 SCC 681*, the Apex Court has held in paragraph 17 of the judgment that there can be no iota of doubt that the date of birth mentioned in matriculation or higher secondary certificate has to be accepted as authentic.

53. In **Manoj Kumar vs Government of NCT of Delhi and others** reported in *(2010) 11 SCC 702,* in paragraph 12 of the decision it was held by the Apex Court that while the matriculation certificate is a strong material, other equally relevant material cannot be ignored, particularly when the matriculation certificate has been corrected. In the instant case, as per matriculation certificate, the date of birth of the petitioner is 1st January, 1993.

54. In **Shah Nawaz vs State of Uttar Pradesh and another,** reported in *(2011) 13 SCC 751,* it was observed by the Apex Court that medical opinion from Medical Board should be sought only when matriculation certificate or school certificate or any birth certificate issued by a corporation or by any panchayat or municipality is not available. In the instant case, the matriculation certificate is available to ascertain the date of birth of the petitioner.

55. It would also be worthwhile to reproduce Examination-Bye-laws framed by the Central Board of Secondary Education, New Delhi, on the basis of said provisions, the applicant no.3 had made an application for correction of his date of birth mentioned in the high school examination certificate. Regulation "69.2 of the said bye-laws, which is relevant in

the facts of the present case is quoted herein below:

"69.2 Change/Correction in Date of Birth

(i) No change in the date of birth once recorded in the Board's records shall be made. However, corrections to correct typographical and other errors to make the certificate consistent with the school records can be made provided that corrections in the school records should not have been made after the submission of application form for admission to Examination to the Board.

(ii) Such correction in Date of Birth of a candidate in case of genuine clerical errors will be made under orders of the Chairman where it is established to the satisfaction of the Chairman that the wrong entry was made erroneously in the list of candidates/application form of the candidate for the examination.

***(iii) Request for correction in Date of Birth shall be forwarded by the Head of the School alongwith attested Photostat copies of :*

(a) application for admission of the candidate to the School;

(b) Portion of the page of admission and withdrawal register where entry in date of birth has been made alongwith attested copy of the Certificate issued by the Municipal Authority, if available, as proof of Date of Birth submitted at the time of seeking admission; and

(c) the School Leaving Certificate of the previous school submitted at the time of admission.

****(iv) The application for correction in date of birth duly forwarded by the Head of school alongwith documents mentioned in byelaws 69.2(iii) shall be entertained by the Board only within five years of the date of declaration of result. No correction whatsoever, shall be made on application submitted after the said period of five years."*

56. From reading of the aforesaid regulation of the bye-laws, it is apparently clear that no correction/rectification or change in the date of birth can be made if the same has already been recorded in the Board's records. Only typographical errors can be corrected. The aforesaid regulation also prohibits that no correction can be made on application submitted after expiry of a period of five years.

57. In view of the aforesaid the maximum period provided for correction or rectification or change of any typographical error in the date of birth of any candidate is provided for five years only.

58. Regarding the right to claim correction in the entry of educational institution or board as well as the maximum period provided for correction in the education board's record, the Apex Court in the case of **Board of Secondary Education of Assam vs. Md. Sarifuzzaman & Others** reported in *(2003) 12 SCC 408* in paragraph nos. 10 to 13 has observed as follows:

"10. Nobody can claim a right to have corrected an entry in a certificate solemnly issued by an educational institution that too the one enjoying the status of a statutory Board under the Act. The right of the applicant to have an error or mistake corrected is accompanied by a duty or obligation on the part of the Board to correct its records and the certificate issued by it. Not only it is a corresponding duty or obligation, it has also to be

perceived as a power exercisable by the Board to correct an entry appearing in the certificate issued by it. People, institutions and government departments etc.- all attach a very high degree of reliability, near finality, to the entries made in the certificates issued by the Board. The frequent exercise of power to correct entries in certificates and that too without any limitation on exercise of such power would render the power itself arbitrary and may result in eroding the credibility of certificates issued by the Board. We therefore, find it difficult to uphold the contention that the applicants seeking correction of entries in such certificates have any such right or vested right.

11. Lastly, the submission cannot also be countenanced that the regulatory measure engrafted into the Regulations on the subject of correction of errors in the certificates is 'absolute' in nature. The Regulation permits correction but subject only to reasonable restrictions.

12. Delay defeats discretion and loss of limitation destroys the remedy itself. Delay amounting to laches results in benefit of discretionary power being denied on principles of equity. Loss of limitation resulting into depriving of the remedy, is a principle based on public policy and utility and not equity alone. There ought to be a limit of time by which human affairs stand settled and uncertainty is lost. Regulation 8 confers a right on the applicant and a power coupled with an obligation on the Board to make correction in the date of birth subject to the ground of wrong calculation or clerical error being made out. A reasonable procedure has been prescribed for processing the application through Inspector of Schools who would verify the school records and submit report to the Board so as to exclude from consideration the claims other than those permissible within the framework of Regulation 8. Power to pass order for correction is vested on a higher functionary like Secretary of the Board. An inaccuracy creeping in at the stage of writing the certificates only, though all other prior documents are correct in all respects, is capable of being corrected within a period of three years from the date of issuance of certificate.

13. Three years period provided by the Regulation is a very reasonable period. On the very date of issuance of the certificate the concerned student is put to notice as to the entries made in the certificate. Everyone remembers his age and date of birth. ***The student would realize within no time that the date of birth as entered in the certificate is not correct if that be so once the certificate is placed in his hands. Based on the certificate the applicant would seek admission elsewhere in an educational institution or might seek a job or career where he will have to mention his age and date of birth. Even if he failed to notice the error on the date of issuance of the certificate, he would come to know the same shortly thereafter. Thus, the period of three years, as prescribed by Regulation 3, is quite reasonable. It is not something like prescribing a period of limitation for filing a suit. The prescription of three years is laying down of a dividing fine before which the power of the Board to make correction ought to be invoked and beyond which it may not be invoked. Belated applications, if allowed to be received, may open a pandora's box. Records may not be available and evidence may have been lost. Such evidence-even convenient evidence- may be brought into existence as may defy scrutiny. The prescription of***

three years bar takes care of all such situations. The provision is neither illegal nor beyond the purview of Section 24 of the Act and also cannot be called arbitrary or unreasonable. The applicants seeking rectification within a period of three years form a class by themselves and such prescription has a reasonable nexus with the purpose sought to be achieved. No fault can be found therewith on the anvil of Article 14 of the Constitution."

(emphasis added)

59. The case of the applicants that obtaining of the third date of birth certificate dated 21st January, 2015 issued by the Lucknow Municipal Corporation, Lucknow showing the date of birth of applicant no.3 as "30th September, 1990" does not comes with the purview of Section 420 and the same is only a correction or rectification of date of birth of applicant no.3 as in the earlier date of birth certificate issued by Nagar Palika Parishad, Rampur dated 28th June, 2012 and the secondary examination certificate, incorrect date of birth of applicant no.3 as "1st January, 1993" has been mentioned, prima facie cannot be accepted by this Court on the ground that the issuing authority has a right to rectify or correct the date of birth certificate issued earlier. In the facts of the present case, in the secondary examination certificate of applicant no.3, the Central Board of Secondary Education has right to rectify or correct the date of birth of applicant no.3, in the date of birth certificate issued by Nagar Palika Parishad dated 28th June, 2012, the authority of Nagar Palika Parishad, Rampur and in the date of birth certificate issued by Lucknow Municipal Corporation, Lucknow dated 21st January, 2015, the authority of Lucknow Municipal Corporation, Lucknow has right to correct or rectify the same. Apart from the above, as per the own case of applicants, applicant no.3 has already made an application on 23rd March, 2015 for correction of his date of birth in the secondary examination certificate under the provisions of Examination Bye-Laws of the Central Board of Secondary Education, New Delhi before the Regional Officer, C.B.S.E. Allahabad through Principal, St. Paul's School Rampur, which is still pending consideration.

60. Even otherwise, when applicant no.3 already possessed a birth certificate of secondary school/high school examination certificate, wherein the date of birth of applicant no.3 was mentioned as "1st January, 1993", there was no occasion for getting two date of birth certificates obtained from Nagar Palika Parishad, Rampur on 28th June, 2012 and thereafter from Lucknow Municipal Corporation, Lucknow on 21st January, 2015.

61. So far as the submission made by the learned counsel for the applicants that the informant, namely, Akash Saxena has no locus to lodge first information report against the applicant, is concerned, this Court refers to Sections 37, 38 and 43 of the Code of Criminal Procedure, which reads as follows:

"37. Public when to assist Magistrates and police. *Every person is bound to assist a Magistrate or police officer reasonably demanding his aid-*

(a) in the taking or preventing the escape of any other person whom such Magistrate or police officer is authorised to arrest; or

(b) in the prevention or suppression of a breach of the peace; or

(c) in the prevention of any injury attempted to be committed to any railway, canal, telegraph or public property.

38. Aid to person, other than police officer, executing warrant.----*When a warrant is directed to a person other than a police officer, any other person may aid in the execution of such warrant, if the person to whom the warrant is directed be near at hand and acting in the execution of warrant.*

43. Arrest by private person and procedure on such arrest.

(1) Any private person may arrest or cause to be arrested any person who in his presence commits a non-bailable and cognizable offence, or any proclaimed offender, and, without unnecessary delay, shall make over or cause to be made over any person so arrested to a police officer, or, in the absence of a police officer, take such person or cause him to be taken in custody to the nearest police station.

(2) If there is reason to believe that such person comes under the provisions of section 41, a police officer shall re- arrest him.

(3) If there is reason to believe that he has committed a non- cognizable offence, and he refuses on the demand of a police officer to give his name and residence, or gives a name or residence which such officer has reason to believe to be false, he shall be dealt with under the provisions of section 42; but if there is no sufficient reason to believe that he has committed any offence, he shall be at once released."

62. The Apex Court in the case of **Sheo Nandan Paswan Vesus State of Bihar & Others** reported in *AIR 1987 SC 877,* specifically in paragraph-14 has observed as follows:

"..... It is now settled law that a criminal proceeding is not a proceeding for vindication of a private grievance but it is a proceeding initiated for the purpose of punishment to the offender in the interest of the society. ***It is for maintaining stability and orderliness in the society that certain acts are constituted offences and the right is given to any citizen to set the machinery of the criminal law in motion for the purpose of bringing the offender to book. It is for this reason that in R.S. Nayak v. A.R. Antulay, [1984] 2 SCC 500 this Court pointed out that "punishment of the offender in the interests of the society being one of the objects behind penal statute enact- ed for larger goods of society, the right to initiate proceedings cannot be whittled down, circumscribed of lettered by putting it into a strait jacket formula of locus standi".*** *This Court observed that locus standi of the complainant is a concept foreign to criminal jurisprudence.* ***Now if any citizen can lodge a first information report or file a complaint and set the machinery of the criminal law in motion and his locus standi to do so cannot be questioned, we do not see why a citizen who finds that a prosecution for an offence against the society is being wrongly withdrawn, cannot oppose such withdrawal.*** *If he can be a complainant or initiator of criminal prosecution, he should equally be entitled to oppose withdrawal of the criminal prosecution which has already been initiated at his instance. If the offence for which a prosecution is being launched is an offence against the society and not merely an individual wrong, any member*

of the society must have locus to initiate a prosecution as also to resist withdrawal of such prosecution, if initiated. Here in the present case, the offences charged against Dr. Jagannath Misra and others are offences of corruption, criminal breach of trust etc. and therefore any person who is interested in cleanliness of public administration and public morality would be entitled to file a complaint, as held by this Court in R.S. Nayak v.A.R. Antulay (supra) and equally he would be entitled to oppose the withdrawal of such prosecution if it is already instituted. ....."

63. In **Subramanian Swamy Versus Manmohan Singh & Another** reported in (2012) 3 SCC 64, the Apex Court has held that there is no restriction on a private citizen to file complaint against a public servant. The Apex Court has also held that locus standi of a private citizen is, therefore, not excluded. In paragraph nos. 72 and 73, the Apex Court has held as follows:

"72. ***The right of private citizen to file a complaint against a corrupt public servant must be equated with his right to access the Court in order to set the criminal law in motion against a corrupt public official. This right of access, a Constitutional right should not be burdened with unreasonable fetters. When a private citizen approaches a court of law against a corrupt public servant who is highly placed, what is at stake is not only a vindication of personal grievance of that citizen but also the question of bringing orderliness in society and maintaining equal balance in the rule of law.***

73. It was pointed out by the Constitution Bench of this Court in Sheonandan Paswan vs. State of Bihar and Others, (1987) 1 SCC 288 at page 315:

".....It is now settled law that a criminal proceeding is not a proceeding for vindication of a private grievance but it is a proceeding initiated for the purpose of punishment to the offender in the interest of the society. It is for maintaining stability and orderliness in the society that certain acts are constituted offences and the right is given to any citizen to set the machinery of the criminal law in motion for the purpose of bringing the offender to book. It is for this reason that in A.R. Antulay v. R.S. Nayak this Court pointed out that (SCC p. 509, para 6) "punishment of the offender in the interest of the society being one of the objects behind penal statutes enacted for larger good of the society, right to initiate proceedings cannot be whittled down, circumscribed or fettered by putting it into a strait jacket formula of locus standi....."

(Emphasis added)

64. In view of the aforesaid, it is crystal clear that every person has a right to lodge a first information report against a person, who in his presence, commits a non-bailable or cognizable offence. Therefore, the informant of the present case, namely, Akash Saxena had every right to lodge first information report against the applicants.

65. Now, this Court comes on the issues whether it is appropriate for this Court being the Highest Court to exercise its jurisdiction under Section 482 Cr.P.C. to quash the charge-sheet and the proceedings at the stage when the Magistrate has merely issued process against the applicants. The aforesaid issue has elaborately been discussed by the Apex Court the following judgments:

(i) **R.P. Kapur Versus State of Punjab;** *AIR 1960 SC 866,*

(ii) **State of Haryana & Ors. Versus Ch. Bhajan Lal & Ors**.;*1992 Supp.(1) SCC 335,*

(iii) **State of Bihar & Anr. Versus P.P. Sharma & Anr.;** *1992 Supp (1) SCC 222,*

(iv) **Zandu Pharmaceuticals Works Ltd. & Ors. Versus Mohammad Shariful Haque & Anr.;** *2005 (1) SCC 122,* and

(v) **M. N. Ojha Vs. Alok Kumar Srivastava;** *2009 (9) SCC 682.*

66. In the case of **R.P. Kapur (Supra),** the following has been observed by the Apex Court in paragraph 6:

"Before dealing with the merits of the appeal it is necessary to consider the nature and scope of the inherent power of the High Court under s. 561 -A of the Code. The said section saves the inherent power of the High Court to make such orders as may be necessary to give effect to any order under this Code or to prevent abuse of the process of any court or otherwise to secure the ends of justice. There is no doubt that this inherent power cannot be exercised in regard to matters specifically covered by the other provisions of the Code. In the present case the magistrate before whom the police report has been filed under s. 173 of the Code has yet not applied his mind to the merits of the said report and it may be assumed in favour of the appellant that his request for the quashing of the .proceedings is not at the present stage covered by any specific provision of the Code. It is well-established that the inherent jurisdiction of the High Court can be exercised to quash proceedings in a proper case either to prevent the abuse of the process of any court or otherwise to secure the ends of justice. Ordinarily criminal proceedings instituted against an accused person must be tried under the provisions of the Code, and the High Court would be reluctant to interfere with the said proceedings at an interlocutory stage. It is not possible, desirable or expedient to lay down any inflexible rule which would govern the exercise of this inherent jurisdiction. However, we may indicate some categories of cases where the inherent jurisdiction can and should be exercised for quashing the proceedings. There may be cases where it may be possible for the High Court to take the view that the institution or continuance of criminal proceedings against an accused person may amount to the abuse of the process of the court or that the quashing of the impugned proceedings would secure the ends of justice. If the criminal proceeding in question is in respect of an offence alleged to have been committed by an accused person and it manifestly appears that there is a legal bar against the institution or continuance of the said proceeding the High Court would be justified in quashing the proceeding on that ground. Absence of the requisite sanction may, for instance, furnish cases under this category. Cases may also arise where the a11egations in the First Information Report or the complaint, even if they are taken at their face value and accepted in their entirety, do not constitute the offence alleged; in such cases no question of appreciating evidence arises; it is a matter merely of looking at the complaint or the First Information Report to decide whether the offence alleged is disclosed or not. In such cases it would be legitimate for the High Court to hold that it would be manifestly unjust to allow the process of the criminal court to be issued against the

accused person. A third category of cases in which the inherent jurisdiction of the High Court can be successfully invoked may also arise. In cases falling under this category the allegations made against the accused person do constitute an offence alleged but there is either no legal evidence adduced in support of the case or evidence adduced clearly or manifestly fails to prove the charge. In dealing with this class of cases it is important to bear in mind the distinction between a case where there is no legal evidence or where there is evidence which is manifestly and clearly inconsistent with the accusation made and cases where there is legal evidence which on its appreciation may or may not support the accusation in question. In exercising its jurisdiction under s. 561-A the High Court would not embark upon an enquiry as to whether the evidence in question is reliable or not. That is the function of the trial magis- trate, and ordinarily it would not be open to any party to invoke the High Court's inherent jurisdiction and' contend that on a reasonable appreciation of the evidence the accusation made against the accused would not be sustained. Broadly stated that is the nature and scope of the inherent jurisdiction of the High Court under s. 561-A in the matter of quashing criminal proceedings, and that is the effect of the judicial decisions on the point (Vide: In Re: Shripad G. Chandavarkar AIR 1928 Bom 184, Jagat Ohandra Mozumdar v. Queen Empress ILR 26 Cal 786), Dr. Shanker Singh v. The State of Punjab 56 Pun LR 54 : (AIR 1954 Punj 193), Nripendra Bhusan Ray v. Govind Bandhu Majumdar, AIR 1924 Cal 1018 and Ramanathan Chettiyar v. K. Sivarama Subrahmanya Ayyar ILR 47 Mad 722: (AIR 1925 Mad 39)."

67. In the case of **State of Haryana (Supra),** the following has been observed by the Apex Court in paragraph 105:

"105. In the backdrop of the interpretation of the various relevant provisions of the Code under Chapter XIV and of the principles of law enunciated by this Court in a series of decisions relating to the exercise of the extra-ordinary power under Article 226 or the inherent powers Under Section 482 of the Code which we have extracted and reproduced above, we give the following categories of cases by way of illustration wherein such power could be exercised either to prevent abuse of the process of any Court or otherwise to secure the ends of justice, though it may not be possible to lay down any precise, clearly defined and sufficiently channelised and inflexible guidelines or rigid formulae and to give an exhaustive list of myriad kinds of cases wherein such power should be exercised.

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

2. Where the allegations in the First Information Report and other materials, if any, accompanying the F.I.R. do not disclose a cognizable offence, justifying an investigation by police officers Under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code.

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

4. Where, the allegations in the F.I.R. do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is

permitted by a police officer without an order of a Magistrate as contemplated Under Section 155(2) of the Code.

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

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

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

68. In the case of **State of Bihar (Supra),** the following has been observed by the Apex Court in paragraph 22. :-

"The question of mala fide exercise of power assumes significance only when the criminal prosecution is initiated on extraneous considerations and for an unauthorised purpose. There is no material whatsoever is this case to show that on the date when the FIR was lodged by R.K. Singh he was activated by bias or had any reason to act maliciously. The dominant purpose of registering the case against the respondents was to have an investigation done into the allegations contained in the FIR and in the event of there being sufficient material in support of the allegations to present the charge sheet before the court. There is no material to show that the dominant object of registering the case was the character assassination of the respondents or to harass and humiliate them. This Court in State of Bihar v J.A.C. Saldhana and Ors., [1980] 2 SCR 16 has held that when the information is lodged at the police station and an offence is registered, the mala fides of the informant would be of secondary importance. It is the material collected during the investigation which decides the fate of the accused person. This Court in State of Haryana and Ors. v. Ch. Bhajan Lal and Ors., J.T. 1990 (4) S.C. 650 permitted the State Government to hold investigation afresh against Ch. Bhajan Lal inspite of the fact the prosecution was lodged at the instance of Dharam Pal who was enimical towards Bhajan Lal."

69. In the case of **Zandu Pharmaceuticals Works Ltd. (Supra),** the following has been observed by the Apex Court in paragraphs nos. 8 to 12:

"8. Exercise of power under Section 482 of the Code in a case of this nature is the exception and not the rule. The Section does not confer any new powers on the High Court. It only saves the inherent power which the Court possessed before the enactment of the Code. It envisages three circumstances under which the inherent jurisdiction may be exercised, namely, (i) to give effect to an order under the Code, (ii) to prevent abuse of the process of court, and (iii) to otherwise secure the ends of justice. It is neither possible nor desirable to lay down any inflexible rule which would govern the exercise of inherent jurisdiction. No legislative enactment dealing with

procedure can provide for all cases that may possibly arise. Courts, therefore, have inherent powers apart from express provisions of law which are necessary for proper discharge of functions and duties imposed upon them by law. That is the doctrine which finds expression in the section which merely recognizes and preserves inherent powers of the High Courts. All courts, whether civil or criminal possess, in the absence of any express provision, as inherent in their constitution, all such powers as are necessary to do the right and to undo a wrong in course of administration of justice on the principle "quando lex aliquid alicui concedit, concedere videtur et id sine quo res ipsae esse non potest" (when the law gives a person anything it gives him that without which it cannot exist). While exercising powers under the section, the court does not function as a court of appeal or revision. Inherent jurisdiction under the section though wide has to be exercised sparingly, carefully and with caution and only when such exercise is justified by the tests specifically laid down in the section itself. It is to be exercised ex debito justitiae to do real and substantial justice for the administration of which alone courts exist. Authority of the court exists for advancement of justice and if any attempt is made to abuse that authority so as to produce injustice, the court has power to prevent abuse. It would be an abuse of process of the court to allow any action which would result in injustice and prevent promotion of justice. In exercise of the powers court would be justified to quash any proceeding if it finds that initiation/continuance of it amounts to abuse of the process of court or quashing of these proceedings would otherwise serve the ends of justice. When no offence is disclosed by the complaint, the court may examine the question of fact. When a complaint is sought to be quashed, it is permissible to look into the materials to assess what the complainant has alleged and whether any offence is made out even if the allegations are accepted in toto.

9. In R. P. Kapur v. State of Punjab (AIR 1960 SC 866) this Court summarized some categories of cases where inherent power can and should be exercised to quash the proceedings.

(i) where it manifestly appears that there is a legal bar against the institution or continuance e.g. want of sanction;

(ii) where the allegations in the first information report or complaint taken at its face value and accepted in their entirety do not constitute the offence alleged;

(iii) where the allegations constitute an offence, but there is no legal evidence adduced or the evidence adduced clearly or manifestly fails to prove the charge.

10. In dealing with the last case, it is important to bear in mind the distinction between a case where there is no legal evidence or where there is evidence which is clearly inconsistent with the accusations made, and a case where there is legal evidence which, on appreciation, may or may not support the accusations. When exercising jurisdiction under Section 482 of the Code, the High Court would not ordinarily embark upon an enquiry whether the evidence in question is reliable or not or whether on a reasonable appreciation of it accusation would not be sustained. That is the function of the trial Judge. Judicial process should not be an instrument of oppression, or, needless harassment. Court should be circumspect and judicious in exercising discretion and should take all

relevant facts and circumstances into consideration before issuing process, lest it would be an instrument in the hands of a private complainant to unleash vendetta to harass any person needlessly. At the same time the section is not an instrument handed over to an accused to short-circuit a prosecution and bring about its sudden death.

11. The scope of exercise of power under Section 482 of the Code and the categories of cases where the High Court may exercise its power under it relating to cognizable offences to prevent abuse of process of any court or otherwise to secure the ends of justice were set out in some detail by this Court in State of Haryana v. Bhajan Lal (1992 Supp (1) 335). A note of caution was, however, added that the power should be exercised sparingly and that too in rarest of rare cases. The illustrative categories indicated by this Court are as follows:

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

(2) Where the allegations in the first information report and other materials, if any, accompanying the FIR do not disclose a cognizable offence, justifying an investigation by police officers under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code.

(3) Where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused. (4) Where the allegations in the FIR do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated under Section 155(2) of the Code. (5) Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.

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

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

As noted above, the powers possessed by the High Court under Section 482 of the Code are very wide and the very plenitude of the power requires great caution in its exercise. Court must be careful to see that its decision in exercise of this power is based on sound principles. The inherent power should not be exercised to stifle a legitimate prosecution. ***The High Court being the highest court of a State should normally refrain from giving a prima facie decision in a case where the entire facts are incomplete and hazy, more so when the evidence has not been collected and produced before the Court and the issues involved, whether factual or legal, are of magnitude and***

cannot be seen in their true perspective without sufficient material. Of course, no hard-and-fast rule can be laid down in regard to cases in which the High Court will exercise its extraordinary jurisdiction of quashing the proceeding at any stage. *(See: Janata Dal v. H. S. Chowdhary (1992 (4) SCC 305), and Raghubir Saran (Dr.) v. State of Bihar (AIR 1964 SC 1). It would not be proper for the High Court to analyse the case of the complainant in the light of all probabilities in order to determine whether a conviction would be sustainable and on such premises arrive at a conclusion that the proceedings are to be quashed. It would be erroneous to assess the material before it and conclude that the complaint cannot be proceeded with. In a proceeding instituted on complaint, exercise of the inherent powers to quash the proceedings is called for only in a case where the complaint does not disclose any offence or is frivolous, vexatious or oppressive. If the allegations set out in the complaint do not constitute the offence of which cognizance has been taken by the Magistrate, it is open to the High Court to quash the same in exercise of the inherent powers under Section 482 of the Code. It is not, however, necessary that there should be meticulous analysis of the case before the trial to find out whether the case would end in conviction or acquittal. The complaint has to be read as a whole. If it appears that on consideration of the allegations in the light of the statement made on oath of the complainant that the ingredients of the offence or offences are disclosed and there is no material to show that the complaint is mala fide, frivolous or vexatious, in that event there would be no justification for interference by the High Court. When an information is lodged at the police station and an offence is registered, then the mala fides of the informant would be of secondary importance. It is the material collected during the investigation and evidence led in court which decides the fate of the accused person. The allegations of mala fides against the informant are of no consequence and cannot by themselves be the basis for quashing the proceedings. (See: Dhanalakshmi v. R. Prasanna Kumar (1990 Supp SCC 686), State of Bihar v. P. P. Sharma (AIR 1996 SC 309), Rupan Deol Bajaj v. Kanwar Pal Singh Gill (1995 (6) SCC 194), State of Kerala v. O. C. Kuttan (AIR 1999 SC 1044), State of U.P. v. O. P. Sharma (1996 (7) SCC 705), Rashmi Kumar v. Mahesh Kumar Bhada (1997 (2) SCC 397), Satvinder Kaur v. State (Govt. of NCT of Delhi) (AIR 1996 SC 2983) and Rajesh Bajaj v. State NCT of Delhi (1999 (3) SCC 259.*

12. The above position was recently highlighted in State of Karnataka v. M. Devendrappa and Another (2002 (3) SCC 89)."

(emphasis added)

70. Thereafter, in the case of **M.N. Ojha Vs. Alok Kumar Srivastava,** reported in *2009 (9) SCC 682* has made observations in paragraphs 25, 27, 28, 29 and 30 regarding the exercise of power under section 482 Cr.P.C. as well as the principles governing the exercise of such jurisdiction:-

"25. Had the learned SDJM applied his mind to the facts and circumstances and sequence of events and as well as the documents filed by the complainant himself along with the complaint, surely he would have dismissed the complaint. He would have realized that the complaint was only a counter blast to the FIR lodged by the Bank against the

complainant and others with regard to same transaction.

26. This Court in Pepsi Foods Ltd. & Anr. Vs. Special Judicial Magistrate & Ors. [(1998)5 SCC 749 held:

"28. Summoning of an accused in a criminal case is a serious matter. Criminal law cannot be set into motion as a matter of course. It is not that the complainant has to bring only two witnesses to support his allegations in the complaint to have the criminal law set into motion. The order of the Magistrate summoning the accused must reflect that he has applied his mind to the facts of the case and the law applicable thereto. He has to examine the nature of allegations made in the complaint and the evidence both oral and documentary in support thereof and would that be sufficient for the complainant to succeed in bringing charge home to the accused. It is not that the Magistrate is a silent spectator at the time of recording of preliminary evidence before summoning of the accused. The Magistrate has to carefully scrutinise the evidence brought on record and may even himself put questions to the complainant and his witnesses to elicit answers to find out the truthfulness of the allegations or otherwise and then examine if any offence is prima facie committed by all or any of the accused."

27. The case on hand is a classic illustration of non-application of mind by the learned Magistrate. The learned Magistrate did not scrutinize even the contents of the complaint, leave aside the material documents available on record. The learned Magistrate truly was a silent spectator at the time of recording of preliminary evidence before summoning the appellants.

28. The High Court committed a manifest error in disposing of the petition filed by the appellants under Section 482 of the Code without even adverting to the basic facts which were placed before it for its consideration.

29. It is true that the court in exercise of its jurisdiction under Section 482 of the Code of Criminal Procedure cannot go into the truth or otherwise of the allegations and appreciate the evidence if any available on record. Normally, the High Court would not intervene in the criminal proceedings at the preliminary stage/when the investigation/enquiry is pending.

30. ***Interference by the High Court in exercise of its jurisdiction under Section 482 of Code of Criminal Procedure can only be where a clear case for such interference is made out. Frequent and uncalled for interference even at the preliminary stage by the High Court may result in causing obstruction in progress of the inquiry in a criminal case which may not be in the public interest.*** *But at the same time the High Court cannot refuse to exercise its jurisdiction if the interest of justice so required where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no fair-minded and informed observer can ever reach a just and proper conclusion as to the existence of sufficient grounds for proceeding. In such cases refusal to exercise the jurisdiction may equally result in injustice more particularly in cases where the Complainant sets the criminal law in motion with a view to exert pressure and harass the persons arrayed as accused in the complaint."*
(emphasis added)

71. The Apex Court in its latest judgment in the case of **Nallapareddy Sridhar Reddy Vs. The State of Andhra Pradesh & Ors.** reported in 2020 0 Supreme (SC) 45, dealing with a cases under Sections 406 and 420 I.P.C. has observed that the Court does not have to delve deep into probative value of evidence regarding the charge. It has only to see if a prima facie case has been made out. Veracity of deposition/material is a matter of trial and not required to be examined while framing charge. The Apex Court further observed that the veracity of the depositions made by the witnesses is a question of trial and need not be determined at the time of framing of charge. Appreciation of evidence on merit is to be done by the court only after the charges have been framed and the trial has commenced. However, for the purpose of framing of charge the court needs to prima facie determine that there exists sufficient material for the commencement of trial. The Apex Court in paragraph nos. 21, 22 and 24 has observed as follows:

"21 The appellant has relied upon a two-judge Bench decision of this Court in Onkar Nath Mishra v The State, (2008) 2 SCC 561 to substantiate the point that the ingredients of Sections 406 and 420 of the IPC have not been established. This Court while dealing with the nature of evaluation by a court at the stage of framing of charge, held thus:

"11. ***It is trite that at the stage of framing of charge the court is required to evaluate the material and documents on record with a view to finding out if the facts emerging therefrom, taken at their face value, disclosed the existence of all the ingredients constituting the alleged offence.*** *At that stage, the court is not expected to go deep into the probative value of the material on record.* ***What needs to be considered is whether there is a ground for presuming that the offence has been committed and not a ground for convicting the accused has been made out.*** *At that stage, even strong suspicion founded on material which leads the court to form a presumptive opinion as to the existence of the factual ingredients constituting the offence alleged would justify the framing of charge against the accused in respect of the commission of that offence." (Emphasis supplied)*

22 In the present case, the High Court while directing the framing the additional charges has evaluated the material and evidence brought on record after investigation and held:

"LW1 is the father of the de facto complainant, who states that his son in law i.e., the first accused promised that he would look after his daughter at United Kingdom (UK) and promised to provide Doctor job at UK and claimed Rs.5 lakhs for the said purpose and received the same and he took his daughter to the UK. He states that his son-in-law made him believe and received Rs.5 lakhs in the presence of elders. He states that he could not mention about the cheating done by his son-in- law, when he was examined earlier. LW13, who is an independent witness, also supports the version of LW1 and states that Rs.5 lakhs were received by A1 with a promise that he would secure doctor job to the complainant's daughter. He states that A1 cheated LW1, stating that he would provide job and received Rs.5 lakhs. LW14, also is an independent witness and he supported the version of LW13. He further states that A1 left his wife and child in India and went away after receiving Rs.5 lakhs.

Hence, from the above facts, stated by LWs. 13 and 14, prima facie, the

version of LW1 that he gave Rs.5 lakhs to A1 on a promise that he would provide a job to his daughter and that A1 did not provide any job and cheated him, receives support from LWs. 13 and 14. When the amount is entrusted to A1, with a promise to provide a job and when he fails to provide the job and does not return the amount, it can be made out that A1 did not have any intention to provide job to his wife and that he utilised the amount for a purpose other than the purpose for which he collected the amount from LW1, which would suffice to attract the offences under Sections 406 and 420 IPC. ***Whether there is truth in the improved version of LW.1 and what have been the reasons for his lapse in not stating the same in his earlier statement, can be adjudicated at the time of trial.***

It is also evidence from the record that the additional charge sheet filed by the investigating officer, missed the attention of the lower court due to which the additional charges could not be framed."

(Emphasis supplied)

24 ***The veracity of the depositions made by the witnesses is a question of trial and need not be determined at the time of framing of charge. Appreciation of evidence on merit is to be done by the court only after the charges have been framed and the trial has commenced. However, for the purpose of framing of charge the court needs to prima facie determine that there exists sufficient material for the commencement of trial. The High Court has relied upon the materials on record and concluded that the ingredients of the offences under Sections 406 and 420 of the IPC are attracted. The High Court has spelt out the reasons that have necessitated the addition of the charge and hence, the impugned order does not warrant any interference."***

(Emphasis added)

72. The submissions made by the applicants' learned counsel call for adjudication on pure questions of fact which may adequately be adjudicated upon only by the trial court and while doing so even the submissions made on points of law can also be more appropriately gone into by the trial court in this case. This Court does not deem it proper, and therefore cannot be persuaded to have a pre-trial before the actual trial begins. A threadbare discussion of various facts and circumstances, as they emerge from the allegations made against the accused, is being purposely avoided by the Court for the reason, lest the same might cause any prejudice to either side during trial. But it shall suffice to observe that the perusal of the F.I.R. and the material collected by the Investigating Officer on the basis of which the charge sheet has been submitted makes out a prima facie case against the accused at this stage and there appear to be sufficient ground for proceeding against the accused. I do not find any justification to quash the charge sheet or the proceedings against the applicants arising out of them as the case does not fall in any of the categories recognized by the Apex Court which may justify their quashing.

73. The prayer for quashing the impugned charge-sheet as well as the proceedings of the entire proceedings of the aforesaid State case are refused as I do not see any abuse of the court's process at this pre-trial stage.

74. The present application under Section 482 Cr.P.C. is, accordingly,

rejected. There shall be no order as to costs.

(2020)02ILR A1565

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 04.02.2020

BEFORE
THE HON'BLE RAM KRISHNA GAUTAM, J.

Application U/S 482 No. 41220 of 2012

Prem Sagar Soni ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Sri Shiva Kant Srivastava

Counsel for the Opposite Parties:
A.G.A., Sri Shyam Sunder Yadav

A. Criminal law- Negotiable Instruments Act- Section 138-for a cause of action to arise for an offence punishable under Section 138 of N.I. Act, the condition precedent is issuing of notice of demand within 30 days from a receipt of information of dishonour .

B. Criminal Law - Negotiable Instruments Act – Section 142- From the very perusal of impugned order, it is apparent that complaint was not filed within stipulated period under Section 142 N.I. Act - Notice, which ought to be issued within one month from date of receipt of dishonour of cheque, was not issued - Section 142 of N.I. Act provides a further limitation of one month for filing complaint from the date when cause of action has arisen - **t**his period of one month may be extended provided complainant satisfies the Court that there was sufficient reason for not filing a complaint under such scheduled period. Whereas in present case there is no sufficient reason, except this that accused was making assurance for making payment, for which there was no evidence on record. This specific ingredient of offence was missing. Hence, there was no abuse of process of law by trial court in passing impugned order. (Para 6,7,8)

Criminal Application rejected.

(Delivered by Hon'ble Ram Krishna Gautam, J.)

1. The applicant, by means of this application under Section 482 Cr.P.C., has invoked the inherent jurisdiction of this Court with prayer to quash the impugned order dated 18.06.2012, passed by A.C.J.M., Court No. 11, Azamgarh in Complaint Case No. 6381 of 2011, under Section 138 N.I. Act, P.S. Sidhari, District Azamgarh.

2. Heard learned counsel for applicant, learned counsel for opposite party no. 2, learned A.G.A. for State and perused the record.

3. Learned counsel for applicant argued that opposite party no. 2 had taken Rs.8,00,000/- as earnest money for making a sale of immovable property in favour of applicant on 10.09.2010 and an assurance for execution of sale deed was given within a week. On 18.09.2010 a further demand of Rs.2,00,000/- towards consideration was made and it was denied. Money paid was demanded back. Opposite party no. 2 requested for grant of time for making repayment, but it was not paid back. Ultimately, on 05.10.2010 opposite party no. 2 issued two cheques, one of Rs.2,00,000/- bearing No.465182 and another of Rs.1,00,000/- bearing No.465183 with assurance for returning remaining Rs.5,00,000/- in cash. These two cheques were presented before Allahabad Bank, Branch Daulatabad, District Azamgarh, which were dishonoured because of insufficient fund in account. This dishonour was

communicated on 30.03.2011. A notice was issued to opposite party no. 2, but even after notice dated 21.05.2011, no response was made. Even after receipt of notice, an assurance was made for making repayment of entire amount within a month. Applicant, being an innocent person, waited for a month, but it was of no avail. Again a request was made, wherein assurance was being extended on every day. Ultimately, a complaint was filed on 04.07.2011 for offences punishable under Section 138 N.I. Act and it was rejected by trial court because of being time barred. It was abuse of process of law. Hence, this application with above prayer.

4. Learned counsel for opposite party no. 2 vehemently opposed the application with this contention that this proceeding under Section 482 Cr.P.C., is not maintainable, rather appeal under Section 372 Cr.P.C. with a leave to appeal under Section 378 Cr.P.C. ought to be filed by the applicant.

5. Learned A.G.A. has vehemently opposed the application.

6. From the very perusal of impugned order, it is apparent that this complaint was not filed within stipulated period under Section 142 N.I. Act. Notice, which ought to be issued within one month from date of receipt of dishonour of cheque, was not issued. It has been written in this application that cheque was dishonoured and communicated on 30.03.2011, but notice was issued on 21.05.2011. Whereas, Section 138 of N.I. Act constitutes offence if a cheque has been issued against existing liability or debt; this has been presented to the Bank within a period of six months or within period of its validity, whichever is earlier; it has been dishonoured owing to insufficiency of amount or amount arranged there for; a demand notice for payment of cheque amount is to be given to the drawer of the cheque within 30 days of the receipt of information by him from the Bank regarding return of cheque as unpaid and within 15 days of receipt of same, if payment is not being made, then and then only cause of action arises for filing of complaint for an offence punishable under Section 138 N.I. Act. Section 142 of N.I. Act provides a further limitation of one month for filing complaint from the date when cause of action has arisen. Section 142 of N.I. Act reads as under:-

Cognizance of offences.-- Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974)--

(a) no court shall take cognizance of any offence punishable under section 138 except upon a complaint, in writing, made by the payee or, as the case may be, the holder in due course of the cheque;

(b) such complaint is made within one month of the date on which the cause of action arises under clause (c) of the proviso to section 138: 24

[Provided that the cognizance of a complaint may be taken by the Court after the prescribed period, if the complainant satisfies the Court that he had sufficient cause for not making a complaint within such period.

.....

7. Meaning thereby, this period of one month may be extended provided complainant satisfies the Court that there was sufficient reason for not filing a

complaint under such scheduled period. Whereas in present case there is no sufficient reason, except this that accused was making assurance for making payment, for which there was no evidence on record. Moreso, Section 138 of N.I. reads as under:-

138. Dishonour of cheque for insufficiency, etc., of funds in the account. *--Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provisions of this Act, be punished with imprisonment for [a term which may be extended to two years], or with fine which may extend to twice the amount of the cheque, or with both:*

Provided that nothing contained in this section shall apply unless--

(a) the cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier;

(b) the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice in writing, to the drawer of the cheque, 20 [within thirty days] of the receipt of information by him from the bank regarding the return of the cheque as unpaid; and

(c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque, within fifteen days of the receipt of the said notice.

Explanation.-- For the purposes of this section, "debt or other liability" means a legally enforceable debt or other liability.

8. The notice is to be issued within 30 days form the date of receipt of dishonour information from the Bank concerned i.e. for a cause of action to arise for an offence punishable under Section 138 of N.I. Act, the condition precedent is issuing of notice of demand within 30 days from a receipt of information of dishonour and in present case no such notice was issued within 30 days. Admittedly, cheque was dishonoured and information was received on 30.03.2011 and notice was issued on 21.05.2011 i.e. much beyond above 30 days. This specific ingredient of offence was missing. Hence, there was no abuse of process of law by trial court in passing impugned order.

9. Jurisdiction of High Court under Section 482 Cr.P.C. is for ensuring end of justice and it can exercise that inherent jurisdiction in any case where it finds that subordinate court is doing abuse of process of law. Hence, argument of learned counsel for the opposite party no. 2 that this proceeding under Section 482 Cr.P.C. is not maintainable is also not tenable.

10. Accordingly, this application merits its dismissal. The application is **dismissed** as such.

(2020)02ILR A1568

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 04.02.2020

BEFORE
THE HON'BLE AJIT SINGH, J.

Application U/S 482 No. 43580 of 2019
&
Application U/S 482 No. 43493 of 2019

Smt. Rekha ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Sri Mohad. Rashid Siddiqui, Sri Abhinav Gaur, Sri Anoop Trivedi

Counsel for the Opposite Parties:
A.G.A., Sri Swetashwa Agarwal

A. Criminal law - Code of Criminal Procedure, 1973-Sections 216 and 217- Amended Charge- The provisions of Sections 216 and 217 are mandatory in nature as they not only sub-serve the requirement of principles of natural justice but guarantee an important right which is given to the accused persons to defend themselves appropriately by giving them full opportunity of cross-examination of the witnesses.

It is incumbent upon the trial court to afford the accused an opportunity of cross-examination, once the charge is amended and denial of such opportunity will amount to violation of the principles of natural justice and render the trial vitiated. (Para 12, 13, 14)

Criminal Application disposed of.

Case law discussed:-

Bhimanna Vs. St. of Karnataka, (2012) 9 SCC 650

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

1. Heard Sri Anoop Trivedi, learned Senior Counsel assisted by Sri Mohd. Rashid Siddiqui and Abhinav Gaur, learned counsel for the applicant and Sri Swetashwa Agarwal, learned counsel for the opposite party no. 2 and learned A.G.A. for the State.

2. The present 482 Cr.P.C. Application No.43580 of 2019 has been filed to quash the orders dated 18.11.2019, 19.11.2019 and 20.11.2019 passed by learned Additional Sessions Judge, Baghpat in S.T. No. 26 of 2017 and S.T. 149 of 2017 (State Vs. Rekha and others), under Sections 147, 148, 149, 302, 307 and 120B IPC, arising out of Case Crime No.271 of 2016, Police Station Binauli, District Baghpat.

3. So far as the Application under Section 482 Cr.P.C. bearing No. 43493 of 2019 is concerned, has also been filed to quash the order dated 19.11.2019 passed by Additional Sessions Judge, IVth, Baghpat in Session Trial No.26 of 2017 (State Vs. Satendra and others), arising out of Case Crime No. 271 of 2016, under Sections 147, 148, 149, 302, 307, 120B IPC, Police Station Binauli, District Baghpat.

4. Both these applications mentioned above are being decided by a common judgment and order as the controversy involved in these two applications is same and identical.

5. The police investigated the matter and submitted the charge sheet against the accused persons, namely, Satendra, Smt. Rekha, Manoj, Nirbhay, Anil, Subodh along with Arjun and the trial commenced. The accused Rekha was charged under Section 120B read with Section 302 IPC and she was further charged under Section 120B read with Section 307 IPC and the accused Manoj was also charged under Section 120B read with Section 302 and 307 IPC and all other accused persons were charged under Sections 302, 147,

148, 149, 307 and 120B IPC and session trial commenced and evidence of prosecution witnesses were recorded. After recording the evidence of the prosecution witnesses, an application was given, copy whereof has been annexed on page 25 onwards under Section 216 Cr.P.C. with the prayer to amend the charges against the accused persons, namely, Rekha and Manoj, charged under Sections 147, 148, 149, 302, 307, 120B IPC. This application was moved on 31.7.2019 and the Court allowed this application vide order dated 18.11.2019, the order has been annexed on page 36 of the paper book and directed that the charge be amended and thereafter the charges against the accused persons, namely, Smt. Rekha and Manoj were amended on 19.11.2019. After the amendment of the charge against the accused Smt. Rekha and Manoj, an application was moved by the prosecution, which is annexed on page 53; which states that the witnesses were present in the Court and they were also ready for cross-examination, but no order was passed by the learned trial Court on the application dated 19.11.2019, moved by the prosecution. Then, again, an application was moved by accused namely Smt. Rekha praying therein that the accused persons may be given an opportunity to cross-examine the prosecution witnesses and the same was rejected. In that application the order was passed on 19.11.2019 by the learned trial Court, which is annexed on page 40 onwards and the operative portion reads as follows:-

"41 वादी के विद्वान अधिवक्ता द्वारा प्रार्थना पत्र प्रस्तुत किया गया है कि अभियुक्ता रेखा व मनोज पर चार्ज में धारा 302 भा०दं०सं० की बढ़ोत्तरी की गयी है। इस स्तर पर अभियोजन अपने साक्षीगण से अभियुक्तगण द्वारा जिरह कराने को तैयार है। अभियुक्तगण के विद्वान अधिवक्ता द्वारा कोई आपत्ति नहीं है और वे जिरह हेतु तैयार हैं। पत्रावली के अवलोकन से पूर्व में ही यह स्पष्ट हो चुका है कि अभियुक्तगण द्वारा अभियोजन पक्ष के साक्षीगण से सम्पूर्ण जिरह की जा चुकी है और धारा 261 दं०प्र०सं० के उपबन्ध-3 के अनुसार अभियुक्तगण को आरोप परिवर्धित किये जाने से कोई भी प्रतिकूल प्रभाव पड़ने की सम्भावना भी प्रतीत नहीं होती है तथा परिवर्धन के पश्चात अभियोजन द्वारा किसी अभियोजन साक्षी का मुख्य परीक्षण नहीं कराया जाना है तथा पूर्व में अभियुक्तगण द्वारा अभियोजन साक्षीगण से प्रतिपरीक्षण विस्तृत रुप से की जा चुकी है। माननीय उच्च न्यायालय के आदेशानुसार पत्रावली का निस्तारण करने के उपरान्त दिनांक 02.12.2019 तक सूचना माननीय उच्च न्यायालय को प्रेषित की जानी है। माननीय उच्च न्यायालय द्वारा भविष्य में भी समयवृद्धि न किये जाने का निर्देश भी दिया गया है। अतः उपरोक्त तथ्यों एवं परिस्थितियों में वादी का प्रार्थना पत्र स्वीकार किये जाने योग्य नहीं है। तद्नुसार प्रार्थना पत्र निरस्त किया जाता है।"

6. The order passed on the application of the accused persons is annexed to the supplementary affidavit oat page 8 dated 20.11.2019, filed in this application. The learned trial Court rejected the application moved by the accused persons for re-crossexamination of the witnesses as fresh and the learned trial Court has opined that if the trial is being proceeded without affording an opportunity to cross-examine the prosecution witnesses to the accused persons, there will be no adverse effect on the accused persons and thereafter

rejected the right of cross-examination of the accused persons.

7. Learned counsel for the applicants has submitted that the trial Court by not affording the opportunity to cross-examine the prosecution witnesses has committed manifest error and has totally bypassed the settled principles of law and by not permitting the accused to cross-examine the prosecution witnesses after amendment of the charge which has been specifically provided by the Sections 216 and 217 Cr.P.C.

8. He further submitted that initially both the accused persons were charged under Section 120-B read with Section 302 IPC and again charged under Section 120B and 302 IPC and they were not charged with the offence under Sections 147, 148, 149, 302 IPC. He further submits that initially the charges were confined only to the conspiracy and now by way of amendment of the charge, substantial change in the charges levelled earlier has been made and a new role has been assigned and attributed to the accused persons by amending charge and the accused persons were not able to defend themselves legally and they have not been provided and afforded an opportunity to cross-examine the prosecution witnesses in light of amended charges and their legal rights have been curtailed and slashed by the learned trial Judge.

9. Sri Swetashwa Agarwal, learned counsel for the opposite party no.2 has not disputed the fact that the charge was amended and he has accepted that the charges were already amended; and in the proper interest of justice the accused should have been provided the right to cross-examine which has never been catered.

10. The provisions of Sections 216 and 217 of Code of Criminal Procedure, which are relevant and necessary for just and proper decision of the controversy, are reproduced below:-

"216. Court may alter charge.

(1) Any Court may alter or add to any charge at any time before judgment is pronounced.

(2) Every such alteration or addition shall be read and explained to the accused.

(3) If the alteration or addition to a charge is such that proceeding immediately with the trial is not likely, in the opinion of the Court, to prejudice the accused in his defence or the prosecutor in the conduct of the case, the Court may, in its discretion, after such alteration or addition has been made, proceed with the trial as if the altered or added charge had been the original charge.

(4) If the alteration or addition is such that proceeding immediately with the trial is likely, in the opinion of the Court, to prejudice the accused or the prosecutor as aforesaid, the Court may either direct a new trial or adjourn the trial for such period as may be necessary. (5) If the offence stated in the altered or added charge is one for the prosecution of which previous sanction is necessary, the case shall not be proceeded with until such sanction is obtained, unless sanction has been already obtained for a prosecution on the same facts as those on which the altered or added charge is founded.

217. Recall of witnesses when charge altered. *Whenever a charge is altered or added to by the Court after the commencement of the trial, the prosecutor and the accused shall be allowed-*

(a) to recall or re-summon, and examine with reference to such alteration

or addition, any witness who may have been examined, unless the Court, for reasons to be recorded in writing, considers that the prosecutor or the accused, as the case may be, desires to recall or re-examine such witness for the purpose of vexation or delay or for defeating the ends of justice;

(b) also to call any further witness whom the Court may think to be material. B.- Joinder of charges The bare reading of Section 216 reveals that though it is permissible for any Court to alter or add to any charge at any time before judgment is pronounced, certain safeguards, looking into the interest of the accused person who is charged with the additional charge or with the alteration of the additional charge, are also provided specifically under sub-sections (3) and 4 of Section 216 of the Code. Sub-section(3), in no uncertain term, stipulates that with the alteration or addition to a charge if any prejudice is going to be caused to the accused in his defence or the prosecutor in the conduct of the case, the Court has to proceed with the trial as if it altered or added the original charge by terming the additional or alternative charge as original charge. The clear message is that it is to be treated as charge made for the first time and trial has to proceed from that stage. This position becomes further clear from the bare reading of sub-section(4) of Section 216 of the Code which empowers the Court, in such a situation, to either direct a new trial or adjourn the trial for such period as may be necessary. A new trial is insisted if the charge is altogether different and distinct.

Even if the charge may be of same species, the provision for adjourning the trial is made to give sufficient opportunity to the accused to prepare and defend himself. It is, in the same process, Section 217 of the Code provides that whenever a charge is altered or added by the Court after the commencement of the trial, the prosecutor as well as the accused shall be allowed to recall or re-summon or examine any witnesses who have already been examined with reference to such alteration or addition. In such circumstances, the Court is to even allow any further witness which the Court thinks to be material in regard to the altered or additional charge.

11. When this Court applies the aforesaid principles to the facts of this application it emerges out that initially the accused persons were charged for an offence under Section 120B read with Section 302 IPC and later on charges were amended to Sections 147, 148, 149, 302 IPC and initially the accused persons were considering that they had to defend themselves against the charge with which they were charged that is criminal conspiracy, later on they were charged with offence of murder they were charged under Sections 147, 148, 149, 302 IPC now they have to defend themselves under the amended charge and the amended charges are bound to create prejudice to the applicants. In order to take care of the said prejudice, it was incumbent upon the prosecution to recall the witnesses, examine them in the context of the charge under Section 302 IPC and other relevant sections and allowed the accused persons to cross-examine the prosecution witnesses in the light of amended charge.

12. In the present case, with the framing of alternative charge, testimony of those witnesses recorded prior to that date could even be taken into consideration and this Court is of the opinion that the provisions of Sections 216 and 217 are

mandatory in nature as they not only sub-serve the requirement of principles of natural justice but guarantee an important right which is given to the accused persons to defend themselves appropriately by giving them full opportunity of cross-examination of the witnesses.

13. The credibility of any witness can be established only after the said witness is put to cross-examination by the accused persons in connection with the charged offence. In the instant case, no cross-examination of the prosecution witnesses has taken place insofar as concerned charge under Sections 147, 148, 149 and 302 IPC and if the accused persons are not provided an opportunity to cross-examine the prosecution witnesses then the trial will be vitiated.

14. It is principle of natural law that nobody will be condemned unheard and proper and due hearing should be provided to the accused and the cross-examination is one of the facet of due hearing which ought to be provided to every accused to defend himself of the charge being levelled against him.

15. In **Bhimanna Vs. State of Karnataka** reported in**(2012) 9 SCC 650,** it has been held:-

"19. It is a matter of great regret that the trial court did not proceed with the case in the correct manner. If the trial Court was of the view that there was sufficient evidence on record against Yenkappa (A- 1) and Suganna (A-3), which would make them liable for conviction and punishment for offences, other than those under Section 447 and 504/34 IPC, the court was certainly not helpless to alter/add the requisite charges, at any stage prior to the conclusion of the trial. Section 216 of the Code of Criminal Procedure, 1973 (hereinafter called "Cr.P.C.") empowers the trial Court to alter/add charge(s), at any stage before the conclusion of the trial. However, law requires that, in case such alteration/addition of charges causes any prejudice, in any way to the accused, there must be a fresh trial on the said altered/new charges, and for this purpose, the prosecution may also be given an opportunity to recall witnesses as required under Section 217 Cr.P.C."

16. After considering the rival submissions and considering the facts and circumstances of this case, this Court deems it proper to direct that the learned trial Court will provide an opportunity to the applicants for cross-examination of the prosecution witnesses in the interest of justice and will protect the constitutional rights of due hearing and fair trial of the accused. It is further directed that the learned trial Court will call the prosecution witness day by day and will provide an opportunity to the accused persons to cross-examine the witnesses and it is also being directed that the prosecution witnesses will present as and when required by the trial Court and the accused persons will not take any unnecessary adjournment, if the witnesses are present in the Court. After providing opportunity to the accused persons for cross-examination of the prosecution witnesses and after recording the statements of the accused persons

under Section 313 Cr.P.C., the learned trial Court will pass the judgment.

17. The learned trial Court will not act in haste in deciding this session trial and the trial Court will follow and adhere to the mandatory provisions of law.

18. With the above observations, both the applications are finally **disposed of.**

(2020)02ILR A1573

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 02.01.2020

BEFORE
THE HON'BLE MRS. MANJU RANI CHAUHAN, J.

Application U/S 482 No. 44125 of 2019

Sonu ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Sri Bhaskar Bhadra

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

A. Criminal law - Code of Criminal Procedure, 1973- Section 311 - Very object of Section 311 is to bring on record evidence not only from the point of view of accused and prosecution but also from the point of view of the orderly society .The court enjoys vast power to summon any person as a witness or recall and re-examine a witness provided same is essentially required for just decision of the case. Moreover, such exercise of power can be at any stage of inquiry, trial or proceedings under the Code, meaning thereby, applicant can file an application at any time before conclusion of trial.

The power of the Court to summon or re-examine any witness, under the exercise of its powers u/s 311 Cr.Pc , is unfettered and can be exercised at any stage of the trial in the interest of justice.

B. Criminal Law - Code of Criminal Procedure, 1973- Section 311- Delay in re-examination of Prosecution witness - Grant of fair and proper opportunities to the persons concerned, must be ensured being a constitutional goal, as well as a human right. If substantial justice and technicalities are pitted against each other, the cause of substantial justice should not be defeated on technicalities. No procedure in a Court of law should be allowed to defeat the cause of substantial justice on some technicalities.

Even though the trial court has allowed the application for re-examination of a witness u/s 311 of the Cr.Pc after 19 years and after the evidence of the prosecution has ended, the order of the trial court is just and proper since delay being a technicality, cannot defeat the ends of substantial justice. (Para 7, 11, 13)

Criminal Application rejected.

Case Law discussed:-

1. Raghunath Prasad Vs. Filed u/s 311 Cr.Pc St. of Raj.,1997 LawSuit (Raj) 12 (Distinguished)

2. Raja Ram Prasad Yadav Vs. St. of Bih. & anr., (2013)*14 SCC 461*

3. Mannan SK & ors. Vs. St. of W.B & anr., AIR (2014) SC 2950

4. Jai Jai Ram Manohar Lal Vs. National Building Material Supply; AIR (1969) SC 1267

5. Ghanshyam Dass & ors. Vs. Dominion of India & ors.; (1984) 3 SCC 46

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

1. Heard Mr. Bhaskar Bhadra, learned counsel for the applicant and Mr.

Prashant Kumar, learned A.G.A. for the State.

2. The present 482 Cr.P.C. application has been filed to quash the order dated 30th October, 2019 passed by the Additional Sessions Judge, Court No. 15, Bareilly in Sessions Trial No. 727 of 2001 (State Vs. Nisar Ahmad & Others) arising out of Case Crime No. 538 of 2000, under Sections-396 and 120-B I.P.C., Police Station-Bahedi, District-Bareilly, whereby the application made by opposite party no.2 under Section 311 Cr.P.C. for re-examination of Prosecution Witness No.2, namely, Ashok Kumar has been allowed.

3. Learned counsel for the applicant submits that the court below, without considering the objection and evidences available on record has passed the impugned order, allowing the application of opposite party no.2 under Section 311 Cr.P.C. It is further submitted that in the trial of the aforesaid case, the evidences between the parties have already been ended and the trial is at the final stage, therefore, the application filed by the prosecution for re-examination of P.W.-2, namely, Ashok Kumar after 19 years delay, is not maintainable. It is further submitted that P.W. -2 Ashok Kumar has already been examined and cross-examined on 19th September, 2006 and when the prosecution thought that the prosecution would not succeed in the instant session trial then with the collusion of said witness, is trying to re-examine him, in an effort to succeed,, which is not permissible under law in any manner. He, therefore, submits that the order impugned, passed by the Additional Sessions Judge, is absolutely illegal, arbitrary, contrary to the evidence on record and is also beyond time, hence the same is liable to be quashed. In support of his plea, learned counsel for the applicant has placed reliance upon a judgment of the Rajasthan High Court (Jaipur Bench) in the case of Raghunath Prasad Vs. State of Rarjasthan, reported in 1997 LawSuit (Raj) 12.

4. Per contra, Mr. Prashant Kumar, learned A.G.A. for the State has opposed the submission made by the learned counsel for the applicant by contending that the order impugned passed by the court below is legal and valid. The court below has recorded pure finding of fact while allowing the application filed by opposite party no.2 under Section 311 Cr.P.C. for re-examination of P.W.-2, namely, Ashok Kumar for identifying Exhibit-Ka-3. The court below has not committed any error in passing the impugned order, therefore, do not call for any interference by this Court. Hence, he submits that the present application is liable to be rejected.

5. I have considered the submissions made by the learned counsel for the parties and have gone through the records of the present application.

6. Before ascertaining correctness of aforesaid submissions having been made by the learned counsel for the parties, vis-a-vis, impugned order passed by the learned court below, this Court deems it proper to take note of the provisions of law contained under Section 311 CrPC:

"311. Power to summon material witness, or examine person present:-. Any Court may, at any stage of any inquiry, trial or other proceeding under this Code, summon any person as a witness, or examine any person in attendance, though

not summoned as a witness, or recall and re- examine any person already examined; and the Court shall summon and examine or recall and reexamine any such person if his evidence appears to it to be essential to the just decision of the case."

7. Careful perusal of aforesaid provision clearly suggests that court enjoys vast power to summon any person as a witness or recall and re-examine a witness provided same is essentially required for just decision of the case. Moreover, such exercise of power can be at any stage of inquiry, trial or proceedings under the Code, meaning thereby, applicant can file an application at any time before conclusion of trial. Very object of Section 311 is to bring on record evidence not only from the point of view of accused and prosecution but also from the point of view of the orderly society.

8. Otherwise also, it is well established principle of criminal jurisprudence that discovery, vindication and establishment of truth are main purposes of underlying object of courts of justice. It is also well settled that wider the power, greater the responsibility upon court, which exercises such power and exercise of such power cannot be untrammeled and arbitrary, rather same must be guided by object of arriving at a just decision of case. Close scrutiny of aforesaid provision of law further suggests that Section 311 has two parts; first part reserves a right to the parties to move an appropriate application for re-examination of a witness at any stage; but definitely the second part is mandatory that casts a duty upon court to re-examine or recall or summon a witness at any stage if his/her evidence appears to be essential for just decision of case because, definitely the underlying object of aforesaid provision of law is to ensure that there is no failure of justice on account of mistake on the part of either of parties in bringing valuable piece of evidence or leaving an ambiguity in the statements of witnesses examined from either side.

9. The Apex Court in **Raja Ram Prasad Yadav vs. State of Bihar and another,** reported in *(2013)14 SCC 461,* has held that power under Section 311 Cr.P.C. to summon any person or witness or examine any person already examined can be exercised at any stage provided the same is required for just decision of the case. It may be relevant to take note of the following paras of the judgment:-

"14. A conspicuous reading of Section 311 Cr.P.C. would show that widest of the powers have been invested with the Courts when it comes to the question of summoning a witness or to recall or re-examine any witness already examined. A reading of the provision shows that the expression "any" has been used as a pre-fix to "court", "inquiry", "trial", "other proceeding", "person as a witness", "person in attendance though not summoned as a witness", and "person already examined". By using the said expression "any" as a pre-fix to the various expressions mentioned above, it is ultimately stated that all that was required to be satisfied by the Court was only in relation to such evidence that appears to the Court to be essential for the just decision of the case. Section 138 of the Evidence Act, prescribed the order of examination of a witness in the Court. Order of re-examination is also prescribed calling for such a witness so desired for such re-examination. Therefore, a reading of Section 311 Cr.P.C. and Section 138

Evidence Act, insofar as it comes to the question of a criminal trial, the order of re-examination at the desire of any person under Section 138, will have to necessarily be in consonance with the prescription contained in Section 311 Cr.P.C. It is, therefore, imperative that the invocation of Section 311 Cr.P.C. and its application in a particular case can be ordered by the Court, only by bearing in mind the object and purport of the said provision, namely, for achieving a just decision of the case as noted by us earlier. The power vested under the said provision is made available to any Court at any stage in any inquiry or trial or other proceeding initiated under the Code for the purpose of summoning any person as a witness or for examining any person in attendance, even though not summoned as witness or to recall or re-examine any person already examined. Insofar as recalling and re-examination of any person already examined, the Court must necessarily consider and ensure that such recall and re-examination of any person, appears in the view of the Court to be essential for the just decision of the case. Therefore, the paramount requirement is just decision and for that purpose the essentiality of a person to be recalled and re-examined has to be ascertained. To put it differently, while such a widest power is invested with the Court, it is needless to state that exercise of such power should be made judicially and also with extreme care and caution."

10. In this context, I also wish to make a reference to the judgment of the Apex Court in **Mannan SK and others vs. State of West Bengal and another** reported in AIR 2014 SC 2950, wherein the the Apex Court Court has held as under:-

"10. The aim of every court is to discover truth. Section 311 of the Code is one of many such provisions of the Code which strengthen the arms of a court in its effort to ferret out the truth by procedure sanctioned by law. It is couched in very wide terms. It empowers the court at any stage of any inquiry, trial or other proceedings under the Code to summon any person as a witness or examine any person in attendance, though not summoned as witness or recall and re-examine already examined witness. The second part of the Section uses the word 'shall'. It says that the court shall summon and examine or recall or re-examine any such person if his evidence appears to it to be essential to the just decision of the case. The words 'essential to the just decision of the case' are the key words. The court must form an opinion that for the just decision of the case recall or reexamination of the witness is necessary. Since the power is wide it's exercise has to be done with circumspection. It is trite that wider the power greater is the responsibility on the courts which exercise it. The exercise of this power cannot be untrammeled and arbitrary but must be only guided by the object of arriving at a just decision of the case. It should not cause prejudice to the accused. It should not permit the prosecution to fill-up the lacuna. Whether recall of a witness is for filling-up of a lacuna or it is for just decision of a case depends on facts and circumstances of each case. In all cases it is likely to be argued that the prosecution is trying to fill-up a lacuna because the line of demarcation is thin. It is for the court to consider all the circumstances and decide whether the prayer for recall is genuine."

11. Aforesaid exposition of law clearly suggests that a fair trial is main

object of criminal jurisprudence and it is duty of court to ensure such fairness is not hampered or threatened in any manner. It has been further held in the aforesaid judgments that fair trial entails interests of accused, victim and society and therefore, grant of fair and proper opportunities to the persons concerned, must be ensured being a constitutional goal, as well as a human right. The Apex Court has categorically held in the aforesaid judgment that adducing evidence in support of the defence is a valuable right and denial of such right would amount to denial of a fair trial.

12. Further, the Apex Court in **Raja Ram Prasad Yadav vs. State of Bihar and another** reported in *(2013)14 SCC 461,* while culling out certain principles required to be borne in mind by the courts while considering applications under Section 311 has held that exercise of widest discretionary powers under Section 311 should ensure that judgment should not be rendered on inchoate, inconclusive and speculative presentation of facts. Hon'ble Apex Court has further held that if evidence of any witness appears to be essential for the just decision of the case, it is the duty of the court to summon and examine or recall and re-examine any such person because very object of exercising power under Section 311 is to find out truth and render a just decision. Most importantly, in the judgment referred to herein above, the Apex Court has held that court should bear in mind that no party in trial can be foreclosed from correcting errors and that if proper evidence was not adduced or a relevant material was not brought on record due to any inadvertence, the Court should be magnanimous in permitting such mistakes to be rectified.

13. There is no dispute that P.W.-2 has already been examined and cross-examined but perusal of the application made by opposite party no.2 under Section 311 Cr.P.C. as well as the order impugned indicate that P.W. -8, namely, Naseer Ahmad had already proved Exhibit Ka-3 but had not identified the accused persons and the informant Kamal Kumar and P.W.-2 Ashok Kumar had earlier identified the accused persons but since informant Kamal Kumar had expired, re-examination of P.W.-2 Ashok Kumar is required to identify Exhibit-Ka-3 as he was the witness of the same. From the finding recorded by the court below under the order impugned, this Court finds no illegality or infirmity in the order impugned. The court below while referring to the provisions of Section 311 Cr.P.C. and the law laid by the Apex Court, has rightly allowed the application made by opposite party no.2 under Section 311 Cr.P.C. The delay in re-examination of P.W.-2 pleaded by the learned counsel for the applicant is a so technical plea, which may hamper the interest of substantial justice. It is settled law that all Courts of law are established for furtherance of interest of substantial justice and not to obstruct the same on technicalities. In **Jai Jai Ram Manohar Lal vs. National Building Material Supply;** *AIR 1969 SC 1267,* **the Apex Court has** held that if substantial justice and technicalities are pitted against each other, the cause of substantial justice should not be defeated on technicalities. No procedure in a Court of law should be allowed to defeat the cause of substantial justice on some technicalities. The Apex Court has reiterated the same in the case of

Ghanshyam Dass & Ors. vs. Dominion of India & Ors; reported in *(1984) 3 SCC 46*. The judgment of the Rajasthan High Court relied upon by the learned counsel for the applicant in the case of Raghunath Prasad (Supra) is clearly distinguishable in the facts of the present case.

14. In view of the aforesaid, I find no good reason to interfere with the order impugned. The present application devoid of merits and is accordingly rejected.

(2020)02ILR A1578

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 19.12.2019

BEFORE
THE HON'BLE RAJUL BHARGAVA, J.

Application U/S 482 No. 44706 of 2019

Rahul Kushwaha ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Sri Ajay Singh, Sri Yogendra Singh

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

A. Criminal law - Code Of Criminal Procedure, 1973- Section 340/ 344- In order to enable the court to form an infallible opinion that the witness who has deposed before the court are speaking false and has given false statement / evidence in their testimony and in order to decide proposed action against the witnesses, it is incumbent on the court to wait for completion of entire evidence and final arguments in the case because the opinion to be formed must be the outcome of appreciation of entire evidence recorded by it. Any haste shown by the court in the course of trial and any hurried opinion formed in the midst of the trial will result in premature consideration of the matter disabling the court from clearly and precisely assessing the truth or reliability of the statement of the witness in its proper perspective.

Proceedings u/s 344 Cr.Pc can be initiated only at the time of delivery of the judgement and the said proceedings cannot be drawn during the pendency of the trial.

B. Criminal law - Code Of Criminal Procedure, 1973 - Section 482- Section 482 (3)- Supervisory Jurisdiction of the High Court –The learned Trial judge committed an illegality in registering a miscellaneous case in the exercise of powers under section 340 of the Cr.Pc during the pendency of the trial and therefore the prayer for expediting the proceedings of the case u/s 340 Cr.Pc is misconceived hence entire proceedings of the Misc. Case u/s 340 Cr.Pc quashed.

Criminal Application rejected.
(Para 7, 11, 12)

(Delivered by Hon'ble Rajul Bhargava, J.)

1. Heard Sri Yogendra Singh holding brief of Sri Ajay Singh, learned counsel for the applicant and Sri Pankaj Saxena, learned A.G.A. for the State.

2. The present application u/s 482 Cr.P.C. has been filed by the applicant for quashing the entire proceeding of Criminal Case no. 73 of 2017 (State vs. Rahul Kushwaha) u/s 354-A, 376, 452, 506 IPC and u/s 3,4,7,8 of POCSO Act, 2012, Case Crime no. 315 of 2017, P.S. Kotwali Jalaun, District Jalaun pending in the court of Additional District & Sessions Court-II, Jalaun at Orai.

3. Learned counsel for the applicant has argued that the opposite party no. 2 has lodged totally false and fictitious case of commission of rape against the applicant with his daughter and infact no

such incident has taken place. The reality is that the first informant, father of the victim is a greedy person and in order to extort money he has lodged false first information report. Learned counsel has also touched upon merit of the case especially the statement of the victim recorded u/s 161 and 164 Cr.P.C. and other contradictions and inconsistencies and weakness of the prosecution case, however, he submitted that till date six witnesses of fact and some formal witnesses have been examined and it is stated that during the pendency of trial of the applicant, his brother Mohit filed an application u/s 340 Cr.P.C. before the trial court on 25.4.2019 drawing attention of the trial court to several weakness of the prosecution case in order to demonstrate that the prosecutrix first informant and I.O., S.I. Brijesh Kumar who was then posted at P.S. Jalaun be prosecuted u/s 170, 182, 193, 209, 211 IPC in the aforesaid session trial. Copy of the application moved u/s 195/340 Cr.P.C. has been annexed as Annexure-6 to the affidavit.

4. Learned counsel has further argued that learned Additional Session Judge considering the contradictions, discrepancy and ocular testimony of the victim with regard to medical evidence and several other weakness has passed an order dated 25.3.2019 that miscellaneous case may be registered against the opposite party no. 2, his daughter victim and aforesaid police inspector. It is recorded that in order to pass further order u/s 340 Cr.P.C. certain more evidence is necessary which the applicant Mohit i.e. brother of the applicant shall be filing. Learned counsel submitted that the trial Judge be directed to expedite the proceeding u/s 340 Cr.P.C. within stipulated time period and as the order passed u/s 340 Cr.P.C. is quite detailed and reasoned order by which the trial court has disbelieved the deposition of first informant, victim especially laying stress on the inconsistencies in the medical evidence and thus as the court has drawn proceeding u/s 340 Cr.P.C. in which dates are being fixed the proceedings against the applicant may be quashed.

5. Learned A.G.A. Strongly opposed and submitted that it is admitted fact that the session trial against the applicant is still pending in which evidence is to be recorded and final order in the case is yet to be pronounced and therefore, order dated 25.3.2019 passed by trial Judge for registration of misc. case in the exercise of its power u/s 340 Cr.P.C. is wholly illegal and is in violation of procedure laid down therein. He has contended that Section 340 Cr.P.C. did not permit for initiation of proceeding under the said section otherwise than at the time of delivery of judgment or final order disposing off any judicial proceeding pending before it, therefore, said order has been assailed by learned AGA as being too premature enough to form a valid and successful foundation for prosecution of the victim and police officer u/s 340 of the Code. He has argued that the trial Judge has exceeded in his jurisdiction in scanning the deposition of the witnesses recorded during trial and disbelieved them during the pendency of trial which is absolutely illegal and perverse. For ready reference Section 340 is as under:-

340. Procedure in cases mentioned in section 195.

(1) When, upon an application made to it in this behalf or otherwise, any Court is of opinion that it is expedient in

the interests of justice that an inquiry should be made into any offence referred to in clause (b) of sub- section (1) of section 195, which appears to have been committed in or in relation to a proceeding in that Court or, as the case may be, in respect of a document produced or given in evidence in a proceeding in that Court, such Court may, after such preliminary inquiry, if any, as it thinks necessary,-

(a) record a finding to that effect;

(b) make a complaint thereof in writing;

(c) send it to a Magistrate of the first class having jurisdiction;

(d) take sufficient security for the appearance of the accused before such Magistrate, or if the alleged offence is non- bailable and the Court thinks it necessary so to do, send the accused in custody to such Magistrate; and

(e) bind over any person to appear and give evidence before such Magistrate.

(2) The power conferred on a Court by sub- section (1) in respect of an offence may, in any case where that Court has neither made a complaint under sub- section (1) in respect of that offence nor rejected an application for the making of such complaint, be exercised by the Court to which such former Court is subordinate within the meaning of sub- section (4) of section 195.

(3) A complaint made under this section shall be signed,-

(a) where the Court making the complaint is a High Court, by such officer of the Court as the Court may appoint;

(b) in any other case, by the presiding officer of the Court.

(4) In this section," Court" has the same meaning as in section 195.

6. In order that provisions of Section 340 Cr.P.C. may apply, the court is under a statutory duty to form an opinion that the witness appearing in the proceeding before it has knowingly or wilfully given or fabricated false evidence for which they can be prosecuted for offence u/s 170, 182, 193, 209, 211 IPC.

7. I am of the considered opinion that in order to enable the court to form an infallible opinion that the witness who has deposed before the court are speaking false and has given false statement / evidence in their testimony and in order to decide proposed action against the witnesses, it is incumbent on the court to wait for completion of entire evidence and final arguments in the case because the opinion to be formed must be the outcome of appreciation of entire evidence recorded by it. It cannot be permitted as the same would amount to pre-judging the testimony of witness before the trial is over. Any haste shown by the court in the course of trial and any hurried opinion formed in this respect will result in premature consideration of the matter disabling the court from clearly and precisely assessing the truth or reliability of the statement of the witness in its proper perspective.

8. At this juncture in order to examine the validity of proceedings pending u/s 340 Cr.P.C., reference of Section 344 Cr.P.C. be made, which reads as under:-

344. Summary procedure for trial for giving false evidence.

(1) If, at the time of delivery of any judgment or final order disposing of any judicial proceeding, a Court of Session or Magistrate of the first class expresses an opinion to the effect that any witness appearing in such proceeding had knowingly or wilfully given false evidence

or had fabricated false evidence with the intention that such evidence should be used in such proceeding, it or he may, if satisfied that it is necessary and expedient in the interest of justice that the witness should

be tried summarily for giving or fabricating, as the case may be, false evidence, take cognizance of the offence and may, after giving the offender a reasonable opportunity of showing cause why he should not be punished for such offence, try such offender summarily and sentence him to imprisonment for a term which may extend to three months, or to fine which may extend to five hundred rupees, or with both.

(2) In every such case the Court shall follow, as nearly as may be practicable, the procedure prescribed for summary trials.

(3) Nothing in this section shall affect the power of the Court to make a complaint under section 340 for the offence, where it does not choose to proceed under this section.

(4) Where, after any action is initiated under sub- section (1), it is made to appear to the Court of Session or Magistrate of the first class that an appeal or an application for revision has been preferred or filed against the judgment or order in which the opinion referred to in that sub- section has been expressed, it or he shall stay further proceedings of the trial until the disposal of the appeal or the application for revision, as the case may be, and thereupon the further proceedings of the trial shall abide by the results of the appeal or application for revision.

9. From the plain and simple reading of Section 344 Cr.P.C. the Court is of the opinion that it is in the interest of justice an enquiry should be made in the offences referred to Clause 2(1) of 195 which appears to have been committed or in relation to proceeding in the court can only be examined while passing the final judgment or order as in the case of Section 344 Cr.P.C. as is also required u/s 344 Cr.P.C. which contemplates summary procedure for trial for giving false evidence.

10. The logical reason why the legislature very consciously provided at the opening part of Section 344 Cr.P.C. at the time of delivery of judgment or final order disposing of any judicial proceeding, a court of Session or Magistrate of First Class expressed an opinion to the effect that any witness appearing in such proceeding had knowingly or wilfully given false evidence or had fabricated false evidence with the intention that such evidence should be used in the such proceeding, it or he may , if satisfied that it is necessary and expedient in the interest of justice that the witness should be tried summarily for giving or fabricating, as the case may be.

11. Thus, from the Section 340 and 344 Cr.P.C. there is clear indication in the aforesaid words that the court should not hurry to form its opinion in the midst of trial of the case that a witness who has deposed in the trial, has knowingly or wilfully given false evidence intending it to be used as evidence in the proceeding.

12. In the light of the aforesaid, this Court in the exercise of its inherent power u/s 482 Cr.P.C. supervisory jurisdiction u/s 482(3) Cr.P.C. deem it fit to quash the entire proceeding of Criminal Case no. 36 of 2019 (Mudit vs. Veer Singh) pending in the court of First Additional Session Judge, Jalaun at Orai.

13. I may record that the prayer for quashing of the proceedings against the applicant made in the present application is bereft of merit and is therefore liable to be dismissed.

14. The present application is dismissed.

15. It is made clear that any finding and observations made by Additional Session Judge in the order dated 25.3.2019 stands effaced and the Presiding Officer before whom proceedings are now pending shall totally ignore any observations made in the order dated 25.3.2019.

16. Office is directed to communicate the order to the concerned court forthwith.

(2020)02ILR A1582

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 17.01.2020

BEFORE
THE HON'BLE RAHUL CHATURVEDI, J.

Application U/S 482 No. 45291 of 2019

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

Counsel for the Applicant:
Sri Dharmendra Singhal, Sri Sunil Singh, Sri Shivendra Raj Singhal

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

A. Criminal law - Code of Criminal Procedure, 1973- Section 319 - Privilege of facing the trial afresh and witnesses be re-heard is given to the newly arrayed accused and not to the accused persons who have already faced the trial and their trial is at the fag end.

The trial of the accused persons who have already faced the trial and their trial is at the fag end, cannot be permitted to commence afresh on the ground that they should be tried together with the newly impleaded accused.

B. Criminal law - Code of Criminal Procedure, 1973- Section 319- Disassociation of trial of newly impleaded accused from the rest of the accused persons, is perfectly just and valid and in consonance with the scheme and spirit of Section 319 Cr.P.C. - Separating the file is not equivalent to separating the session trial. It is like two branches coming out of a same stem.

Dissassociation of trial of the newly impleaded accused is not equivalent to separation of the Sessions Trial and will not result in any prejudice, therefore the application filed on behalf of the accused, whose trial is about to end, that he should be tried together afresh with the newly impleaded accused, is misconceived and against the provisions of Section 319 Cr.P.C.

Interpretation of Statutes-Harmonious Construction-Words "such person"- Indicative of a person who is non-accused and has been summoned to face the prosecution in the midst of the trial in exercise of power u/s 319 Cr.P.C. Words "could be tried together with the accused" are directory.

The mandate of law of fresh trial is mandatory whereas the mandate that a newly added accused could be tried together with the accused whose trial is at the fag end is directory. The words "could be tried together with the accused" in Section 319(1) Cr.P.C. cannot be said to be capable of only one construction. If it was so, the approach to be adopted would be different since the intent of parliament is to be respected despite the consequences of interpretation. There is, however, a scope of two possible constructions. That being the position, a reasonable and a common sense approach deserves to be adopted and preferred rather than a construction that would lead to absurd results. (Para 9, 17,19)

Criminal Application rejected.

Case Law discussed:-

1. Hardeep Singh vs. St. of Punjab, (2014) 2 SCC (Crl), 86

2. Labhu Ji Amratji Thakor vs. St. of Guj., (2019) AIR SC, 734

3. Delhi Cloth and General Mills Co. Ltd. vs. St. of M.P. & ors., AIR (1996) SC 283

4. Shashi Kant Singh vs. Tarkeshwar Singh, (2002) 5 SCC 738

5. State of Rajasthan vs. Ganeshi Lal reported in A.I.R. (2008) SC 690

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

1. Heard Shri Dharmendra Singhal, learned Senior Counsel assisted by Shri Sunil Singh and Shri Shivendra Raj Singhal leanred counsel for the applicant as well as learned A.G.A. and also perused the record.

2. After hearing the parties at length, this Court deems it proper to adjudicate this application u/s 482 Cr.P.C. at the threshold/admission stage itself.

3. The applicant Kailash Singh, by means of present application is invoking the extraordinary powers of this Court under Section 482 Cr.P.C. targeting the validity and veracity of the order dated 26.11.2019 whereby learned Additional Session Judge-II/Special Judge, SC/ST Act, Kanpur Dehat (Ramabai Nagar) has turned down the request of the accused-applicant to hold a de-novo trial of the Special Session Trial No.28 of 2017, arising out of Case Crime No.368 of 2016, u/s 302/34, 307/34, 504, 506 I.P.C. and Section 3(2)(V) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, Police Station-Rura, District-Kanpur Dehat, along with newly arrayed accused Pratap Singh Katiyar but to the contrary the trial court has disconnected and disassociated the trial of the newly arrayed accused Pratap Singh Katiyar vide the impugned order. Aggrieved by the aforesaid order, the present Application u/s 482 Cr.P.C., has been moved by the accused-applicant Kailash Singh.

4. Learned Senior Counsel. while addressing the Court, has strenuously argued that the impugned order dated 26.11.2019 is against the soul and spirit of Section 319 of the Code of Criminal Procedure, therefore, it is liable to be quashed.

5. **Facts of the case :-** The applicant along with accused Ashutosh Singh @ Anshu is facing criminal prosecution in the court of the II-Additional Session Judge/Special Judge, SC/ST Act, Kanpur Dehat by means of Special Session Trial No.28 of 2017 (State vs. Ashutosh Pratap Singh and others). The genesis of the case ignites from lodging of the F.I.R. by one Indra Pal Chamar on 16.11.2016 for the incident said to have taken place on 16.11.2016 at 9.00 A.M. of which the F.I.R. was got registered at 11.10 A.M. as Case Crime No.368 of 2016 at Police Station Rura, District-Kanpur Dehat (Ramabai Nagar), u/s 302, 307, 504, 506, 34 I.P.C. and Section 3(2)(5) of SC/ST Act against Ashutosh Singh @ Anshu Singh, Kailash Singh and Pratap Singh Katiyar, with the allegations that when the informant Indra Pal Chamar along with his father Ram Shankar (50 years old), went to his agriculture field, the accused persons, namely, Ashutosh Singh @ Anshu, his

father Kailash Singh (applicant) with Pratap Singh Katiyar appeared at the place of occurrence and tried to take away their tractor over the standing crop of the informant forcibly. On resistance by them, the accused applicant Ashutosh Singh @ Anshu fired from his gun causing instant death of Ram Shankar, father of the informant. Thereafter, he again fired upon the informant but due to his lady luck the informant could save his life. The assailants after causing death, ran away from the spot hurling filthy abuses rebuking their caste. This incident was witnessed by many of the co-villagers. The post-mortem report of the deceased reveals that he received two gun shot injuries on his person. After holding an extensive and threadbare investigation, the Police has submitted report u/s 173(2) Cr.P.C. against Ashutosh Singh @ Anshu and Kailash Singh dropping the name of Pratap Singh Katiyar from the charge sheet under Sections 302/34, 307/34, 504, 506 I.P.C. and Section 3(2)(V) of SC/ST Act and against Bhanu Pratap Singh and Bhupendra Pratap Singh an additional charge sheet was also submitted u/s 201 I.P.C. However, a Bench of this Court by entertaining the Application u/s 482 Cr.P.C. No.15196 of 2017 by order dated 14.9.2017 has directed that no coercive action shall be taken against Bhanu Pratap Singh and Bhupendra Pratap Singh. The file of Ashutosh Pratap Singh @ Anshu and Kailash Singh was disassociated and on 22.9.2018 the charges were framed against these named accused persons in the aforementioned sections of Indian Penal Code.

6. During trial the testimony of Indra Pal, Munna and number of other prosecution witnesses were recorded. Thereafter, an Application No.17Kha was moved u/s 319 Cr.P.C. with the prayer to call upon Pratap Singh Katiyar (non-accused) to face the prosecution. Vide order dated 16.01.2019 the said application was allowed by the learned Trial Judge summoning Pratap Singh Katiyar under Sections 302, 307, 504, 506, 201, 34 I.P.C. and Section 3(2)(5) of SC/ST Act. Aggrieved by the aforesaid order, newly arrayed accused Pratap Singh Katiyar preferred a Criminal Revision No.806 of 2019, which was allowed by this Court on 25.2.2019, quashing the order dated 16.01.2019 and remanding the matter to reconsider and revisit the entire issue and decide the same in the light of latest judgments of Hon'ble Apex Court within a period of eight weeks. Pursuant to the order dated 25.02.2019, learned Session Judge again on 4.5.2019 passed a detailed reasoned order taking into account the guidelines laid down by Hon'ble Apex Court in various judgments and summoned the non accused Pratap Singh Katiyar to face the trial. On the other hand, the co-accused Ashutosh Pratap Singh @ Anshu has preferred a Criminal Appeal No.3383 of 2017 challenging the order dated 9.5.2017, whereby the learned Additional Session Judge/Special Judge, SC/ST Act, Kanpur Dehat had rejected the Bail Application No.800 of 2017, arising out of Case Crime No.368 of 2016, under Sections 302, 307, 504, 506/34, 201 I.P.C. and Section 3(2)(5) of SC/ST Act, P.S.-Rura, District-Kanpur Dehat. The said appeal was dismissed by a bench of this Court by order dated 18.5.2018 with a direction to the court below to decide the trial within a period of nine months from the date of production of a certified copy of the order.

7. From the order impugned, it is being borne out that in Special Session

Trial No.28 of 2017, in addition to all witnesses of fact, as many as nine witnesses were examined by the trial court and at that stage the application u/s 319 Cr.P.C. was moved. So practically speaking the trial has already reached to its pinnacle and after passing the order impugned, 26.11.2019 was the date fixed for recording the statement u/s 313 of Cr.P.C. At this juncture, it appears that it was prayed by the accused persons that they should be tried together with Pratap Singh Katiyar, the newly arrayed accused, which was turned down by the trial court and files of both were ordered to be segregated. Aggrieved by this order, the present application u/s 482 Cr.P.C. has been preferred.

8. To appreciate the controversy involved, it is imperative to critically analyze the provisions of Section -319 Cr.P.C. which reads thus :-

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

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

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

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

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

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

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

9. For the purposes of present controversy the catch expression is "such person could be tried together with the accused" and in Section 319(4)(a) 'the proceedings in respect of "such person" shall be commenced afresh and the witnesses re-heard. Thus, on the plain reading of the Section 319 Cr.P.C., it is explicit and clear that this privilege of facing the trial afresh and witnesses be re-heard, is given to the newly arrayed accused. The accused persons who have already faced the trial and their trial is at the fag end, cannot take help of stalling the trial or in other words their trial can not be permitted to commence afresh. Therefore, disassociation of trial of newly impleaded accused Pratap Singh Katiyar from the rest of the accused persons, is perfectly just and valid and in consonance with the scheme and spirit of Section 319 Cr.P.C. In Section 319 Cr.P.C. "such person" is indicative of a person who is non-accused and has been summoned to face the prosecution in the midst of the trial in exercise of power u/s 319 Cr.P.C. In the instant case, the applicant Kailash Singh, who has already faced the trial and whose trial is about to reach to the logical conclusion, now is making application that

he should be tried together with newly impleaded accused Pratap Singh Katiyar, which would amount to travesty of justice and against the provisions of Section 319 Cr.P.C. Moreover, when the Coordinate Bench of this Court has already given a direction to conclude the trial within nine months, this Bench should not pass any order which is tangent to or to nullify the aforementioned order of Coordinate Bench.

10. The second limb of argument advanced by learned senior counsel for the applicant is narrated in paragraph 14 of the petition that separating the trial would cause a serious prejudice to the applicant. Learned counsel for the applicant has relied upon certain paragraphs of Constitution Bench judgment of Hon'ble Supreme Court given in the case of **Hardeep Singh vs. State of Punjab, 2014 (2) SCC (Crl), 86,** which are being quoted hereinbelow :

"105. Power under Section 319 Cr.P.C. is a discretionary and an extra-ordinary power. It is to be exercised sparingly and only in those cases where the circumstances of the case so warrant. It is not to be exercised because the Magistrate or the Sessions Judge is of the opinion that some other person may also be guilty of committing that offence. Only where strong and cogent evidence occurs against a person from the evidence led before the court that such power should be exercised and not in a casual and cavalier manner.

106. Thus, we hold that though only a prima facie case is to be established from the evidence led before the court not necessarily tested on the anvil of Cross-Examination, it requires much stronger evidence than mere probability of his complicity. The test that has to be applied is one which is more than prima facie case as exercised at the time of framing of charge, but short of satisfaction to an extent that the evidence, if goes unrebutted, would lead to conviction. In the absence of such satisfaction, the court should refrain from exercising power under Section 319 Cr.P.C. In Section 319 Cr.P.C. the purpose of providing if "it appears from the evidence that any person not being the accused has committed any offence' is clear from the words "for which such person could be tried together with the accused." The words used are not "for which such person could be convicted'. There is, therefore, no scope for the Court acting under Section 319 Cr.P.C. to form any opinion as to the guilt of the accused."

11. In order to buttress his contentions, learned Senior counsel submitted that the above observations made by Hon'ble Sureme Court in the case of Hardeep Singh (supra) are being regularly followed in the latest judgments of the Hon'ble Apex Court in the case of **Labhu Ji Amratji Thakor vs. State of Gujrat, 2019 AIR (SC), 734.**

12. On a careful reading of above excerpts of Hardeep Singh's judgment (supra) would speak about the satisfaction required to be recorded while the Court should exercise this power sparingly and under the circumstances if they warrant. It is very this extraordinary power where there is a definite, strong and cogent evidence is available on record against the person (non-accused), then only such power could be exercised and not in a casual or cavalier way. The expression of Section 319 Cr.P.C. is self revealing. The purpose and the object of providing if "it appears from the evidence that any person

not being the accused has committed any offence is clear from the words "for which such person could be tried together. Thus the words are not which such person tried together.

13. Learned counsel for the applicant has shown yet another authority of Hon'ble Apex Court in the case of **Delhi Cloth and General Mills Co. Ltd. vs. State of Madhya Pradesh and others, AIR 1996 SC 283.** This case relates to the Prevention of Food Adulteration Act and deals with the Section 20(A) of the Act. Paragraph-7 of the judgment reads thus :

"7. A reading of Section 20-A clearly indicates that during the course of the trial for any of the offence under the Act alleged to have been committed by any person, if the evidence adduced before the Court discloses that the manufacturer, distributor or dealer is also concerned with that offence, then the Court has been empowered, notwithstanding anything contained in sub-section (3) of s.319 of the Code of Criminal Procedure (for short, 'the Code') to treat as if the manufacturer, distributor or the dealer is being proceeded against under Section 20 of the Act, as originally instituted thereunder. The concept of vendor and vendee is known to civil law and passing of the title in the goods is alien to the prosecution for an offence under the Act. It cannot, therefore, be introduced in a trial for the offence under the Act. The Act advisedly made a person who sells adulterated article of food liable to be prosecuted for the offence of adulteration of the article of food. During the trial when it comes to the notice of the Magistrate, from the evidence adduced, that the manufacturer, distributor or dealer of that article of food, which is the subject matter of adulteration, is also concerned with the offence, then the court has been empowered to proceed against such manufacturer, distributor or dealer as if prosecution has initially been instituted against him under Section 20 of the Act. In fact, for general offences,SEction 319 (1) of the Code empowers the court where during the course of enquiry or trial of an offence, if it appears from the evidence that any person not being accused has committed any offence for which such person could be tried together with the accused, to proceed against such person for the offence which he appears to have committed. In view of the language of Section 20-A of the Act, whatever is contained in sub-section (3) of Section 319 of the Code, would not stand in the way of the Magistrate to proceed at a trial against any person, i.e., the original accused and against others mentioned in Section 20-A. In other words, joint trial for the same offence is permitted. The object appears to be that in a case where common evidence discloses that the manufacturer, distributor or dealer is also concerned with the offence for which the prosecution was launched against a person from whom the article of food was purchased, to avoid multiplicity of prosecution and also keeping in view the doctrine of autrefois acquit the Legislature introduced s.20A to have joint trial."

14. While laying the stress upon the aforesaid judgment, learned counsel for the applicant submits and tried to draw a parallel that the present accused should also be tried with newly impleaded accused as in the above case the accused was required to be tried along with the manufacturer, distributor or dealer of any article of food, if the court is satisfied, on the evidence adduced before it, that such manufacturer, distributor or dealer is also

concerned with that offence. Learned counsel further submits that according to the Hon'ble Apex Court the object appears to be that in a case where a common evidence discloses that the manufacturer, distributor or dealer is also concerned with the offence for which the prosecution was launched against a person from whom the article of food was purchased, to avoid the multiplicity of the prosecution and also keeping in view the doctrine of *autrefois* acquit, the legislature introduced Section 20A to have joint trial.

This Court has given its conscious consideration to the arguments advanced by learned counsel for the applicant but afraid to follow the aforesaid ratio in the present case, as in this case Laxmi Narayan the accused resident of Joura was found selling Vanaspati Ghee and on analysis it was found to be adulterated and in consequence of same Laxmi Narayan was prosecuted u/s 60 of Prevention of Food Adulteration Act, 1954. Section 20A of the aforesaid Act empowers like this :-

"20A. Power of court to implead manufacturer, etc.--*Where at any time during the trial of any offence under this Act alleged to have been committed by any person, not being the manufacturer, distributor or dealer of any article of food, the court is satisfied, on the evidence adduced before it, that such manufacturer, distributor or dealer is also concerned with that offence, then, the court may, notwithstanding anything contained in sub-section (3) of section 319 of the Code of Criminal Procedure, 1973 (2 of 1974)] or in section 20 proceed against him as though a prosecution had been instituted against him under section 20."*

15. Thus, Section 20A of the Act clearly indicates that the concept of vendor and vendee is known in civil law and passing of the title in the goods is alien to the prosecution for an offence under the Act. It cannot, therefore, be introduced under a trial of the offence under the Act. The facts of the aforesaid case is entirely distinct and different from the set of facts of the present case and to mind of this Court, it would not be of any help to the counsel for the applicant.

16. Per contra learned A.G.A. while refuting the submissions advanced by learned counsel for the applicant has cited the judgment of Hon'ble Apex Court, which touches the core issue of the present controversy, in the case of **Shashi Kant Singh vs. Tarkeshwar Singh, 2002 (5) SCC 738,** where the Hon'ble Apex Court has lucidly explained the import of expression "could be tried together with the accused". The relevant paragraph 9 of the judgment is quoted herein below :

"9. The intention of the provision here is that where in the course of any enquiry into, or trial of, an offence, it appears to the court from the evidence that any person not being the accused has committed any offence, the court may proceed against him for the offence which he appears to have committed. At that stage, the court would consider that such a person could be tried together with the accused who is already before the Court facing the trial. The safeguard provided in respect of such person is that, the proceedings right from the beginning have mandatorily to be commenced afresh and the witnesses re-heard. In short, there has to be a de novo trial against him. The provision of de novo trial is mandatory. It vitally affects the rights of a person so brought before the Court. It would not be sufficient to only tender the witnesses for the cross-examination of such a person. They have to be examined afresh. Fresh

examination in chief and not only their presentation for the purpose of the cross-examination of the newly added accused is the mandate of Section 319(4). The words 'could be tried together with the accused' in Section 319(1), appear to be only directory. 'Could be' cannot under these circumstances be held to be 'must be'. The provision cannot be interpreted to mean that since the trial in respect of a person who was before the Court has concluded with the result that the newly added person cannot be tried together with the accused who was before the Court when order under Section 319(1) was passed, the order would become ineffective and inoperative, nullifying the opinion earlier formed by the Court on the basis of evidence before it that the newly added person appears to have committed the offence resulting in an order for his being brought before the Court."

17. From the above, it is clear that the mandate of law of fresh trial is mandatory whereas the mandate that a newly added accused could be tried together with the accused whose trial is at the fag end is directory. The words "could be tried together with the accused" in Section 319(1) Cr.P.C. cannot be said to be capable of only one construction. If it was so, the approach to be adopted would be different since the intent of parliament is to be respected despite the consequences of interpretation. There is, however, a scope of two possible constructions. That being the position, a reasonable and a common sense approach deserves to be adopted and preferred rather than a construction that would lead to absurd results. Here in the instant case, accused persons Ashutosh Singh @ Ashu and Kailash Singh have already faced the trial and their trial is almost at the verge of culmination. Now accused-applicant Kailash Singh wants at this stage that a *de novo* trial may be ordered, keeping in view that Pratap Singh Katiyar, a non-accused, has been summoned in exercise of power u/s 319 Cr.P.C. This is not permissible under the law nor the provisions of Section 319 Cr.P.C. subscribe to this view.

18. Learned A.G.A. while refuting the submissions advanced on behalf of applicant has further relied upon another judgment of Hon'ble Apex Court given in the case of **State of Rajasthan vs. Ganeshi Lal reported in A.I.R. 2008 SC 690,** wherein the Hon'ble Apex Court has proceeded to observe :-

"11. Reliance on the decision without looking into the factual background of the case before it is clearly impermissible. A decision is a precedent on its own facts. Each case presents its own features. It is not everything said by a Judge while giving a judgment that constitutes a precedent. The only thing in a Judge's decision binding a party is the principle upon which the case is decided and for this reason it is important to analyse a decision and isolate from it the ratio decidendi. According to the well-settled theory of precedents, every decision contains three basic postulates (i) findings of material facts, direct and inferential. An inferential finding of facts is the inference which the Judge draws from the direct, or perceptible facts; (ii) statements of the principles of law applicable to the legal problems disclosed by the facts; and (iii) judgment based on the combined effect of the above. A decision is an authority for what it actually decides. What is of the essence in a decision is its ratio and not every observation found therein nor what logically flows from the various

observations made in the judgment. The enunciation of the reason or principle on which a question before a Court has been decided is alone binding as a precedent. (See:State of Orissa v. Sudhansu Sekhar Misra and Ors (AIR 1968 SC 647) and Union of India and Ors. vs. Dhanwanti Devi and Ors. (1996 (6) SCC 44). A case is a precedent and binding for what it explicitly decides and no more. The words used by Judges in their judgments are not to be read as if they are words in Act of Parliament. In Quinn v. Leathem (1901) AC 495 (H.L.), Earl of Halsbury LC observed that every judgment must be read as applicable to the particular facts proved or assumed to be proved, since the generality of the expressions which are found there are not intended to be exposition of the whole law but governed and qualified by the particular facts of the case in which such expressions are found and a case is only an authority for what it actually decides."

Thus, learned A.G.A. has submitted that the ratio laid down in the case of Delhi Cloth and General Mills Company Ltd. (supra) is not applicable under the present scenario.

19. This Court has keenly perused the order impugned and found that by impugned order the file of newly added accused Pratap Singh Katiyar was ordered to be segregated. Merely separating the file of an accused for the reason that he failed to appear before the Court, is quite different from separating the case of an accused for other legal reasons. Former is a procedural matter while the latter is a legal one. In the instant case where a person is being summoned in exercise of power u/s 319 Cr.P.C., the accused persons the trial of whom, is at the fag end cannot claim parallelity with newly impleaded accused. However, where, to avoid the delay in trial, caused by continued long absence of any one or more accused persons, the file of absconded persons is separated as a matter of procedural convenience. Separating the file is not equivalent to separating the session trial. It is like two branches coming out of a same stem and an analogy can be drawn by following example. Where a person never appears before the court or has been added at the later stage, his file is separated, and therefore, this Court at the loss to appreciate the unfounded suspicion that the accused-applicant would suffer a serious prejudice, if file of the newly added accused Pratap Singh Katiyar is separated.

20. After thoroughly marshalling the law and the facts of the present case, I do not find any illegality or impropriety in the order impugned and as such present application u/s 482 Cr.P.C. being lacks merit is hereby dismissed.

21. It is given to understand that the trial of accused persons, namely, Ashutosh Singh @ Ashu and Kailash Singh is at the pinnacle and it is expected from the learned Trial Judge to conclude the same within a period of two months (maximum) from the date of production of certified copy of this order.

(2020)02ILR A1590

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 11.12.2019

BEFORE
THE HON'BLE MRS. MANJU RANI CHAUHAN, J.

Application U/S 482 No. 45539 of 2019

Padam @ Aasif Raza ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Sri Aditya Vardhan Singh

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

A. Criminal law - Code of Criminal Procedure, 1973 - Section 190 – Affidavits filed by witnesses , along with the Protest Petition would not amount to statements recorded u/s 200 and 202 Cr.Pc- The Magistrate committed an illegality in rejecting the Final Report submitted by the police and in summoning the applicants on the basis of the affidavits filed by the witnesses with the Protest Petition, which cannot be termed as ` statements" within the meaning of Section 200/ 202 of the Cr.pc.

B. Criminal law - Code of Criminal Procedure, 1973- Section 190 (1)- The use of the words `may take cognizance of any offence' in sub-section (1) of Section 190 Cr.P.C. imports the exercise of `judicial discretion' and the Magistrate, who receives the report under Section 173 Cr.P.C., will have to consider the said report and judicially take a decision whether or not to take cognizance of the offence . If ultimately the Magistrate is of the opinion that the facts set out in the police report constituted an offence he can take cognizance thereof, notwithstanding contrary opinion of the police expressed in the report.

It is open to the Magistrate to exercise his judicial discretion and ignore the police report if he arrives at the conclusion that the facts in the police report make out an offence against the accused but in case a protest petition is accompanied by affidavits of witnesses the recourse open to the Magistrate would be to proceed under Chapter XV of the Cr.Pc.

Magistrate has not referred to any material/documents and oral as well as documentary evidence collected by the Investigating Officer during the course of the investigation and the same has been placed before the concerned Magistrate - No reasons recorded while rejecting the final report - The Magistrate has failed to appreciate that neither acceptance nor non-acceptance of the police report can be termed as an administrative function.

It is incumbent upon the Magistrate to refer to the evidence collected during the course of the investigation and assign reasons for rejecting the final report. (Para 13, 18)

Criminal Application allowed.

Case Law discussed:-

1. Mohammed Yusuf Son of Muzaffar Vs. St. of U.P. & Zeeshan , (2008) CriLJ 493;

2. Subhash Singh & ors. Vs. St. of U.P. & anr. (2011) 2 JIC 827 (All)(LB);

3. Hari Ram Vs. St. of U.P. & anr. (Crl. Revision No. 695 of 2001, decided on 06.05.2016) 2016 Lawsuit (All) 1359

4. 4. Ramji Lal Vs. St. of U.P. & Ors. (Crl. Misc. Writ Petition No. 6485 of 2004, decided on 15.03.2019).

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

1. Heard Mr. Aditya Vardhan Singh, learned counsel for the applicant and Mr. Prashant Kumar, learned A.G.A. for the State.

2. This application under Section 482 Cr.P.C. has been filed with a prayer to allow this application and direct the learned Additional Chief Judicial Magistrate, Court No. 02, Moradabad to register the case, arising out of Case Crime No. 199(c) of 2016, under Sections 452, 323, 504, 506 I.P.C., Police Station - Behjoi, District Moradabad as a complaint case.

3. Brief facts of the case are that opposite party no. 2, namely, Sabir lodged an F.I.R. on 13.03.2016 against the present applicant and five other accused persons under Sections 395, 397 I.P.C., with

allegations that on 24.01.2016, at about 07:00 p.m., when the informant was having dinner at his house, the accused persons, namely, Sachin, Padam (applicant herein), Virendra, Kiran, Bhagwan and Narayandas armed with lathi, stick and country-made pistol entered into the house of the informant stating that he had lodged a case against them and started beating him, hurling abuses. They also threatened to kill him and hit him by the butt of the country made pistol due to which informant's teeth were broken. They also snatched thousand rupees from his pocket. After hearing the informant's screaming, Jogendra Singh and Jogesh Sharma as also other villagers came to rescue the informant. It has also been alleged that about 8 months prior, the aforesaid persons had beaten the informant and his son Harun and has also taken away cash and goods from his house.

4. After investigation, a final report was submitted on 21.03.2016. Thereafter, respondent no. 2 filed a protest petition on 08.11.2016 against the aforesaid final report with a prayer to summon the accused persons. In support of the protest petition, affidavits of Jogendra Singh and his wife Musrin were also filed. It has been submitted by learned counsel for the applicant that vide order dated 18.08.2017, learned Magistrate has rejected the final report and has summoned the accused persons and further directed the case to be registered as a state case.

5. It has been argued by learned counsel for the applicant that the Magistrate after considering the protest petition and the affidavits had the option to proceed in the following manner:

(i) He may agree with the conclusions arrived at by the police, accept the report and drop the proceedings. But, before doing so, he shall give an opportunity of hearing to the complainant; or

(ii) He may take cognizance under Section 190(I)(b) and issue process straightway to the accused without being bound by the conclusions of the investigating agency, where he is satisfied that upon the facts discovered by the police, there is sufficient ground to proceed; or

(iii) He may order further investigation; or

(iv) He may decide to take cognizance under Section 190(I)(b) upon the protest petition treating the same as complaint and proceed under Sections 200 and 202 Cr.P.C. and thereafter, decide whether complaint should be dismissed or process should be issued.

6. It has been submitted that in the instant case, cognizance was taken on the basis of protest petition and accompanying affidavits. However, the learned Magistrate should have adopted the procedure of complaint case as referred to in Chapter XV of Code of Criminal Procedure and should have recorded the statements of complainant and witnesses who had filed their submissions in support of the protest petition.

7. In support of his case learned counsel for the applicant has placed reliance upon the following judgments :

1. **Mohammed Yusuf Son of Muzaffar.....Vs. State of Uttar Pradesh and Zeeshan** reported in *2008 CriLJ 493;*

2. **Subhash Singh & Ors. Vs. State of U.P. & Anr**. reported in *2011(2) JIC 827 (All)(LB);*

3. **Hari Ram Vs. State of U.P. and another** *(Criminal Revision No. 695 of 2001, decided on 06.05.2016)* reported in *2016 Lawsuit (All) 1359 ;*

4. **Ramji Lal Vs. State of U.P. And Others** *(Criminal Misc. Writ Petition No. 6485 of 2004, decided on 15.03.2019).*

8. Per contra, Mr. Prashant Kumar, learned A.G.A. for the State has vehemently opposed the submissions made by the learned counsel for the applicant by submitting that the learned Magistrate on the basis of the complaint, protest petition filed by the complainant against the final report as well as the affidavits of witnesses, has rightly directed the present case to be registered as a state case. There is no illegality and infirmity in the order passed by the concerned Magistrate, therefore, the same cannot be interfered with by this Court and the present application is liable to be rejected.

9. Before coming to the merits of the submissions made by the learned counsel for the parties it would be worthwhile to reproduce Section 190 Cr.P.C., which is quoted hereinbelow:

"190. Cognizance of offences by Magistrates.

(1) Subject to the provisions of this Chapter, any Magistrate of the first class, and any Magistrate of the second class specially empowered in this behalf under sub- section (2), may take cognizance of any offence-

(a) upon receiving a complaint of facts which constitute such offence;

(b) upon a police report of such facts;

(c) upon information received from any person other than a police officer, or upon his own knowledge, that such offence has been committed.

(2) The Chief Judicial Magistrate may empower any Magistrate of the second class to take cognizance under sub- section (1) of such offences as are within his competence to inquire into or try."

10. Thus, cognizance can be taken by the Magistrate upon (a)receipt of a complaint disclosing facts constituting commission of an offence (b)upon a police report disclosing such facts or (c)on his own knowledge.

11. A bare perusal of Clause (b) above, would show that the Magistrate can take cognizance of any offence, irrespective of whether it is a cognizable offence or a non-cognizable offence upon a police report disclosing such facts as would constitute commission of an offence. The foundation of the jurisdiction of the Magistrate for taking cognizance of an offence does not depend upon the validity or otherwise of an investigation carried out by the police. It depends only upon the set of facts and circumstances placed before the Court, from which the Court comes to a conclusion that they constitute commission of an offence.

12. If the primary requirement is satisfied, an FIR is to be registered and the criminal law is set in motion and the officer-in-charge of the police station takes up the investigation.

13. Further perusal of the aforesaid provisions it is clear that a Magistrate to

whom a report under Section 173 (1) Cr.P.C. had been submitted to the effect that no case has been made out against the accused, can not direct the police to file a charge-sheet on his disagreeing with that report. The use of the words `may take cognizance of any offence' in sub-section (1) of Section 190 Cr.P.C. imports the exercise of `judicial discretion' and the Magistrate, who receives the report under Section 173 Cr.P.C., will have to consider the said report and judicially take a decision whether or not to take cognizance of the offence. It is also clear that the the Magistrate has no jurisdiction to direct the police to submit a charge-sheet but it was open to the Magistrate to agree or disagree with the police report. If he agrees with the report that there is no case made out for issuing process to the accused he may accept the report and close the proceedings. If he comes to the conclusion that further investigation is necessary he may make an order to that effect under Section 156(3) Cr.P.C. It is further clear that if ultimately the Magistrate is of the opinion that the facts set out in the police report constituted an offence he can take cognizance thereof, notwithstanding contrary opinion of the police expressed in the report.

14. In para (21) of **Mehmood Ul Rehman v. Khazir Mohammad Tunda and others** reported in (2015) 12 SCC 420, the Apex Court has made a fine distinction between taking cognizance based upon charge sheet filed by the police under Section 190(1)(b) Cr.P.C. and a private complaint under Section 190(1)(a) Cr.P.C. and held as under:-

"Under Section 190(1)(b) CrPC, the Magistrate has the advantage of a police report and under Section 190(1)(c) CrPC, he has the information or knowledge of commission of an offence. But under Section 190(1)(a) CrPC, he has only a complaint before him. The Code hence specifies that "a complaint of facts which constitute such offence". Therefore, if the complaint, on the face of it, does not disclose the commission of any offence, the Magistrate shall not take cognizance under Section 190(1)(a) CrPC. The complaint is simply to be rejected."

15. For ready reference, paragraph-11 of the judgment of this Court in the case of **Mohammed Yusuf (supra)** reads as follows:

"11. Where the Magistrate decides to take cognizance under Section 190(1)(b) ignoring the conclusions reached at by the Investigating Officer and applying his mind independently, he can act only upon the statements of the witnesses recorded by the police in the case-diary and material collected during investigation. It is not permissible at that stage to consider any material other than that collected by the investigation Officer. In the instant case the cognizance was taken on the basis of the protest petition and accompanying affidavits. The Magistrate should have adopted the procedure of complaint case under Chapter XV of the Code of Criminal Procedure and recorded the statements of the complainant and the witnesses who had filed affidavits under Sections 200 and 202 Cr.P.C. The Magistrate could not take cognizance under Section 190(1)(b) Cr.P.C. on the basis of protest petition and affidavits filed in support thereof. The Magistrate having taken into account extraneous material i.e. protest petition and affidavits while taking cognizance

under Section 190(1)(b) Cr.P.C. the impugned order is vitiated."

16. Paragraphs nos. 3 and 4 of the judgment of this Court in the case of **Subhash Singh (supra),** which is relevant for deciding the present application is quoted herein-under:

"3. Upon perusal of the order impugned I find that the learned Magistrate has considered the record, protest application, affidavit as well as case diary and some other documents also, which may be material of the police report and thereafter having found investigation as not proper, he rejected the final report. It is settled law that once after submission of the final report, the Magistrate takes cognizance of offence on the basis of protest application, keeping in view the material therein, he has to proceed with the case as a complaint case.

4. Since the learned Magistrate has considered the case diary also and observed that the Investigating Officer has not recorded the statement of witnesses properly, I am of the view that he has considered the case diary also, whereas the learned Magistrate has to clear himself as to whether he has to proceed on the basis of material available in the case diary or on the basis of material of the protest application, because these two different mode of considerations provide two different procedure of trial, therefore, I hereby quash the order impugned dated 5th of April, 2011 with the direction to the learned Magistrate, first to clear himself as to whether he has to proceed on the basis of protest application or on the basis of case diary, and then proceed accordingly. The Magistrate is at liberty to proceed to his own wisdom".

17. Lastly, paragraph nos. 22 to 28 of the of the judgment of this Court in the case of **Hari Ram (supra)** are also quoted herein-below:

"22. In Mohammad Yusuf Vs. State of U.P. 2007 (9) ADJ 294, Police submitted final report which was not accepted by Magistrate, not on the basis of material collected by Police, but, relying on Protest Petition and accompanying affidavit Magistrate issued process. Court disapproved the aforesaid procedure adopted by Magistrate and said:

"Where the magistrate decides to take cognizance under section 190 (1) (b) ignoring the conclusions reached at by the investigating officer and applying his mind independently, he can act only upon the statements of the witnesses recorded by the police in the case-diary and material collected during investigation. It is not permissible at that stage to consider any material other than that collected by the investigating officer. In the instant case the cognizance was taken on the basis of the protest petition and accompanying affidavits. The Magistrate should have adopted the procedure of complaint case under Chapter XV of the Code of Criminal Procedure and recorded the statements of the complainant and the witnesses who had filed affidavits under Section 200 and 202 Cr.P.C. The Magistrate could not take cognizance under section 190 (1) (b) Cr.P.C. on the basis of protest petition and affidavits filed in support thereof. The Magistrate having taking into account extraneous material i.e. protest petition and affidavits while taking cognizance under section 190 (1) (b) Cr.P.C. the

impugned order is vitiated." (emphasis added)

23. In Kallu and others Vs. State of U.P. 2010 (69) ACC 780, Court said:

"Therefore, in present case also, if the material in the case diary was not sufficient for summoning the accused persons to face the trial, then the protest petition filed by the complainant against the final report ought to have been registered as complaint and after following the procedure laid down in section 200 and 202 Cr.P.C."

24. Court further held:

"If after taking evidence under section 200 and 202 Cr.P.C., the magistrate decides to take cognizance against the accused persons, final report has to be rejected, but in any case, cognizance cannot be taken merely on the basis of affidavits or other material filed by the complainant in support of the protest petition against final report without following the procedure laid down under Chapter XV Cr.P.C., if the material in the case diary is not sufficient to take cognizance."(emphasis added)

25. In Mitrasen Yadav Vs. State of U.P. 2010 (69) ACC 540, Court said that on the basis of Protest Petition and documents filed therewith, no cognizance under Section 190(1)(b) Cr.P.C. can be taken.

26. In Criminal Revision No. 1601 of 2015 (Mukeem and 2 others Vs. State of U.P. and another) decided on 07.08.2015, Court while deprecating procedure followed by Magistrate by relying on Protest Petition and its documents, without following procedure of complaint, said:

"The impugned order shows that the Magistrate summoned accused persons presuming that oral evidence on behalf of first informant was adduced on protest petition, which is possible only when the protest petition was ordered to be treated as a complaint. The record shows that neither protest petition was ordered to be registered as complaint nor any oral evidence of the witnesses was recorded. Summoning of the accused persons on the basis of the oral evidence indicates that the Magistrate was satisfied with the fact that in evidence collected by the I.O, there was no sufficient material for taking cognizance. The learned Magistrate has also observed that the I.O. has committed a mistake in not recording the evidence of other witnesses. Summoning is also based on facts mentioned in the protest petition and documentary evidence, as mentioned in the order impugned which is erroneous in view of the law cited above." (emphasis added)

27. In Writ Petition- Misc. Single No. 3776 of 2012 (Mohammad Shafiq Khan and others Vs. State of U.P. and others) decided on 24.03.2014, Court, in para 9, held as under:

"9. Therefore, it is clear from the above that the Magistrate on the basis of protest petition can reject the final report, he may treat the protest petition as complaint, he may also direct for further investigation. But in the facts of this case the Magistrate while rejecting the final report has also taken into consideration the affidavits filed along with protest petition and this approach of the Magistrate was not in accordance with law." (emphasis added)

28. Looking to exposition of law, discussed above, I find that in the present case Magistrate has not referred to any material placed before him or collected by Investigating Officer. Instead it has rejected final report on the basis of facts stated in Protest Petition and thereafter relying on the affidavits filed before him

along with Protest Petition, proceeded to issue notice. The affidavits would not amount to a statement recorded by Magistrate under Section 200 and 202 Cr.P.C. Magistrate has not given any reason for rejecting Police report and nothing has been said in this regard except that in the light of affidavits placed before him along with Protest Petition, he finds that final report is liable to be rejected and accused would be summoned. This approach on the part of Magistrate, I find contrary to what has been laid down in the above authorities and the same cannot be sustained."

18. In the light of the judgments of the Apex Court as well as this Court, referred to above, it is explicitly clear that the contention raised on behalf of the applicant has substance. The impugned order passed by the concerned Magistrate is cryptic and does not stand the test laid down by the Apex Court as well as this Court. In the present case also, the concerned Magistrate has not referred to any material/documents and oral as well as documentary evidence collected by the Investigating Officer during the course of the investigation and the same has been placed before the concerned Magistrate. Apart from the above, the concerned Magistrate has rejected the final report submitted by the Investigating Officer only on the basis of facts stated in the protest petition filed by opposite party no.2 and considering the facts of the protest petition and affidavits of the witnesses produced before him, the concerned Magistrate has issued notice to the applicant. Such affidavits would not amount to a statement recorded by the Magistrate under Section 200 and 202 Cr.P.C. The concerned Magistrate has not recorded any reasons while rejecting the final report and he has also not mentioned anything in that regard. Only in view of the affidavits produced before him along with Protest Petition, the concerned Magistrate has found that the final report is liable to be rejected and accused-applicant would be summoned. The concerned Magistrate has failed to appreciate that neither acceptance nor non-acceptance of the police report can be termed as an administrative function. Since it is after application of judicial mind and examination of the material submitted along with the report under S. 173 Cr.P.C., the Magistrate makes the order under Section 190 Cr.P.C. Such lethargic approach of the concerned Magistrate, as per my view, is contrary to what has been laid down in the above authorities and the same cannot be legally sustained.

19. In view of the above discussion, the application u/S 482 Cr.P.C. succeeds and is allowed. The impugned order dated 18.08.2017 is hereby set aside and the matter is remanded to the concerned Magistrate to take decision afresh in accordance with observations made herein above.

(2020)02ILR A1597

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 13.12.2019

BEFORE
THE HON'BLE ANIL KUMAR-IX, J.

Application U/S 482 No. 45657 of 2019

Sharda Devi ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:

Sri Praneet Kumar Srivastava, Sri Utkarsh Singh

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

A. Criminal law - Code of Criminal Procedure, 1973- Section 482- Scope - Disputed question of facts cannot be adjudicated upon by this Court under Section 482 Cr.P.C. At this stage only prima facie case is to be seen as held by the Hon'ble Supreme Court. (Para 8)

Criminal Application rejected.

Case Law discussed:-

1. Monica Kumar Vs. St. of U.P (2008) 8 SCC 781

2. St. of Bih. Vs. Murad Ali Khan AIR (1989) SC 1

3. U.O.I Vs. Prakash P. Hinduja & anr., AIR (2003) SC 2616

4. R.P. Kapur Vs. St. of Punj., A.I.R. (1960) S.C. 866

5. St. of Har. Vs. Bhajan Lal (1992) SCC (Cr.) 426

(Delivered by Hon'ble Anil Kumar-IX, J.)

1. Heard learned counsel for the applicant, learned AGA for the State and perused the record.

2. This application u/s 482 Cr.P.C. has been filed by the applicant with the prayer to quash the entire proceeding of Case No./S.S.T. No.156 of 2019 (State Vs.Aniket Harsh and others), under Sections 363, 366, 120B, 368, 406 IPC & 17, 18 POCSO Act, Police Station- Mungra Badshapur, District- Jaunpur as well as charge sheet dated 16.10.2019.

3. Brief facts, which are requisite to be stated for adjudication of this application are that an F.I.R. was lodged by opposite party No.2 against accused Aniket and his associates on 01.03.2019 alleging therein that they have enticed away his minor daughter (victim) aged about 17 years on 25.2.2019. She left the house with cash and ornaments. After investigation charge has been filed by the Investigating Officer against the applicant and co-accused Aniket and Krishna Chandra, under Sections 363, 366, 120B, 368, 406 IPC and 17/18 POCSO Act, Police Station- Mungra Badshapur, District- Jaunpur.

4. Learned counsel for the applicant contended that applicant is innocent and has been falsely implicated in this case. He further argued that no offence is disclosed against the applicant and present prosecution has been instituted with a mala fide intention for the purpose of harassment.

5. Learned AGA opposed the prayer of the applicant and submitted that at this stage, it cannot be said that the allegations are false or witnesses have given false statements. Disputed question of the defence cannot be considered at this stage. He further submitted that at this stage, it cannot be said that no offence is made out against the applicant.

6. In the case of **Monica Kumar Vs. State of Uttar Pradesh (2008) 8 SCC 781** it was held by the Hon'ble Apex Court that inherent jurisdiction under Section 482 Cr.P.C. has to be exercised sparingly, carefully and with caution and only when such exercise is justified by the tests specifically laid down in this section. In the case of **State of Bihar Vs. Murad Ali**

Khan AIR 1989 SC 1 it was held that in exercising jurisdiction under Section 482 Cr.P.C. High Court would not embark upon an enquiry whether the allegations in the complaint are like to be established by evidence or not.

7. The scope and ambit of power under Section 482 Cr.P.C. has been examined by Hon'ble Apex Court in **Union of India Vs. Prakash P. Hinduja and another, AIR 2003 SC 2616** and observed as follows:-

"The grounds on which power under Section 482 Cr.P.C. can be exercised to quash the criminal proceedings basically are (1) where the allegations made in the FIR or complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused (2) where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused, (3) where there is an express legal bar engrafted in any of the provisions of Code of Criminal Procedure or the concerned Act to the institution and continuance of the proceedings. But this power has to be exercised in a rare case and with great circumspection".

8. In case in hand, from the perusal of the material on record and looking into the facts of the case, at this stage it cannot be said that no offence is made out against the applicant. All the submissions made by the learned counsel for the applicant relates to the disputed question of fact which cannot be adjudicated upon by this Court under Section 482 Cr.P.C. At this stage only prima facie case is to be seen in the light of law laid down in the above mentioned cases and in the cases of **R.P. Kapur Vs. State of Punjab, A.I.R. 1960 S.C. 866 and State of Haryana Vs. Bhajan Lal 1992 SCC (Cr.) 426.**

9. In view of the above, the prayer for quashing the entire proceedings and charge sheet dated 16.10.2019 of the aforesaid case pending before the court concerned is refused.

10. Accordingly, this application u/s 482 Cr.P.C. is **dismissed.**

(2020)02ILR A1599

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 11.02.2020

BEFORE

THE HON'BLE BISWANATH SOMADDER, J.
THE HON'BLE DR. YOGENDRA KUMAR SRIVASTAVA, J.

Special Appeal No. 48 of 2020

Smt. Krishna Shri Gupta ...Appellant
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Appellant:
Sri Amit Saxena, Sri Amit Shukla

Counsel for the Respondents:
C.S.C., Sri Ashok Khare, Sri Siddharth Khare

A. Eligibility/Qualification - Regulation 1 of Chapter II of the Regulation framed under the Intermediate Education Act, 1921 - prescribes alternative eligibility criteria for appointment as Principal or Headmaster of an institution - dismissal of claim of the appellant for the post of Principal based on the case of *Amal*

Kishore Singh **is unfounded - the appellant's claim rests on the alternate eligibility criterion prescribed under clause (2)**

The qualifications prescribed in terms of clause (2) being one of the alternative sets of eligibility criteria specifically omits to mention any training qualification, a candidate possessing the qualifications thereunder would not require to possess a training qualification which is required under the alternative criteria as per clause (1) and clause (3) of the Entry 1 under Appendix A of Chapter II of the Regulations. Therefore, no requirement of any training qualification and a second class post graduate degree along with teaching experience of ten years in intermediate classes in any recognized institution alone is sufficient for the purpose of being eligible for the post of Principal. (para 38 & 39)

B. Doctrine of Precedent - a judgment is only an authority for what it actually decided and not what logically follows from the various observations made in the judgment - it is necessary to see what were the facts of the case in which the decision was given and what was the point decided

C. Interpretation of Statute - "or" - generally construed as being disjunctive i.e., a connective that marks alternatives

The use of the word "or" as a connective between the three sets of eligibility criteria is indicative of the disjunctive sense marking the three alternatives. The three sets of eligibility criteria under Entry 1 of Appendix A have thus been prescribed, alternatively, as minimum qualifications for being appointed as head of the institution. (para 30)

Special Appeal Allowed. (E-10)

List of cases cited:-

1. Amal Kishore Singh V. State of U.P. ad ors 2018 (10) ADJ 529 *(distinguished)*

2. Cable Corporation of India Limited V. Additional Commissioner of Labour and ors (2008) 7 SCC 680

3. Guru Nanak Dev University V. Sanjay Kumar Katwal and anr (2009) 1 SCC 60

4. G.P. Ceramics (P) Ltd. V. Commissioner, Trade Tax, U.P. (2009) 2 SCC 90

5. Mersey Docks and Harbour Board V. Henderson (1888) 13 AC 595 (HL)

6. The State of Orissa V. Sudhansu Sekhar Misra and ors AIR 1968 SC 647

7. Quinn V. Leathem 1901 AC 495

8. UOI V. Amrit Lal Manchandra and ors (2004) 3 SCC 75

9. London Graving Dock Co. Ltd. V. Horton 1951 AC 737

10. Home Office V. Dorcet Yacht Co. 1970 (2) ALL ER 294

11. Herrington V. British Railways Board 1972 (2) WLR 537

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

1. Heard Sri Amit Saxena, learned Senior Counsel assisted by Sri Amit Shukla, for the appellant and Sri Ashok Khare, learned Senior Counsel assisted by Sri Siddharth Khare, for the respondent-petitioner.

2. This intra-court appeal has been preferred against the judgment and order dated 19.12.2019 passed in Writ-A No.48219 of 2013 (Anita Singh Vs. State of U.P. and others) whereby the order dated 16.05.2013, which was impugned in the writ petition, has been set aside and the District Inspector of Schools, Jalaun, has been directed to pass a fresh order in light of the observations made in the judgment for the senior most eligible person to be allowed to officiate as Principal of the Institution so long as regularly selected

Principal is not made available. Further, the respondent-petitioner has been held to be entitled to salary as officiating Principal in accordance with the provisions of Section 18(2) of the U.P. Secondary Education Services Selection Board Act, 19821.

3. Briefly stated, the facts of the case are that the post of Principal at Jalaun Balika Inter College2, Jalaun fell vacant on 30.6.2009. The aforementioned Institution is a recognized Institution under the provisions of the Intermediate Education Act, 19213 and the payment of salaries to teachers and other employees of the said Institution is regulated in terms of the provisions of the Uttar Pradesh High School and Intermediate Colleges Payment of Salaries of Teachers and Other Employees Act, 19714.

4. A question arose as to who is entitled to officiate as Principal of the Institution and by an order dated 16.5.2013 the District Inspector of Schools5, Jalaun accepted the candidature of the appellant herein to officiate as Principal as against the claim of the respondent-petitioner primarily on the ground that on the date of occurrence of the vacancy on 30.06.2009 the petitioner did not fulfil the prescribed eligibility criteria.

5. The learned Single Judge while adverting to the rival claims of the two teachers has taken notice of a judgment rendered by a Full Bench of this Court in **Amal Kishore Singh Vs. State of U.P. and others6,** on the point as to whether a person possessing Bachelor's degree in physical education is qualified to be appointed as Principal in a recognised intermediate college. Following the view expressed by the Full Bench that a teacher having B.P.Ed. degree is not eligible to be appointed as Principal of an intermediate college, the learned Single Judge drew an inference that the training qualification possessed by the appellant being a diploma in physical education she could not be treated to possess the requisite training qualification for the purposes of appointment to the post of Principal in a recognised intermediate college.

6. As regards the petitioner not possessing the requisite qualification for the post of Principal on the date of occurrence of the vacancy on 30.06.2009, since she obtained the necessary qualification only later on 15.12.2010, the learned Single Judge applying the doctrine of necessity held that though the initial appointment of the appellant as officiating Principal in such circumstances may be justified but such necessity would continue only so long as a qualified and eligible teacher was not available to be appointed as officiating Principal. It has been further held that the petitioner having acquired the necessary eligibility on 15.12.2010, the appellant had no right to continue as Principal any further and accordingly the order dated 16.5.2013 has been set aside and the District Inspector of Schools has been directed to pass a fresh order in light of the observations made in the judgment for the senior most eligible person to be allowed to officiate as Principal of the Institution so long as regularly selected Principal is not made available. Simultaneously, the petitioner has also been held entitled to salary for the post of officiating Principal in accordance with the relevant statutory provision.

7. The principal contention raised by the learned Senior Counsel for the appellant is that the Hon'ble Single Judge

had erred in failing to consider that on the date of occurrence of vacancy on 30th June, 2009, the appellant was having a postgraduate degree with second division in the subject Sanskrit and also more than ten years' teaching experience in intermediate classes and as such she was fully eligible to be appointed as Principal as per eligibility criteria specified under Entry 1, clause (2) of Appendix A under Chapter II, Regulation 1 of the Regulations framed under the Act, 1921.

8. It is submitted that even though the appellant may not possess the requisite training qualification as per the law laid down in the Full Bench Judgment in the case of **Amal Kishore Singh,** she still fulfills the requisite qualification as per terms of clause (2) under Entry 1 of Appendix A of the Regulations referred to above.

9. The finding recorded by the learned Single Judge that "there has never been any disciplinary action" against the petitioner have also been assailed by submitting that the material facts with regard to initiation of disciplinary proceedings against the petitioner have been concealed including the fact that she had also been placed under suspension.

10. *Per contra*, the learned Senior Counsel appearing for the respondent writ petitioner has supported the order passed by the learned Single Judge by submitting that in view of the pronouncement made by the Full Bench in the case of **Amal Kishore Singh,** the appellant did not possess the requisite training qualification for being appointed as Principal as per the Regulations and her initial appointment as officiating Principal could only be justified on the touchstone of doctrine of necessity and that such necessity came to an end when the writ petitioner obtained the necessary training qualification for being appointed as Principal in December, 2010, and accordingly the continuance of the appellant as officiating Principal thereafter was not permissible in law.

11. In order to appreciate the rival contentions, the necessary statutory framework with regard to the subject matter of the controversy may be adverted to.

12. The Intermediate Education Act, **Amal Kishore SinghAmal Kishore SinghAmal Kishore SinghAmal Kishore SinghAmal Kishore SinghAmal Kishore SinghAmal Kishore SinghAmal Kishore SinghAmal Kishore Singh** 1921 was enacted for the establishment of a Board of High School and Intermediate Examination for the purposes of regulating and supervising the system of High School and Intermediate Education in Uttar Pradesh and to prescribe courses therefor. **Amal Kishore SinghAmal Kishore SinghAmal Kishore SinghAmal Kishore SinghAmal Kishore SinghAmal Kishore SinghAmal Kishore SinghAmal Kishore SinghAmal Kishore Singh**

13. The institution in question is a recognised institution as per terms of the aforementioned Act, 1921. Section 16E of the Act, deals with the procedure for selection of teachers and heads of institutions. Section 16-F pertains to the selection committees for making the aforesaid appointments and Section 16-FF is in respect of minority institutions.

14. The power to make regulations for the purposes of carrying into the effect

the provisions of the Act, 1921 is as per terms of sub-section (1) of Section 15 of the Act. It is in exercise of the aforesaid powers that regulations have been framed and the subject matter of "appointment of heads of institutions and teachers" has been dealt with under Chapter II thereof, which is referable to the provisions contained under Sections 16-E, 16-F and 16-FF of the Act, 1921.

15. Regulation 1 under Chapter II of the Regulations stipulates that the minimum qualifications for appointment as heads of institution and teachers in any recognised institution, whether by direct recruitment or otherwise, shall be as given in Appendix A. The educational qualifications and training experience for appointment as head of the institution is provided under Entry 1 of Appendix A, and the same are being extracted below:-

Sl. No.	Name of the Post & Educational Training Experience	Age	Desirable Qualifications
1	2	3	4
1	Head of institution (1) trained M.A. or M.Sc. or M.Com or M.Sc. (Agri) or any equivalent Post-graduate or any other degree which is awarded by corporate body specified in above-mentioned para one and should have at least teaching experience of four years in classes 9-12 in any training institute or in any institution or university specified in above-mentioned para one or in any degree college affiliated to such University or institution, recognized by Board or any institution affiliated from Boards of other States or such other institutions whose examinations recognised by the Board, or should the condition is also that he/she should not be below 30 years' of age. or (2) First or second class post-graduate degree along with teaching experience of ten years in Intermediate classes of any recognized institutions or third class post-graduate degree with teaching experience of fifteen years, or (3) Trained post-graduate diploma-holder in science. The condition is that he has passed this diploma course in first or second class and have efficiently worked for 15 or 20 years respectively after passing such diploma course.	Minimum 30 years	

Notes: (1) Assistant teachers having at least second class postgraduate degree and specified teaching experience of ten years in Intermediate classes of a recognised institution may be exempted from training qualifications, (as per the provisions contained in the Act.)

(2) Teaching experience includes teaching prior to or after teaching or both.

(3) Higher classes means classes from 9 to 12 and experience of teaching these classes is admissible for the post of Head Master of Intermediate college.

16. The provisions of the Uttar Pradesh Secondary Education Service Selection Boards Act, 19827, which was enacted to establish Selection Boards for the selection of teachers in institutions recognised under the Act, 1921, may also be taken note of.

17. The powers and duties of the Uttar Pradesh Secondary Education Services Selection Board8 are prescribed under Section 9 of the said Act and it inter alia includes the power to prepare guidelines in respect of matters relating to the method of recruitment and promotion of teachers; to conduct examinations, where necessary, and hold interviews and make selection, of candidates for being appointed as teachers and to make recommendations regarding appointment of selected candidates.

18. Section 16 of the Act, 1982, which begins with a non-obstante clause, provides that notwithstanding anything to the contrary contained under the Intermediate Education Act, 1921 or the Regulations made thereunder but subject to certain specified provisions of the Act, every appointment of a teacher shall on or after the date of commencement of the U.P. Secondary Education Service Selection Board (Amendment) Act, 20019 be made by the management only on recommendation of the Board, and any appointment made in contravention thereof shall be void.

19. Section 18 of the Act, as substituted by the U.P. Act No.5 of 2001 w.e.f. 30.12.2000 provides for appointment of ad hoc Principals or Headmasters, and it runs as follows:-

"18. *Ad hoc* Principals or Headmasters.--(1) Where the management has notified a vacancy to the Board in accordance with sub-section (1) of Section 10 and the post of the Principal or the Headmaster actually remained vacant for more than two months, the Management shall fill such vacancy on purely *ad hoc* basis by promoting the senior most teacher, -

(a) in the lecturer's grade in respect of a vacancy in the post of the Principal;

(b) in the trained graduate's grade in respect of a vacancy in the post of the Headmaster.

(2) Where the Management fails to promote the senior most teacher under sub-section (1), the Inspector shall himself issue the order of promotion of such teacher and the teacher concerned shall be entitled to get his salary as the Principal or the Headmaster, as the case may be, from the date he joins such post in pursuance of such order of promotion.

(3) Where the teacher to whom the order of promotion is issued under sub-section (2) is unable to join the post of Principal or the Headmaster, as the case may be, due to any act or omission on the part of the Management, such teacher may submit his joining report to the Inspector, and shall thereupon be entitled to get his salary as the Principal or the Headmaster, as the case may be, from the date he submits the said report.

(4) Every appointment of an *ad hoc* Principal or Headmaster under subsection (1) shall cease to have effect from the date when the candidate recommended by the Board joins the post."

20. In terms of Section 32 of the Act, 1982 the provisions of the Act, 1921 and the Regulations made thereunder in so far as they are not inconsistent with the provisions of the Act, 1982 or the Rules or Regulations made thereunder are to continue to be in **Amal Kishore SinghAmal Kishore SinghAmal Kishore**

SinghAmal Kishore SinghAmal Kishore SinghAmal Kishore SinghAmal Kishore SinghAmal Kishore SinghAmal Kishore SinghAmal Kishore Singh force for the purposes of selection, appointment, promotion, dismissal, removal, termination or reduction in rank of a teacher.

21. In exercise of rule making power conferred under Section 35 of the Act, 1982, the U.P. Secondary Education Service Selection Board Rules, 1998, were made and Rule 5 thereof provides the academic qualifications for appointment to the post of teachers, and the same reads as under:-

"5. Academic qualifications.--A candidate for appointment to a post of teacher must possess qualifications specified in Regulation 1 of Chapter II of the Regulations made under the Intermediate Education Act, 1921."

22. As per terms of the aforesaid rule, in order to be appointed as a teacher, which term includes a Principal or a Headmaster, the qualifications would be as specified under Regulation 1 of Chapter II of the Regulations framed under the Intermediate Education Act, 1921. Thus, in order to be considered for appointment as an ad hoc Principal or Headmaster under Section 18 of the Act, 1982, the teacher concerned has to possess the qualifications which are prescribed for appointment as Principal or Headmaster under the Regulations, as provided under Entry 1 of Appendix A of Chapter II thereof.

23. The minimum educational qualifications/training experience for the purposes of appointment as head of an institution, as set out under Entry 1 of Appendix A of Chapter II, Regulation 1 of the Regulations under the Act, 1921, envisages three alternatives, which are as follows:-

(1) trained M.A. or M.Sc. or M.Com or M.Sc. (Agri) or any equivalent Post-graduate or any other degree which is awarded by corporate body specified in above-mentioned para one and should have at least teaching experience of four years in classes 9-12 in any training institute or in any institution or university specified in above-mentioned para one or in any degree college affiliated to such University or institution, recognized by Board or any institution affiliated from Boards of other States or such other institutions whose examinations recognised by the Board, or should the condition is also that he/she should not be below 30 years' of age; **or**

(2) first or second class post-graduate degree along with teaching experience of ten years in Intermediate classes of any recognized institutions or third class post-graduate degree with teaching experience of fifteen years, **or**

(3) trained post-graduate diploma-holder in science. The condition is that he has passed this diploma course in first or second class and have efficiently worked for 15 or 20 years respectively after passing such diploma course.

24. Notice may be had of the fact that the three sets of alternative eligibility criteria mentioned aforesaid under Entry 1 of Appendix A are connected by the word "or".

25. In logic, mathematics and in the context of statutory interpretation, the word "or" has generally been construed as being disjunctive i.e. a connective that marks alternatives. It has been used to

connect words, phrases or classes representing alternatives.

26. The meaning of the word "or" as a tool of statutory construction fell for consideration in the context of interpretation of Section 25-N (6) of the Industrial Disputes Act, 1947, in **Cable Corporation of India Limited Vs. Additional Commissioner of Labour and others10,** and it was held that the word "or" is normally disjunctive and its use in a statute manifests the legislative intent of the alternatives prescribed under law. The relevant observations made in the judgment are as follows :-

"11. The word "or" is normally disjunctive and "and" is normally conjunctive. But at times they are read as vice versa to give effect to the manifest intention of the legislature as disclosed from the context. As stated by **Scrutton, L.J.:**

"You do sometimes read "or' as "and' in a statute. But you do not do it unless you are obliged because "or' does not generally mean "and' and "and' does not generally mean "or'. And as pointed out by Lord Halsbury the reading of "or' as "and' is not to be resorted to, "unless some other part of the same statute or the clear intention of it required that to be done'. But if the literal reading of the words produces an unintelligible or absurd result "and' may be read for "or' and "or' for "and' even though the result of so modifying the words is less favourable to the subject provided that the intention of the legislature is otherwise quite clear. Conversely if reading of "and' as "or' produces grammatical distortion and makes no sense of the portion following "and', "or' cannot be read in place of "and'..."

12. In *Fakir Mohd. v. Sita Ram* [(2002) 1 SCC 741] it was held that the word "or" is normally disjunctive. The use of the word "or" in a statute manifests the legislative intent of the alternatives prescribed under law.

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14. A plain reading of the provision makes the position clear that two courses are open. Power is conferred on the appropriate Government to either on its own motion or on an application made, review its order or refer the matter to the Tribunal. Whether one or the other of the courses could be adopted depends on the fact of each case, the surrounding circumstances and several other relevant factors.

15. Under sub-section (6) of Section 25-N it is open to the appropriate Government or the specified authority to review its order granting or refusing to grant permission under sub-section (3).

16. *"24.* When the words of a statute are clear, plain or unambiguous i.e. they are reasonably susceptible to only one meaning, courts are bound to give effect to that meaning irrespective of consequences. (See *State of Jharkhand v.Govind Singh* [(2005) 10 SCC 437 and *Nathi Devi v. Radha Devi Gupta* [(2005) 2 SCC 271] .)

25. In *Sussex Peerage case* [(1844) 11 Cl & Fin 85 : 8 ER 1034] , Cl & Fin at p. 143 Tindal, C.J. observed as follows: (ER p. 1057)

"If the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense. The words themselves alone do, in such case, best declare the intention of the lawgiver.'

26. When the language is plain and unambiguous and admits of only one meaning no question of construction of a statute arises, for the Act speaks for itself.

27. As observed in *Nathi Devi case* [(2005) 2 SCC 271] if the words used are capable of one construction only, then it would not be open to the courts to adopt any other hypothetical construction on the

ground that such construction is more consistent with the alleged object and policy of the Act. The spirit of the law may well be an elusive and unsafe guide and the supposed spirit can certainly be not given effect to in opposition to the plain language of the sections of the Act.[Ed.: As observed in *Orient Paper & Industries Ltd. v. State of M.P.*, (2006) 12 SCC 468.]"

27. In a similar set of facts, as in the present case, where two sets of eligibility criteria were prescribed for admission to a University course and they were connected by the word "or", the Supreme Court in the case of **Guru Nanak Dev University vs. Sanjay Kumar Katwal and another11,** held that the use of "or" between two qualifications conveyed a disjunctive sense indicating alternatives and possession of either of the qualifications would make a candidate eligible. It was reiterated that the word "or" is normally used in the disjunctive sense unless the context warrants otherwise. The relevant extract from the judgment is as follows :-

"9. The prescription of eligibility criteria is very clear. It requires a Bachelor's degree with not less than 45% marks or a Master's degree. The University's contention that the candidate must have a Bachelor's degree and only if his marks are less than 45% in the Bachelor's degree course, was the Master's degree to be considered, would mean that the word "or" should be substituted by the words "in the event of the candidate not having 45% marks in the Bachelor's degree". Reading such words into the provision is impermissible. The word "or" is disjunctive. No doubt, in some exceptional circumstances, the word "or" has been read as conjunctive as meaning "and", where the context warranted it. But the word "or" cannot obviously be read as referring to a conditional alternative, when such condition is not specified. In view of the provision relating to eligibility being unambiguous and using the word "or", it is clear that a Master's degree without a Bachelor's degree will satisfy the eligibility requirement."

28. The interpretation of the word "or" in the context of an exemption notification issued under the U.P. Trade Tax Act, 1948 came up for consideration in the case of **G.P. Ceramics (P) Ltd. Vs. Commissioner, Trade Tax, Uttar Pradesh12,** and it was held that the three contingencies provided for under the notification which were connected by the word "or", were disjunctive in nature. It was stated thus :-

"24. The eligibility criteria is contained in the notification. Sub-clause (ii) of Clause 2-B of the notification envisages three contingencies i.e. (i) the unit is established on land or building or both owned by the dealer; or (ii) the unit is established on land or building or both taken on lease for a period of not less than 15 years; or (iii) the unit is established on land or building or both allotted to such unit by the State or the Central Government or any government company or any corporation owned or controlled by the Central or the State Government.

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27. The eligibility criteria are laid down in the notification, which, as noticed hereinbefore, provide for three contingencies. They are disjunctive in nature and not conjunctive..."

29. In this regard, we may also refer to the observations made by **Lord Halsbury** in **Mersey Docks and Harbour**

Board vs. Henderson13, which are as follows :-

".....I know no authority for such a proceeding unless the context makes the necessary meaning of "or" "and" as in some instances it does; but I believe it is wholly unexampled so to read it when doing so will upon one construction entirely alter the meaning of the sentence unless some other part of the same statute or the clear intention of it requires that to be done...."

30. In the instant case, the use of the word "or" as a connective between the three sets of eligibility criteria is indicative of the disjunctive sense marking the three alternatives. The three sets of eligibility criteria under Entry 1 of Appendix A have thus been prescribed, alternatively, as minimum qualifications for being appointed as head of the institution. Accordingly, in terms of clause (2) thereof a person having a first or second class postgraduate degree alongwith teaching experience of ten years in Intermediate classes of any recognised institution or having a third class postgraduate degree with teaching experience of fifteen years, would be held to be eligible.

31. The facts of the present case, as reflected from the order dated 16.05.2013 passed by the DIOS, which was under challenge in the writ petition, indicate that the appellant herein possessed a second class post gratuate degree (M.A. in Sanskrit), and had been granted the Lecturer's pay scale with effect from 17.02.2001. She also had a teaching experience of ten years in intermediate classes as on the date of occurrence of vacancy against the post of Principal on 30.06.2009. In addition, the appellant also possessed the training qualifications of C.P.Ed and D.P.Ed.

32. In respect of the petitioner the order dated 16.5.2013 records that at the time of occurrence of vacancy against the post of Principal in the Institution the petitioner in addition to possessing the educational qualification of M.A. (Economics) in third class, had a teaching experience of only six years in intermediate classes.

33. In view of the aforementioned position, the DIOS, in terms of the order 16.5.2013, held that the appellant having posssessed a second class post graduate degree along with teaching experience of ten years in intermediate classes at the institution in question, as on the date of occurrence of vacancy on the post of Principal on 30.6.2009, was qualified for the post of Principal. The order also records that since the petitioner had a post graduate degree in third class with teaching experience of only six years as on the aforesaid date of occurrence of vacancy, she did not possess the necessary eligibility qualification for the post of Principal.

34. The principal ground on which the learned Single Judge has non-suited the claim of the appellant to be appointed as officiating Principal is by placing reliance upon the judgment of the Full Bench in the case of **Amal Kishore Singh** referred to above. The learned Single Judge by placing reliance upon the judgment has held that since the appellant only possessed a diploma in physical education she was not having the requisite training qualification in order to make her eligible for the post of Principal.

35. In order to appreciate the import of the judgment rendered in the case of **Amal Kishore Singh** (supra), it may be apt to take note of the questions referred for consideration by the Full Bench, which are as follows:-

"(i) Whether training qualification B.P.Ed. is equivalent qualification to that of B.Ed., L.T., B.T./C.T. Etc. so as to be covered by the phrase "equivalent qualification" of training degree/diploma as contained by Clause-2 of Appendix-A of Chapter-II of the Regulations framed under the Intermediate Education Act, 1921?

(ii) Whether a teacher possessed of a degree of Post Graduate and training qualification of B.P.Ed. from an institute duly recognized by National Council for Teachers Education is qualified for being considered for appointment as Principal/Headmaster of a recognized High School/Intermediate institution?

(iii) Whether the law laid down by the Division Bench in the case of Vindhyachal Yadav (Supra) is the correct law or not."

36. The Full Bench in the case of **Amal Kishore Singh** thus principally considered the question as to whether a B.P.Ed. degree which is a post graduate training qualification, would entitle a person to hold the post of Principal of an Intermediate college. The aforementioned question was answered by Full Bench by stating that a B.P.Ed. degree holder is eligible to be appointed as Headmaster of a High School, but not as Principal of an Intermediate college. The relevant extract from the judgment in the case of **Amal Kishore Singh,** answering the questions referred, is as follows :-

"47. We, thus, answer question (i) in affirmative and question (iii) by holding that Vindhyachal Yadav does not lay down the correct law. However, question (ii) has to be answered, subject to certain riders. A B.P.Ed. degree being a post graduate training qualification, would entitle a person to hold post of Headmaster of a recognised High School but not that of Principal of an Intermediate college. The reason is that under Regulations, 2001 as well as under Minimum Qualification Regulations, 2014 framed by NCTE, B.P.Ed. is recognised as eligibility qualification for teaching Classes IX - X (Secondary/ High School) but not for Classes XI - XII (Senior Secondary/Intermediate). For teaching Intermediate classes, the person should possess M.P.Ed. degree of at least two years duration from any National Council for Teacher Education recognised institution. These regulations do not prescribe any separate qualification for Head of institution and thus the qualification prescribed for a teacher of Intermediate classes (Senior-Secondary) would also apply to Head of such an institution. We have already held above that the qualifications prescribed by NCTE would be binding on the State, therefore, the qualifications prescribed by Minimum Qualification Regulations, 2014 have to be read alongwith Appendix-A and thus, a teacher possessing B.P.Ed. degree, would not be eligible to hold post of Principal of an Intermediate College.

48. We, thus, reply to question (ii) by holding that a teacher in physical education having B.P.Ed. degree is eligible to be appointed as Headmaster of a High School, but not as Principal of an Intermediate college."

37. The principal question which fell for consideration before the Full Bench in the case of **Amal Kishore Singh** was thus as to whether a person holding a B.P.Ed. Degree would be held to possess the necessary training qualification for being appointed to the post of Principal in a

recognised intermediate college, and the said question was answered by holding that a teacher having B.P.Ed. degree is eligible to be appointed as Headmaster of a High School, but not as Principal of an Intermediate college.

38. As we have already taken note of, Entry 1 under Appendix A of Chapter II of the Regulations, prescribes three alternative sets of qualifications for being eligible for appointment as Head of the institution. The requirement of possessing a training qualification is prescribed under clause (1) and clause (3) under Entry 1, whereas there is no such prescription of a training qualification under clause (2) thereof. In terms of clause (2), a person having a first or second class post-graduate degree along with teaching experience of ten years in Intermediate classes of any recognized institution or a third class post-graduate degree with teaching experience of fifteen years, has been held to be eligible. The qualifications prescribed in terms of clause (2) being one of the alternative sets of eligibility criteria which specifically omits to mention any training qualification, a candidate possessing the qualifications thereunder would not require to possess a training qualification which is required under the alternative sets of criteria as per clause (1) and clause (3) of the aforesaid Entry.

39. The question under consideration in the case of **Amal Kishore Singh** being with regard to the training qualifications as prescribed under clause (1) and the interpretation thereof, the law laid down in the aforesaid judgment, would not be applicable to the facts of the present case, inasmuch as the claim of the appellant herein rests on the other alternative eligibility criterion as prescribed under clause (2) whereunder there is no requirement of any training qualification and a second class post graduate degree along with teaching experience of ten years in intermediate classes in any recognised institution, alone is sufficient for the purpose of being eligible for the post of Principal in terms thereof.

40. The law with regard to applicability of the doctrine of precedents is well settled. It has been consistently held that a judgment is only an authority for what it actually decides and not what logically follows from the various observations made in the judgment. In order to fully understand and appreciate the binding force of a decision, it is always necessary to see what were the facts of the case in which the decision was given and what was the point decided.

41. In the case of **The State of Orissa Vs. Sudhansu Sekhar Misra and Ors.14** referring to the observations made by **Earl of Halsbury LC** in **Quinn Vs. Leathem15,** it was stated thus :-

"12...A decision is only an authority for what it actually decides. What is of the essence in a decision is its ratio and not every observation found therein nor what logically follows from the various observations made in it. On this topic this is what Earl of Halsbury L.C. said in Quinn v. Leathem, 1901 AC 495.

"Now before discussing the case of Allen v. Flood, (1898) AC 1 and what was decided therein, there are two observations of a general character which I wish to make, and one is to repeat what I have very often said before, that every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the

expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. The other is that a case is only an authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it. Such a mode of reasoning assumes that the law is necessarily a logical Code, whereas every lawyer must acknowledge that the law is not always logical at all."

42. A similar view was taken in **Union of India vs. Amrit Lal Manchandra and others16**, and after referring to the decisions in **London Graving Dock Co. Ltd. Vs. Horton17, Home Office Vs. Dorcet Yacht Co.18** and **Herrington Vs. British Railways Board19,** it was stated that observations of Court must be read in the context in which they appear and that one additional or different fact may make a world of difference.

"15...Courts should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed.

Observations of Courts are neither to be read as Euclid's theorems nor as provisions of the statute and that too taken out of their context. These observations must be read in the context in which they appear to have been stated. Judgments of Courts are not to be construed as statutes. To interpret words, phrases and provisions of a statute, it may become necessary for Judges to embark into lengthy discussions but the discussion is meant to explain and not to define. Judges interpret statutes, they do not interpret judgments. They interpret words of statutes; their words are not to be interpreted as statutes. In London Graving Pock Co. Ltd. v. Horton (1951 AC 737 at p. 761), Lord Mac Dermot observed:

"The matter cannot, of course, be settled merely by treating the ipsissima verba of Willes, J. as though they were part of an Act of Parliament and applying the rules of interpretation appropriate thereto. This is not to detract from the great weight to be given to the language actually used by that most distinguished Judges."

16. In Home Office v. Dorset Yacht Co.(1970 (2) All ER 294), Lord Reid said, "Lord Atkin's speech....is not to be treated as if it was a statute definition. It will require qualification in new circumstances." Megarry, J. in (1971) 1 WLR 1062 observed:

"One must not, of course, construe even a reserved judgment of even Russell L.J. as if it were an Act of Parliament." And, in Herrington v. British Railways Board (1972 (2) WLR 537) Lord Morris said:

"There is always peril in treating the words of a speech or judgment as though they are words in a legislative enactment, and it is to be remembered that judicial utterances made in the setting of the facts of a particular case."

17. Circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two cases. Disposal of cases by blindly placing reliance on a decision is not proper.

18. The following words of Lord Denning in the matter of applying precedents have become locus classicus:

"Each case depends on its own facts and a close similarity between one case and another is not enough because

even a single significant detail may alter the entire aspect, in deciding such cases, one should avid the temptation to decide cases (as said by Cordozo) by matching the colour of one case against the colour of another. To decide therefore, on which side of the line a case falls, the broad resemblance to another case is not at all decisive."

xxx

"Precedent should be followed only so far as it marks the path of justice, but you must cut the dead wood and trim off the side branches else you will find yourself lost in thickets and branches. My plea is to keep the path to justice clear of obstructions which could impede it."

43. The judgment in the case of **Amal Kishore Singh** (supra) being on a point of law, which does not arise in the fact situation of the present case, reliance placed on the said decision was therefore misplaced and the judgment of the writ court cannot be sustained for the said reason.

44. In the facts of the present case, since the appellant possessed the requisite eligibility criteria as per the relevant Regulations, as on the date of occurrence of vacancy on the post of Principal in the institution as against the writ petitioner who was not eligible on the said date, the order dated 16.05.2013 passed by the DIOS, which was under challenge in the writ petition, could not be held to be erroneous so as to warrant interference.

45. The Special Appeal is, accordingly, allowed and the judgment dated 19.12.2019 passed in Writ-A No.48219 of 2013 is set aside.

46. The writ petition stands dismissed.

(2020)02ILR A1612

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 27.01.2020

BEFORE
THE HON'BLE BISWANATH SOMADDER, J.
THE HON'BLE DR. YOGENDRA KUMAR SRIVASTAVA, J.

Special Appeal No. 64 of 2020

Dr. Smt. Abha Sharma ...Appellant
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Appellant:
Sri Radhakant Ojha, Sri Ram Gopal Tripathi

Counsel for the Respondents:
Ms. Akansha Sharma, Sri M.N. Singh, Sri Pankaj Misra

A. Constitution of India – Article 226 - confers very wide powers in the matter of issuing writs on the High Court - remedy of writ - absolutely discretionary in character - non-entertainment of petitions under writ jurisdiction by the High Court when an efficacious alternative remedy is available - rule of self-imposed limitation - rule of policy, convenience and discretion rather than a rule of law - existence of an alternative remedy does not per se affect, curtail or impinge upon the jurisdiction of the High Court under Article 226 of the Constitution of India - can legitimately be invoked by an aggrieved party in a fit case - where Court comes to the conclusion that there has been a breach of the principles of natural justice or the procedure required for decision has not been adopted. (Para-6,7)

The Principal of the institution in question (i.e. Agra College, Agra) decided the question of seniority and the private respondent never invoked the remedy of preferring a statutory

appeal Section 68 of State Universities Act,1973 and under the provisions of Clause 17.14 of the First Statutes of Dr. Bhim Rao Ambedkar University, Agra - writ petition dismissed purely on the ground of alternative remedy.(Para – 1,4)

Held:- The writ petition ought to have been heard upon exchange of affidavits and only after consideration of what has been stated by the respective parties in their affidavits a final decision ought to have been taken in the matter. (Para 9)

Impugned judgment and order set aside. (E-7)

List of cases cited:-

1. Farhat Hussain Azad vs. State of U.P. and Ors. (2005) 1 UPLBEC 474

2. Rakesh Kumar Pandey vs. State of U.P. & Anr. Special Appeal No. 825 of 2004

3. Commissioner of Income Tax and Ors. Vs. Chhabil Dass Agarwal , (2014) 1 SCC 603

4. Maharashtra Chess Association Vs. Union of India and Others , (2019) SCC Online SC 932

if the Court comes to the conclusion that there has been a breach of the principles of natural justice or the procedure required for decision has not been adopted

(Delivered by Hon'ble Biswanath Somadder, J. & Hon'ble Dr. Yogendra Kumar Srivastava, J.)

1. The Special Appeal has been preferred in respect of a judgment and order dated 7th January, 2020, passed by a learned Single Judge in Writ - A No.- 19882 of 2019 (Dr. Smt. Abha Sharma vs. State of U.P. and 5 others). By the impugned judgement and order, the learned Single Judge was pleased to dismiss the writ petition purely on the ground of alternative remedy.

2. This Special Appeal has been preferred by the writ petitioner, namely, Dr. Smt. Abha Sharma.

3. For convenience, the impugned judgment and order is reproduced hereinbelow in its entirety:-

"Heard Sri R.K. Ojha, learned Senior Advocate assisted by Sri K.B. Dixit, counsel for the petitioner and Sri M.N. Singh, learned counsel for respondent Nos.2 and 3.

The petitioner by means of the present writ petition has made a prayer to quash the impugned order dated 27.11.2019 passed by the Vice Chancellor determining the seniority between the petitioner and respondent no. 6.

A preliminary objection has been raised by counsel for the respondents that the statutory alternate remedy of reference under Section 68 of State Universities Act is available to the petitioner, therefore, the writ petition is not maintainable.

It is contended by Sri R.K. Ojha, learned Senior Advocate for the petitioner that the petitioner has been senior to respondent no. 6 since 1996 and no objection has been raised by respondents in the seniority list published subsequent to 1996 by the respondents. Thus, the submission is that long standing seniority cannot be disturbed in view of the settled principle of law. In this regard, learned counsel for the petitioner has placed reliance on Full Bench judgment of this Court passed in the case of **Farhat Hussain Azad vs. State of U.P. and Ors. reported in (2005) 1 UPLBEC 474 and Division Bench judgment of this Court passed in Special Appeal No. 825 of 2004 (Rakesh Kumar Pandey vs. State of U.P. & Anr.).**

Be that as it may, the petitioner has statutory remedy of reference under Section 68 of the State Universities Act, therefore, this Court is not inclined to interfere in the matter at this stage as the contention advanced by counsel for the petitioner can very well be seen by the Chancellor under Section 68 of the State Universities Act.

Thus, the writ petition is, accordingly, **dismissed** on the ground of alternate remedy."

4. In the facts of the instant case, we notice that the Principal of the institution in question (i.e. Agra College, Agra) decided the question of seniority as far back as on 12th July, 2016, and the private respondent no.6, namely, Dr. C.K. Gautam, never invoked the remedy of preferring a statutory appeal under the provisions of Clause 17.14 of the First Statutes of Dr. Bhim Rao Ambedkar University, Agra. For ease of reference, Clause 17.14 of the aforementioned First Statutes is being extracted below :-

"17.14 All disputes regarding seniority of teachers (other than the Principal), shall be decided by the Principal of the College who shall give reasons for the decision. Any teacher aggrieved by the decision of the Principal may prefer an appeal to the Vice-Chancellor within 60 days from the date of communication of such decision to the teacher concerned. If the Vice-Chancellor disagrees from the Principal, he shall give reasons for such disagreement."

5. In such facts and circumstances to simply relegate the appellant / writ petitioner to avail the statutory remedy of a reference under Section 68 of the Uttar Pradesh State Universities Act, 1973, was not proper.

6. The rule of exhaustion of statutory remedies before a writ is granted has consistently been held to be a rule of self imposed limitation, a rule of policy and discretion rather than a rule of law. The Courts, therefore, in appropriate cases, may issue appropriate writs, notwithstanding that the statutory remedies have not been exhausted. The existence of an alternative remedy does not per se affect, curtail or impinge upon the jurisdiction of the High Court under Article 226 of the Constitution of India, which can legitimately be invoked by an aggrieved party in a fit case.

7. The legal position in this regard has been succinctly summarized in the judgment in the case of **Commissioner of Income Tax and Ors. Vs. Chhabil Dass Agarwal1,** wherein it was stated as follows :-

"11....It is settled law that non-entertainment of petitions under writ jurisdiction by the High Court when an efficacious alternative remedy is available is a rule of self-imposed limitation. It is essentially a rule of policy, convenience and discretion rather than a rule of law. Undoubtedly, it is within the discretion of the High Court to grant relief under Article 226 despite the existence of an alternative remedy...*(See State of U.P. v. Mohd. Nooh AIR* 1958 SC 86, *Titaghur Paper Mills Co. Ltd. v. State of Orissa* (1983) 2 SCC 433, *Harbanslal Sahnia v. Indian Oil Corpn. Ltd.* (2003)2 SCC 107 *and State of H.P. v. Gujarat Ambuja Cement Ltd.* (2005) 6 SCC 499)

12. The Constitution Benches of this Court in K.S. Rashid and Son v. Income Tax Investigation Commission AIR

1954 SC 207, Sangram Singh v. Election Tribunal AIR 1955 SC 425, Union of India v. T.R. Varma AIR 1957 SC 882, State of U.P. v. Mohd. Nooh AIR 1958 SC 86 and K.S. Venkataraman and Co. (P) Ltd. v. State of Madras AIR 1966 SC 1089 have held that though Article 226 confers very wide powers in the matter of issuing writs on the High Court, the remedy of writ is absolutely discretionary in character. If the High Court is satisfied that the aggrieved party can have an adequate or suitable relief elsewhere, it can refuse to exercise its jurisdiction. The Court, in extraordinary circumstances, may exercise the power if it comes to the conclusion that there has been a breach of the principles of natural justice or the procedure required for decision has not been adopted.(See N.T. Veluswami Thevar v. G. Raja Nainar AIR 1959 SC 422, *Municipal Council, Khurai v. Kamal Kumar AIR* 1965 SC 1321, *Siliguri Municipality v. Amalendu Das* (1984) 2 SCC 436, *S.T. Muthusami v. K. Natarajan (1988) 1 SCC 572, Rajasthan SRTC v. Krishna Kant* (1995) 5 SCC 75, *Kerala SEB v. Kurien E. Kalathil* (2000) 6 SCC 293, *A. Venkatasubbiah Naidu v. S. Chellappan* (2000) 7 SCC 695, *L.L. Sudhakar Reddy v. State of A.P.* (2001) 6 SCC 634, *Shri Sant Sadguru Janardan Swami (Moingiri Maharaj) Sahakari Dugdha Utpadak Sanstha v. State of Maharashtra (2001) 8 SCC 509, Pratap Singh v. State of Haryana* (2002) 7 SCC 484 *and GKN Driveshafts (India) Ltd. v. ITO* (2003) 1 SCC 72)."

8. The aforementioned view that the existence of an alternative remedy does not create an absolute bar on the exercise of writ jurisdiction by a High Court has been reiterated in a recent decision in the case of **Maharashtra Chess Association Vs. Union of India and Others2,** in the following words :-

"22...The existence of an alternate remedy, whether adequate or not, does not alter the fundamentally discretionary nature of the High Court's writ jurisdiction and therefore does not create an absolute legal bar on the exercise of the writ jurisdiction by a High Court. The decision whether or not to entertain an action under its writ jurisdiction remains a decision to be taken by the High Court on an examination of the facts and circumstances of a particular case.

23. This understanding has been laid down in several decisions of this Court. In Uttar Pradesh *State Spinning Co. Limited v. R S Pandey (2005) 8 SCC 264* this Court held:

"11. Except for a period when Article 226 was amended by the Constitution (Forty-Second Amendment) Act, 1976, the power relating to alternative remedy has been considered to be a rule of self imposed limitation. It is essentially a rule of policy, convenience and discretion and never a rule of law. Despite the existence of an alternative remedy it is within the jurisdiction or discretion of the High Court to grant relief under Article 226 of the Constitution..."

24. The principle that the writ jurisdiction of a High Court can be exercised where no adequate alternative remedies exist can be traced even further back to the decision of the Constitution Bench of this Court in State of *Uttar Pradesh v. Mohammad Nooh 1958 SCR 595* where Justice Vivian Bose observed:

"10. In the next place it must be borne in mind that there is no rule, with regard to certiorari as there is with mandamus, that it will lie only where there is no other equally effective remedy. It is

well established that, provided the requisite grounds exist, certiorari will lie although a right of appeal has been conferred by statute. (Halsbury's Laws of England, 3rd Ed., Vol. 11, p. 130 and the cases cited there). The fact that the aggrieved party has another and adequate remedy may be taken into consideration by the superior court in arriving at a conclusion as to whether it should, in exercise of its discretion, issue a writ of certiorari to quash the proceedings and decisions of inferior courts subordinate to it and ordinarily the superior court will decline to interfere until the aggrieved party has exhausted his other statutory remedies, if any. But this rule requiring the exhaustion of statutory remedies before the writ will be granted is a rule of policy, convenience and discretion rather than a rule of law and instances are numerous where a writ of certiorari has been issued in spite of the fact that the aggrieved party had other adequate legal remedies."

25. The mere existence of alternate forums where the aggrieved party may secure relief does not create a legal bar on a High Court to exercise its writ jurisdiction. It is a factor to be taken into consideration by the High Court amongst several factors..."

9. Having regard to the facts of the case, and in particular the fact that one of the principal grounds sought to be raised to assail the order impugned in the writ petition is that the statutory authority has not acted in accordance with the provisions of the relevant statutory provisions, this Court is of the view that the writ petition ought to have been heard upon exchange of affidavits and only after consideration of what has been stated by the respective parties in their affidavits a final decision ought to have been taken in the matter.

10. As such, we are of the view that the impugned judgment and order cannot be sustained and is liable to be set aside and is accordingly set aside.

11. The writ petition, being Writ - A No.-19882 of 2019 (Dr. Smt. Abha Sharma vs. State of U.P. and 5 others) shall be heard finally upon exchange of affidavits.

12. Counter affidavit to be filed within four weeks. Rejoinder thereto, if any, be filed within two weeks therefrom.

13. List this matter on 16.3.2020 before the learned Bench having appropriate determination.

(2020)02ILR A1616

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 03.02.2020

BEFORE
THE HON'BLE BISWANATH SOMADDER, J.
THE HON'BLE DR. YOGENDRA KUMAR SRIVASTAVA, J.

Special Appeal No. 87 of 2020

C/M Bharti Inter College, Dhatari, Firozabad & Anr. ...Appellant
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Appellant:
Sri Yogesh Kumar Saxena

Counsel for the Respondents:
Sri Mata Prasad, Sri Anil Bhushan, Sri Pratik Srivastava

A. Service Law– Promotion - Intermediate Education Act, 1921: Section 32; Uttar Pradesh Secondary Education Services Selection Board Act, 1982: Sections 2(i), 12, 32, 35; Uttar

Pradesh Secondary Education Services Selection Board Rules, 1998: Rule 14 – In order to be considered for promotion for the Lecturer grade, the teacher concerned is to possess the qualifications prescribed for the post and should have completed five years continuous regular service as such on the first day of the year of recruitment. In the present case, the order impugned was modified to the extent that apart from other facts, the question regarding eligibility for the promotional post was also left open for DIOS to examine, before submitting the papers to Regional Level Committee. (Para 13, 16)

Special Appeal disposed of. (E-4)

Special appeal against the judgment and orders dated 17.01.2020, passed by High court of Allahabad.

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

1. Heard Sri Yogesh Kumar Saxena, learned counsel for the appellants, Sri Mata Prasad, learned Standing Counsel for the State-respondents and Sri Anil Bhushan, learned Senior Advocate assisted by Sri Pratik Srivastava, learned counsel appearing for the fourth respondent.

2. The present intra-court appeal has been filed against the order dated 17.01.2020 passed in Writ-A No.875 of 2020 (C/M Bharti Inter College, Firozabad and another Vs. State of U.P. and 3 others).

3. Before the writ court, the order dated 27.12.2019 passed by the Joint Director of Education, Agra Division, Agra had been challenged whereunder a direction had been issued to the Committee of Management of the institution in question (the appellant herein) to forward the requisite papers to the District Inspector of Schools, Firozabad (DIOS) with a further stipulation that the papers which were submitted would be examined by the Inspector and transmitted to the Regional Level Committee for consideration of the claim of the fourth respondent for promotion.

4. The aforementioned order passed by the Joint Director of Education was pursuant to directions issued in an earlier judgment and order dated 08.10.2018 passed in Writ-A No.21639 of 2018 (Mahesh Chandra Vs. State of U.P. and 3 others) and after due consideration of the objections of the Committee of Management.

5. The arguments sought to be raised before the learned Single Judge that the fourth respondent was not possessing M.A. Degree as on the date of occurrence of vacancy i.e. 01.07.2008, was repelled for the reason that no such contention had been raised by the Committee of Management in its objections dated 11.12.2019 filed before the Joint Director of Education when the matter was being considered by the said authority although detailed written objections had been filed.

6. Learned counsel appearing for the appellants has, however, contended that in order to be considered for promotion the teacher concerned has to possess the necessary eligibility as on the first day of the year of recruitment, which in the present case is 01.07.2008, and according to him, the fourth respondent does not fulfil the eligibility criteria. As such, the direction to forward his papers to the Educational Authorities, is legally unsustainable.

7. In order to appreciate the controversy, the necessary statutory framework for recruitment by promotion

in an institution recognised under the Intermediate Education Act, 1921 may be adverted to.

8. The Uttar Pradesh Secondary Education Services Selection Board Act, 1982 was enacted to provide for establishment of a Secondary Education Service Selection Board for the selection of teachers in institutions recognised under the Intermediate Education Act, 1921.

9. Section 2(l) defines the 'year of recruitment' as follows:-

"(l) 'Year of recruitment' means a period of twelve months commencing from first day of July of a calendar year".

10. Chapter III of the Act deals with the procedure for selection by promotion. Section 12, which is a part of Chapter III, is in the following terms:-

"12. Procedure of selection by promotion.--(1) For each region, there shall be a Selection Committee, for making selection of candidates for promotion to the post of a teacher, comprising

(i) Regional Joint Director of Education: -- Chairman

(ii) Senior most Principal of Government

Inter College in the region: -- Member

(iii) Concerned District Inspector of Schools -- Member/ Secretary

(2) The procedure of selection of candidates for promotion to the post of a teacher shall be such as may be prescribed."

11. Section 32 stipulates that the provisions contained in the Intermediate Education Act, 1921 and its regulations would continue to be in force insofar as they are not inconsistent with the provisions of the Act or Rules or Regulations made under it, *inter alia*, for the purpose of selection, appointment and promotion in the rank of a teacher.

12. In exercise of the Rule making powers under section 35 of the Act, 1982, the Uttar Pradesh Secondary Education Services Selection Board Rule, 1998 were made. The procedure for recruitment by promotion is provided for under Rule 14 of the aforementioned Rules, and the same is as follows:-

"14. Procedure for recruitment by promotion.--(1) Where any vacancy is to be filled by promotion, all teachers working in Trained graduates grade or Certificate of Teaching grade, if any, who possess the qualifications prescribed for the post and have completed five years continuous regular service as such on the first day of the year of recruitment shall be considered for promotion to the Lecturers grade or the Trained graduates grade, as the case may be, without their having applied for the same.

Note.--For the purposes of this sub-rule, regular service rendered in any other recognized institution shall be counted for eligibility, unless interrupted by removal, dismissal or reduction to a lower post.

(2) The criterion for promotion shall be seniority subject to the rejection of unfit.

(3) The Management shall prepare a list of teachers referred to in sub-rule (1), and forward it to the Inspector with a copy of seniority list, service records, including the character rolls, and a

statement in the *pro forma* given in Appendix 'A'.

(4) Within three weeks of the receipt of the list from the Management under sub-rule (3), the Inspector shall verify the facts from the record of his office and forward the list to the Joint Director.

(5) The Joint Director shall consider the cases of the candidates on the basis of the records referred to in sub-rule (3) and may call such additional information as it may consider necessary. The Joint Director shall place the records before the Selection Committee referred to in sub-section (1) of Section 12 and after the Committee's recommendation, shall forward the panel of selected candidates within one month to the Inspector with a copy thereof to the Management,

(6) Within ten days of the receipt of the panel from the Joint Director under sub-rule (5), the Inspector shall send the name of the selected candidates to the Management of the institution which has notified the vacancy and the Management shall accordingly on authorization under its resolution issue the appointment order in the *pro forma* given in Appendix 'F' to the such candidate."

13. As per the aforementioned procedure prescribed under Rule 14, in order to be considered for promotion to the Lecturer grade, the teacher concerned is to possess the qualifications prescribed for the post and should have completed five years continuous regular service as such on the first day of the year of recruitment.

14. Learned Senior Advocate has pointed out that as per the order dated 27.12.2019, which was impugned in the writ petition, the direction is to the Committee of Management to forward the papers to the DIOS with a further stipulation that the Inspector would examine the papers as per the relevant Rules and thereafter forward the same to the Regional Level Committee.

15. Learned Senior Advocate submits that in terms of the directions under the order impugned, it would be open to the Inspector to examine the proposal sent by the Committee of Management, including the fulfilment of the eligibility criteria by the fourth respondent, before the papers are submitted to the Regional Level Committee for further consideration.

16. Having regard to the facts of the case and as agreed to by the counsel for the parties, the order dated 17.01.2020 passed by the learned Single Judge is modified by providing that the appellant - Committee of Management would forward the necessary papers with regard to the claim of the petitioner for promotion on the post of Lecturer in Hindi at the institution in question along with the relevant records and the DIOS would thereafter verify the facts including the question of eligibility of the fourth respondent for the promotional post and accordingly transmit the papers to the Regional Level Committee to proceed in accordance with law.

17. The order of the writ court is modified to the extent indicated above.

18. The special appeal stands disposed of accordingly.

(2020)02ILR A1620

APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 14.02.2020

BEFORE

THE HON'BLE ANIL KUMAR, J.
THE HON'BLE SAURABH LAVANIA, J.

Special Appeal No. 263 of 2014

The Institute of Chartered Accountants of India ...Appellant
Versus
Ashutosh Nigam & Anr. ...Respondents

Counsel for the Appellant:
Amit Jaiswal

Counsel for the Respondents:
A.S.G., Ajay Kishor Pandey, Satish Chandra Rai, Sudeep Kumar

A. Civil Law-Education – Re-evaluation of answer sheet - Chartered Accountants Act, 1949; Chartered Accountant Regulation, 1988: Regulation 39(7) – The Regulation 39(7) only permits the Council/Institute to amend the result in any case, where it is found to be affected by error, malpractice, fraud, improper conduct or other matter, of whatever nature. The Court in absence of any provision, neither can direct for re-evaluation, nor can act as an expert and evaluate the answers and direct to award numbers as per its opinion. (Para 17, 19)

Special Appeal allowed. (E-4)

Precedent followed:

1. Board of Secondary Education Vs. Pravas Ranjan Panda and another, (2004) 13 SCC 383 (Para 5)

2. Himachal Pradesh Public Service Commission Vs. Mukesh Thakur and another, (2010) 6 SCC 759 (Para 5)

3. Maharashtra State Board of Secondary and Higher Secondary Education and another Vs. Paritosh Bhupesh Kurmarsheth, AIR 1984 SC 1543; (1984) 4 SCC 27 (Para 5, 15)

4. The Secretary, All India Pre-Medical / Pre-Dental Examination, C.B.S.C. and others Vs. Khushboo Shrivastava and others, (2014) 14 SCC 523 (Para 16)

5. Ran Vijay Singh and others Vs. State of U.P. and others, 2017 SCC Online SC 1448 (Para 18)

Precedent distinguished:

1. Manish Ujwal and others Vs. Maharishi Dayanand Saraswati University and others, (2005) 13 SCC 144 (Para 9)

2. High Court of Tripura through the Registrar General Vs. Tirtha Sarathi Mukherjee and others, 2019 SCC Online SC 139 (Para 10)

3. Saumitra Gigodia Vs. Union of India and others, 2018 (2) ALJ 98 (Para 11)

Present petition challenges judgment and order dated 28.04.2013, passed by learned Single Judge in WP No. 5887(MS) of 2013.

(Delivered by Hon'ble Anil Kumar, J. & Hon'ble Saurabh Lavania, J.)

1. Heard Sri Amit Jaiswal, learned counsel for the appellant and Sri Sudeep Kumar, learned counsel for the opposite party no.1 and Sri Ajay Kishore Pandey, learned counsel for opposite party no.2.

2. Facts, in brief, of the present case are that Institute of Chartered Accountants of India (herein after referred as "Institute') is a statutory body created by an Act of Parliament viz the Chartered Accountants Act,1949 (hereinafter referred at "Act'). Further , as per regulations which were framed by the Institute a person who has to become a Chartered Accountant has to

enroll with the Institute and he has to clear compulsory paper in the Intermediate and final examination conducted by the Institute.

3. In the present case , writ petitioner/ Ashutosh Nigam appeared in the examination for the purpose of enrollment of Chartered Accountant conducted by the Institute. He was not successful in the said examination, so he approached this Court by filing Writ Petition No.5887(MS) of 2013 (Ashutosh Nigam Vs. Union of India, Ministry of Human Resources through Secretary and another) with the following main relief:-

"(a) Issue writ, order or direction in the nature of mandamus commanding the opposite parties to evaluate/ re-evaluate the answer sheet of the petitioner for the corporate and allied Laws paper.

(b) Issue, writ, order or direction in the nature of Mandamus commanding the opposite parties produce the answer sheet of the petitioner of the corporate and Allied Laws Paper and to get them evaluated by some independent agency.

(c) Issue writ, order or direction in the nature of Mandamus commanding the opposite parties to declare the petitioner as having passed in Corporate and Allied Laws paper for the final group examination, 2013.

(d) Award costs in favour of the petitioner and against the opposite parties and to pass such further or other orders as may be considered just and proper in the interest of justice and in the circumstances of the case."

4. After exchange of pleadings , the writ petition was allowed vide judgment and order dated 28.04.2014 which reads as under:-

" Heard Shri Manish Mathur, learned counsel for the petitioner as well as Sri Vibhu Shanker, learned counsel for respondent no. 2.

Petitioner seeks reevaluation of the answer sheets of Corporate and Allied Law papers. Through the rejoinder affidavit he has brought on record the relevant documents i.e, (i) answer sheet,(ii) modal question answers prepared by the Institute. He drew the attention of this Court towards answer no. 1 A, 1 D and 4 B as well as answers suggested by the Institute and submitted that after comparing those it is obvious that the petitioner answered the questions in the same very manner. Therefore, he should have been awarded total marks assigned to each and every answer but it has not been done so far,rather in each answer marks have been reduced deliberately. After reading over the comparative chart of the answers, the mistake appears to be apparent.

Shri Vibhu Shanker, learned counsel for the respondent has raised questions on maintainability of the writ petition for the relief as sought therein on the ground that the relief of re-evaluation of answer book is not maintainable unless the rule permits so. He further submits that there is no such rule in the Institute concerned. He also submitted that there are several decisions propounded by Hon'ble the Supreme Court on this point. he pointed out some decisions which are referred to hereunder;

(i)Board of Secondary Education Vs. Pravas Ranjan Panda and anohter (2004) 13 Supreme Court Cases 383,

(ii)Himachal Pradesh Public Service Commission Vs. Mukesh Thakur and another (2010) 6 Supreme Court Cases 759,

(iii)Maharashtra State Board of Secondary and Higher Secondary Education and another Vs. Paritosh

Bhupesh Kurmasheet (AIR 1984 Supreme Court 1543).

Learned counsel for the petitioner is also unable to produce any such rule, framed by the Institute, which permits the re-evaluation. However, after going through the comparative chart of the answers given by the petitioner as well as the answers suggested by the Institute, I find that there is no difference in the answers written by the petitioner and suggested by the Institute.Therefore, without applying any technical mind over there, I am of the view that the petitioner should have been awarded full marks allotted to each and every question. Therefore, I feel it appropriate to make an observation for the Institute concerned to re-consider petitioner's case as the error committed by the authority in awarding marks is apparent. Besides this Mr Mathur also points out that Regulation 39 of the Regulations framed by the Institute permits the authority to correct mistake. Therefore, it would be appropriate for them to award appropriate marks to the petitioner in the interest of his career.

In the aforesaid manner, this Court interfered with the matter and issued directions accordingly. I hope that the Institute shall come forward to correct its mistake within fifteen days and communicate result to the petitioner forthwith.

In the aforesaid term, the writ petition stands disposed of finally."

5. The appellant has challenged the judgment and order dated 28.04.2013 on the ground that there is no provisions of re-evaluation in the regulation which has been framed by the Institute, so the direction which has been given by Hon'ble Single Judge is contrary to law as laid down by Hon'ble Apex Court in the cases namely, (I) ***Board of Secondary Education Vs. Pravas Ranjan Panda and another (2004) 13 Supreme Court Cases 383,*** (ii) ***Himachal Pradesh Public Service Commission Vs. Mukesh Thakur and another (2010) 6 Supreme Court Cases 759,*** (iii) ***Maharashtra State Board of Secondary and Higher Secondary Education and another Vs. Paritosh Bhupesh Kurmasheet (AIR 1984 Supreme Court 1543).***

6. It is stated that the relevant judgments were placed before the Hon'ble Single Judge but the same were not considered while passing the judgment and order dated 28.04.2014, under appeal, and the impugned judgement has been passed, so the present special appeal has been filed and on 15.05.2014, this Court has passed an interim order, which on reproduction reads as under:-

"Sri Manish Mathur has accepted notice on behalf of the respondent no.1, while Miss. Alka Verma, learned counsel has accepted notice on behalf of respondent no.2.

Both may file counter affidavit within four weeks. Rejoinder affidavit, if any, may be filed within two weeks thereafter.

List after six weeks.

Apart from other arguments, it is urged that there being no provision under the rules for evaluation, the learned Single Judge exceeded his jurisdiction. It is further urged that even otherwise. the answers given by the respondent petitioner was quite contrary to the answers provided in the model answers of the Institute.

Accordingly, the operation of the order and judgment dated 28.4.2014 passed in Writ Petition No.5887 (M/S) of 2013 shall remain stayed."

7. Learned counsel for the appellant also submitted that that the observations

which has been given by Hon'ble Single Judge while passing the impugned judgment dated 28.04.2014 is not correct as per record and the material on record placed before him as well as contrary to law. Accordingly, he requests that the present appeal may be allowed.

8. Sri Sudeep Kumar, learned counsel for the respondents submitted that there is no error in the judgement passed by Learned Single Judge rather the same is in accordance with regulation 39 (7) of the Chartered Accountant Regulation1988, which reads as under:-

"39(7) In any case where it is found that the result of an examination has been affected by error, malpractice, fraud, improper conduct or other matter, of whatever nature, the Council shall have the power to amend such result, in such manner as shall be in accordance with the true position and to make such declaration as the Council shall consider necessary in that behalf

Provided that no such amendment shall be made which adversely affects a candidate, without giving him an opportunity of being heard:

Provided further that in the event of any error not arising out of any act or default of a candidate, proceedings for amendment adversely affecting the candidate shall not be initiated after the expiry of a period of oe month from the date of the declaration of result."

9. He further submitted that the judgment passed by learned single judge is also in accordance with law laid down by Hon'ble the Apex Court in the case of ***Manish Ujwal and others Vs. Maharishi Dayanand Saraswati University and others (2005) 13 SCC 744*** where in para 9 and 10 it has been held as under:-

"9. In Kanpur University v. Samir Gupta [(1983) 4 SCC 309] considering a similar problem, this Court held that there is an assumption about the key answers being correct and in case of doubt, the Court would unquestionably prefer the key answers. It is for this reason that we have not referred to those key answers in respect whereof there is a doubt as a result of difference of opinion between the experts. Regarding the key answers in respect whereof the matter is beyond the realm of doubt, this Court has held that it would be unfair to penalise the students for not giving an answer which accords with the key answer, that is to say, with an answer which is demonstrated to be wrong. There is no dispute about the aforesaid six key answers being demonstrably wrong and this fact has rightly not been questioned by the learned counsel for the University. In this view, students cannot be made to suffer for the fault and negligence of the University.

10. The High Court has committed a serious illegality in coming to the conclusion that "it cannot be said with certainty that answers to the six questions given in the key answers were erroneous and incorrect". As already noticed, the key answers are palpably and demonstrably erroneous. In that view of the matter, the student community, whether the appellants or intervenors or even those who did not approach the High Court or this Court, cannot be made to suffer on account of errors committed by the University. For the present, we say no more because there is nothing on record as to how this error crept up in giving the erroneous key

answers and who was negligent. At the same time, however, it is necessary to note that the University and those who prepare the key answers have to be very careful and abundant caution is necessary in these matters for more than one reason. We mention few of those; first and paramount reason being the welfare of the student as a wrong key answer can result in the merit being made a casualty. One can well understand the predicament of a young student at the threshold of his or her career if despite giving correct answer, the student suffers as a result of wrong and demonstrably erroneous key answers; the second reason is that the courts are slow in interfering in educational matters which, in turn, casts a higher responsibility on the University while preparing the key answers; and thirdly, in cases of doubt, the benefit goes in favour of the University and not in favour of the students. If this attitude of casual approach in providing key answers is adopted by the persons concerned, directions may have to be issued for taking appropriate action, including disciplinary action, against those responsible for wrong and demonstrably erroneous key answers, but we refrain from issuing such directions in the present case."

10. Sri Sandeep Kumar, in support of his case, has also placed reliance on the judgment passed by the Hon'ble Apex Court in the case of ***High Court of Tripura through the Registrar General Vs. Tirtha Sarathi Mukherjee and others, 2019 SCC Online SC 139,*** wherein the Hon'ble Apex Court in paras 19 20 and 23 held as under:-

"19. We have noticed the decisions of this Court. Undoubtedly, a three Judge Bench has laid down that there is no legal right to claim or ask for revaluation in the absence of any provision for revaluation. Undoubtedly, there is no provision. In fact, the High Court in the impugned judgment has also proceeded on the said basis. The first question which we would have to answer is whether despite the absence of any provision, are the courts completely denuded of power in the exercise of the jurisdiction under Article 226 of the Constitution to direct revaluation? It is true that the right to seek a writ of mandamus is based on the existence of a legal right and the corresponding duty with the answering respondent to carry out the public duty. Thus, as of right, it is clear that the first respondent could not maintain either writ petition or the review petition demanding holding of revaluation.

20. The question however arises whether even if there is no legal right to demand revaluation as of right could there arise circumstances which leaves the Court in any doubt at all. A grave injustice may be occasioned to a writ applicant in certain circumstances. The case may arise where even though there is no provision for revaluation it turns out that despite giving the correct answer no marks are awarded. No doubt this must be confined to a case where there is no dispute about the correctness of the answer. Further, if there is any doubt, the doubt should be resolved in favour of the examining body rather than in favour of the candidate. The wide power under Article 226 may continue to be available even though there is no provision for revaluation in a situation where a candidate despite having giving correct answer and about which there cannot be even slightest manner of doubt, he is treated as having given the wrong answer and consequently the candidate is found disentitled to any marks.

23. In this case we have already noted that the writ petition was filed

challenging the results and seeking revaluation. The writ petition came to be dismissed in the year 2012 by the High Court. The Special Leave Petition was dismissed in the year 2013. The review petition is filed after nearly 5 years. In the interregnum, there were supervening development in the form of fresh selection. While it may be true that the delay in filing the review petition may have been condoned, it does not mean that the Court where it exercises its discretionary jurisdiction under Article 226 is to become oblivious to the subsequent development and the impact of passage of time. Even in the judgment of this Court in U.P.P.S.C. through its Chairman & Anr. Vs. Rahul Singh & Anr. reported in 2018 (2) SCC 357 which according to the first respondent forms the basis of the High Court's interference though does not expressly stated so, what the Court has laid down is that the Court may permit revaluation inter alia only if it is demonstrated very clearly without any inferential process of reasoning or by a process of rationalization and only in rare or exceptional cases on the commission of material error. It may not be correct to characterize the case as a rare or exceptional case when the first respondent approaches the Court with a delay of nearly 5 years allowing subsequent events to overtake him and the Court. We feel that this aspect was not fully appreciated by the High Court. The review, it must be noted is not a re-hearing of the main matter. A review would lie only on detection without much debate of an error apparent. Was this such a case? It is here that we must notice the argument of the appellant relating to question in Part III of the examination alone, engaging the attention of the Court for the reason that the first respondent pressed this aspect alone before the High court. The judgment of the High Court in the writ petition appears to bear out this submission of the appellant. The issue relating to the anomaly in the evaluation of the Paper III has been discussed thread bare in the judgment. The view of the High Court has not been disturbed by this Court. Despite this the High Court in the impugned judgment has proceeded to take up the plea relating to questions in Part-I and Part-II and proceeded to consider the review petition and granted relief that too after the passage of nearly 5 years. This suffices to allow the present appeal."

11. Reliance on the judgment of the Division Bench of this Court passed in the case of ***Saumitra Gigodia Vs. Union of India and others, 2018 (2) ALJ 98*** has also been placed, where in this Court in paras 21 and 22 observed as under:-

"21. Thus, we find that the opinion of the University or the expert, normally, should be accepted as it is assumed that such experts are well versed in their subject. We are further of the opinion that the decision of the examining body or the expert is not beyond judicial review. The prime consideration is to maintain the fairness of the examination and welfare of the students/ candidates, inasmuch as, in the event a wrong answer key is accepted, it would alter the fate of many candidates. The object of conducting an examination is to assess the merit of the candidates and to find out as to who is most suitable one for admission. The object of conducting a test would be defeated in case a wrong answer given is held to be beyond judicial review.

22. Normally, the Court should be cautious in interfering with the opinion of the expert but where it is found that the answer keys are demonstrably wrong, that is to say, it cannot be such as no reasonable body of men, well versed in the particular subject, would regard it as

correct, in that event the Court should exercise its writ jurisdiction and ensure that the error is rectified."

12. Sri Sudeep Kumar, learned counsel for the respondent no.1 further submitted that in the present case, the learned Single Judge the pleadings on record and comparative chart, which was produced by the writ petitioner-respondent no.1 before the writ court, as also the answers suggested by the Institute and thereafter the writ court passed the judgment dated 28.04.2014, so it is not a case of re-evaluation rather it is a case where Learned Single Judge has passed the judgment after comparing the answers, which were given by the writ petitioner/ respondent no.1 with the model answers, so the present appeal lacks merit and is liable to be dismissed.

13. In rebuttal, Sri Amit Jaiswal, learned counsel for the appellant submitted that it is totally incorrect as a matter of fact the answers given by the writ petitioner/ respondent no.1 in examination for enrollment as Chartered Accountant are not same or similar to the answers as suggested in model answers provided by the Institute. Thus, the writ court exceeded its jurisdiction by acting as an expert of the subject. The judgment in appeal is contrary to settled principles on the issue. Prayer is to allow the appeal.

14. We have heard learned counsel for the parties and gone through the record.

15. So far the re-evaluation of answer book is concerned, there is no provision under Regulations or Statute of the Institute,the examination conducting body, and as such the court cannot direct for re-evaluation as held by Hon'ble Apex Court in the case of ***Maharashtra State Board of Secondary and Higher Secondary Education and another Vs. Paritosh Bhupesh Kumar Sheth and others (1984) 4 SCC 27*** where in para 12 it has been held as under :-

"12. Though the main plank of the arguments advanced on behalf of the petitioners before the High Court appears to have been the plea of violation of principles of natural justice, the said contention did not find favour with the learned Judges of the Division Bench. The High Court rejected the contention advanced on behalf of the petitioners that non-disclosure or disallowance of the right of inspection of the answer books as well as denial of the right to ask for a revaluation to examinees who are dissatisfied with the results visits them with adverse civil consequences. The further argument that every adverse "verification" involves a condemnation of the examinees behind their back and hence constitutes a clear violation of principles of natural justice was also not accepted by the High Court. In our opinion, the High Court was perfectly right in taking this view and in holding that the "process of evaluation of answer papers or of subsequent verification of marks" under clause (3) of Regulation 104 does not attract the principles of natural justice since no decision-making process which brings about adverse civil consequences to the examinees is involved. The principles of natural justice cannot be extended beyond reasonable and rational limits and cannot be carried to such absurd lengths as to make it necessary that candidates who have taken a public examination should be allowed to participate in the process of evaluation of their performances or to

verify the correctness of the evaluation made by the examiners by themselves conducting an inspection of the answer books and determining whether there has been a proper and fair valuation of the answers by the examiners. As succinctly put by Mathew, J. in his judgment in the Union of India v. Mohan Lal Kapoor [(1973) 2 SCC 836 : 1974 SCC (L&S) 5 : (1974) 1 SCR 797 : (1973) 2 LLJ 504] it is not expedient to extend the horizon of natural justice involved in the audi alteram partem rule to the twilight zone of mere expectations, however great they might be. [SCC para 56, p. 863: SCC (L&S) p. 31]. The challenge levelled against the validity of clause (3) of Regulation 104 based on the plea of violation of natural justice, was therefore, rightly rejected by the High Court."

16. Further Hon'ble the Apex Court in the case of ***The Secretary, All India Pre- Medical/ Pre-Dental Examination, C.B.S.E. and others Vs. Khushboo Shrivastava and others, (2014) 14 SCC 523*** has held in para 7 and 8 as under:-

"7. We find that a three-Judge Bench of this Court in Pramod Kumar Srivastava v. Chairman, Bihar Public ServiceCommission, Patna & Ors. (2004) 6 SCC 7141 has clearly held relying on Maharashtra State Board of Secondary and Higher Secondary Education & Anr. v. Paritosh Bhupeshkumar Sheth & Ors.(1984)4 SCC 27 that in the absence of any provision for the re-evaluation of answers books in the relevant rules, no candidate in an examination has any right to claim or ask for re-evaluation of his marks. The decision in Pramod Kumar Srivastava v.Chairman, Bihar Public Service Commission, Patna & Ors. (2004)6 SCC 714 was followed by another three-Judge Bench of this Court in Board of Secondary Education v. Pravas Ranjan Panda & Anr. [(2004) 13 SCC 383] in which the direction of the High Court for reevaluation of answers books of all the examinees securing 90% or above marks was held to be unsustainable in law because the regulations of the Board of Secondary Education, Orissa, which conducted the examination, did not make any provision for re-evaluation of answers books in the rules.

8. In the present case, the bye-laws of the All India Pre-Medical/Pre-Dental Entrance Examination,2007 conducted by the CBSE did not provide for re-examination or reevaluation of answers sheets. Hence, the appellants could not have allowed such re-examination or re-evaluation on the representation of the respondent no.1 and accordingly rejected the representation of the respondent no.1 for reexamination/ re-evaluation of her answers sheets. The respondent no.1, however, approached the High Court and the learned Single Judge of the High Court directedproduction of answer sheets on the respondent no.1 depositing a sum of Rs.25,000/- and when the answer sheets were produced, the learned Single Judge himself compared the answers of the respondent no.1 with the model answers produced by the CBSE and awarded two marks for answers given by the respondent no.1 in the Chemistry and Botany, but declined to grant any relief to the respondent no.1. When respondent no.1 filed the LPA before the Division Bench of the High Court, the Division Bench also examined the two answers of the respondent no.1 in Chemistry and Botany and agreed with the findings of the learned Single Judge that the respondent no.1 deserved two additional marks for the two answers. In our considered opinion,

neither the learned Single Judge nor the Division Bench of the High Court could have substituted his/its own views for that of the examiners and awarded two additional marks to the respondent no.1 for the two answers in exercise of powers of judicial review under Article 226 of the Constitution as these are purely academic matters. This Court in Maharashtra State Board of Secondary and Higher Secondary Education & Anr. v. Paritosh Bhupeshkumar Sheth & Ors. (supra) has observed :

".... As has been repeatedly pointed out by this Court, the Court should be extremely reluctant to substitute its own views as to what is wise, prudent and proper in relation to academic matters in preference to those formulated by professional men possessing technical expertise and rich experience of actual day-to-day working of educational institutions and the departments controlling them. It will be wholly wrong for the Court to make a pedantic and purely idealistic approach to the problems of this nature, isolated from the actual realities and grass root problems involved in the working of the system and unmindful of the consequences which would emanate if a purely idealistic view as opposed to a pragmatic one were to be propounded. ..."

17. In regard to the arguments advanced by learned counsel for the respondent no.1,while supporting the judgment under challenge in the present appeal, that in view of the provisions as provided under Regulation 39(7) of the Chartered Accountant Regulation,1988, quoted herein above, the court has power to telly the answers given by the writ petitioner model answer and thereafter direct the appellant to award appropriate marks to the writ petitioner in the interest of the career, we have considered the Regulation 39(7) of the Chartered Accountant Regulation,1988 and a perusal thereof it appears that under Regulation 39(7) the Council has power to amend the result in any case where it is found that the result of an examination has been affected by error, malpractice, fraud, improper conduct or other matter, of whatever nature. Thus, we are of the view that keeping in view the provision as envisaged in Regulation 39(7), the Court neither can direct for re-evaluation nor the court is empowered to act as an expert and record the finding to the effect that "I find tht there is no difference in the answers written by the petitioner and suggested by the Institute."

18. Further, on the point in issue, Hon'ble the Supreme Court in the case of ***Ran Vijay Sigh and others Vs. State of U.P. and others, 2017 SCC Online SC 1448*** in paras 33 to 37 has held as under:-

"33. The law on the subject is therefore, quite clear and we only propose to highlight a few significant conclusions. They are: (i) If a statute, Rule or Regulation governing an examination permits the re-evaluation of an answer sheet or scrutiny of an answer sheet as a matter of right, then the authority conducting the examination may permit it; (ii) If a statute, Rule or Regulation governing an examination does not permit re-evaluation or scrutiny of an answer sheet (as distinct from prohibiting it) then the Court may permit re-evaluation or scrutiny only if it is demonstrated very clearly, without any "inferential process of reasoning or by a process of rationalisation" and only in rare or exceptional cases that a material error has been committed; (iii) *The Court should not*

at all re-evaluate or scrutinize the answer sheets of a candidate - it has no expertise in the matter and academic matters are best left to academics; (iv) The Court should presume the correctness of the key answers and proceed on that assumption; and (v) In the event of a doubt, the benefit should go to the examination authority rather than to the candidate.

34. On our part we may add that sympathy or compassion does not play any role in the matter of directing or not directing re-evaluation of an answer sheet. If an error is committed by the examination authority, the complete body of candidates suffers. The entire examination process does not deserve to be derailed only because some candidates are disappointed or dissatisfied or perceive some injustice having been caused to them by an erroneous question or an erroneous answer. All candidates suffer equally, though some might suffer more but that cannot be helped since mathematical precision is not always possible. This Court has shown one way out of an impasse - exclude the suspect or offending question.

35.It is rather unfortunate that despite several decisions of this Court, some of which have been discussed above, there is interference by the Courts in the result of examinations. This places the examination authorities in an unenviable position where they are under scrutiny and not the candidates. Additionally, a massive and sometimes prolonged examination exercise concludes with an air of uncertainty. While there is no doubt that candidates put in a tremendous effort in preparing for an examination, it must not be forgotten that even the examination authorities put in equally great efforts to successfully conduct an examination. The enormity of the task might reveal some lapse at a later stage, but the Court must consider the internal checks and balances put in place by the examination authorities before interfering with the efforts put in by the candidates who have successfully participated in the examination and the examination authorities. The present appeals are a classic example of the consequence of such interference where there is no finality to the result of the examinations even after a lapse of eight years. Apart from the examination authorities even the candidates are left wondering about the certainty or otherwise of the result of the examination - whether they have passed or not; whether their result will be approved or disapproved by the Court; whether they will get admission in a college or University or not; and whether they will get recruited or not. This unsatisfactory situation does not work to anybody's advantage and such a state of uncertainty results in confusion being worse confounded. The overall and larger impact of all this is that public interest suffers.

36.The facts of the case before us indicate that in the first instance the learned Single Judge took it upon himself to actually ascertain the correctness of the key answers to seven questions. This was completely beyond his jurisdiction and as decided by this Court on several occasions, the exercise carried out was impermissible. Fortunately, the Division Bench did not repeat the error but in a sense, endorsed the view of the learned Single Judge, by not considering the decisions of this Court but sending four key answers for consideration by a one-man Expert Committee.

37. Having come to the conclusion that the High Court (the learned Single Judge as well as the Division Bench) ought to have been far

more circumspect in interfering and deciding on the correctness of the key answers, the situation today is that there is a third evaluation of the answer sheets and a third set of results is now ready for declaration. Given this scenario, the options before us are to nullify the entire re-evaluation process and depend on the result declared on 14th September, 2010 or to go by the third set of results. Cancelling the examination is not an option. Whichever option is chosen, there will be some candidates who are likely to suffer and lose their jobs while some might be entitled to consideration for employment."

19. The law on the subject is thus clear that in absence of any provision, the students have no right to re-evaluate the answer-sheet. The Court in absence of any provision can not direct for re-evaluation nor the court can act as an expert and evaluate the answers and direct to award numbers as per its opinion.

20. The grounds, which have been taken by the writ petitioner in the writ petition under Article 226 of the Constitution of India are not sufficient for issuing directions to the appellant to reconsider the case of the petitioner-respondent no.1 and grant appropriate marks, which has been done by the writ court, as an expert in the present case after going through the comparative chart of the answers given by the writ petitioner/ respondent no.1 as well as the answers suggested by the Institute. There is no provisions for re-evaluation in the regulation specially Regulation 39(7) of the Chartered Accountant Regulation,1988, as the said provision only permits the Institute to correct the mistake and award appropriate marks .

21. So far as the judgments cited by Sri Sudeep Kumar, learned counsel for the respondent no.1 are concerned, we have carefully gone through the aforesaid judgments and to our view the same are not applicable in the present case. In the judgments cited by learned counsel for respondent no.1, the Hon'ble the Apex Court has not propounded the law that in absence of provision of re-evaluation the High Court can direct for re-evaluation or can act as expert in exercise of its power under Article 226 of the Constitution of India and compare the model answers with the answers given by the candidates, who appeared in the examination, as such the writ petitioner-respondent no.1 cannot derive any benefit from the same.

22. For the foregoing reasons, the impugned judgment and order dated 28.04.2014 passed by learned Single Judge in Writ Petition no.5887 (MS) of 2013 (Ashutosh Nigam Vs. The Union of India, Ministry of Human Resources through Secretary and another) is not in accordance with law.

23. In the result, the Special Appeal is allowed and the order dated 28.04.2014 passed by learned Single Judge in Writ Petition no.5887 (MS) of 2013 is set aside.

24. No order as to costs.

(2020)02ILR A1630

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 28.01.2020

BEFORE

THE HON'BLE SAURABH LAVANIA, J.

Service Single No. 590 of 2010

Virendra Kumar Mishra ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:

Y.K. Mishra

Counsel for the Respondents:
C.S.C., B.L. Verma, Balram Yadav, N.N. Jaiswal

A. Service Law – Dismissal - U.P. Rajya Sahakari Bhumi Vikas Bank Employees Services Rules, 1976: Rule 81; U.P. Co-operative Societies Employee's Service Regulation, 1975: Regulation 102 – Petitioner assails the impugned order of dismissal, which is based on the enquiry report dated 18.03.2007. Court allowed the present petition on the following principles.

B. Following principles of natural justice and the manner in which they have to be followed is important to hold 'Regular Enquiry'. (Para 18, 19) – On the ground of non- supply of documents demanded by petitioner and flaw in conducting the enquiry proceedings, the enquiry report is found to be vitiated on account of non-following of principles of natural justice as also the procedure prescribed under the Rules of 1976. The enquiry report is the basis of impugned order and when a foundation is removed the superstructure falls. (Para 21, 22)

C. "Conclusions" and "reasons" are two different things and reasons must show mental exercise of authorities in arriving at a particular conclusion. Failure to give reasons amounts to denial of justice. (Para 25, 26) – The disciplinary authority has not applied its mind while the passing the impugned order and the same is a non-speaking order. (Para 24)

Writ petition allowed. (E-4)

Precedent followed:

1. State of U.P. Vs. Deepak Kumar, Writ Petition No 34093 (S/B) of 2018, judgment dated 28.11.2018 (Para 20)

2. Breen Vs. Amalgamated Engg. Union, 1971 (1) AllER 1148 (Para 26)

3. Alexander Machinery (Dudley) Ltd. Vs. Crabtress, 1974(4) IRC 120 (NIRC) (Para 26)

4. Union of India Vs. Mohan Lal Kapoor, (1973) 2 SCC 836 (Para 27)

5. Uma Charan Vs. State of Madhya Pradesh & another, AIR 1981 SC 1915 (Para 28)

6. S.N. Mukherjee Vs. Union of India, AIR 1990 SC 1984 (Para 29)

7. Raj Kishore Jha Vs. State of Bihar and others, (2003) 11 SCC 519 (Para 30)

8. Mc Dermott International Inc. Vs. Burn Standard Co. Ltd. & others, (2006) 11 SCC 181 (Para 31)

9. Kranti Associates Private Limited and another Vs. Masood Ahmed Khan and others, (2010) 9 SCC 496 (Para 32)

10. Competition Commission of India Vs. Steel Authority of India Ltd. and another, JT 2010 (10) SC 26 (Para 33)

Present petition challenges order dated 05.09.2009, passed by Managing Director, U.P. Sahkari Gram Vikas Bank Limited.

(Delivered by Hon'ble Saurabh Lavania, J.)

1. Heard Sri Y.K. Mishra, learned counsel for the petitioner, Sri Awadhesh Kumar Pal, learned counsel for the respondent No. 1 and Sri Balram Yadav, learned counsel for the respondent No. 2 to 4.

2. By means of the present writ petition, a challenge has been made to the order dated 05.09.2009, whereby the petitioner (now deceased) was dismissed from the services, passed by the respondent No. 2/Managing Director, U.P. Sahkari Gram Vikas Bank Limited.

3. The legal heirs of the petitioner, who expired on 27.08.2016, have been substituted in compliance of the order of this Court dated 05.01.2017.

4. Facts, in brief, of the present case are that the petitioner was appointed on Class IV post of Sahyogi in the Head Office of U.P. Sahkari Gram Vikas Bank Ltd. with the approval of the Institutional Service Board, Lucknow and thereafter, he joined the services on 31.07.1984. Thereafter, the petitioner was promoted in the year 1991 on the post of Assistant Field Officer and he was posted at Salon Branch of the Bank, District-Raebareli. Thereafter, the petitioner was reverted from the post of Assistant Filed Officer to the post of Sahyogi and the said reversion order was challenged by him by means of the Writ Petition No. 210 (S/S) of 1993.

5. It is stated that in the aforesaid writ petition, the interim order was passed on 22.01.1993 and subsequently, the writ petition was allowed by this Court vide judgment and order dated 20.09.2012 and despite the judgment and order passed by this Court in favour of the petitioner, he was suspended on 30.08.2005 and charge-sheet dated 08.02.2006 was issued, which was received by the petitioner on 24.04.2006 and vide order dated 28.04.2006, the petitioner demanded the copy of the documents mentioned in the charge-sheet but the same were not provided to the petitioner. No reply to the charge-sheet was filed by the petitioner.

6. Thereafter, the enquiry officer conducted the ex-parte enquiry and submitted his report dated 18.03.2007, which was served to the petitioner vide show cause notice dated 02.05.2008 and thereafter, the impugned order of punishment dated 05.09.2009 was passed, whereby the petitioner was dismissed from the services of the Bank.

7. Assailing the order dated 05.09.2009, learned counsel for the petitioner submitted that the enquiry proceedings carried out by the enquiry officer are in utter violation of Rule 81 of U. P. Rajya Sahakari Bhumi Vikas Bank Employees Services Rules, 1976 (in short "Rules of 1976") framed under Regulation 102 of the U.P. Co-operative Societies Employee's Service Regulation, 1975, which reads as under:-

"Disciplinary proceedings

(1) The disciplinary proceedings against an employee shall be conducted by the Inquiring Officer appointed by the appointing authority or by an officer of the Bank authorised by the appointing authority. Provided that the officer at whose instance disciplinary action was started shall not be appointed as an Inquiry officer not shall the Inquiry Officer be the appellate authority.

(a) The Inquiry Officer during inquiry shall observe the principles of natural justice for which it shall be necessary that the employee shall be served with a charge sheet containing specific charges, the evidence in support of each charge and he shall be required to submit explanation in respect of the charge within a reasonable time which shall be not less than 15 days.

(b) Such employee shall also be given an opportunity to produce at his own cost or to cross examine witnesses in his defence and shall also be given an opportunity of being heard in person, if he so desires:

(c) If no explanation in respect of charge sheet is received or the explanation

submitted is unsatisfactory the competent authority may award him appropriate punishment considered necessary.

(2) (a) Where the employee is dismissed or removed from service on the ground of conduct which has led to his conviction on a criminal charge, or

(b) Where the employee has absconded and his whereabouts are not known to the Bank for more than 3 months, or

(c) Where the employee refuses or fails without sufficient cause to appear before the Inquiring Officer when specifically called upon in writing to appear, or

(d) Where it is otherwise (for reasons to be recorded) not possible to communicate with him the competent authority may award appropriate punishment without taking or continuing disciplinary proceedings.

(3) Disciplinary proceedings shall be taken by the Bank against the employee on a report made to this effect by the inspecting authority or an officer of the Bank under whose control the employee is working.

(4) The Inquiring Officer shall be appointed by the appointing authority or by an officer of the society authorised for the purpose by the appointing authority.

Provided that the officer at whose instance disciplinary action was started shall not be appointed as an enquiring officer nor shall the said inquiring officer be the appellate authority.

(5) Where an erring employee is on deputation with the Bank, The Committee of Management, the Chairman or the Managing Director/Secretary, as the case may be, draw up a duplicate charge sheet against such employee and the same shall be communicated to the parent employer who shall, if prima facie case has been made out by the reporting authority, withdraw him from the Bank and take disciplinary action against him."

8. It is further submitted that on account of non following the procedure prescribed under the Regulation of 1976, the enquiry report is vitiated and accordingly, the order of dismissal dated 05.09.2009 based on the same is liable to be interfered with.

9. He further stated that the impugned order dated 05.09.2009 is non speaking order and being so is unsustainable in the eye of law.

10. The prayer is to interfere in the order of dismissal dated 05.09.2009 and allow the writ petition.

11. Per contra, Sri Balram Yadav, learned counsel for the respondent No. 2 to 4 on the basis of the averments made in the counter affidavit as well as the documents annexed therewith submitted that the reasonable opportunity was provided to the petitioner during the enquiry proceedings but the petitioner failed to avail the opportunity provided to him and accordingly, the enquiry officer proceeded with the enquiry and submitted his report before the disciplinary authority. The disciplinary authority also provided reasonable opportunity to the petitioner but the petitioner at that stage too failed to avail the opportunity provided to him. The disciplinary authority-respondent No. 2 after considering the enquiry report passed the order impugned dated 05.09.2009. The order impugned dated 05.09.2009 is approved by the respondent No.

4/Secretary, Institutional Service Board, Lucknow.

12. It is further stated that in the facts of the case, the impugned order dated 05.09.2009 is not liable to be interfered with and the writ petition for it is liable to be dismissed.

13. Heard the submissions made by learned counsel for the parties and perused the record.

14. It appears from the record particularly the report of the enquiry officer dated 18.03.2007 and the impugned order dated 05.09.2009 that some opportunity was provided to the petitioner by the enquiry officer as well as by the disciplinary authority while holding the enquiry and prior to passing of the order dated 05.09.2009.

15. It also appears from the record that the specific averments made in para 18 of the writ petition to the effect that the documents demanded by the petitioner were not supplied to him, have not been refuted in para 7 of counter affidavit filed on behalf of the respondent Nos. 2 and 3, which contains reply to para 18 of the writ petition.

16. It is also evident from the eqnuiry report that the enquiry officer without conducting the enquiry as per the procedure prescribed under the Rules of 1976, which casts a duty on the enquiry officer to hold regular enquiry, submitted his report.

17. It further appears from the enquiry report as well as the contents of counter affidavit that the enquiry officer without fixing date, time and place for oral evidence, under intimation to the petitioner, to prove the charges and documents mentioned in the charge-sheet prepared the enquiry report, based on the documents, and submitted the same before the disciplinary authority. It also appears therefrom that certain charges have been proved only on account of non submission of reply to the charge-sheet.

18. Rule 81 of the Rules of 1976 speaks that regular enquiry has to be conducted and principles of natural justice have to be followed in the disciplinary proceedings by the enquiry officer, which includes an opportunity to the employee to examine the witnesses of department, those are required to prove the charges and documents relied upon in the charge sheet, as also an opportunity to produce his witnesses in his defence and an opportunity of being heard in person.

19. In what manner the principles of natural justice have to be followed in the departmental/disciplinary proceedings has already explained by the Apex Court as well as by this Court.

20. The Division Bench of this Court, after considering the catena of judgments on the issue of holding the disciplinary enquiry i.e. a regular enquiry, in the judgment dated 28.11.2018 passed in Writ Petition No.34093 (S/B) of 2018 (State of U.P. v. Deepak Kumar) has observed asunder:-

"It is settled by the catena of judgments that it is the dutyof Enquiry Officer to hold "Regular Enquiry'. Regularenquiry means that after reply to the charge-sheet theEnquiry Officer must record oral evidence with anopportunity to the delinquent employee to cross-

examinethe witnesses and thereafter opportunity should be given tothe delinquent employee to adduce his evidence in defence.The opportunity of personal hearing should also begiven/awarded to the delinquent employee. Even if thecharged employee does not participate/co-operate in theenquiry, it shall be incumbent upon the Enquiry Officer toproceed ex-parte by recording oral evidence. For regularenquiry, it is incumbent upon the Enquiry Officer to fixdate, time and place for examination and cross-11S.A. No. 175 of 2005examination of witnesses for the purposes of proving ofcharges and documents, relied upon and opportunity todelinquent employee should also be given to produce hiswitness by fixing date, time and place. After completion ofenquiry the Enquiry Officer is required to submit its report,stating therein all the relevant facts, evidence andstatement of findings on each charge and reasons thereof,and thereafter, prior to imposing any punishment, the copyof the report should be provided to charged officer for thepurposes of submission of his reply on the same. Thepunishment order should be reasoned and speaking andmust be passed after considering entire material on record.(vide: Jagdish Prasad Vs. State of U.P. 1990 (8) LCD 486;Avatar Singh Vs. State of U.P. 1998 (16) LCD 199; TownArea Committee, Jalalabad Vs. Jagdish Prasad 1979 Vol. ISCC 60; Managing Director, U.P. Welfare HousingCorporation Vs. Vijay Narain Bajpai 1980 Vol. 3 SCC459; State of U.P. Vs. Shatrughan Lal 1998 (6) SCC 651;Chandrama Tewari Vs. Union of India and others AIR1998 SC 117; Anil Kumar Vs. Presiding Officer and othersAIR 1985 SC 1121; Radhey Kant Khare Vs. U.P. Co-operative Sugar Factories 2003 (21) LCD 610; RoopSingh Negi Vs. Punjab National Bank and others (2009) 2SCC 570; M.M. Siddiqui Vs. State of U.P. and others 2015(33) LCD 836; Moti Ram Vs. State of U.P. and others 2013(31) LCD 1319; Kaptan Singh Vs. State of U.P. and others2014 (4) ALJ 440."

21. In view of the law settled by this Court in regard to holding of regular enquiry and observations, made hereinabove, with regard to non supply of documents to the petitioner and flow in conducting the enquiry proceedings, this Court finds that the enquiry report is vitiated on account of non following of principles of natural justice as also the procedure prescribed under the Rules of 1976.

22. The basis of the impugned order dated 05.09.2009 is the enquiry report dated 18.03.2007, which this Court has already held that the same is in violation of principles of natural justice and Rules of 1976 and keeping in view of the same as well as the maxim "Sublato Fundamento Cadit Opus" (a foundation being removed, the superstructure falls) the impugned order is liable to be interfered/set aside by this Court.

23. In regard to submissions made by the learned counsel for the petitioner that the impugned order dated 05.0.9.2009 is a non speaking order, this Court considered the order dated 05.09.2009, which on reproduction reads as under:-

"आदेश

यतः श्री वीरेन्द्र कुमार मिश्रा सहयोगी (निल0) द्वारा उ0प्र0सह0ग्राम विकास बैंक लि0 शाखा कटरा जनपद शाहजहांपुर के कार्यकाल मे की गयी अनियमितताओ के परिप्रेक्ष्य मे प्र0का0

आदेशांक 128304/स्था0/05–06, दि0 30.08.05 द्वारा निलम्बित कर अनुशासनिक कार्यवाही प्रारम्भ की गयी तथा वरि0 प्रबंधक बदायूँ को जांच अधिकारी नियुक्त किया गया।

यतः जांच अधिकारी द्वारा विधिवत अनुशासनिक कार्यवाही सम्पन्न की गयी। इस संबंध मे श्री मिश्रा को जांच अधिकारी द्वारा अनुमोदित आरोप पत्र प्रेषित किया गया परंतु श्री मिश्रा द्वारा आरोप पत्र का उत्तर प्रेषित नही किया गया। जांच अधिकारी द्वारा इस संबंध मे कई स्मरण पत्र भी दिए गए तत्पश्चात जांच अधिकारी द्वारा प्रतिवाद के अभाव मे उपलब्ध साक्ष्यों एवं अन्य सुसंगत अभिलेखों के आधार पर जांच आख्या प्रस्तुत की गयी।

यतः जांच अधिकारी द्वारा प्रेषित जांच आख्या एवं उपलब्ध साक्ष्यों का परीक्षण सक्षम प्राधिकारी द्वारा किया गया, परीक्षणोपरान्त बैंक इस निष्कर्ष पर पहुंचा कि निश्चय ही श्री वीरेन्द्र कुमार मिश्रा, सहयोगी, विलम्ब से शाखा पर उपस्थित होने, कास पर हस्ताक्षर करने, बिना अनुमति के शाखा बंद होने से पूर्व चले जाने, शा0प्र0 के कालम मे हस्ताक्षर के ऊपर कास लगाने, उच्चाधिकारियों से अभद्रता करने, गाली गलौज करने, बैंक छवि धूमिल करने तथा अपने पद के कर्त्तव्यों एवं दायित्वों के निर्वहन मे चूक करने के दोषी है।

संबंधित समस्त अभिलेखों पर सक्षम प्राधिकारी द्वारा सम्यक रूप से विचार किया गया, विचारोपरांत मामले मे आरोपों की गम्भीरता को दृष्टिगत रखते हुए प्र0का0 के पत्रांक 116636/का0/08–09 दि0 02.05.08 द्वारा अधोलिखित दण्ड प्रस्तावित करते हुये कारण बताओ नोटिस निर्गत की गयी।

''श्री वीरेन्द्र कुमार मिश्रा सहयोगी (निल0) को बैंक सेवा से सेवाच्युत कर दिया जाये''

''निलम्बन काल मे जीवन निर्वाह भत्ते के अतिरिक्त अन्य कोई वेतन भत्ते न दिए जाए।''

यतः श्री वीरेन्द्र कुमार मिश्रा सहयोगी (निल0) द्वारा दी गयी कारण बताओ नोटिस का उत्तर समयान्तर्गत प्रस्तुत न किए जाने के फलस्वरूप उन्हें प्र0का0 के पत्र दि0 12.06.08, 15.09.2008 दि0 12.10.08, 17.12.08 अनुस्मारक पत्र प्रेषित किया गया परंतु श्री मिश्रा द्वारा उक्त दी गयी नोटिस का प्रतिवाद प्रेषित नही किया गया। मानवीय दृष्टिकोण को दृष्टिगत रखते हुए श्री मिश्रा दिनांक 28.01.09, 17.02.09 एवं 05.3.09 को व्यक्तिगत सुनवाई का अवसर भी दिया गया, परंतु श्री मिश्रा उक्त तिथियों मे व्यक्तिगत सुनवाई हेतु उपस्थित नही हुए। अतएव प्रशासकीय निर्णय दि0 22.10.07 द्वारा प्रदत्त अधिकारों का प्रयोग करते हुए सक्षम प्राधिकारी द्वारा उपलब्ध साक्ष्यों एवं अभिलेखों के आधार पर कारण बताओ नोटिस मे प्रस्तावित दण्ड को यथावत बनाए रखने का निर्णय लिया गया। बैंक के पत्रांक 107575/का0/08–09 दि0 09.04.09 द्वारा सचिव, उ0प्र0सह0संस्थागत सेवामण्डल, लखनऊ को श्री वीरेन्द्र कुमार मिश्रा, सहयोगी को बैंक सेवा से सेवाच्युत किए जाने हेतु अनुमति मांगी गयी। उ0प्र0सह0संस्थागत सेवामण्डल लखनऊ के पत्रांक 841/अन0का0/09 दि0 31.08.09 के द्वारा श्री वीरेन्द्र कुमार मिश्रा, सहयोगी को बैंक से सेवाच्युत किए जाने हेतु अनुमति प्रदान कर दी गयी। उक्त अनुमति के कम मे श्री वीरेन्द्र कुमार मिश्रा, सहयोगी की अनुशासनिक कार्यवाही अधोलिखित दण्ड के साथ समाप्त की जाती है।

''श्री वीरेन्द्र कुमार मिश्रा, सहयोगी (निल0) को बैंक सेवा से सेवाच्युत किया जाता है।''

निलम्बन काल मे जीवन निर्वाह भत्ते के अतिरिक्त अन्य कोई वेतन भत्ते देय नही होंगे।''

हस्ताक्षर – अपठनीय
(नवल किशोर)
प्रबन्ध निदेशक"

24. It reflects from the order dated 05.09.2009 that the disciplinary authority has not applied its mind while passing it and the same is a non speaking order.

25. The recording of reasons are necessary. It is well known that "conclusions" and "reasons" are two different things and reasons must show

mental exercise of authorities in arriving at a particular conclusion.

26. In Breen Vs. Amalgamated Engg. Union, reported in 1971(1) AIIER 1148, it was held that the giving of reasons is one of the fundamentals of good administration. In Alexander Machinery (Dudley) Ltd.Vs. Crabtress, reported in 1974(4) IRC 120 (NIRC) it was observed that "failure to give reasons amounts to denial of justice. Reasons are live links between the mind of the decision taker to the controversy in question and the decision or conclusion arrived at".

27. In Union of India Vs. Mohan Lal Kapoor (1973) 2 SCC 836, as under:

"Reasons are the links between the materials on which certain conclusions are based and the actual conclusions. They disclose how the mind is applied to the subject matter for a decision whether it is purely administrative or quasi-judicial. They should reveal a rational nexus between the facts considered and the conclusions reached."

28. The Apex Court in the case of Uma Charan Vs. State of Madhya Pradesh & Anr. AIR 1981 SC 1915 said:

"Reasons are the links between the materials on which certain conclusions are based and the actual conclusions. They disclose how the mind is applied to the subject matter for a decision whether it is purely administrative or quasi-judicial. They should reveal a rational nexus between the facts considered and the conclusions reached. Only in this way can opinions or decisions recorded be shown to be manifestly just and reasonable"

29. The Hon'ble Supreme Court of India in the case of S.N. Mukherjee v. Union of India, AIR 1990 SC 1984, has explained that reasons are necessary links between the facts and the findings recorded in the administrative orders, which visit a party with evil civil consequences. In absence of reasons such an order cannot be permitted to stand."

30. The Hon'ble Supreme Court of India in the case of Raj Kishore Jha v. State of Bihar and others, (2003) 11 SCC 519, has held that reasons are the heartbeat of every conclusion and without the same, it becomes lifeless.

31. In Mc Dermott International Inc. Vs. Burn Standard Co. Ltd. & Ors. (2006) 11 SCC 181 Apex Court referring to Bachawat's Law of Arbitration and Conciliation, 4th Edn., pp. 855-56 in para 56 said:

"Reasons are the links between the materials on which certain conclusions are based and the actual conclusions..."

32. The Apex Court in Kranti Associates Private Limited & Anr. Vs. Masood Ahmed Khan & Ors. (2010) 9 SCC 496 referring to the judgment in Mohan Lal Capoor (supra) in para 23 said:

"Such reasons must disclose how mind was applied to the subject-matter for a decision regardless of the fact whether such a decision is purely administrative or quasi-judicial. This Court held that the reasons in such context would mean the link between materials which are considered and the conclusions which are reached. Reasons

must reveal a rational nexus between the two."

33. The Apex Court also in Competition Commission of India Vs. Steel Authority of India Ltd. & Anr. JT 2010 (10) SC 26 in para 68 referring to the judgment in the case of Gurdial Singh Fijji (supra) said:

*"Reasons are the links between the materials on which certain conclusions are based and the actual conclusions. By practice adopted in all courts and by virtue of judge- made law, the concept of reasoned judgment has become an indispensable part of basic rule of law and in fact, is a mandatory requirement of the procedural law. Clarity of thoughts leads to cla*rity of vision and therefore, proper reasoning is foundation of a just and fair decision."

34. In view of the above, the punishment order dated 05.09.2009 being based on the enquiry report dated 18.03.2007, which is vitiated under the law, and non speaking is liable to be interfered with.

35. Accordingly, the writ petition is ***allowed.*** The order dated 05.09.2009 is hereby quashed.

36. In view of the facts of the case to the effect that the petitioner has expired and the matter can not be remanded back to the disciplinary authority to hold the enquiry a fresh as well as keeping in view the principle of no work no pay, I am of the view that the petitioner (now deceased) would not be entitled to back wages for the intervening period.

37. However, the family members of the petitioner (now deceased) would be entitled for the consequential benefits, which are available to them, under the relevant Rules of Bank.

(2020)02ILR A1638

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 22.01.2020

BEFORE
THE HON'BLE BHARATI SAPRU, J.
THE HON'BLE SAURABH SHYAM SHAMSHERY, J.

Special Appeal Defective No. 607 of 2016

U.P. Rajya Vidyut Utpadan Nigam Ltd. ...Appellant

Versus

Smt. Sunita & Ors. ...Respondents

Counsel for the Appellant:
Sri Anil Kumar Mehrotra

Counsel for the Respondents:
Sri Siddharth Khare

A. Service – Compassionate Appointment – Uttar Pradesh Recruitment of Dependents of Government Servants Dying-in-Harness Rules, 1974: Rule 2(c) – The Court in the present case followed the law upheld by the Apex Court that 'exclusion of married daughter' from the ambit of the expression of 'family' in Rule 2 (c), was illegal and unconstitutional being violative of Articles 14 and 15 of the Constitution and therefore the word 'unmarried' has been rightly struck down.

Appeal dismissed.

Precedent followed:

1. Vimla Srivastava Vs. State of U.P. and another, Writ-C No. 60881 of 2015 (Para 2, 8)

2. Manjula Vs. State of Karnataka, 2005 (104) FLR 271 (Para 3)

3. Smt. Ranjana Murlidhar Anerao Vs. The State of Maharashtra, Writ Petition No. 5592 of 2009, decided on 13.08.2014 (Para 3)

4. S. Kavita Vs. The District Collector, Writ Petition No. 16153 of 2015, decided on 09.06.2015 (Para 3)

5. Purnima Das Vs. The State of West Bengal, Writ Petition No. 33967 (W) of 2013, decided on 19.03.2014 (Para 3)

Precedent distinguished:

Mudita Vs. State of U.P., Writ Petition No. 49766 of 2015, decided on 10.09.2015 (Para 3)

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

1. The application for compassionate appointment of the writ petitioner-respondent under the dying in Harness Rules due to the death of her father, was rejected vide order dated 03.3.2016, on the ground that the married daughter was not included in the definition of 'family' as described under Section 2 (c) of the Uttar Pradesh Recruitment of Dependents of Government Servants Dying-in-Harness Rules, 1974 (hereinafter referred to as the "Rules, 1974").

2. Aggrieved by the aforesaid order, the writ petitioner-respondent has approached the learned Single Judge. The learned Single Judge vide impugned order dated 03.5.2016 allowed the writ petition relying upon a judgment passed by a Division Bench of this Court in Writ-C No.60881 of 2015, (Smt. Vimla Srivastava Vs. State of U.P. & Anr.) and connected matters wherein the Division Bench had held that the 'exclusion of married daughter' from the ambit of the expression of 'family' in Rule 2 (c) of the Rules, 1974 was illegal and unconstitutional being violative of Articles 14 and 15 of the Constitution and accordingly the Division Bench struck down the word 'unmarried' in Rule 2 (c) (iii) of the Rules 1974.

3. The relevant portion of the judgment is reproduced hereinafter:

"Specifically in the context of compassionate appointments various High Courts have taken the view that a woman who is married cannot be denied entry into service on compassionate appointment merely on the ground of marriage. This view was taken by a learned Single Judge of the Karnataka High Court in ***Manjula vs. State of Karnataka,2005 (104) FLR 271.*** *The same view has been adopted by a Division Bench of the Bombay High Court in* ***Smt. Ranjana Murlidhar Anerao vs. The State of Maharashtra, Writ Petition No.5592 of 2009, decided on 13 August 2014,*** *where it was held that the exclusion of a married daughter for the grant of a retail kerosene license on the death of the license holder was not justifiable. The Division Bench of the Bombay High Court held as follows:*

"This exclusion of a married daughter does not appear to be based on any logic or other justifiable criteria. Marriage of a daughter who is otherwise a legal representative of a license holder cannot be held to her disadvantage in the matter of seeking transfer of license in her name on the death of the license holder. Under Article 19(1)(g) of the Constitution of India the right of a citizen to carry on any trade or business is preserved. Under Article 19(6) reasonable restrictions with regard to professional or technical qualifications necessary for carrying on any trade or business could be imposed. Similarly, gender discrimination is prohibited by Article 15 of the Constitution. The exclusion of a married daughter from the purview of expression "family" in the Licensing Order of 1979 is not only violative of Article 15 but the same also infringes the right guaranteed by Article 19(1)(g) of the Constitution."

The same view has been adopted by a learned Single Judge of the Madras

High Court in ***S Kavitha vs. The District Collector, Writ Petition No.16153 of 2015, decided on 9 June 2015.*** *A learned Single Judge of the Kolkata High Court in* ***Purnima Das vs. The State of West Bengal, Writ Petition No.33967 (W) of 2013 decided on 19 March 2014*** *has held that while appointment on compassionate ground cannot be claimed as a matter of right, at the same time, it was not open to the State to adopt a discriminatory policy by excluding a married daughter from the ambit of compassionate appointment.*

We are in respectful agreement with the view which has been expressed on the subject by diverse judgments of the High Courts to which we have made reference above.

During the course of submissions, our attention was also drawn to the judgment rendered by a learned Single Judge of this Court in ***Mudita vs. State of U.P., Writ Petition No.49766 of 2015, decided on 10 September 2015.*** *The learned Single Judge while proceeding to deal with an identical issue of the right of a married daughter to be considered under the Dying-in-Harness Rules observed that a married daughter is a part of the family of her husband and could not therefore be expected to continue to provide for the family of the deceased government servant. The judgment proceeds on the premise that marriage severs all relationships that the daughter may have had with her parents. In any case it shuts out the consideration of the claim of the married daughter without any enquiry on the issue of dependency. In the view that we have taken we are unable to accept or affirm the reasoning of the learned Single Judge and are constrained to hold that* ***Mudita*** *does not lay down the correct position of the law.*

In conclusion, we hold that the exclusion of married daughters from the ambit of the expression "family" in Rule 2 (c) of the Dying-in-Harness Rules is illegal and unconstitutional, being violative of Articles 14 and 15 of the Constitution.

We, accordingly, strike down the word 'unmarried' in Rule 2 (c) (iii) of the Dying-in-Harness Rules.

In consequence, we direct that the claim of the petitioners for compassionate appointment shall be reconsidered. We clarify that the competent authority would be at liberty to consider the claim for compassionate appointment on the basis of all the relevant facts and circumstances and the petitioners shall not be excluded from consideration only on the ground of their marital status."

4. Accordingly, the learned Single Judge allowed the writ petition and directed the competent authority to consider the claim of the writ petitioner-respondent for compassionate appointment.

5. The appellant has approached this Court by way of filing the present special appeal against the judgment passed by the learned Single Judge.

6. Learned counsel appearing on behalf of the respondent at the outset pointed out that the relied upon judgment was challenged by the State of U.P. before the Apex Court and the Apex Court vide order dated 23.7.2019 passed in Special Leave to Appeal Civil No.22646 of 2016 and connected matters has dismissed the special leave to appeal.

7. We have perused the impugned judgment as well as the relied upon judgment.

8. The learned Single Judge has rightly followed the judgment passed by the Division Bench of this Court in the

matter of ***Vimla Srivastava (supra)*** and now it has been brought on record that the said judgment has been upheld by the Apex Court also, therefore, we do not find any reason to interfere with the order passed by the learned Single Judge.

9. Accordingly, this special appeal is **dismissed.**

(2020)02ILR A1641

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 22.01.2020

BEFORE
THE HON'BLE BHARATI SAPRU, J.
THE HON'BLE SAURABH SHYAM SHAMSHERY, J.

Special Appeal Defective No. 617 of 2016

U.P. Rajya Vidyut Utpadan Nigam Ltd. & Anr. ...Appellants

Versus

Raj Laxmi & Ors. ...Respondents

Counsel for the Appellants:
Sri Anil Kumar Mehrotra, Sri Abhishek Srivastava

Counsel for the Respondents:
Sri Chintamani Yadav

A. Service Law– Compassionate Appointment – Uttar Pradesh Recruitment of Dependents of Government Servants Dying-in-Harness Rules, 1974: Rule 2(c) – The Court in the present case directed 'divorced married daughter' to be considered for compassionate appointment. Court followed the law upheld by the Apex Court that 'exclusion of married daughter' from the ambit of the expression of 'family' in Rule 2 (c), was illegal and unconstitutional being violative of Articles 14 and 15 of the Constitution and therefore the word 'unmarried' has been rightly struck down.

Special Appeal dismissed. (E-4)

Precedent followed:

1. Vimla Srivastava Vs. State of U.P. and another, Writ-C No. 60881 of 2015 (Para 2, 8)

2. Manjula Vs. State of Karnataka, 2005 (104) FLR 271 (Para 3)

3. Smt. Ranjana Murlidhar Anerao Vs. The State of Maharashtra, Writ Petition No. 5592 of 2009, decided on 13.08.2014 (Para 3)

4. S. Kavita Vs. The District Collector, Writ Petition No. 16153 of 2015, decided on 09.06.2015 (Para 3)

5. Purnima Das Vs. The State of West Bengal, Writ Petition No. 33967 (W) of 2013, decided on 19.03.2014 (Para 3)

Precedent distinguished:

Mudita Vs. State of U.P., Writ Petition No. 49766 of 2015, decided on 10.09.2015 (Para 3)

Appeal against the judgment and order dated 18.03.2016, passed by Division Bench of High Court of Allahabad.

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

1. The application for compassionate appointment of the writ petitioner-respondent under the dying in Harness Rules due to the death of her father, was rejected vide order dated 05.5.2014, on the ground that the divorced married daughter was not included in the definition of 'family' as described under Section 2 (c) of the Uttar Pradesh Recruitment of Dependents of Government Servants Dying-in-Harness Rules, 1974 (hereinafter referred to as the "Rules, 1974").

2. Aggrieved by the aforesaid order, the writ petitioner-respondent has

approached the learned Single Judge. The learned Single Judge vide impugned order dated 18.3.2016 allowed the writ petition relying upon a judgment passed by a Division Bench of this Court in Writ-C No.60881 of 2015, (Smt. Vimla Srivastava Vs. State of U.P. & Anr.) and connected matters wherein the Division Bench had held that the 'exclusion of married daughter' from the ambit of the expression of 'family' in Rule 2 (c) of the Rules, 1974 was illegal and unconstitutional being violative of Articles 14 and 15 of the Constitution and accordingly the Division Bench struck down the word 'unmarried' in Rule 2 (c) (iii) of the Rules 1974.

3. The relevant portion of the judgment is reproduced hereinafter:

"Specifically in the context of compassionate appointments various High Courts have taken the view that a woman who is married cannot be denied entry into service on compassionate appointment merely on the ground of marriage. This view was taken by a learned Single Judge of the Karnataka High Court in ***Manjula vs. State of Karnataka,2005 (104) FLR 271.*** *The same view has been adopted by a Division Bench of the Bombay High Court in* ***Smt. Ranjana Murlidhar Anerao vs. The State of Maharashtra, Writ Petition No.5592 of 2009, decided on 13 August 2014,*** *where it was held that the exclusion of a married daughter for the grant of a retail kerosene license on the death of the license holder was not justifiable. The Division Bench of the Bombay High Court held as follows:*

"This exclusion of a married daughter does not appear to be based on any logic or other justifiable criteria. Marriage of a daughter who is otherwise a legal representative of a license holder cannot be held to her disadvantage in the matter of seeking transfer of license in her name on the death of the license holder. Under Article 19(1)(g) of the Constitution of India the right of a citizen to carry on any trade or business is preserved. Under Article 19(6) reasonable restrictions with regard to professional or technical qualifications necessary for carrying on any trade or business could be imposed. Similarly, gender discrimination is prohibited by Article 15 of the Constitution. The exclusion of a married daughter from the purview of expression "family" in the Licensing Order of 1979 is not only violative of Article 15 but the same also infringes the right guaranteed by Article 19(1)(g) of the Constitution."

The same view has been adopted by a learned Single Judge of the Madras High Court in ***S Kavitha vs. The District Collector, Writ Petition No.16153 of 2015, decided on 9 June 2015.*** *A learned Single Judge of the Kolkata High Court in* ***Purnima Das vs. The State of West Bengal, Writ Petition No.33967 (W) of 2013 decided on 19 March 2014*** *has held that while appointment on compassionate ground cannot be claimed as a matter of right, at the same time, it was not open to the State to adopt a discriminatory policy by excluding a married daughter from the ambit of compassionate appointment.*

We are in respectful agreement with the view which has been expressed on the subject by diverse judgments of the High Courts to which we have made reference above.

During the course of submissions, our attention was also drawn to the judgment rendered by a learned Single Judge of this Court in ***Mudita vs. State of U.P., Writ Petition No.49766 of 2015, decided on 10 September 2015.*** *The learned Single Judge while proceeding to*

deal with an identical issue of the right of a married daughter to be considered under the Dying-in-Harness Rules observed that a married daughter is a part of the family of her husband and could not therefore be expected to continue to provide for the family of the deceased government servant. The judgment proceeds on the premise that marriage severs all relationships that the daughter may have had with her parents. In any case it shuts out the consideration of the claim of the married daughter without any enquiry on the issue of dependency. In the view that we have taken we are unable to accept or affirm the reasoning of the learned Single Judge and are constrained to hold that ***Mudita*** *does not lay down the correct position of the law.*

In conclusion, we hold that the exclusion of married daughters from the ambit of the expression "family" in Rule 2 (c) of the Dying-in-Harness Rules is illegal and unconstitutional, being violative of Articles 14 and 15 of the Constitution.

We, accordingly, strike down the word 'unmarried' in Rule 2 (c) (iii) of the Dying-in-Harness Rules.

In consequence, we direct that the claim of the petitioners for compassionate appointment shall be reconsidered. We clarify that the competent authority would be at liberty to consider the claim for compassionate appointment on the basis of all the relevant facts and circumstances and the petitioners shall not be excluded from consideration only on the ground of their marital status."

4. Accordingly, the learned Single Judge allowed the writ petition and directed the competent authority to consider the claim of the writ petitioner-respondent for compassionate appointment.

5. The appellants have approached this Court by way of filing the present special appeal against the judgment passed by the learned Single Judge.

6. Learned counsel appearing on behalf of the respondent at the outset pointed out that the relied upon judgment was challenged by the State of U.P. before the Apex Court and the Apex Court vide order dated 23.7.2019 passed in Special Leave to Appeal Civil No.22646 of 2016 and connected matters has dismissed the special leave to appeal.

7. We have perused the impugned judgment as well as the relied upon judgment.

8. The learned Single Judge has rightly followed the judgment passed by the Division Bench of this Court in the matter of ***Vimla Srivastava (supra)*** and now it has been brought on record that the said judgment has been upheld by the Apex Court also, therefore, we do not find any reason to interfere with the order passed by the learned Single Judge.

9. Accordingly, this special appeal is **dismissed.**

(2020)02ILR A1643

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 04.02.2020

BEFORE
THE HON'BLE BISWANATH SOMADDER, J.
THE HON'BLE DR. YOGENDRA KUMAR SRIVASTAVA, J.

Special Appeal No. 873 of 2019

Smt. Dharmraji Devi Ganga Prasad Singh Uchchatar Madhyamik Vidyalaya, Khuiri, Jaunpur & Anr. ...Appellants

Versus

State of U.P. & Ors. ...Respondents

Counsel for the Appellants:

Sri Radha Kant Ojha, Sri Ali Hasan

Counsel for the Respondents:
Sri A.K. Roy, C.S.C., Sri Kailash Singh Kushwaha

A. Service – Uttar Pradesh High Schools and Intermediate Colleges (Payment of Salaries of Teachers and other Employees), Act, 1971: Sections 3(3), 4, 5, 6, 10(1), 11; Uttar Pradesh High Schools and Intermediate Colleges (Payment of Salaries of Teachers and other Employees), Rules, 1993 – The responsibility for ensuring submission of necessary papers for the purposes of payment of salaries of teachers and other employees is of the management of the Institution and when a default in the aforesaid has been recorded, management is the only body which could have filed the writ petition and not the Principal of the institution.

Appeal dismissed.

Precedent mentioned:

Committee of Management, Gangabux Kanauriya Gandhi Inter College, Deoria Vs. Deputy Director of Education, Seventh Region Gorakhpur and others, 2000 (3) ALR 314 (Para 5)

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

1. Heard Sri Radha Kant Ojha, learned Senior Counsel, assisted by Sri Ali Hasan, learned counsel for the appellants, Sri Kailash Singh Kushwaha, learned counsel for the sixth respondent/caveator and Sri A.K. Roy, learned Additional Chief Standing Counsel appearing for the State-respondents.

2. The present Special Appeal has been filed against the judgment and order dated 23.07.2019 passed in Writ-A No.10710 of 2019 (Smt. Dharmraji Devi Ganga Prasad Singh Uchchatar Madhyamik Vidyalaya And Another Vs. State of U.P. and 5 others), whereby the writ petition has been dismissed by assigning the reason that the same had been filed by a person not competent to file the petition. The learned Single Judge has, however, granted liberty to the Committee of Management of the petitioner institution to file a writ petition.

3. The judgment passed by the writ court is sought to be assailed principally on the ground that since the dispute involved in the case related to a Class-IV employee in the petitioner institution, it was not correct to say that the writ petition could be filed only by the Committee of Management and not by the Principal of the institution.

4. In this regard, the learned Senior Counsel appearing for the appellant has sought to draw attention of this Court to the provisions contained under the Intermediate Education Act, 19211 and the Regulations framed thereunder, to submit that as per the statuary frame work, it is the Principal of the institution, who is solely responsible and has all the necessary powers with regard to the appointment, promotion and punishment of a Class-IV employee and that it is only in respect of teachers and employees other than Class-IV employees that the power with regard to the aforesaid matters vests with the Committee of Management.

5. The learned Senior Counsel has also pointed out that the decision of this Court in the case of **Committee of Management, Gangabux Kanauriya Gandhi Inter College, Deoria Vs. Deputy Director of Education, Seventh Region Gorakhpur and others2,** which

has been relied upon in the judgment under appeal, was a case where the educational authority had refused to accord approval to the management's decision to terminate the services of a person who was working as a teacher in the institution in question. Contention of the learned Senior Counsel is that taking notice of the fact that under the relevant regulations it was the Committee of Management which was the appointing authority, the appeal filed before the Deputy Direction of Education having been preferred in the name of the College, was held not to be an appeal in the eyes of law and for the said reason, the Court had refused to exercise its jurisdiction under Article 226 of the Constitution of India.

6. *Per contra*, learned counsel appearing for the sixth respondent and learned Additional Chief Standing Counsel for the State-respondents submit that in the instant case the writ petition has been preferred against an order dated 28.03.2019 passed by the District Inspector of Schools, Jaunpur3, exercising powers under Section 3(3) of the Uttar Pradesh High Schools and Intermediate Colleges (Payment of Salaries of Teachers and other Employees), Act, 19714, whereunder the responsibility with regard to payment of salaries is that of the management, and accordingly, it was only the Committee of Management which could have challenged the said order. It has been pointed out that the matter does not relate to either the appointment or initiation of any disciplinary proceedings against a Class-IV employee, and as such, the assertion on behalf of the appellant that the Principal of the institution was competent to prefer the writ petition, had rightly been turned down by the learned Single Judge.

7. The record of the case indicates that the principal grievance sought to be raised in the writ petition was against the order dated 28.03.2019 passed by the DIOS, which is an order passed in exercise of powers conferred under sub-section (3) of Section 3 of the Act, 1971, which empowers the DIOS to ensure payment of salary of a teacher or employee, in case of any default on part of the management.

8. A plain reading of the aforesaid order which was sought to be challenged in the writ petition indicates that despite earlier directions having been issued to the management for submission of salary bill of the sixth respondent (a Class-IV employee), the management had defaulted and consequently a notice dated 27.03.2019 was issued to the Committee of Management and it was subsequent thereto that the DIOS proceeded to pass the order dated 28.03.2019 in exercise of powers conferred under sub-section (3) of Section 3 of the Act, 1971.

9. The Uttar Pradesh High Schools and Intermediate Colleges (Payment of Salaries of Teachers and others Employees), Act, 1971 was enacted to regulate the payment of salaries to teachers and other employees of High Schools and Intermediate Colleges, receiving aid out of State funds and to provide for matters connected therewith. The object of the Act is to secure regular and prompt payment of salaries to teachers and other employees of the High Schools and Intermediate Colleges in the State and for the said purpose the machinery and procedure to regulate the payment has been provided in the Act itself.

10. In terms of sub-section (1) of Section 10 of the Act 1971, a duty is cast

upon the State Government for payment of salaries of teachers and employees of every institution which is recognized under Intermediate Education Act, 1971 and is receiving maintenance grant from the State Government. The procedure for payment of salaries is provided for under Section 5 which *inter alia* provides for the operation of a separate account to be opened jointly by a representative of the management and by the inspector or such other officer as may be authorized by the inspector in that behalf for the purposes of disbursement of salaries of the teachers and employees of the institution in question.

11. Section 3 of the Act, 1971, provides for payment of salary within time and without unauthorized deduction and under sub- section (3) thereof the DIOS has been saddled with the statutory duty of ensuring payment of salary of teachers and other employees of a recognized institution within a prescribed time frame. It also provides for the contingency that in case of any default on part of the management, the Inspector may take necessary steps for ensuring the payment of salary.

12. For ease of reference, Section 3 of the Act, 1971 is being extracted herein below:-

"**3. Payment of salary within time and without unauthorised deduction**.-- (1) Notwithstanding any contract to the contrary, the salary of a teacher or other employee of an institution in respect of any period after the thirty-first day of March, 1971 shall be paid to him before the expiry of the twentieth day, or such earlier day as the State Government may, by general or special order in that behalf appoint, of the month next following the month in respect of which or any part of which it is payable.

(2) The salary shall subject to the provisions of sub-section (3), be paid without deduction of any kind except those authorised by the regulations or by any rules made under the Act or by any other law for the time being in force.

(3) Where the salary of a teacher employee of an institution is not paid in accordance with sub-section (1) due to any default on the part of the management, the Inspector may, without prejudice to any other provision of this Act, pay or cause to be paid within ten days from the date mentioned in sub-section (1) of Section 4 at the rate of salary last drawn by such teacher or employee as the case may be, and in case fresh appointment at the rate of the minimum of the pay scale in which he has been appointed and any adjustment in respect of such payment shall, thereafter be made as soon as possible."

13. In terms of Section 4 of the Act, 1971, the Inspector is empowered to make inspection of the institution with regard to payment of salaries and in case of any default by the management adequate measures for enforcement of the provisions and directions under the Act have been provided for under Section 6 of the said Act.

14. Under Section 11, punishment and penalties have also been provided, in case of default committed by manager or any other person vested with the authority to manage and conduct the affairs of the institution, in complying with the provisions of the Act, 1971.

15. The rules framed for carrying out the purpose of the Act 1971, namely the

Uttar Pradesh High Schools and Intermediate Colleges (Payment of Salaries of Teachers and others Employees), Rules 1993, also provide that the responsibility for submission of requisition and the bill relating to the grant is that of the manager.

16. A conjoint reading of the aforesaid provisions, thus indicates that as per the statutory frame work and the scheme, as provided for under the Act, 1971 and the Rules framed thereunder, the responsibility for ensuring submission of necessary papers for the purposes of payment of salaries of teachers and others employees is of the management of the Institution.

17. In the instant case, the order dated 28.03.2019, under challenge in the writ petition, is an order passed by the DIOS, exercising powers under sub-section (3) of Section 3 of the Act 1971, after recording the default of the management in submission of the salary bill.

18. In the said circumstances, the judgment of the learned Single Judge whereunder it has been held that the Committee of Management of the institution in question is the only body which could have filed the writ petition and not the Principal of the institution, cannot be faulted with.

19. No palpable infirmity or perversity has been pointed out in the judgment under appeal so as to warrant interference.

20. We are therefore not inclined to interfere with the judgment dated 23.07.2019 passed in Writ-A No. 10710 of 2019. The present Special Appeal is thus liable to be dismissed and is accordingly dismissed.

21. Learned Senior Counsel appearing for the appellants at this stage has referred to certain disciplinary proceedings which are stated to have been initiated against the sixth respondent.

22. In this regard we may only say that the issue with regard to initiation of disciplinary proceedings against the sixth respondent was not the subject matter of the writ petition before the learned Single Judge, therefore, the dismissal of the writ petition and also the present special appeal would not in any manner effect any proceedings in that regard, if the same have already been initiated.

(2020)02ILR A1647

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 06.02.2020

BEFORE

THE HON'BLE PANKAJ KUMAR JAISWAL, J.
THE HON'BLE KARUNESH SINGH PAWAR, J.

Service Bench No. 3213 of 2020

Lal Ji ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Yadukul Shiromani Srivast

Counsel for the Respondents:
C.S.C., Shikhar Anand

A. Service Law– Promotion – Petitioner claims to have been wrongly reverted to the post of Scientific Assistant from post of Senior Scientific Assistant in the year 2015, due to

mis-interpretation of judgment in Rajesh Kumar's case.

B. Service Law-Uttar Pradesh Public Servants (Reservation for Scheduled Caste, Scheduled Tribe & Other Backward Classes) Act, 1994: Sections 3(2), 3(5), 3(7); Fourth Amendment Seniority Rules, 2007: Rule 8A – Section 3(2), cannot subsist independent of Section 3(7) as the policy of reservation in the State of U.P existed prior to enactment of 1994 Act and once the policy of reservation in promotion is struck down by Hon'ble Supreme Court in Rajesh Kumar's case, the concept of backlog vacancies automatically collapse and thus, the applicability of Section 3(2) becomes limited only to direct recruitment. (Para 6)

C. Service Law-The Uttar Pradesh Government Servant (Discipline and Appeal) Rules, 1999; Service Rules, 2016: Rule 4(ii) – Petitioner would be treated eligible and his experience as Senior Scientific Assistant from 2007-2015 should be counted as service experience as provided in Rule 4(ii), but his promotion shall be subject to his seniority w.r.t. other candidates. (Para 8)

Writ petition dismissed. (E-4)

Precedent followed:

1. U.P. Power Corporation Ltd. Vs. Rajesh Kumar, (2012) 7 SCC 1 (Para 2)

2. Rajendra Singh Vs. State of U.P., Writ Petition No. 6426 of 2018, Judgment dated 28.02.2018 (Para 9)

Precedent cited:

Jarnail Singh Vs. Lachhmi Narain Gupta, (2018) 10 SCC 396; AIR 2018 SC 4729 (Para 10)

Petition challenges order dated 20.01.2020, passed by State Public Services Tribunal.

(Delivered by Hon'ble Karunesh Singh Pawar, J.)

1. Under challenge is the judgment and order dated 20.1.2020, passed by State Public Services Tribunal, Indira Bhawan, Lucknow in Claim Petition No.1503 of 2018 Lal Ji versus State of U.P. and others, whereby the tribunal while partly allowing the claim petition has declined to interfere with the order dated 16.2.2018, passed by Director, Forensic Sciences Laboratory with a further finding that the petitioner's seniority can be determined only from the date of his regular promotion in 2016.

2. The facts necessary for adjudication of the case are that the petitioner Lal Ji was appointed on 25.1.1993 on the post of Lab Attendant. He was further appointed as Lal Assistant vide order dated 15.7.1995. The petitioner was promoted to the post of Scientific Assistant on 10.12.2003. Vide Government Order dated 3.7.2002, the Government of U.P. directed to fill up backlog posts in accordance with the provisions of Uttar Pradesh Public Servants (Reservation for Scheduled Caste, Scheduled Tribe & Other Backward Classes) Act, 1994 (in short, 1994 Act). Subsequently, vide Government Order dated 22.5.2007, a direction was made to all the departments to fill up backlog vacancies in Group A, B and C posts by way of special drive within six months, in the light of Section 3(2) and 3(5) of 1994 Act. In pursuance thereof, the petitioner was promoted as Senior Scientific Assistant vide order dated 21.8.2007. In the meantime, one Smt. Neelam Kumari, a direct recruit, was appointed as Senior Scientific Assistant on 18.10.2012 and she was placed at serial No.62 in the tentative seniority list dated 10.2.2014.

Thereafter, the petitioner was reverted vide order dated 4.9.2015, purportedly in compliance of the decision of Hon'ble Supreme Court of India in U.P. Power Corporation Limited versus Rajesh Kumar (2012)7 SCC 1 whereby Section 3(7) of 1994 Act and Rule 8A of Fourth Amendment Seniority Rules, 2007 were declared ultra vires.

Learned counsel for the petitioner submits that the decision of Hon'ble Supreme Court did not affect promotions made under Section 3(2) of 1994 Act under which the petitioner had been promoted.

It is further submitted that due to misreading of the judgment of Hon'ble Supreme Court in Rajesh Kumar's case (supra), the petitioner has been wrongly reverted on 4.9.2015. However, on his pointing out that he has been wrongly reverted, he was assured that the petitioner would be promoted again and he was thus promoted vide order dated 13.1.2016 and the mistake was rectified. He has been continuing on the post of Senior Scientific Assistant since 13.1.2016.

Learned counsel has vehemently contended that since he was mistakenly reverted and he was promoted on 13.1.2016 after correcting the mistake, hence the intervening period from 4.9.2015 to 13.1.2016 is liable to be ignored and he should be treated in continuous service on the said post of Senior Scientific Assistant in view of the judgment in Rajesh Kumar's case (supra).

Further submission is that his reversion amounted to demotion which could only be done on a proved mis-conduct after full fledged enquiry in accordance with The Uttar Pradesh Government Servant (Discipline and Appeal) Rules, 1999 (in short, 1999 Rules). He submits that a break of few months would not dis-entitle him of the experience that he had gained as Senior Scientific Assistant, which is necessary for consideration for promotion against vacancies of promotional quota.

It is next submitted that a tentative seniority list was announced on 18.1.2018 seeking objections by 31.1.2018 but before it was finalised, Departmental Promotion committee was held on 8.2.2018 in which his candidature was overlooked and he was by-passed.

Feeling aggrieved, the petitioner preferred a writ petition No.4050(S/S) of 2018 before this Court. Vide order dated 8.2.2018, this Court while passing an interim order directed that in case a meeting of the Departmental Promotion Committee is held, the result thereof shall not be declared or given effect to. However, it is stated by the learned counsel that the DPC was held on the same day and a decision was taken not to promote the petitioner. His representation preferred in relation to his seniority was rejected on 26.2.2018, although the promotion was not made and the final result of DPC is yet to be declared.

Lastly, it has been submitted that the seniority list of 25.5.2016 stood superseded by issuance of tentative seniority list on 18.1.2018 and therefore, the DPC was not authorised to consider promotions on the basis of that seniority list.

Learned Additional Chief Standing Counsel for the State has opposed the petition and submitted that the petitioner was promoted on the basis of policy of reservation in promotion on 16.2.2003 from Labotratory Assistant to the post of Scientific Assistant and thereafter he was again promoted as Senior Scientific Assistant on the basis of the

policy of reservation in promotion on a backlog vacancy.

It is further submitted by learned Addl. Chief Standing Counsel that Neelam Kumari was appointed on the post of Senior Scientific Assistant by direct recruitment on 18.10.2012. It is submitted that since the petitioner was not a member of feeder cadre of Senior Scientific Assistant on 10.2.2014, the date on which the seniority list was published, the name of the petitioner was not included in the said seniority list. It is also submitted that the petitioner was reverted to the post of Scientific Assistant in compliance of the judgment of Hon'ble Supreme Court in Rajesh Kumar's case (supra) along with all other employees of the State Government who had been promoted on the ground of reservation between 15.11.1997 and 28.4.2012. The petitioner was rightly reverted to the post of Scientific Assistant and the case of Rajesh Kumar (supra) is applicable to the case of the petitioner. It is submitted that the policy of promotion of Scheduled Castes/Scheduled Tribes in promotional posts was squarely covered by Section 3(7) of 1994 Act, which was struck down by the Hon'ble Supreme Court and hence, in case any benefit had accrued to the petitioner through Section 3(7) of 1994 Act, he became disetitled to that, in the light of the order (s) passed by Hon'ble Supreme Court.

3. Learned Addl. Chief Standing Counsel has submitted that the record does not depict that the petitioner was wrongly reverted to the post of Scientific Assistant and the wrong was corrected, thereby promoting the petitioner as Senior Scientific Assistant. It is submitted that the petitioner was considered for promotion on the basis of his placement in the feeder cadre of Scientific Assistant and the promotion made in 2016 was completely an independent exercise.

It is next submitted that since the petitioner was not eligible for promotion on 8.2.2018 when the DPC was held and thus his case for promotion was not considered. The petitioner was junior to Smt. Neelam Kumari in the final seniority list of 25.5.2016 which is undisputed. Circulation of tentative seniority list dated 14.1.2018 was a separate exercise and did not affect the finality or sanctity of 2016 seniority list, on the basis of which the promotions were made by the DPC on 8.2.2018.

Lastly, it is submitted that the petitioner stood reverted in the year 2016 and thereafter he was not part of the feeder cadre of Senior Scientific Assistant. He submits that since the post of Senior Scientific Assistant has to be filled up on the basis of seniority and experience and as he was not senior vis-a-vis other candidates, he was not considered for promotion.

4. We have heard learned counsel for the petitioner and learned Addl. Chief Standing Counsel.

5. The bone of contention of the petitioner's counsel is that since the petitioner was wrongly reverted in the year 2015 due to mis-interpretation of judgment in Rajesh Kumar's case (supra), he should be reinstated at appropriate place in the seniority list and he be considered for promotion on the higher post. Learned tribunal while deciding the controversy whether the petitioner's promotion in 2003 and 2007 were covered by the judgment rendered in Rajesh Kumar's case (supra) has given the following finding :

"13. The basic point that needs to be determined in the instant matter is whether the petitioner's promotions in the year 2003 and 2007 were covered by the decision of Hon'ble Supreme Court in Rajesh Kumar's case or not. In the Rajesh

Kumar case the Hon'ble Supreme Court had held that "In the ultimate analysis, we conclude and hold that Section 3(7) of the 1994 Act and Rule 8 (A) of the 2007 Rules are ultra-vires as they run counter to the dictum in M.Nagaraj. Any promotion that has been given on the Indira Sawhney case and without the aid or assistance of Section 3 (7) and Rule 8(A) shall remain undisturbed."

14. The petitioner has denied that he has derived any benefit of Section 3(7) of 1994 Act and therefore he was not covered by the above said decision. He has stated that he was promoted on the basis of Section 3(2) of the 1994 Act regarding filling of backlog vacancies and not on basis of Section 3(7) of 1994 Act.

15. It is worth considering whether Section 3(2) in regard to reservations in promotion can subsist independent of Section 3(7) of the 1994 Act. The two relevant Sections are reproduced below: 3. (2) If, in respect of any year of recruitment any vacancy reserved for any category of persons under sub-section (1) remains unfilled, such vacancy shall be carried forward and be filled through special recruitment in that very year or in succeeding year or years of recruitment as a separate class of vacancy and such class of vacancy shall not be considered together with the vacancies of the year of recruitment in which it is filled and also for the purpose of determining the ceiling of fifty per cent reservation of the total vacancies of that year notwithstanding anything to the contrary contained in sub-section 3. (7) If, on the date of commencement of this Act, reservation was in force under Government Orders for appointment to posts to be filled by promotion, such Government Orders shall continue to be applicable till they are modified or revoked.

17. In the instant matter the issue that has been raised by the petitioner is that the provision of backlog as contained in Section 3(2) of 1994 Act stands independent of Section 3(7) of the Act. Section 3(2) of the 1994 Act specifically deals with the concept of backlog and lays down that unfilled reserved vacancies would be treated as backlog and prescribes a mechanism for filling those posts up. This provision related both to direct appointments as well as recruitment through promotions.

18. In U.P. the policy of reservation in promotions existed prior to the enactment of 1994 Act. A detailed scheme of roster to effectuate reservations too had been in existence historically. It was only on basis of this policy of reservation in promotions and roster that the concept of backlog vacancies in promotion posts came into existence. In absence of an enabling policy of reservation in promotions, the concept of backlog vacancies cannot exist. Once the policy of reservation in promotions itself is struck down, the concept of backlog vacancies automatically crumbles. It is left with no feet to stand upon. In absence of a policy of reservations in promotions, Section 3(2)'s applicability becomes limited only to direct recruitments.

19. Filling up of vacancies in promotion posts on basis of reservation pre-supposes existence of an enabling policy of reservation in promotions. In absence of such a policy, enumeration of vacancies to be filled up through reservation is neither feasible nor possible. Despite repeated queries by the Court, neither the Ld. PO nor Ld. Counsel for petitioner could clarify the origin of the policy of reservation in promotions in U.P. But apparently from the sequence of facts, it can be logically deduced that it

preceded the enactment of the 1994 Act and it was allowed to continue through the instrumentality of Section 3(7). Once, the Hon'ble Apex Court struck down Section 3(7) the entire edifice of reservation in promotions was annihilated. In Indira Sawhney case The Hon'ble Supreme Court had found the policy of reservation in promotions impermissible under the Constitution but protected the extant and prevailing policies only for a period of 5 years till 15-11-1997. Thus the policy of reservation in promotions stood decisively negated by a joint operation of Indira Sawhney, M.Nagaraj and Rajesh Kumar decisions of the Hon'ble Supreme Court. While affirmative action in terms of reservation for Scheduled Castes and Scheduled Tribes in direct recruitments under Article 16(4) of the Indian Constitution has been repeatedly upheld by the Hon'ble Supreme Court, its application in promotions has been subjected to certain conditionalities.

20. We find that the petitioner could not have been promoted as Scientific Assistant or Senior Scientific Assistant without the instrumentality of enabling policy of reservation in promotions which was protected by Section 3(7) of the 1994. The claim of the petitioner that he did not avail the benefit of 3(7) of the 1994 Act is thus unacceptable."

6. On due consideration of the finding recorded by the tribunal, we are of the view that the learned tribunal has rightly held that Section 3(2) of 1994 Act cannot subsist independent of Section 3(7) of 1994 Act as the policy of reservation in the State of U.P. existed prior to enactment of 1994 Act and in absence of any enabling policy of reservation in promotion, the concept of backlog vacancies as provided in Section 3(2) of the 1994 Act cannot exist and once the policy of reservation in promotion itself is struck down, the concept of backlog vacancies automatically collapse and thus in absence of policy of reservation in promotions, the applicability of Section 3(2) becomes limited only to direct recruitment.

The tribunal has rightly held that the policy of reservation in promotion in U.P. existed prior to the enactment of 1994 Act and it was allowed through Section 3(7) which has been struck down by Hon'ble Supreme Court in Rajesh Kumar's case (supra) and therefore the entire concept of reservation in promotion was destroyed completely.

7. In regard to the second contention of learned counsel for the petitioner that his reversion was wrongful and on his protest, the mistake was corrected and he was again promoted in 2016, the tribunal has given a finding after perusal of original record that the exercise of promotion made in the year 2016 was independent of petitioner's reversion in 2015 and the petitioner was routinely promoted on the basis of his seniority in the feeder cadre, along with other candidates.

8. As regards plea of the petitioner that his experience as Senior Scientific Assistant from 2007 to 2015 should be counted as qualifying service for the purpose of deciding his eligibility for the post of Scientific Officer, the tribunal has given a categorical finding and justified his plea in this context and held that his experience as Senior Scientific Assistant from 2007-2015 should be counted as service experience as provided in Rule 4(ii) of the Service Rules, 2016. The

tribunal has further held that the petitioner would be treated as eligible under Rule 4(ii) (supra), however, promotion of the petitioner shall be subject to his seniority vis-a-vis other candidates.

9. In regard to the legality of DPC dated 8.2.2018, the tribunal has not made any observation, and rightly so, as the issue has already been considered and dealt with by this Court in Writ Petition No.6426 of 2018

Rajendra Singh versus State of U.P. vide judgment dated 28.2.2018.

10. Contention of learned counsel for the petitioner that Hon'ble Supreme Court in Jarnail Singh versus Lachhmi Narain Gupta has held that the judgment in M. Nagraj is invalid to the extent of asking quantifiable data for Scheduled Caste category as being inconsistent with 9 Judges judgment in Indra Sawhney case and therefore, ignoring the judgment in Rajesh Kumar's case (supra), the petitioner is liable to be considered for promotion on the higher post is not sustainable for the reason that the judgment in Rajesh Kumar's case (supra) has not been overruled and still holds good and this Court is bound by the dictum of Hon'ble Supreme Court under Art. 141 of the Constitution of India and therefore, the plea of the petitioner is rejected.

11. In view of the above, we do not find any perversity or illegality in the order passed by the tribunal. The writ petition lacks merit and is accordingly dismissed.

(2020)02ILR A1653

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 20.02.2020

BEFORE

THE HON'BLE PANKAJ KUMAR JAISWAL, J.
THE HON'BLE KARUNESH SINGH PAWAR, J.

Service Bench No. 4836 of 2020

Girish Kumar Dwivedi ...Petitioner
Versus
U.P. State Public Services Tribunal, Lko & Ors. ...Respondents

Counsel for the Petitioner:
Paritosh Kumar Trivedi, Piyush Trivedi

Counsel for the Respondents:
C.S.C.

A. Service Law– Compulsory retirement – Limited scope for review of the order of compulsory retirement is that if the evidence of arbitrariness and *mala fide* is attached to it – In the present case, evidence for compulsorily retiring the Petitioner was placed before the Screening Committee. Thus, allegation of *mala fide* and arbitrariness does not suffice. The petitioner has also not adduced any evidence to establish the same. (Para 10, 11)

B. The decision of compulsorily retiring a Government Servant depends upon the subjective satisfaction of the competent authority, which should however be based on objective facts. Such an order is beyond the scope of judicial scrutiny. (Para 9, 10, 13)

Writ petition dismissed. (E-4)

Precedent followed:

Baikuntha Nath Das and another Vs. Chief District Medical Officer, Baripada and another, (1992) 2 SCC 299 (Para 6, 9, 13)

Precedent distinguished:

1. Brij Mohan Singh Chopra Vs. State of Punjab, AIR 1987 SC 948 (Para 7)

2. R.P. Malhotra Vs. Chief Commissioner of Income Tax, Patiala and others, 1990 (Supp) Supreme Court Cases 771 (Para 7)

Present petition challenges orders dated 05.11.2019, 12.02.2018 and 14.08.2017, passed and upheld respectively by U.P. State Public Services Tribunal.

(Delivered by Hon'ble Karunesh Singh Pawar, J.)

(1) Heard Sri Paritosh Kumar Trivedi, learned Counsel for the petitioner and Sri Gopal Kumar Srivastava, learned Standing Counsel for all respondents/State.

(2) By means of this petition, the petitioner is praying for the following reliefs:-

"(i) issue a writ, order or direction in the nature of certiorari quashing the impugned Judgment and Order dated 5.11.2019 (Annexure No.1) passed by the opposite party No.1.

(ii) issue a writ, order or direction in the nature of certiorari quashing the impugned order dated 14.8.2017 (Annexure No.2) passed by the opposite party No.3 retiring the petitioner compulsorily from service on the post of Assistant Consolidation Officer (ACO) and the report dated 5.8.2017 (Annexure No.3) made/submitted by the Screening Committee headed by the opposite party No.3.

(iii) issue writ, order or direction in the nature of certiorari quashing the impugned order dated 12.2.2018 (Annexure No.4) passed by the opposite party No.2 dismissing the appeal dated 28.8.2017 against the impugned order dated 14.8.2017.

(iv) issue a writ, order or direction in the nature of Mandamus commanding the respondents and directing them to reinstate petitioner in service without any break providing entire service benefits including promotion etc. and other pecuniary benefits, due to him.

(v) issue a writ, order or direction in the nature of Mandamus directing the respondents to provide all the Assured Career Promotions (A.C.P.) due and available to petitioner as per service rules, the arrears of salary, including revised salary with full allowance, annual pay increments and post retiral benefits including pension, gratuity etc. after proper fixation of salary due on full length of his service upto the age of superannuation in the year, 2021.

(vi) issue any other suitable writ, order or direction which this Hon'ble Court may deem fit and proper under the facts and circulation of the case.

(vii) Award the cost of petition against the respondents."

(3) In nutshell, the case of the petitioner is that initially, the petitioner was appointed on the post of Kanoongo in the year 1988 and thereafter, he was appointed on the post of Assistant Consolidation Officer on 19.12.1997. From 1997 to 2017, the petitioner faced nine departmental proceedings, but he was not charged with any allegation of financial irregularity, corruption, inefficiency or misconduct including immoral acts. Out of nine departmental proceedings, he was exonerated in five cases whereas admittedly, four matters still remain pending before the State Public Services Tribunal for its consideration.

Considering all these aspects of the matter, the matter has been referred to the Screening Committee. Thereafter, vide order dated 14.8.2017, the petitioner has been compulsorily retired from service on the post of Assistant Consolidation Officer. The petitioner has challenged the same before the Appellate Authority who also rejected it vide order dated 12.2.2018. Consequently, the petitioner has filed a claim petition before the State Public Services Tribunal which has been dismissed vide impugned order dated 5.11.2019.

(4) Learned Counsel for the petitioner has vehemently argued that though nine department proceedings have been initiated against the petitioner on frivolous charges, yet five matters have been closed in his favour. So far in none of the proceeding, he has been punished. Therefore, the case of the petitioner has not been considered by the Screening Committee in accordance with law.

(5) Learned Counsel for the petitioner has extensively argued that the entries awarded to the petitioner is good and integrity has also been certified.

(6) Further, learned Counsel for the petitioner has submitted that no evidence has been placed before the Screening Committee for compulsorily retiring the petitioner from service. Therefore, the action of the respondents is *mala fide* and arbitrariness and the guidelines framed by the Apex Cour in the case of ***Baikuntha Nath Das and another v. Chief District Medical Officer, Baripada and another, [(1992) 2 SCC 299]*** have not been followed in its letter and spirit.

(7) Lastly, he submits that even the Tribunal has not been considered the above aspects of the matter and therefore, the petition is liable to be allowed and in support of his submissions, he has relied upon the citations of Apex Court in the cases of ***Brij Mohan Singh Chopra v. State of Punjab [AIR 1987 SC 948]*** *and* ***R. P. Malhotra v. Chief Commissioner of Income Tax, Patiala and others [1990 (Supp) Supreme Court Cases 771].***

(8) On the other hand, learned Standing Counsel supports the impugned order of the Tribunal on the ground that the Tribunal has considered each and every aspect of the matter minutely and dismissed it. Therefore, the writ petition deserves dismissal.

(9) Before entering into the rival submissions of the parties, it is necessary to peep into the guidelines framed by the Apex Court in the case of ***Baikuntha Nath Das (supra)*** which are as follows:-

"32. The following principles emerge from the above discussion:

(i) An order of compulsory retirement is not a punishment. It implies no stigma nor any suggestion of misbehaviour.

(ii) The order has to be passed by the government on forming the opinion that it is in the public interest to retire a government servant compulsorily. ***The order is passed on the subjective satisfaction of the government.***

(iii) Principles of natural justice have no place in the context of an order of compulsory retirement. This does not mean that judicial scrutiny is excluded

altogether. ***While the High Court or this Court would not examine the matter as an appellate court, they may interfere if they are satisfied that the order is passed (a) mala fide or (b) that it is based on no evidence or (c) that it is arbitrary - in the sense that no reasonable person would form the requisite opinion on the given material; in short, if it is found to be perverse order.***

(iv) The government (or the Review Committee, as the case may be) shall have to consider the entire record of service before taking a decision in the matter - of course attaching more importance to record of and performance during the later years. The record to be so considered would naturally include the entries in the confidential records/character rolls, both favourable and adverse. If a government servant is promoted to a higher post notwithstanding the adverse remarks, such remarks lose their sting, more so, if the promotion is based upon merit (selection) and not upon seniority.

(v) An order of compulsory retirement is not liable to be quashed by a Court merely on the showing that while passing it uncommunicated adverse remarks were also taken into consideration. That circumstance by itself cannot be a basis for interfere. Interference is permissible only on the grounds mentioned in (iii) above. This aspect has been discussed in paras 29 to 31 above."

(10) Further, the Tribunal has elaborately discussed and observed in paras 16 to 19 of the order, which read as under:-

"16. It's the clear opinion of the Hon'ble Supreme Court that the decision of compulsorily retiring a Government Servant depends upon the subjective satisfaction of the competent authority, which should however be based on objective facts. The Court's can review such a decision on grounds of being either mala-fide, based on no evidenced or arbitrariness.

17. In the present case there is no allegation of mala fide either on the part of Screening Committee or the Competent Authority and hence there is no occasion to examine this aspect. The petitioner has also not adduced any evidence to establish prejudice or mala fide in this regard. Facts also do not bear out the contention of the petitioner that he had 'best' or excellent annual entries throughout. The respondents have clarified that in the 10 years prior to compulsory retirement the petitioner had only one outstanding entry while 7 were Good and one average entry. A perusal of record also shows that there were a number of punishments awarded to him, some of which still continue to exist in his record. The petitioner has himself admitted in his petition that punishment orders dated 03-02-2001, 23.08.2012, 10-03-2015 and 25.04.12 continue to exist, though they have been challenged in the U. P. Public Services Tribunal by way of Claim Petitions Nos. 1862/12, 2332/16, 1628/15 and 2103/16 respectively. No stay order exists in favour of the petitioner in any of these Claim Petitions. Punishment order dated 10-03-2015 also casts a shadow on his integrity. Another punishment order dated 02-09-2001 continues to exist on record in a watered down form in spite of partial modification in Appellate Order dated 04-09-2015.

18. The adequacy and sufficiency of these grounds lies entirely within the subjective satisfaction of the

competent authority and beyond the scope of judicial scrutiny.

19. In view of the above discussion we find that the competent authority retired the petitioner compulsorily following the procedure laid down in law after due examination of service record of the petitioner. We thus find no merit in the petition which deserves to be dismissed."

(11) In view of the guidelines framed by the Apex Court, the limited scope for review of the order of compulsory retirement is that if the evidence or arbitrariness and *mala fide* is attached to it. Here in the case, the petitioner has admitted that during his service period, nine departmental proceedings have been initiated by the department. Out of nine, in five matters, favourable decision has been taken. From perusal of Screening Committee's order and from the pleadings of petition, it is abundantly clear that the evidence relied upon by the petitioner has been placed before the Committee. Therefore, it cannot be said that the evidence has not been placed before the Screening Committee.

(12) Next, learned Counsel for the petitioner has submitted that the action of the respondents is *mala fide* and arbitrariness. By saying this, strings cannot be attached to the impugned order of compulsory retirement. Even otherwise, the appeal preferred against this order has been rejected which also ends in dismissal of claim petition.

(13) A bare perusal of paragraphs 16 to 19 of the impugned order, dated 5.11.2019 it is evidently clear that the Tribunal has conspicuously touched all points raised by the petitioner including entires of last ten years from the date of passing of the compulsory retirement order and gave its verdict which need not be reviewed in the appellate jurisdiction. Furthermore, the guidelines framed by the Apex Court in the case of ***Baikuntha Nath Das (supra)*** have been followed and the impugned order of compulsory retirement has been passed in accordance with law.

(14) In view of above, the case laws cited by the petitioner are not at all attracted on the facts and circumstances of the instant case. Since the petitioner's counsel is unable to establish his claim or point out any illegality or infirmity in the impugned order, we are not inclined to entertain this petition.

(15) For all the aforementioned reasons, the writ petition filed by the petitioner has no force and is accordingly ***dismissed.***

(2020)02ILR A1657

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 10.01.2020

BEFORE

THE HON'BLE SAURABH SHYAM SHAMSHERY, J.

Writ A No. 11764 of 2017

Kameshwar Prasad ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:

Sri Ram Krishna

Counsel for the Respondents:
C.S.C., Sri D.K. Ojha

A. Service Law - regularization - Section 33F (1) (a) and (d) - U.P. Secondary Education Services Commission and Selection Board (Amendment) Act, 2016 - lays two requirement for regularization i.e., appointment should be made between 07.08.1993 to 25.03.1999 and he should continuously work till 22.03.2016 (date on which amendment of 2016 to the Act came into effect) - petitioner fail to fulfill the abovementioned requirements
B. Interpretation - the order of the Court will be interpreted strictly - "reinstatement in service" as ordered by the Court shall not be interpreted to include "continuous in service"

Court's order for "reinstatement", "reinstatement with continuous service" and "reinstatement with continuous service along with all the consequential benefits" are three different orders. The words used in the order will be strictly construed and effect shall follow as ordered. (para 24)

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

1. प्रस्तुत प्रकरण के प्रमुख तथ्य निम्न है:-

2. सर्वोदय शिक्षा सदन इण्टर कालेज मीरपुर, इलाहाबाद एक मान्यता प्राप्त एवं सहायता प्राप्त इण्टर कालेज है। इस विद्यालय में कार्यरत शिक्षा एवं शिक्षणोत्तर कर्मचारियो पर माध्यमिक शिक्षा (संशोधित) अधिनियम 1921, वेतन वितरण अधिनियम-1971 तथा माध्यमिक सेवा आयोग/चयन बोर्ड नियमावली 1982 एवं 1968 पूरी तरफ प्रभावी है।

3. उपरोक्त इण्टर कालेज के प्रबन्धतंत्र ने तीन सहायक अध्यापकों की नियुक्ति के लिये एक विज्ञापन 6.10.93 को प्रकाशित करवाया गया था तथा 29.10.93 तक आवेदन पत्र आमंत्रित किये गए थे।

4. उपरोक्त प्रक्रिया के आधार पर उपरोक्त इण्टर कालेज के प्रबन्धतंत्र ने अपने प्रस्ताव दिनाँक 31.10.1993 द्वारा प्रार्थी व अन्य दो (श्री कामेश्वर प्रसाद पाण्डेय, श्री फूलचन्द्र व श्री दयानाथ पाण्डेय) का चयन किया और 31.10.1993 को इन तीनों को नियुक्ति पत्र भी निर्गत कर दिये । तीनों ने कार्यभार ग्रहण दिनाँक 1.11.1993 को कर लिया तथा प्रबन्धकतंत्र ने अपने पत्रांक प्रबन्धक मीमो 93-94 दिनांक 2.11.93 द्वारा नियुक्ति के अनुमोदन हेतु पत्राजात, जिला विद्यालय निरीक्षक, इलाहाबाद को प्रेषित किये गये।

5. उपरोक्त इण्टर कालेज के प्रबन्ध तंत्र द्वारा निर्गत अध्यापक सूची तालिका 1993 के अनुसार याची की नियुक्ति श्री शोभानाथ सं0अ0 के प्रवक्ता वेतन क्रम में दिनांक 21.10.91 से प्रवक्ता (अर्हत) में पदोन्नति के कारण हुए पद पर हुई होना दर्शाया गया है। यह तालिका याचिका के संलग्न सं. 2 के रुप में संग्लन को लगाई गई है। यह fjfDr तदर्थ (अल्प) दर्शायी गयी है।

6. याची को नियुक्ति के बाद वेतन व भुगतान न होने के कारण इस उच्च न्यायालय में वेतन भुगतान हेतु व्यवहार प्रकीर्ण आज्ञा पत्र याचिका संख्या 8001 वर्ष 1994 योजित की गयी। उक्त याचिका आदेश दिनांक 4.12.2003 के द्वारा निस्तारित की गई तथा जिला विद्यालय निरीक्षक, इलाहाबाद को निर्देशित किया गया कि प्रकरण में उभय पक्षों को सुनकर सकारण/ आख्यापक आदेश द्वारा यह निर्णित करे कि क्या याची की नियुक्ति नियमानुसार हुई है या नहीं? अगर नियुक्ति नियमानुसार है तो जिला विद्यालय निरीक्षक यह सुनिश्चित करे कि याची को वेतन मिल जाये।

7. याची ने उपरोक्त वर्णित आदेश के अनुपालन में एक प्रतिवेदन दिनांक 23.12.2003, जिला विद्यालय निरीक्षक इलाहाबाद के समक्ष पेश किया व 1.11.1993 से वेतन भुगतान का निवेदन किया।

8. जिला विद्यालय निरीक्षक, इलाहाबाद ने ऊभय पक्षों को सुनकर आख्यापक आदेश दिनांक 27.4.2006 द्वारा याची के प्रतिवेदन को अस्वीकार कर दिया और उल्लेख किया कि "समीक्षा के आधार पर पाया गया कि याची की नियुक्ति बिना नियमों के पालन किये हुए, मौलिक रिक्त पद पर प्रबन्धतंत्र को नियुक्ति करने का अधिकार नहीं था। अतः याची की नियुक्ति आमान्य कि जाती है।" इस आदेश के अनुसार प्रबन्धनतंत्र द्वारा मौलिक रिक्त पद के प्रति तदर्थ (अल्प) पद पर नियुक्ति के लिए जो विज्ञापन प्रकाशित किया उसमें निम्न त्रुटियां भी पाई गई।

1. विज्ञापन में कोई न्यूनतम शैक्षिक योग्यता अंकित नहीं की गयी थी।

2. विद्यालय द्वारा यह भी प्रस्तुत नहीं किया गया था कि कुल कितने आवेदन पत्र प्राप्त हुए इसमें कितने साक्षात्कार में उपस्थित हुए।

3. साक्षात्कार सूची नियमानुसार प्रस्तुत नहीं की गयी थी।

4. चयन सम्बन्धी कोई कार्यवाही नहीं की गयी थी।

5. चयन का क्या आधार लिया गया है यह भी स्पष्ट नहीं था।

6. मौलिक नियुक्तियों पर तत्समय रोक थी।

9. उपरोक्त वर्णित आदेश दिनाँक 27.4.2006 जो जिला विद्यालय निरीक्षक, इलाहाबाद द्वारा पारित किया गया था से क्षुब्द होने के कारण, प्रार्थी ने एक व्यवहार प्रकीर्ण आज्ञापत्र याचिका संख्या 45941 वर्ष 2006 इस उच्च न्यायालय में योजित की। उच्च न्यायालय की एकल पीठ ने आदेश दिनांक 15.5.2007 के माध्यम से आदेश दिनांक 27.4.2006 को अपास्त कर दिया तथा निर्णय दिया कि याची की नियुक्ति करने में वैधानिक प्रक्रिया का पूर्णतः पालन किया गया था। याची की नियुक्ति तदर्थ (अल्प) पद पर सर्वथा उचित थी। न्यायालय ने परमादेश जारी किया की जिला विद्यालय निरीक्षक याची द्वारा किये गये दिवस जिन पर उसने कार्य किया है उसके अनुसार याची को वेतन का 50% भुगतान करना सुनिश्चित करे तथा तत्पश्चात याची को पूर्ण वेतन देने के लिये उचित कदम उठाये।

10. जिला विद्यालय निरीक्षक, इलाहाबाद द्वारा उच्च न्यायालय के आदेश दिनांक 15.5.2007, के अनुपालन में आदेश पारित न करने की दशा में, याची ने अवमानना याचिका 3693/07 भी पेश की जिस पर दिनाँक 9.9.2009 को इस उच्च न्यायालय से जिला विद्यालय निरीक्षक को शीघ्र आदेश पारित करने का निर्देश दिया गया।

11. उपरोक्त उल्लेखित आदेश दिनांक 15.5.2007 व 9.9.2009 के अनुक्रम में, जिला विद्यालय निरीक्षक ने अपने आदेश दिनांक 12.10.2009 द्वारा निम्न निर्णय लियेः-

"1. माननीय उच्च न्यायालय के आदेश दिनांक 15.5.2007 के अनुपालन में याची की विद्यालय में उपस्थित स्टाफ रजिस्टर से प्रामाणित करने हेतु दिनांक 20.7.2007 में मेरे द्वारा स्थलीय निरीक्षण किया गया। उपस्थित पंजिका के अवलोकन से स्पष्ट हुआ कि याची श्री कामलेश्वर प्रसाद पाण्डेय के हस्ताक्षर विद्यालय की उपस्थिति पंजिका में दिनांक 10.5.2006 के बाद से नहीं है तथा उक्त विद्यालय में कार्यरत नहीं है। निरीक्षण के

समय में भी याची विद्यालय से अनुपस्थित था। चूकि याची दिनांक 11.5.2006 से 15.5.2007 तक विद्यालय में कार्यरत नहीं रहे है और इस अवधि में याची की उपस्थित विद्यालय में प्रमाणित नहीं हो रही है। अतः 11.5.06 से 15.5.2007 तक एरियर में 50 प्रतिशत का भुगतान की देयता नहीं बनती है। अतः याची की यह मांग अस्वीकार किया जाता है।

2. याची के प्रत्यावेदन के बिन्दू के संबंध में स्पष्ट करना है कि प्रबन्धक द्वारा याची का ग्रामीण भत्ता रू0 225 माह नवम्बर 98 से मई 99 तक लगाया गया था जब कि इस अवधि में ग्रामीण भत्ता के रुप में रुप 40 प्रतिमाह देय था। जिसे निदेशालय स्तर पर जांच में सही कर दिया गया है। अतः 581254 रुपया के स्थान पर 580606 भुगतान होना सही पाया गया। इस बिन्दु पर याची को कोई देयता नहीं बनती है।

3. माननीय उच्च न्यायालय ने अपने आदेश दिनांक 15.5.2007 में याची के तत्काल नियमित वेतन भुगतान के आदेश दिए थे अतः याची के 16.05.2007 से 31.10.2007 तक के वेतन भुगतान की सहमति प्रदान की जाती है।

4. याची की नियुक्ति 1.11.93 से मानते हुए वेतन निर्धारण कराने एवं अवशेष देयक के भुगतान की सहमति प्रदान की जाती है।"

12. उक्त आदेश का अनुपालन किया गया तथा याची को वेतन दिया जाने लगा। परन्तु याची को यह शिकायत रही कि जब जिला विद्यालय निरीक्षक, इलाहाबाद ने यह मान लिया था कि याची 1.11.1993 से काम कर रहा है तो इसके फलस्वरुप अन्य लाभ जैसे, ज्येष्ठता, चयन ग्रेड, पदोन्नति ग्रेड इत्यादि का लाभ भी याची को मिलना चाहिये। इसके लिए याची ने बहुत से प्रार्थना पत्र भी लिखे परन्तु जब कोई उत्तर नहीं मिला तो याची ने एक बार फिर न्याय के दरवाजे को खटखटाया और याचिका सं 4914 वर्ष 2016 इस उच्च न्यायालय में पेश की। इस न्यायालय के एकल पीठ ने आदेश दिनाँक 4.2.2016 के द्वारा उक्त याचिका को निस्तारित किया एवं जिला विद्यालय निरीक्षक, इलाहाबाद को निर्देशित किया कि वो अतिशीघ्र याची की पीड़ा पर सकारण उचित आदेश पारित करे।

13. उपरोक्त आदेश के अनुपालन में जिला विद्यालय निरीक्षक इलाहाबाद ने सकारण/आख्यापक आदेश दिनाँक 28.5.2016/30.5.2016 को पारित किया व निम्न उद्धृत निर्णय पारित किया ।

"श्री कामेश्वर प्रसाद पाण्डेय का विनियमितीकरण का प्रकारण संयुक्त शिक्षा निदेशक, इलाहाबाद मण्डल इलाहाबाद को प्रेषित करने की कार्यवाही की जाये तथा श्री पाण्डेय के विनियमित के सम्बन्ध में मण्डलीय समिति से निर्णय होने के पश्चात तदनुसार याची को नियमित कर्मचारियों की वरिष्ठता सूची में सम्मिलित करने, इनके नाम के सम्मुख अंकित तदर्थ शब्द हटाने, नियमानुसार चयन वेतनमान एवं प्रोन्नत वेतनमान देने तथा पेंशन, सामान्य भविष्य निधि में सम्मिलित किये जाने संबंधी कार्यवाही किये जाने का निर्णय लेते हुये याची का प्रत्यावेदन निस्तारित किया जाता है।"

अपने आदेश में जिला विद्यालय निरीक्षक ने निम्न कारणों का उल्लेख किया है।

"1. श्री पाण्डेय के तदर्थ नियुक्त के कारण इनको वरिष्ठता सूची में अंकित नहीं किया गया, विनियमितीकरण के पश्चात ही नियमिते कर्मचारियों के साथ वरिष्ठता सूची में सम्मिलित किया जा सकता है।

2. श्री कामेश्वर प्रसाद पाण्डेय की नियुक्ति तदर्थ सहायक अध्यापक के रुप में हुई है जिसका विनियमितीकरण नहोने के कारण तदर्थ शब्द नहीं हटाया जा सकता।

3. श्री कामेश्वर प्रसाद पाण्डेय की नियुक्ति तदर्थ सहायक अध्यापक के रुप में हुई है जिसका विनियमितीकरण नहोने के कारण चयन वेतनमान एवं प्रोन्नत वेतनमान का लाभ नहीं दिया जा सकता।

4. श्री कामेश्वर प्रसाद पाण्डेय की नियुक्ति तदर्थ सहायक अध्यापक के रुप में हुई है जिसका विनियमितीकरण न होने के कारण पेंशन एवं सामान्य भविष्य निधि योजना में सम्मिलिति नहीं किया जा सकता है।"

14. ऐसा प्रतीत होता है, कि याची ने इस उच्च न्यायालय के आदेश दिनाँक 4.2.2006 के अनुपालन न होने के कारण अवमानना प्रार्थनापत्र (सिविल) 432 वर्ष 2017 इस उच्च न्यायालय में पेश किया, जो 31.1.2017 को निस्तारित इस आदेश के साथ की गयी कि इस आदेश की प्रति मिलने के एक सप्ताह के भीतर जिला विद्यालय निरीक्षक, इलाहाबाद विधिवत् आदेश पारित करे।

15. उपरोक्त आदेशों के अनुपालन व अनुक्रम में 3 संसदीय मण्डलीय विनियमितिकरण समिति ने सभी परिस्थितियों के अनुशीलन के उपरान्त निम्नलिखित आदेश दिनांक 27.2.2017 पारित किया। जिसके अनुसार यह निर्धारित किया गया कि याची विनियमितिकरण की परिधि में नहीं आते है।

निर्णय

"मण्डलीय समिति द्वारा उपरोक्त स्थितियों

के अनुशीलन के उपरान्त निर्णय लेती है कि-

1- श्री कामेश्वर प्रसाद पाण्डेय स0अ0 की नियुक्ति दिनांक 01.11.1993 को अल्पकालिक रिक्त पद पर की गई थी। श्री पाण्डेय को माननीय उच्च न्यायालय में योजित याचिका संख्या 45941/2006 में पारित अन्तिम निर्णय दिनांक 15.05.2007 के अनुपालन में दिनांक 01.11.1993 से 10.05.2006 तक का 50 प्रतिशत भुगतान किया गया है।

2- श्री कामेशवर प्रसाद पाण्डेय को दिनांक 11.05.2006 से 15.05.2007 की अवधि में विद्यालय में कार्यरत न रहने के कारण विभाग द्वारा वेतन भुगतान अस्वीकार कर दिया गया है जिससे स्पष्ट है कि कामेश्वर प्रसाद पाण्डेय संस्था में नियुक्त तिथि से निरन्तर कार्यरते नहीं रहे। शासनादेश संख्या 588/79-दि-1-16-1(क) 13-2016 दिनांक 22 मार्च 2016 से आच्दांदित न होने के कारण श्री कामेश्वर प्रसाद पाण्डेय विनियमितीकरण की परिधि में नहीं आते हैं।

एतद्द्वारा माननीय उच्च न्यायालय में योजित याचिका संख्या 4914/2016 एवं अवमानना याचिका संख्या 432/2017 में पारित निर्णय क्रमशः दिनांक 04.02.2016 एवं 31.01.2017 के अनुपालन प्रकरण निस्तारित किया जाता है।"

16. उपरोक्त निर्णय दिनाँक27.2.2017 से क्षुब्द्ध होने के कारण याची ने वर्तमान व्यावहार प्रकीर्ण आज्ञापत्र याचिका पेश की जिसके द्वारा निर्णय दिनाँक 27.2.2017 को अपास्त करने व याची को 10.11.1993 से विनियमित करने का आदेश पारित करने की प्रार्थना की गयी है।

17. प्रत्यार्थी सं0 2 व 3 (मण्डलीय विनियमितीकरण समिति व जिला विद्यालय निरीक्षक, इलाहाबाद) के ओर से प्रति उत्तर शपथ पत्र दाखिल किया गया है। याची की ओर इस प्रति उत्तर शपथ पत्र का कोई उत्तर देने से इंकार किया गया है। प्रत्यार्थी 4 व 5 (प्राइवेट प्रत्यार्थी) की ओर से श्री वी के ओझा अधिवक्ता पेश हो रहे थे परन्तु 29.11.2019 जब इस याचिका पर निर्णय सुरक्षित किया गया, उस

दिन याची अधिवक्ता द्वारा उनको लिखित सूचना देने के उपरांत भी श्री वी के ओझा या कोई अधिवक्ता प्रत्यार्थी 4 व 5 की ओर से उपस्थित नहीं हुआ। अतः याची के अधिवक्ता एवं प्रत्याशी 2 व 3 के अधिवक्ता को विस्तार से सुनकर याचिका पर निर्णय सुरक्षित रखा गया।

18. राम कृष्णा, याची के विद्वान अधिवक्ता ने कथन किया किः-

क- याची को विद्यालय के प्रबंधक तंत्र ने जिला विद्यालय निरीक्षक के आदेश दिनांक 27.4.2006 (याची को 10.5.2006 को मिला) के कारण याची को अपने पद पर कार्य नहीं करने दिया गया, परन्तु उक्त आदेश को उच्च न्यायालय के आदेश दिनांक 15.5.2007 द्वारा अपास्त कर दिया गया था। याची द्वारा 10.5.2006 से 15.5.2007 तक काम न करने कारण केवल वो आदेश ही था, जो बाद में अपास्त भी हो गया, अतः याची को इस समय अंतराल में भी कार्यरत मानना चाहिये तथा याची को निरन्तरता का लाभ भी देना चाहिये।

ख- याची शासनादेश दिनांक 22.3.2016 से पूर्णतः आच्छादित है। उक्त शासनादेश के अनुसार विनियमित होने के लिए अध्यापक को 7.8.1993 से या उसके पश्चात् किन्तु 2.1.1999 के पश्चात् नियुक्त नहीं होना चाहिए है। याची 1.11.1993 को नियुक्त हुआ था अतः वो इस शर्त को पूर्णतः पूर्ण करता है। इस शासनादेश की अन्य शर्त है कि अध्यापक/य़ाची उत्तर प्रदेश माध्यमिक शिक्षा सेवा चयन बोर्ड (संशोधन) अधिनियम 2016 के प्रारम्भ की तिथि तक संस्था में निरन्तर कार्य करता हो। याची इस शर्त को भी पूर्ण करता है, क्यों कि 10.5.2006 से 15.5.2007 तक कार्य न करने का एकमात्र कारण, उच्च न्यायालय के आदेश दिनांक 15.5.2007 जिसके द्वारा आदेश दिनांक 27.4.2006 (जो याची को 10.5.2006को मिला) अपास्त करने के कारण प्रत्याहार हो गया तथा फलस्वरुप याची को 10.5.2006 से 15.5.2007 तक भी सेवारत मानना चाहिये। उसके बाद याची निरंतर काम करता रहा।

ग- याची विनियमितिकरण के लिए आवश्यक सभी अर्हताओ को पूर्ण करता है, अतः उसकी सेवाओं को विनियमित करना चाहिये तथा इसके फलस्वरुप होने वाले सभी लाभों को याची को प्रदान करना चाहिये।

19. प्रतिउत्तर में उत्तर प्रदेश सरकार के स्थाई अधिवक्ता ने कथन किया कि यह निविवाद है कि याची 10.5.2006 से 15.5.2007 तक सेवारत नहीं रहा। उच्च न्यायालय ने अपने आदेश दिनाँक 15.5.2007 (याचिका सं 4941 वर्ष 2006) में जिला विद्यालय निरीक्षक के आदेश दिनांक 27.4.2006 को अपास्त तो किया परन्तु 10.5.2006 से 15.5.2007 तक की याची की सेवा के विषय पर कोई टिप्पणी नहीं करी। अतः इस अंतराल में याची को सेवारत नहीं माना जा सकता। अतः याची के अपनी नियुक्ति से 22.3.2016 तक जब उ0प्र0 माध्यमिक शिक्षा सेवा चयन बोर्ड (संशोधन) अधिनियम 2016 प्रारम्भ हुआ, तक निरन्तर कार्य नहीं किया है तथा निर्विवाद रुप से 10.5.2006 से 15.5.2007 तक याची सेवारत नहीं रहा, अतः उक्त अधिनियम द्वारा धारा 33 (छ) में दी गई शर्तो का पालन न करने के कारण याची विनियमितिकरण की परिधि के अंतर्गत नहीं आता है।

20. याची व प्रत्यार्थी के विद्वान अधिवक्ताओं को ध्यान पूर्वक सुना व याचिका पर उपबल्ध समस्त अभिलेखों का ध्यान पूर्वक परिशीलन किया।

21. इस प्रकरण में यह निरधारित किया जाना है कि याची विनियमितिकरण के लिये धारा 33 छ जो उ0प्र0 माध्यमिक शिक्षा सेवा

चयन बोर्ड (संशोधन) अधिनियम 2016 द्वारा ब़ढ़ा दी गई है, में वर्णित शर्तो को पूर्ण करता है कि नहीं। प्रस्तुत प्रकरण के संदर्भ के लिए 'धारा 33छ' निम्न उद्धृत की गई है।

"33-छ (1) प्रधानाचार्य या प्रधानाध्यापक से भिन्न ऐसे किसी अध्यापक को प्रबन्धक द्वारा मौलिक नियुक्ति दी जायेंगी जो,-

(क) समय-समय पर यथासंशोधित उत्तर प्रेदश माध्यमिक शिक्षा सेवा आयोग (कठिनाइयों को दूर करना) (द्वितीय) आदेश 1981 के पैरा-2 के अनुसार अल्पकालिक रिक्ति के सापेक्ष प्रवक्ता श्रेणी या प्रशिक्षित स्नातक श्रेणी में 07 अगस्त 1993 को या उसके पश्चात किन्तु 25 जनवरी, 1999 के पश्चात नहीं पदोन्नति द्वारा या सीधी भर्ती द्वारा नियुक्ति किया गया था और ऐसी रिक्ति को बाद में मौलिक रिक्ति में परिवर्तित कर दिया गया था, (अल्पकालिक रिक्तियों के सापेक्ष कतिपय और नियुक्तियों का विनियमितीकरण)

(ख) प्रवक्ता श्रेणी या प्रशिक्षित स्नातक श्रेणी में धारा 18 के अनुसार मौलिक रिक्त के सापेक्ष पदोन्नति द्वारा अथवा सीधी भर्ती द्वारा 07 अगस्त 1993 को या उसके पश्चात किन्तु 30 दिसम्बर 2000 के पश्चात नहीं तदर्थ आधार पर नियुक्त किया गया था,

(ग) इण्टरमीडिएट शिक्षा अधिनियम 1921 के उपबन्धों के अधीन चिन्हित अर्हताएं रखता हो या उनके अनुसार ऐसी अर्हताओं से छूट प्राप्त हो,

(घ) ऐसी नियुक्ति के दिनांक से उत्तर प्रदेश माध्यमिक शिक्षा सेवा चयन बोर्ड (संशोधन) अधिनियम, 2016 के प्रारम्भ होने के दिनांक तक संस्था में निरन्तर कार्य कर रहा हो,

(ङ) उक्त उपधारा के खण्ड (ख) के अधीन विहित प्रक्रियानुसार धारा 33-ग की उपधारा (2) के खण्ड (क) में निर्दिष्ट चयन समिति द्वारा मौलिक रुप से नियुक्ति के लिए उपयुक्त पाया गया हो।

(2) (क) मौलिक नियुक्ति के लिए अध्यापकों के नामों की संस्तुति उनकी नियुक्ति के दिनांक से यथा अवधारित ज्येष्ठता क्रम में की जायेगी,

(ख) यदि दो या अधिक ऐसे अध्यापक एक ही दिनांक को नियुक्त किये गये हो तो आयु में ज्येष्ठ अध्यापक की संस्तुति पहले की जायेगी।

(3) उपधारा (1) के अधीन मौलिक रुप से नियुक्ति प्रत्येक अध्यापक को ऐसी मौलिक नियुक्ति के दिनांक से परिवीक्षा पर समझा जायेगा।

(4) ऐसा अध्यापक, जो उपधारा (1) के अधीन उपयुक्त न पाया जाय और ऐसा अध्यापक जो उक्त उपधारा के अधीन मौलिक नियुक्ति पाने के लिए पात्र न हो, ऐसे दिनांक को, जैसा राज्य सरकार आदेश द्वारा विनिर्दिष्ट करे, नियुक्ति पर नहीं रह जायेगा।

(5) इस धारा की किसी बात से यह नहीं समझा जायेगा कि कोई अध्यापक मौलिक नियुक्ति के लिए हकदार है, यदि उत्तर प्रदेश माध्यमिक शिक्षा सेवा चयन बोर्ड (संशोधन) अधिनियम 2016 के प्रारम्भ के दिनांक को ऐसी रिक्ति पहले से ही भरी हुयी थी या ऐसी रिक्ति के लिए चयन इस अधिनियम के अनुसार पहले से ही कर लिया गया है।

(6) तदर्थ अध्यापकों और अल्पकालिक रिक्ति के सापेक्ष नियुक्ति अध्यापकों की सेवा उत्तर प्रदेश माध्यमिक शिक्षा सेवा चयन बोर्ड (संशोधन) अधिनियम 2016 के प्रारम्भ होने के दिनांक से विनियमित की जायेगी।

(7) तदर्थ एवं अल्पकालिक रिक्तियों के सापेक्ष नियुक्त अध्यापकों के विनियमितीकरण में आरक्षण नियमों का पालन किया जाएगा।

(8) ऐसे तदर्थ शिक्षक जो उत्तर प्रदेश माध्यमिक शिक्षा सेवा आयोग (कठिनाईयों) का निवारण आदेश 1981 के अनुसार या उत्तर प्रदेश माध्यमिक शिक्षा सेवा चयन बोर्ड अधिनियम, 1982 की धारा 18क के अनुसार नियुक्त नहीं किये गये हैं और अन्यथा जो केवल मा0 न्यायालय के अन्तरिम आदेश के आधार पर वेतन प्राप्त कर रहे हैं, विनियमितीकरण के हकदार नहीं है।"

22. उपरोक्त वर्णित धारा 33 (छ) (1) (क) व (घ), स्पष्ट रुप से वर्णित करते है कि विनियमितिकरण के लिये अध्यापक की नियुक्ति 7.8.1993 से 25.3.1999 के मध्य होनी चाहिये व नियुक्ति की तिथि से 22.3.2016 (जब संशोधित अधिनियम 2016 प्रारम्भ हुआ) तक संस्था में निरन्तर कार्य करना चाहिए।

23. प्रस्तुत प्रकरण में याची की नियुक्ति 1.11.1993 को संस्था में हुई अर्थात उसकी नियुक्ति 7.8.1993 से 25.1.1999 में मध्य हुई। अन्य शर्त जैसे याची की नियुक्ति 1.11.1993 को अल्पकालिक रिक्त पद पर की गई थी तथा नियुक्ति प्रक्रिया को उच्च न्यायालय द्वारा भी उचित माना गया है को पूर्ण करता है। तथापि याची द्वारा उसकी नियुक्ति से संशोधित अधिनियम 2016 में प्रारम्भ होने की तिथि तक निरन्तर कार्य करने की शर्त पूर्ण नहीं करता है क्योंकि उसकी सेवा में 10.5.2006 से 15.5.2007 तक की सेवा की निरंतरता भंग हो गई थी अतः याची तथ्यात्मक रुप से सेवा की निरन्तरता की शर्त को पूर्ण नहीं करता है। याची को विद्वान अधिवक्ता भी इस तथ्य को नकार नहीं पाये है।

23. एक बिन्दू और जो इस प्रकरण में ऊभर कर आता है कि क्या न्यायालय के द्वारा सेवा में आये अंतराल को निरंतर मानने के सम्बन्ध में निश्चित आदेश की अनुपस्थिति में भी इस अंतराल को भी सेवा के संदर्भ में निरंतर माना जा सकता है या नहीं।

24. न्यायालय द्वारा सेवा में पुनर्नियुक्ति का आदेश केवल पुनर्नियुक्ति का आदेश या पुनर्नियुक्ति के साथ सेवा की निरन्तरता का भी आदेश या पुनर्नियुक्ति के साथ सेवा की निरन्तरता व साथ ही साथ सेवा भी निरन्तरता के फलस्वरुप होने वाले सभी लाभो का भी आदेश हो सकता है। इन तीनों आदेशों में अंतर है। आदेश में प्रयोग किये गये शब्दो के अनुसार ही उस आदेश का लाभ दिया जा सकता है <u>मात्र 'पुनर्नियुक्ति' के आदेश में 'सेवा की निरन्तरता' का आदेश स्वतः शामिल है यह नहीं माना जा सकता है।</u>

25. वर्तमान प्रकरण में इस उच्च न्यायालय कि एकल पीठ ने अपने आदेश दिनांक 15.5.2007 के द्वारा जिला विद्यालय निरीक्षक के आदेश दिनांक 27.4.2006 को अपास्त (जो याची को 11.5.2006 को प्राप्त हुआ) तो कर दिया, परन्तु याची की इस अंतराल (11.5.2006 से 15.5.2007) की सेवा की निरन्तरता के विषय में कोई विशिष्ट आदेश नहीं पारित किया। अतः इस अंतराल में याची सेवारत रहा यह नहीं माना जा सकता। अतः याची धारा 33 (6) (1) (घ) में वर्णित 'नियुक्ति से 22 मार्च 2006 तक सेवा की निरन्तरता' की शर्त को पूर्ण नहीं करता है, क्योंकि निर्विवाद रुप से 11.5.2006 से 15.5.2007 तक याची संस्था में अध्यापक के रुप में सेवारत नहीं था।

26. उपरोक्त विवेचना से यह पूर्णतः विदित है कि याची विनियमितिकरण की सभी शर्तो को पूर्ण न करने के कारण विनियमितिकरण की परिधि में नहीं आता है। अतः मण्डलीय विनियमितिकरण समिति द्वारा पारित आछेपित आदेश दिनाँक 27.2.2017 में

कोई तथ्यात्मक या वैधानिक त्रुटि नहीं है। अतः यह याचिका बलहीन होने के कारण निरस्त होने योग्य है अतः निरस्त की जाती है।

27. व्यय पर कोई आदेश पारित नहीं किया जा रहा है।

(2020)02ILR A1665

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 26.11.2019

BEFORE
THE HON'BLE PRAKASH PADIA, J.

Writ A No. 17980 of 2019

C/M Kisan Intermediate College Jaunpur & Anr. ...Petitioners

Versus

State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Jitendra Kumar Srivastava

Counsel for the Respondents:
C.S.C., Sri Rakesh Kumar

A. Service Law - Promotion - Constitution of India - Article 226 – Maintainability - U.P. Intermediate Act, 1921 - U.P. High School and Intermediate Colleges (Payment of Salaries of Teachers and other Employees) Act, 1972 - typing test/speed prescribed under the Government Orders - specific findings recorded by the respondent No.3/District Inspector of Schools - respondent No.5 is having 26.8 words per minute typing speed in Hindi which is requisite typing speed as per Government Orders - respondent No.5 is also having a valid "CCC" Certificate duly issued in his favour – no illegality in the order passed by respondent No.3.(Para 11)

The petitioner challenged the order passed by respondent No.3/District Inspectorof Schools – one post of Assistant Clerk and four posts of Class IV employees were sanctioned by the State Government - requisite qualification for promotion from Class IV post to Class III posts is mentioned in the Government Orders - first requisite qualification for promotion - typing test/speed between 25 to 30 words per minute either in Hindi or in English and not in both the languages - second requisite qualification for promotion - having certificate of CCC certificate issued by the DOEACC.(Para 2,3,10)

Held:- The order passed by the District Inspectorof Schools dated 19.10.2019 is absolutely just and proper and does not call for any interference by this Court specially under Article 226 of the Constitution of India. (Para 12)

Writ Petition dismissed. (E-7)

List of cases cited:-

Sudhanshu Tyagi Vs. State Of U.P. And 4 Others , Writ A No.23580 of 2018

(Delivered by Hon'ble Prakash Padia, J.)

1. Heard Sri J.K. Srivastava, learned counsel for the petitioners. Learned Standing Counsel accepted notice on behalf of respondent Nos. 1 to 4 and Sri Rakesh Kumar, learned counsel accepted notice on behalf of respondent No. 5.

2. The petitioner has preferred the present writ petition challenging the order dated 19.10.2019 passed by respondent No.3/District Inspectorof Schools Jaunpur, copy of which is appended as Annexure No.14 to the writ petition.

3. Facts in brief as contained in the writ petition are that the Institution in question namely Kisan Intermediate College, Ajosi, District Jaunpur is a recognized and aided Institution up to High School Level. The same is governed

under the provisions of U.P. Intermediate Act, 1921. All the teachers and employees of the Institution in question are getting their salary thorough State Exchequer as per the provisions of U.P. High School and Intermediate Colleges (Payment of Salaries of Teachers and other Employees) Act, 1972 (hereinafter referred to as "the Act, 1972"). In the Institution in question, apart from the posts of Head Master and teachers, one post of Assistant Clerk and four posts of Class IV employees were sanctioned by the State Government. One Sri Ram Singh who was working as Assistant Clerk was retired on 28.02.2018. In order fill up the aforesaid post, proceedings were initiated. By the order dated 17.4.2019 passed by respondent No.3, the respondent No.5 namely Santosh Kumar Yadav was promoted on the post of Assistant Clerk. The aforesaid order was subject matter of Writ A No.7233 of 2019 (C/M Kisan Intermediate College, Jaunpur, And Another Vs. State Of U.P. And 4 Others) filed by the present petitioners. The aforesaid writ petition was finally disposed of by judgement and order dated 9.5.2019. The order dated 9.5.2019 is reproduced below:-

"Heard Sri J.K. Srivastava, counsel for the petitioners, learned standing counsel for respondent Nos. 1 to 4 and Sri Vimal Kumar holding brief of Sri Vidya Dhar Yadav for respondent No. 5. With their consent, the instant petition is being decided finally, without inviting a formal counter affidavit.

The petitioner Committee of Management of Kisan Intermediate College, Jaunpur has filed the instant petition assailing the correctness of the order dated 15/17.4.2019 passed by District Inspector of Schools, Jaunpur, the third respondent whereby, the representation of respondent No. 5 dated 8.1.2019 has been accepted and a direction has been issued to promote him on the vacant post of Assistant Clerk in the Institution. The order records that the only post of Assistant Clerk in the Institution had fallen vacant consequent to retirement of Ram Ashish Yadav on 28.2.2018. The respondent No. 5 is the senior most class IV employee having requisite qualification for Class III post. Accordingly, he has been directed to be promoted, having regard to Regulation 2(2) of Chapter 3 of the Regulations framed under the U.P. Intermediate Education Act, 1921.

Learned counsel for the petitioners submitted that the petitioners in their application dated 3.4.2019, specifically pointed out that respondent No. 5 does not possess CCC Certificate, nor is having knowledge of typing, as mandatorily required under Government Orders dated 23.8.2016 and 4.1.2017. He further submitted that the validity of these Government Orders has been upheld by this Court in its judgment dated 22.11.2018 in Writ A No. 23580 of 2018.

Learned counsel for respondent No. 5 submitted that respondent No. 5 possesses CCC Certificate. He further submitted that he also has knowledge of typing. However, he admits that typing test has not been held so far.

Learned standing counsel appearing on behalf of State respondents points out that as per Government Order dated 23.8.2016 and 4.1.2017, the employee seeking promotion should have a typing speed of 25/30 words in Hindi/English, apart from having qualification of Intermediate and CCC Certificate.

It being not in dispute between the parties that before promotion could be granted, it has to be ascertained whether

the employee has typing speed as prescribed under Government Orders dated 23.8.2016 and 4.1.2017, but which has not been done in the instant case, consequently, the impugned order cannot be sustained and is hereby quashed. The petition is disposed of with direction to Management and District Inspector of Schools to get typing test conducted and also ascertain whether respondent No. 5 possesses a valid CCC Certificate, and thereafter pass a fresh order in accordance with law."

4. Pursuant to the aforesaid order, the proceedings were initiated by the respondent No.3 to conduct the typing test of the respondent No.5. It appears from perusal of record that the respondent No.3 wrote a letter to the petitioners on 2.8.2019 directing them to ensure their presence on 12.8.2019 so that the typing test of respondent No.5 be conducted in their presence. It is argued that in spite of the same, nobody was put their appearance in the office of respondent No.3 on the date fixed in the matter. In the circumstances, a decision was taken by the respondent No.3 to conduct typing test of respondent No.5 through one Sri Ramesh Yadav, Incharge Head Master, Government Ucchatar Madhayamic Vidhayalaya, District Jaunpur. The typing test of respondent No.5 was conducted on 10.10.2019. Thereafter the order impugned has been passed by respondent No.3 on 19.10.2019 stating therein that since the respondent No.5 has already passed his typing test, he is entitled for his promotion. The order dated 19.10.2019 passed by respondent No.3 is under challenged in the present writ petition.

5. It is argued by learned counsel for the petitioners that the order dated 19.10.2019 passed by respondent No.3 is wholly illegal order and was passed contrary to the Government Orders dated 23.08.2016 and 4.10.2017. It is further argued that respondent No.3 has conducted typing test of the respondent No.5 in a very arbitrary manner and typing test was conducted on a type writer supplied by the respondent No.3. It is further argued that only Hindi typing test was conducted although Hindi and English both typing tests are required. It is further argued that at no point of time "CCC" Certificate was made available by the respondent No.5 to the petitioners and as such the findings recorded by the respondent No.3 that the respondent No.5 is having CCC certificate is absolutely wrong. Counsel for the petitioners also relied upon a co-ordinate Bench of this Court in Writ A No.23580 of 2018 *(Sudhanshu Tyagi Vs. State Of U.P. And 4 Others),* copy of which is appended as Annexure 15 to the writ petition. In view of the aforesaid, it is argued that the order passed by respondent No.3 is liable to be quashed.

6. To the contrary, it is argued by Sri Rakesh Kumar learned counsel appearing on behalf of respondent No.5 that the order impugned passed by respondent No.3 dated 19.10.2019 is absolutely perfect order and the same has been passed in accordance with the provisions contained in the Government Order 23.8.2016 and 4.1.2017. It is further argued by Sri Rakesh Kumar learned counsel for respondent No.5 that vide the aforesaid Government Orders, the requirement is possessing CCC certificate from DOEACC Society and also knowledge of Hindi/ English Tying with speed of minimum 25 to 30 words per minute has been made essential for promotion. The respondent No.5 is having sufficient

typing speed 26.8 words per minute in Hindi and also having a valid "CCC" Certificate. The Government Orders dated 23.8.2016 and 4.1.2017 are extracted hereinafter:-

"प्रेषक,
जितेन्द्र कुमार
प्रमुख सचिव
उत्तर प्रदेश शासन।

सेवा में

1. शिक्षा निदेशक (मा0)
2. वित्त नियन्त्रक,

उ0प्र0 लखनऊ /इलाहाबाद।
शिक्षा निदेशालय, उ0प्र0
इलाहाबाद।
शिक्षा (8) अनुभाग

लखनऊः दिनांक, 23 अगस्त, 2016

विषय– वेतन समिति (2008) के 11वें प्रतिवेदन के माध्यम से अशासकीय सहायता प्राप्त माध्यमिक विद्यालयों के शिक्षणेत्तर कर्मचारियों (लिपिक संवर्ग) के वेतन पुनरीक्षण के संबंध में।

महोदय,

1– उपर्युक्त विषयक शिक्षा निदेशक (मा0), उ0प्र0 के पत्रांक–शिविर/19878/2015–16, दिनांक 28 मार्च, 2016 के क्रम में पूर्व निर्गत शासनादेश संख्या 1468/15–8–2015–3011/2009 टी0सी0 दिनांक 03 नवम्बर, 2015 को निरस्त करते हुए मुझे यह कहने का निदेश हुआ है कि वेतन समिति (2008) के ग्यारहवें प्रतिवेदन के माध्यम से सहायता प्राप्त शिक्षण संस्थाओं, प्राविधिक शिक्षण संस्थाओं के शिक्षेणेत्तर कर्मचारियों सामान्य संवर्ग तथा अन्य संवर्ग के संबंध में की गयी संस्तुतियों के क्रम में वित्त विभाग द्वारा निर्गत शासनादेश सं0–वसे0आ0–2–665 (11)/दस–54 (एम)/2008 टी0सी0 दिनांक 26.09.2013 द्वारा लिपिकीय संवर्ग के प्रथम स्तर का पदनाम राजकीय विभागों की भांति कनिष्ठ सहायक करते हुए वेतन बैण्ड–1 रुपये 5200–20200 एवं ग्रेड वेतन रूपये 2000 तत्काल प्रभाव से अनुमन्य किया जाय। इसी प्रकार लिपिकीय संवर्ग के द्वितिय स्तर का पदनाम राजकीय विभागों की भांति वरिष्ठ सहायक करते हुए वेतन बैण्ड–1 रूपये 5200–20200 एवं ग्रेड वेतन रूपये 2800 तत्काल प्रभाव से अनुमन्य किया जाय।

2– उक्त निर्णयानुसार विभाग के लिपिकीय संवर्ग का पुनगर्ठन करते हुए लिपिकीय संवर्ग के प्रथम स्तर से पद का पदनाम कनिष्ठ सहायक करते हुए वेतन बैण्ड–1 रूपये 5200–20200 एवं ग्रेड वेतन रू0 2000/–तथा लिपिकीय संवर्ग के द्वितीय स्तर के पद का पदनाम वरिष्ठ सहायता करते हुए वेतन बैण्ड–1 रूपये 5200–20200 एवं ग्रेड वेतन रू0 2800/– दिनांक 26 सितम्बर, 2013 से इस प्रतिबन्ध के अधीन अनुमन्य किया जाता है कि इन पदों पर अर्हता/भर्ती की विधि निम्न तालिका के अनुसार निर्धारित की जायेगी।

क0 स0		वर्तमान				
1	2	3	4	5	6	7
	पदनाम	वेतन बैण्ड एवं ग्रेड वेतन (रू0)	भर्ती की विधि	पदनाम	वेतन बैण्ड एवं ग्रेड वेतन (रू0)	भर्ती की विधि
1	नैत्यिक लिपिक /कर्णिक	950–1500–5200–20200 एवं ग्रेड वेतन रू0 1900/–	**शैक्षिक अर्हता** – इण्टर मीडिएट शिक्षा अधिनियम, 1921 की धारा 16 (छ) विनियम 2(1) के अन्तर्गत किसी सस्था में नियुक्ति हेतु लिपिक की न्यूनतम शैक्षिक अर्हता	कनिष्ठ सहायक	5200–20200 एवं ग्रेड वेतन रू0 2000/–	80 प्रतिशत सीधी भर्ती द्वारा। अर्हता इण्टरमीडिएट के साथ–साथ कम्प्यूटर संचालन का 'डोयक' सोसाइटी द्वारा प्रदत्त सी0सी0सी0' प्रमाण पत्र तथा हिन्दी/अंग्रेजी में कम से कम 25/30 शब्द प्रति मिनट की टंकण गति। 15

			वही होगी जो राजकीय उच्चतर माध्यमिक विद्यालयों के समकक्षीय कर्मचारियों के लिए समय पर निर्धारित की गई है। **भर्ती की विधि–** इण्टरमीडिएट शिक्षा अधिनियम 1921 के अध्याय 3 विनियम 101 में शिक्षणेत्तर पदों की भर्ती विषयक व्यवस्था है जिसके अनुसार नियुक्ति प्राधिकारी निरीक्षक के पूर्वानुमोदन के सिवाय किसी मान्यत			प्रतिशत चतुर्थ श्रेणी के ऐसे कार्मिकों से पदोन्नति द्वारा जो हाईस्कूल हो तथा टंकण ज्ञान रखते हो। 05 प्रतिशत पद चुतर्थ श्रेणी के ऐसे कर्मिकों से पदोन्नति द्वारा जो इण्टरमीडिएट हो तथा टंकण ज्ञान रखते हो।					ा प्राप्त सहायता प्राप्त सस्था के शिक्षणेत्तर स्टाफ में किसी रिक्ति को नहीं भरेगा। इण्टर स्तरीय विद्यालय में लिपिक के सृजित पदों के सापेक्ष 50 प्रतिशत चतुर्थ श्रेणी अर्ह कर्मचारी की पदोन्नति करके लिपिक के पदों को भरे जाने की व्यवस्था है। **टिप्पणी–** 50 प्रतिशत पदों की सगंणना करने में आधे से कम भाग को छोड दिया जायेगा और आधे या			

			आधे से अधिक भाग को एक समक्षा जायेगा। शासनादेश दिनांक 20.11.1976 द्वारा निर्धारित ढांचा अद्यतन प्रवृत्त है। अशासकीय सहायता प्राप्त मा0 वि0 के लिपिक संवर्ग का पुनर्गठित ढांचा नही है। प्रश्नगत लिपिक संवर्ग के भर्ती की विधि एवं चयन प्रकिया नियमावली अद्यतन प्रख्यापित नहीं है।							वेतन रू0 2400/–)	**विधि–** अशासकीय सहायता प्राप्त मा0वि0 (हाईस्कूल स्तरीय) में लिपिक का पद एकल है। इण्टर स्तरीय विद्यालय में ही प्रधान लिपिक का पद सृजित है। प्रधान लिपिक का पद शत प्रतिशत पदोन्नतिका है। इण्टर स्तरीय विद्यालय में लिपिक श्रेणी में सृजित पदों के सापेक्ष कार्यरत लिपिक की पदोन्नति उपर्युक्तता एवं ज्येष्ठता के आधार पर प्रधान लिपि		–	वाले कनिष्ठ सहायक के पदों से।
2	प्रधान कर्णिक अथवा प्रधान लिपिक	1200–2040 (5200–20200एवं ग्रेड	**शैक्षिक अर्हता एवं भर्ती की**	वरिष्ठ सहायक	5200–20200 एवं ग्रेड वेतन रू0 2800/	शत प्रतिशत पदोन्नति द्वारा–05 वर्ष की सेवा							

			क के पद पर की जाती है।			

4– उपर्युक्त पुर्नगठन के फलास्वरूप उच्चीकृत ग्रेड वेतन के सापेक्ष समायोजित होने वाले पदधारकों का वेतन निर्धारण वित्त विभाग के शासनादेश सं0–बे0आ0–2–841/दस–2009–59 (एस)/2008 दिनांक 24 दिसम्बर, 2009 में वर्णित व्यवस्था के अनुसार किया जायेगा।

5– उपर्युक्त व्यवस्था के समावेश संबंधित विषय के विनियाली में यथाशीघ्र करा लिया जायेगा। उपरोक्तानुसार पुनर्गठन करने के फलस्वरूप वर्तमान में विद्यालयों में उपलब्ध पदों की संख्या में कोई परिवर्तन नही होगा।

6– यह आदेश वित्त विभाग के अशासकीय संख्या–वेआ0–2–431/दस–2015 दिनांक 16.04.2015 में प्राप्त उनकी सहमति से निर्गत किये जा रहे हैं।

भवदीय
ह0अ0
(जितेन्द्र कुमार)
प्रमुख सचिव''

''प्रेषक,
जितेन्द्र कुमार
प्रमुख सचिव
उत्तर प्रदेश शासन।
सेवा में
2. शिक्षा निदेशक (मा0) 2. वित्त नियन्त्रक,

उ0प्र0 लखनऊ/इलाहाबाद। शिक्षा निदेशालय, उ0प्र0 इलाहाबाद।

शिक्षा (8) अनुभाग लखनऊः
दिनांक, 04, जनवरी, 2017

विषय– उत्तर प्रदेश के अशासकीय सहायता प्राप्त माध्यमिक विद्यालयों में कनिष्ठ सहायक के पदों पर चतुर्थ श्रेणी के पदों से पदोन्नति की व्यवस्था के संबंध में।

महोदय,

1–उपर्युक्त विषयक शिक्षाक निदेशक (मा0) उ0प्र0 के पत्रांक–शिविर/18491/2015–16 दिनांक 29 फरवरी 2016 का संदर्भ ग्रहण करने का कष्ट करें, जिसके द्वारा उत्तर प्रदेश के अशासकीय सहायता प्राप्त माध्यमिक विद्यालयों में कनष्ठि सहायक के पदों पर चतुर्थ श्रेणी के पदों से पदोन्नति की व्यवस्था विषयक अनुरोध के कम में मुझे यह कहने का निदेश हुआ है कि वेतन समिति (2008) के ग्यारहवें प्रतिवेदन के माध्यम से अशासकीय सहायता प्राप्त माध्यमिक विद्यालयों के शिक्षणेत्तर कर्मचारियों के संबंध में शासनादेश संख्या–1067/15–8–2016–3011/2009 टी0 सी0 दिनांक 23 अगस्त 2016 के प्रस्तर–2 की तालिका के स्तम्भ–7 में भर्ती की विधि की वर्तमान व्यवस्था के सीान पर निम्नलिखित व्यवस्था किए जाने की श्री राज्यपाल सहर्ष स्वीकृति प्रदान करते हैः–

(1) अर्हता	50 प्रतिशत सीधी भर्ती द्वारा इण्टरमीडिएट के साथ–साथ कम्प्यूटर संचालन का 'डोयक' सोसाइटी द्वारा प्रदत्त 'सी0सी0सी0' प्रमाण पत्र तथा हिन्दी/अंग्रेजी में कम से कम 25/30 शब्द प्रति मिनट की टंकण गति।
(2)	प्रतिशत चतुर्थ श्रेणी के ऐसे पदधारों से पदोन्नति द्वारा जो सीधी भर्ती की अर्हता रखते हो और 05 वर्ष की मौलिक सेवा पूर्ण कर चुकें हो और उनका सेवा अभिलेख अच्छा हो।

2– उत्तर प्रदेश अशासकीय सहायता प्राप्त माध्यमिक विद्यालयों में कनिष्ठ सहायक के पदों पर चतुर्थ श्रेणी के पदों पर सीधी भर्ती/पदोन्नति के संबंध में शासनादेश संख्या–1067/15–8–2016–3011/2009 टी0 सी0 दिनांक 23 अगस्त, 2016 में की गयी व्यवस्था को उक्त सीमा तक संशोधित एवं अवकमित समझा जाय।

5– यह आदेश वित्त विभाग के अशासकीय संख्या बे0आ0–2–2928/दस–2016 दिनांक 04 जनवरी, 2017 में प्राप्त उनकी सहमति से निर्गत किए जा रहे है।

भवदीय
ह0अप0
(जितेन्द्र कुमार)
प्रमुख सचिव''

7. In this view of the matter, it is argued that as per the aforesaid

Government orders, typing test/speed is required either in Hindi or in English and not in both the languages. It is further argued that in the earlier writ petition filed by the petitioners, the directions were given to the respondent No.3 to ascertain whether the respondent No.5 is having typing speed as prescribed under the Government Orders dated 23.08.2016 and 4.1.2017 and whether the respondent No.5 is having a valid "CCC" Certificate. The directions issued by this court in the earlier writ petition filed by the petitioners, were fully complied with by the respondent No.3 by conducting typing test of the respondent No.5. Finding were further recorded by the respondent No.3 in the impugned order that respondent No.5 is having a valid "CCC" Certificate. Apart from the same, original "CCC" certificate has been produced by the counsel for respondent No.5 before the Court. From perusal of the same, it is clear that the respondent No.5 is having a certificate of Computer Concept Course (CCC) issued by National Institute of Electronics and Information Technology (NIELIT). One photocopy of the same is provided to the counsel for the petitioners and one photocopy of the same also taken on record. From perusal of the same, it is clear that the respondent No.5 is having valid "CCC" Certificate duly issued by National Institute of Electronics and Information Technology (NIELIT).

8. A Division Bench of this Court in Special Appeal (Defective) No.679 of 2017 (Sanjay Kumar Vs. State of U.P. and 2 others) decided on 06.05.2019 has already been held that the Computer Concept Course (CCC) is designed to fulfil the beginner level computer literacy and that can be undertaken by a person at his own also. It was further held that only requirement is that he must get the same verified by NIELIT (formerly known as "DOEACC Society"). The course in question is not expertise in computer application but is the most preliminary knowledge for computer operation. The certificate of CCC is available even for the persons who are having no formal education. Relevant portion of the aforesaid judgement is reproduced below:-

"In appeal, we have looked into the entire issue including the nature of certificate of CCC. As per the details available on the official website of the NIELIT, the deails of the Course on Computer Concepts (CCC) is as follows:-

"Introduction: This course is designed to aim at imparting a basic level IT LIteracy programme for the common man. This programme has essentially been conceived with an idea of giving an opportunity to the common man to attain computer literacy thereby contributing to increased and speedy PC penetration in different walks of life. After completing the course the incumbent should be able to use the computer for basis purposes of preparing his personnel/business letters, viewing information on internet (the web), receiving and sending mails, preparing his business presentations, preparing small databases etc. This helps the small business communities, housewives, etc. to maintain their small accounts using the computers and enjoy in the world of Information Technology. This course is, therefore, designed to be more practical oriented.

Eligibility: The candidates can appear in the NIELIT CCC Examination through following three modes and the eligibility criteria for each mode are indicated against each:

2.1 Candidates sponsored by NIELIT approved Institutes permitted to conduct CCC

2.2 Candidates sponsored by Government recognized Schools/Colleges having obtained an Unique Identity number from NIELIT for conducting CCC - irrespective of any educational qualifications, and

2.3 Direct Applicants (without essentially undergoing the Accredited Course or without being sponsored by a Govt. recognized School/College) - irrespective of any educational qualification;

Duration: The total duration of the course is 80 hours, consisting of

(I) Theory 25 hours

(ii) Tutorials 5 hours

(iii) Practicals 50 hours

The course could ideally be a two weeks intensive course."

The introduction quoted above indicates that the Course on Computer Concepts (CCC) is designed to fulfill the beginner level computer literacy and that can be undertaken by a person at his own also. The only requirement is that he must get the same verified by NIELIT (formerly known as "DOEACC Society"). The course is not expertise in computer application but is the most preliminary knowledge for computer operation. The certificate of CCC is available even for the persons who are having no formal education. As a matter of fact, it is the first step for computer literacy. The only purpose to include certificate of "CCC" in the eligibility is that the aspirant must be aware with computer and he should a computer literate. The appellant-petitioner who is a Post Graduate Diploma in Computer Application is too ahead to the knowledge extended through CCC. The advance knowledge available to the appellant-petitioner very well satisfies the purpose and need to have certificate of CCC. Learned single Bench failed to appreciate that the purpose of having a CCC certificate stands satisfied on having the higher qualification of Post Graduation in Computer Application.

In view of whatever stated above, we are of considered opinion that learned single Bench erred while arriving at the conclusion that the order passed by District Judge, Unnao dated 19th September, 2016 does not suffer from any error.

Accordingly, the appeal is allowed. The order dated 5th January, 2017 is set aside. The Writ Petition No.60818 of 2016 is allowed. The order dated 19th September, 2016 passed by the District Judge, Unnao cancelling the appointment of the appellant-petitioner is set aside. The petitioner is declared entitled to be reinstated as Stenographer Grade III in district judgeship Unnao with all consequential benefits except the actual payment of salary for the period he remained out of employment in pursuance to the order dated 19th September, 2015."

The same view was again taken by a Co-ordinate Bench of this Court in Writ A No.16106 of 2017 (Arvind Kumar Vs. Registrar General High Court of Judicature at Allahabad and another).

9. Heard learned counsel for the parties.

10. From perusal of the record, it is clear that requisite qualification for promotion from Class IV post to Class III posts is mentioned in the Government Orders dated 23.08.2016 and 4.1.2017. The first requisite qualification for promotion is typing test/speed between 25 to 30 words per minute either in Hindi or in English and not in both the languages and the second requisite qualification for promotion is having certificate of CCC certificate issued by the DOEACC.

11. Insofar as the first requirement is concerned namely typing test/speed as prescribed under the aforesaid Government Orders, specific findings has already been recorded by the respondent No.3 in the order impugned that respondent No.5 is having 26.8 words per minute typing speed in Hindi which is requisite typing speed as per Government Orders, i.e., 25 to 30 words per minute. From the facts as narrated above, it is clear that respondent No.5 is having typing speed as prescribed under the Government Orders dated 23.08.2016 and 04.01.2017. Apart from the same, the respondent No.5 is also having a valid "CCC" Certificate duly issued in his favour by the National Institute of Electronics and Information Technology (NIELIT). Apart from the aforesaid arguments, no other argument whatsoever has been raised by the counsel for the petitioners.

12. In view of the aforesaid, this Court is of the view that the order passed by the respondent No.3 dated 19.10.2019 is absolutely just and proper and does not call for any interference by this Court specially under Article 226 of the Constitution of India.

13. The writ petition is devoid of merits and the same is hereby dismissed. No order as to costs.

(2020)02ILR A1674

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 17.01.2020

BEFORE
THE HON'BLE SARAL SRIVASTAVA, J.
Writ A No. 18733 of 2019

Abhishek Kumar Bajpayee ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Shivendu Ojha, Sri Shikhar Trivedi

Counsel for the Respondents:
C.S.C., Sri Ashok Kumar Yadav

A. Service Law – vacancy of Assistant Teacher in Primary School – selection process has to brought to a logical end – finding - time granted by this Court in the case of Narendra Kumar Chaturvedi Vs. State of U.P. should be treated to be cut off date for the purpose of permitting the candidates to apply for re-evaluation - Petitioner did not approach Court challenging the result of re-evaluation - pleadings lacks material fact as to the date on which petitioner received scanned copy and the mode by which scanned copy was sent – no merit.
(Para 17,19)

Petitioner applied for selection and appointment on the post of Assistant Teacher - illegalities and discrepancies committed in conducting the evaluation - Government Order - permitting candidates desirous for re-evaluation of their copies - petitioner was three mark short of minimum qualifying marks after re-evaluation - petitioner applied for obtaining the scanned copy of his answer copy - Court granted two weeks time to apply for re-evaluation - candidates dissatisfied with the marks awarded after re-evaluation again approached Court - State Government considering the welfare of the candidates again decide to re-evaluate the copy of all the petitioners who being dissatisfied with the result of re-evaluation approached court . (Para -5,8,14,15)

Held :- The contention of the petitioner that no cut off date is provided by this Court for making application for re-evaluation is misconceived as the process of re-evaluation cannot be allowed to be continued to infinity. (Para-19)

Writ Petition dismissed. (E-7)

List of cases cited:-

1. Aniruddh Narayan Shukla and 118 Ors. vs. State of U.P. , Writ-A No.18235 of 2018

2. Narendra Kumar Chaturvedi Vs. State of U.P. and other , Writ-A No.6420

3. Ranvijay Singh & Ors. , 2018 (2) SCC 357
4. Priya Sharma Vs. State of U.P. , Special Appeal No. 620 of 2019

5. Satish Kumar Pandey & Others, Writ-A No. 19760 of 2019

6. Manju vs. State of U.P. & Anr. ,Writ-A No.17887 of 2019

(Delivered by Hon'ble Saral Srivastava, J.)

1. Heard Sri R.K. Ojha, learned Senior Counsel assisted by Sri Shivendu Ojha, learned counsel for the petitioner, Sri A.K. Yadav, learned counsel for respondent No.3 and learned Standing Counsel for respondent Nos.1, 2 and 4.

2. The State of U.P. has decided to fill up 68500 vacancies of Assistant Teacher in Primary School run by U.P. Basic Shiksha Parishad, Allahabad. Pursuant to the aforesaid decision, State Government directed the Director, State Council of Educational Research and Training JBTC, Campus, Nishatganj, U.P. Lucknow as well as respondent no.4-Secretary Examination Regulatory Authority, U.P. Allahabad to conduct the Assistant Teacher Recruitment Examination of 2018 (hereinafter referred to as 'Examination 2018). Pursuant to the said decision, on-line applications were invited to fill up 68500 vacancies of Assistant Teachers by advertisement dated 8.5.2018. The cut off percentage to qualify in the examination was 45% for General and O.B.C (other backward class) candidates and 40% for Schedule Cast Candidates. Thus, to qualify the examination 2018, candidates belonging to General/O.B.C category should secure 67 marks and candidates belonging to scheduled cast category should secure 60 marks.

3. The petitioner being eligible applied for selection and appointment on the post of Assistant Teacher. The examination consisted of written examination of 150 questions . The petitioner appeared in the examination and attempted 142 questions out of 150 questions. Respondent no.4 published answer key on 5.6.2018 and objections against the proposed answer key was entertained till 9.6.2018. The Expert Committee was to consider the objections against the answer key and submit its recommendation by 15.6.2018. The modified/corrected model answer key was to be published on 18.6.2018. The result was declared on 13.6.2018 and model answer key was also published. The petitioner secured 59 marks in the examination.

4. It appears that non selected candidates approached this Court by filing Writ-A No.18235 of 2018 (Aniruddh Narayan Shukla and 118 Ors. vs. State of U.P.) which was decided by this court by judgment dated.30.10.2018. The relevant extract of the judgment is extracted hereinbelow:-

"It appears that some of the petitioners have not availed of the liberty granted under the Government Order dated 05.10.2018 to apply for re-evaluation, for the simple reason that the writ petitions were pending before this

Court. It is stated that some of the petitioners were advised not to do so. Since the task of re-evaluation has, otherwise, been made available by the respondents themselves, it would be appropriate to grant one further indulgence to all such petitioners to make their objections or to apply for re-evaluation, within a period of two weeks from today, along with certified and/or true copy of this order. It is made clear that except to grant this opportunity, no further opportunity would be extended to any of the persons to raise a fresh grievance. Exercise of re-evaluation would be carried out by the Examination Regulatory Authority on the basis of observations, made above, and in accordance with law. Aforesaid guidelines are necessary in order to ensure that the candidates are treated fairly and unnecessary further litigation, in respect of the recruitment itself, could be avoided on the questions already formulated."

5. It also transpires that many a candidate submitted complaints to the State Government for the illegalities and discrepancies committed in conducting the evaluation. The State Government during the pendency of Writ-A No.18235 of 2018 issued a Government Order dated 5.10.2018 permitting all those candidates, who are desirous for re-evaluation of their copies should apply on-line between 11.10.2018 to 20.10.2018.

6. It appears that some of petitioners in the aforesaid writ petition could not apply for re-evaluation within the period stipulated in Government Order dated 5.10.2018, but they were allowed to apply for re-evaluation by this court in Writ-A No.18235 of 2018, the relevant extract of the judgment is already extracted above.

7. The re-evaluation result was declared. After declaration of result of re-evaluation, many a candidate again found discrepancy in re-evaluation of their copy. Accordingly, they approached this Court, challenging the correctness of the re-evaluation in Writ-A No.6420 (Narendra Kumar Chaturvedi Vs. State of U.P.) and other connected writ petitions. During the pendency of the said writ petition, the State Government again issued Government Order dated 18.10.2019 deciding to re-evaluate the copy of all the candidates, who have preferred writ petition before this Court being not satisfied with the result of re-evaluation. In the aforesaid backdrop, this Court disposed off Writ-A No.6420 of 2019 along with other connected writ petitions. The relevant portion of the judgment is extracted hereinbelow:-

"In view of aforesaid decision taken by the State Government, present petition is disposed of with direction to Secretary, Examination Regulatory Authority, U.P. Allahabad to conduct the re-evaluation of answer book of petitioner in this petition as well as in all connected writ petitions within a period of three months from today strictly in accordance with guidelines issued by this Court in the matter of Aniruddh Narayan Shukla (supra) as well as Radha Devi (supra).

Needless to say that in case some order is passed by the Apex Court in SLP in the matter of Radha Devi (supra), same shall be abide by the "Secretary" while conducting the re-evaluation.

Petitioners are also directed to submit copy of this order along with application in the office of "Secretary" within a period of one month from today to avoid any confusion in re-evaluation of their answer books.

After re-evaluation of answer sheet and declaration of result, "Secretary" is directed to send the result to concern State authority for issuance of appointment letter against the remaining 22211 post of Assistant Teacher as per marks obtained by the petitioner as well as minimum cut off marks within four weeks from the date of declaration of result."

8. The petitioner also submitted application for re-evaluation. On re-evaluation, the marks of the petitioner has increased from 59 to 64. The petitioner being O.B.C. candidate was to secure 67 marks to qualify the examination. Hence, the petitioner was three mark short of minimum qualifying marks after re-evaluation. After the declaration of the result of the re-evaluation, the petitioner deposited Rs.2,000/- for obtaining the scanned copy of his answer copy. It is stated in the writ petition that the petitioner has received scanned copy in the Month of November, 2019. The petitioner found that though his answer to question no.30, 51, 57, 63, 64 and 133 are correct, but marks in those questions were not awarded, and if the petitioner had been awarded marks against the aforesaid questions, he would have secured 70 marks and would have qualified the examination. In the aforesaid backdrop, the petitioner has come up in the writ petition praying for the following reliefs:-

"i. A writ order or direction in the nature mandamus commanding the respondent to produce original answer key (answer copy) of Booklet Series 'D' of the petitioner before this Hon'ble Coue tans same may be duly compared with the answers given by the petitioner and at least marks be allotted to the petitioner against Question Nos.31, 51, 57, 63, 64 and 133.

ii. A writ order or direction in the nature of mandamus commanding to the respondent to calculate mark against Question Nos. 31, 51, 57, 63, 64 and 133 declare result of the petitioner of Assistant Teacher Recruitment Examination-2018.

iii. A writ order or direction in the nature of mandamus commanding the respondents to issue appointment letter in favour of the petitioner after being found eligible and qualified in Assistant Teacher Recruitment Examination-2018 and also provided all other consequential benefits as given to other qualified and selected candidates."

9. Learned counsel for the petitioner contended that this Court in the case of ***Narendra Kumar Chaturvedi (supra)*** has restricted the filing of the application within one month to the petitioners before the court. Thus, the period of one month prescribed by this court in the case of ***Narendra Kumar Chaturvedi (supra)*** is not applicable to those candidates who were not before this court in the bunch of petitions decided with the case of ***Narendra Kumar Chaturvedi (supra)***. Hence, there is no cut-off date for filing the application for re-evaluation.

10. Learned Senior Counsel for the petitioner further contended that since there is apparent error on the face of record in not awarding the marks to the petitioner against question nos.30, 51, 57, 63, 64 and 133, which have been answered correctly by the petitioner, the petitioner may be permitted to submit application for re-evaluation of his answer-sheet in terms of orders passed by this Court in the case of ***Narendra Kumar Chaturvedi (supra)*** as non awarding of marks in respect to the answer of the questions correctly answered by the petitioner has caused serious prejudice to the rights of the petitioner.

11. Per contra, learned Standing Counsel contended that the State Government has decided by Government Order dated 18.10.2019 to re-evaluate the copy of all the candidates, who have preferred writ petitions after declaration of the result of re-evaluation, and in the light of the Government Order dated 18.10.2019 , this court disposed off the writ petition of ***Narendra Kumar Chaturvedi (supra)*** and other connected petitions permitting the petitioners to submit application in the Office of 'Secretary' within a period of one month from the date of judgment i.e. 22.10.2019 for re-evaluation of their answer books. Thus, the submission is that if the petitioner was dissatisfied with the result of re-evaluation, he ought to have approached this Court in time to get the benefit of the judgment of this Court in the case of ***Narendra Kumar Chaturvedi (Supra)***. He submitted that a very vague averment with regard to the fact that the scanned copy has been received by the petitioner in the month of November, 2019 has been made, whereas, the petitioner has not stated in the writ petition as to the date on which and the mode by which he has received the scanned copy.

12. He further submits that this Court cannot permit the candidate to apply for re-evaluation for indefinite period inasmuch as if this process continues indefinitely, the process of selection cannot be brought to a logical end. Thus, the submission is that the cut-off date for making application for re-evaluation was 21.10.2019 i.e. one month period from the date of judgment in the case of ***Narendra Kumar Chaturvedi (supra)***, and since the petitioner has not approached within the said period, the relief prayed by the petitioner cannot be granted. He further submits that even otherwise the relief sought for by the petitioner cannot be granted by this Court in exercise of power under Article 226 of the Constitution of India in view of various pronouncements of Hon'ble Apex Court where the Apex Court held that if there is no provision for re-evaluation, the Court should not permit re-evaluation as a matter of right

13. I have heard learned counsel for the petitioner and learned Standing Counsel for the State.

14. This Court while deciding the case of ***Aniruddh Narayan Shukla (supra)*** has granted two weeks time to the petitioners in those petition to apply for re-evaluation. The Court further observed that no further liberty would be extended to any candidate to raise such grievance. The Government Order dated 15.10.2018 also granted liberty to all the candidates not satisfied with the marks to apply for re-evaluation. The Board in the light of Government Order dated 15.10.2018 and the case of Aniruddh Narayan Shukla (supra) re-evaluated the copies of all the candidates who had availed the opportunity of re-evaluation.

15. As some of the candidates were dissatisfied with the marks awarded after re-evaluation, they again approached this Court in Writ-A No.6420 of 2019 and other connected writ petitions. The State Government considering the welfare of the candidates again decide to re-evaluate the copy of all the petitioners who being dissatisfied with the result of re-evaluation approached this court.

16. At this stage, it would appropriate to refer paragraph 31 and 32 of the judgment of the Hon'ble Apex Court in the case of ***Ranvijay Singh & Ors. 2018 Volume 2 SCC 357,*** wherein the Apex Court has expressed anguish where the

selection of Assistant Teachers could not be brought to a logical end for about eight years. Relevant part of the judgment is quoted hereinbelow:-

"31. On our part we may add that sympathy or compassion does not play any role in the matter of directing or not directing re-evaluation of an answer sheet. If an error is committed by the examination authority, the complete body of candidates suffers. The entire examination process does not deserve to be derailed only because some candidates are disappointed or dissatisfied or perceive some injustice having been caused to them by an erroneous question or an erroneous answer. All candidates suffer equally, though some might suffer more but that cannot be helped since mathematical precision is not always possible. This Court has shown one way out of an impasse - exclude the suspect or offending question.

32. It is rather unfortunate that despite several decisions of this Court, some of which have been discussed above, there is interference by the Courts in the result of examinations. This places the examination authorities in an unenviable position where they are under scrutiny and not the candidates. Additionally, a massive and sometimes prolonged examination exercise concludes with an air of uncertainty. While there is no doubt that candidates put in a tremendous effort in preparing for an examination, it must not be forgotten that even the examination authorities put in equally great efforts to successfully conduct an examination. The enormity of the task might reveal some lapse at a later stage, but the Court must consider the internal checks and balances put in place by the examination authorities before interfering with the efforts put in by the candidates who have successfully participated in the examination and the examination authorities. The present appeals are a classic example of the consequence of such interference where there is no finality to the result of the examinations even after a lapse of eight years. Apart from the examination authorities even the candidates are left wondering about the certainty or otherwise of the result of the examination - whether they have passed or not; whether their result will be approved or disapproved by the Court; whether they will get admission in a college or University or not; and whether they will get recruited or not. This unsatisfactory situation does not work to anybody's advantage and such a state of uncertainty results in confusion being worse confounded. The overall and larger impact of all this is that public interest suffers."

17. As per the law laid down by the Apex court, the selection process has to brought to a logical end, therefore, in the facts of the present case, this Court finds that the time granted by this Court in the case of ***Narendra Kumar Chaturvedi (supra)*** should be treated to be cut off date for the purpose of permitting the candidates to apply for re-evaluation.

18. It is also pertinent to mention that if the candidate is allowed to submit application for re-evaluation for indefinite period, then the selection process would never complete and the very purpose of selection is frustrated which is against the various pronouncements of Apex Court, wherein, the Apex, Court has expressed anguish for non completion of the selection process in time.

19. In the case in hand, the petitioner did not approach this Court challenging the result of re-evaluation. The petitioner in order to avail the benefit of judgment of this court in the case of ***Narendra Kumar Chaturvedi (supra)*** in paragraph 20 of the writ petition has made a vague averment

that he has received scanned copy in the month of November, 2019. The pleadings in this regard lacks material fact as to the date on which he has received scanned copy and the mode by which scanned copy was sent to him. Thus, the contention of the learned counsel for the petitioner that no cut off date is provided by this Court for making application for re-evaluation is misconceived as the process of re-evaluation cannot be allowed to be continued to infinity.

20. While the judgment was reserved, the counsel for the petition has placed two judgments; one in Special Appeal No. 620 of 2019 (Priya Sharma Vs. State of U.P.) decided on 18.12.2019, and the other judgment in Writ-A No. 19760 of 2019 (Satish Kumar Pandey & Others) decided on 07.01.2019 to contend that the petitioner is also entitled to the benefit of the aforesaid judgment.

21. The judgment Special Appeal No. 620 of 2019 has been rendered in different factual context wherein the writ petition filed by the appellant in special appeal was dismissed before the judgment of this Court in ***Aniruddh Narayan Shukla (supra)*** case. In the said backdrop, this Court has extended the benefit of the judgment of this Court in Writ-A No.14509 of 2019, thus, the judgment of this Court in Special Appeal No.620 of 2019 is of no help to the petitioner.

22. So far as the other judgment relied upon by counsel for the petitioner in Writ-A No. 19760 of 2019 is concerned, the same has been passed on the basis of judgment of this Court in Special Appeal No.620 of 2019, but this aspect that judgment of Special Appeal No. 620 of 2019 has been rendered in different factual context has not been placed before the court. Further, the said judgment has also not considered the judgment of this Court in Writ-A No.17887 of 2019 (Manju vs. State of U.P. & Anr.) decided on 05.12.2019, wherein this Court has dismissed the writ petition filed by one such candidate, who has approached this Court after the time of one month granted by this Court in ***Aniruddh Narayan Shukla (supra)*** case has expired. Thus, the judgment of this Court in Writ-A No. 19760 of 2019 does not come to aid of the petitioner.

23. Thus, in view of the said fact, the writ petition lacks merit and is, accordingly, ***dismissed.***

(2020)02ILR A1680

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 02.12.2019

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.
THE HON'BLE RAJEEV MISRA, J.

Writ A No. 19257 of 2019

Din Bandhu Ram ...Petitioner
Versus
Union of India & Ors. ...Respondents

Counsel for the Petitioner:
Col. Ram Achal Pandey (Retd.)

Counsel for the Respondents:
A.S.G.I.

A. Service Law - Disability pension - Constitution of India - Article 226 – Armed Forces Tribunal Act ,2007 - Army Rules, 1954 - Rule 13(3)(IV) - Undue delay and laches are relevant factors in exercising equitable jurisdiction under Article 226 of the Constitution of India –

order of Tribunal non suiting petitioner on merits - cannot be said to be faulty - circumstances in which, within six months of his recruitment, petitioner was found suffering from ailment of Schizophrenia - petitioner do not satisfy the requirement of disability pension - no merit in writ petition.(Para 6,10)

Petitioner, enrolled in Indian Army - suffered some problem diagnosed as "Schizophrenia" - medically held invalid from service under Rule 13(3)(IV) of Army Rules, 1954 and was discharged - request for disability pension - declined by Principal Controller of Defence Account (Pension) - ground - medical disability suffered by petitioner was neither attributable nor aggravated to military service - order attained finality - petitioner did not challenge the same by filing any appeal for more than 22 years - petitioner could not explain delay and laches either before Tribunal or before this Court.(Para 3,5)

Held:- The petitioner is admittedly guilty of undue delay and laches which has not been explained at all - For granting relief under Article 226 of the Constitution of India, laches is an important factor disentitling a litigant for any relief.(Para-9)

Writ Petition dismissed. (E-7)

List of cases cited:-

1. West Bengal Vs. Tarun K. Roy and others , 2004 (1) SCC 347

2. Chairman U.P. Jal Nigam and another Vs. Jaswant Singh and another , 2006 (11) SCC 464

3. New Delhi Municipal Council Vs. Pan Singh and others , J.T.2007 (4) SC 253,

4. M/S Lipton India Ltd. And others vs. Union of India and others, J.T. 1994 (6) SC 71

5. M.R. Gupta Vs. Union of India and others , 1995 (5) SCC 628

6. K.V. Rajalakshmiah Setty Vs. State of Mysore , AIR 1961 SC 993,

7. State of Orissa Vs. Pyari Mohan Samantaray and others , AIR 1976 SC 2617

8. State of Orissa and others Vs. Arun Kumar Patnaik and others 1976 (3) SCC 579

9. Shiv Dass Vs. Union of India and others AIR 2007 SC 1330= 2007(1) Supreme 455

10. Chunvad Pandey Vs. State of U.P. and others, 2008 (4) ESC 2423.

11. C. Jacob vs. Director of Geology and Mining and another, 2008 (10) SCC 115

12. Union of India and others vs. M.K. Sarkar, 2010 (2) SCC 58

(Delivered by Hon'ble Sudhir Agarwal, J. & Hon'ble Rajeev Misra, J.)

1. Heard Col. Ram Achal Pandey, Advocate for applicant and Sri S.K. Rai, Advocate for respondents.

2. This writ petition under Article 226 of the Constitution of India has arisen from judgment and order dated 26.10.2018 whereby petitioner's Transfer Application No. 1187 of 2010 has been dismissed by Armed Forces Tribunal, Regional Bench, Lucknow *(hereinafter referred to as "Tribunal").*

3. It appears that petitioner, who was enrolled in Indian Army on 02.05.1979, suffered some problem diagnosed as "Schizophrenia" on account whereof he was medically held invalid from service w.e.f. 18.03.1980 under Rule 13(3)(IV) of Army Rules, 1954 and was discharged. His request for disability pension was declined by Principal Controller of Defence Account (Pension), Allahabad vide order dated 17.01.1981 on the ground that medical disability suffered by petitioner was neither attributable nor aggravated to military service. Said order attained finality as petitioner did not challenge the same by filing any appeal. It

is only in 2003 he filed Writ Petition No. 49882 of 2003 seeking following reliefs:

"(i) to issue a writ order or direction in nature of certiorari to quash the impugned order dated 17.1.81 passed by P.C.D.A. (Pension) (Respondent No. 2), through his letter No. G3/80/8846/VI which is not served to the petitioner till the date of filing and the order dated 3.3.1993 passed by Record Officer, the Maratha Light Infantry, Belgaum-9.

(ii) to issue a writ order or direction in nature of mandamus directing the respondents to take any decision for petitioner's rehabilitation/ disability pension/ financial assistance.

(iii) to issue a writ order or direction which this Hon'ble Court may deem fit and proper under the facts and circumstances of the case.

(iv) to award the cost of the writ petition to the petitioner."

4. After enactment and enforcement of Armed Forces Tribunal, aforesaid writ petition was transferred to Tribunal and renumbered as Transfer Application No. 1187 of 2010. Tribunal has found that petitioner was enrolled in Indian Army in 1979. He was diagnosed for suffering of Schizophrenia on 07.11.1979, i.e., almost within six months from the date of enrollment in military service. Consequently he was declared invalid for military service by medical board on 19.03.1980. In these facts and circumstances Tribunal found that there was nothing to show that petitioner's medical invalidity was either on account of rendering service in army nor there was anything to show that it was aggravated due to Military Service for the reason that he has worked only for almost six months when aforesaid disease was discovered and that too while he was undergoing basic recruitment training at Maratha Light Infantry Regimental Centre, Belgaum and not even posted for active service at any hard place. Tribunal, therefore, rejected the same.

5. Besides the fact stated by Tribunal in the impugned judgment, we also find that petitioner was invalidated in 1980. His claim for disability pension was rejected on 17.01.1981. He did not challenge aforesaid order dated 17.01.1981 before any appropriate forum for more than 22 years and this delay and laches has not been explained by petitioner either before Tribunal or before this Court.

6. Undue delay and laches are relevant factors in exercising equitable jurisdiction under Article 226 of the Constitution of India. Following the cases of Government of **West Bengal Vs. Tarun K. Roy and others 2004(1) SCC 347** and **Chairman U.P. Jal Nigam and another Vs. Jaswant Singh and another 2006(11) SCC 464,** the Apex Court **in New Delhi Municipal Council Vs. Pan Singh and others J.T.2007(4) SC 253,** observed that after a long time the writ petition should not have been entertained even if the petitioners are similarly situated and discretionary jurisdiction may not be exercised in favour of those who approached the Court after a long time. It was held that delay and laches were relevant factors for exercise of equitable jurisdiction. In **M/S Lipton India Ltd. And others vs. Union of India and others, J.T. 1994(6) SC 71** and **M.R. Gupta Vs. Union of India and others 1995(5) SCC 628** it was held that though there was no period of limitation provided for filing a petition under Article 226 of Constitution of India, ordinarily a writ

petition should be filed within reasonable time. In **K.V. Rajalakshmiah Setty Vs. State of Mysore, AIR 1961 SC 993,** it was said that representation would not be adequate explanation to take care of delay. Same view was reiterated in **State of Orissa Vs. Pyari Mohan Samantaray and others AIR 1976 SC 2617** and **State of Orissa and others Vs. Arun Kumar Patnaik and others 1976(3) SCC 579** and the said view has also been followed recently in **Shiv Dass Vs. Union of India and others AIR 2007 SC 1330= 2007(1) Supreme 455** and **New Delhi Municipal Council (supra).** The aforesaid authorities of the Apex Court has also been followed by this Court in **Chunvad Pandey Vs. State of U.P. and others, 2008(4) ESC 2423.**

7. In **C. Jacob vs. Director of Geology and Mining and another, 2008(10) SCC 115** Court observed that Courts and Tribunals proceed on the assumption that every citizen deserves a reply to his representation. It also observed that a mere direction to consider and dispose of the representation does not involve any 'decision' on rights and obligations of parties. Little do they realize the consequences of such a direction to 'consider'. If the representation is considered and accepted, the ex-employee gets a relief, which he would not have got on account of the long delay, all by reason of the direction to 'consider'. If the representation is considered and rejected, the ex employee files an application/ writ petition, not with reference to the original cause of action may be of 10 or 20 years back but by treating the order of rejection passed after a decade or two or more from the date of original cause of action, as a fresh cause of action. In such cases normally a prayer is made for quashing of order of rejection of representation and they further to grant relief as claimed in representation. The Tribunals/ Courts routinely entertain such applications/ petitions ignoring the huge delay preceding the representation and proceed to examine the claim on merits and grant relief. In this manner, the bar of limitation or the laches gets obliterated or ignored. Deprecating it and holding that such order passed on representation will not furnish a fresh cause of action and revive a stale or dead claim, Supreme Court in para 10 said as under:

"10. Every representation to the government for relief, may not be replied on merits. Representations relating to matters which have become stale or barred by limitation, can be rejected on that ground alone, without examining the merits of the claim. In regard to representations unrelated to the department, the reply may be only to inform that the matter did not concern the department or to inform the appropriate department. Representations with incomplete particulars may be replied by seeking relevant particulars. The replies to such representations, cannot furnish a fresh cause of action or revive a stale or dead claim. "

8. In **Union of India and others vs. M.K. Sarkar, 2010(2) SCC 58** Court said that a belated representation with regard to statutory or dead issue if considered or decided, in compliance with a direction by Court/ Tribunal to do so, the date of such decision cannot be considered as furnishing a fresh cause of action for reviving the 'dead' or time barred issue. Issue of limitation or delay and laches should be considered with reference to the original cause of action and not with

reference to the date on which an order is passed in compliance with a Court's direction. Neither a Court's direction to consider a representation issued without examining the merits, nor a decision given in compliance with such direction, will extend the limitation, or erase the delay and laches.

9. The petitioner is admittedly guilty of undue delay and laches which has not been explained at all. For granting relief under Article 226 of the Constitution of India, laches is an important factor disentitling a litigant for any relief, as discussed above.

10. Even otherwise, order of Tribunal non suiting petitioner on merits also cannot be said to be faulty. The circumstances in which, within six months of his recruitment, petitioner was found suffering from ailment of Schizophrenia, we do not find that petitioner satisfies the requirement of disability pension. Hence we find no merit in writ petition.

11. Dismissed accordingly.

(2020)02ILR A1684

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.12.2019

BEFORE

THE HON'BLE J.J. MUNIR, J.

Writ A No. 19346 of 2019

Anuj Kumar ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Ram Asrey Yadav

Counsel for the Respondents:
C.S.C.

A. Disciplinary proceeding - procedure established for conducting an enquiry was not followed - evidences were not recorded - inquiry report was submitted based on the charge sheet and petitioner's explanation.

The law is settled with respect to the manner in which the disciplinary proceedings are to be undertaken in a matter involving major punishment. After the issuance of charge sheet and receipt of a reply, a date, time and venue of the inquiry have to be fixed. On the appointed date and time, whether the delinquent employee appears or not, it is for the establishment to prove its case by examining evidence in support of the charges. Mostly, this kind of a charge cannot be established, unless the establishment examines and gets their oral evidence recorded. In addition, if there are certain documentary evidence on which the establishment whishes to rely, they have to lead that evidence before the inquiry officer through their presiding officer. It is only after the establishment discharge their onus on the charge that burden shifts to the delinquent employee, to produce evidence in support of his case, all of which would be ultimately evaluated by the inquiry officer to reach his conclusion, one way or the other. (para 8)

B. Power of administrative authority - no jurisdiction to revive the order quashed by the High Court

An order quashed by any Court, Tribunal or Judicial Authority can be revived by a competent court of appellate jurisdiction, empowered by law to hear and decide an appeal from the order quashing the administrative order. No administrative authority is possessed of jurisdiction to revive an order that has been quashed or set aside by a Court of competent jurisdiction, while determining a matter on remand by the Court. To pass the same order afresh or reach the same conclusions, on determining a matter after remand by a Court setting aside the order

of an administrative authority is permissible. But, that determination is to be expressed in a fresh order to be made by the authority. (para 12)

Writ Petition Allowed.

List of cases cited

1. Chamoli District Co-operative Bank Ltd. Through its Secy/Mahaprabandhak and anr V. Raghunath Singh Rana and ors 2016(12) SCC 204

2. State of U.P. and ors v. Saroj Kumar Sinha 2010(2) SCC 772

3. State of U.P. v. Aditya Prasad Srivastava and anr 2017(2) ADJ 554 (DB)(LB)

(Delivered by Hon'ble J.J. Munir, J.)

1. Heard Sri Ram Asrey Yadav, learned counsel for the petitioner and Dr. Amar Nath Singh, learned Standing Counsel appearing on behalf of all the respondents.

2. Pursuant to the order of this Court dated 3rd December, 2019, Arun Atri, the then District Panchayat Raj Officer, Shamli (now Additional District Panchayat Raj Officer), Shamli has appeared before the Court. He has produced before the Court record of the inquiry proceedings on the basis of which the impugned order dated 28.09.2018 has been passed. By the said order, the petitioner's services have been terminated.

3. The facts giving rise to this petition are that the petitioner was placed under suspension pending inquiry by the respondents. The petitioner is a Class IV employee *(Safaikarmi)*. Post suspension and formal initiation of departmental proceedings, a notice dated 24.03.2017 was served upon him and a final opportunity was given to the petitioner to submit his reply to the allegations that were there against him. The petitioner submitted his reply to this notice on 31st March, 2017. The order of punishment records that this reply was not found satisfactory. However, instead of proceeding to conduct an inquiry, the Inquiry Officer within the next three days proceeded to submit an inquiry report on 3rd April, 2017 which formed basis of the order of termination that was earlier passed against the petitioner on 10.04.2017. The said order was challenged before this Court in Writ-A No. 35939 of 2017. The ground of challenge, amongst others, appears to be that there is absolutely no consideration of the petitioner's case in the order impugned and even if the explanation submitted by the petitioner was not accepted, the Inquiry Officer was obliged to proceed in the manner that a date for holding the inquiry had to be fixed. Thereafter, opportunity of producing evidence etc. ought to have been afforded, but no such procedure has been followed.

4. This Court proceeded to quash the order of termination holding that it was a case where after reply to the charge sheet was submitted, no date, time or place was fixed for holding the inquiry, no oral evidence was adduced and the Inquiry Officer submitted a report within three days of the petitioner filing a reply. The petitioner's services were terminated by the order impugned in the writ petition, last mentioned. Accordingly, the order dated 24th March, 2017 was quashed with liberty to the respondents to conclude the inquiry within a period of four months from the presentation of a certified copy of the order passed in that case.

5. Now, by the impugned order what has happened is this. The order of this Court appears to have been filed before the respondents to do the proceedings all over again. They were required to undertake an inquiry in accordance with law afresh. However, in purported compliance of the order of this Court, it appears that notice was issued on 20.06.2018 fixing 27.06.2018 at 10.00 a.m., requiring the petitioner to appear in the office of the District Panchayat Raj Officer, so that further proceedings could be taken.

6. Dr. Amar Nath Singh, learned Standing Counsel makes a statement on instructions received that the records having been placed before the Court, the respondents do not propose to file a counter affidavit.

7. The Court has perused the original record. It appears that on the date fixed, an explanation was filed by the petitioner to the charges against him. The said explanation was considered by the Inquiry Officer/Assistant Development Officer, Panchayat Block, Kandla, Shamli vide his report dated 03.07.2018, who appears to have perused the explanation submitted by the petitioner on 27.06.2018, and on its basis, held it to be unsatisfactory. Rather, there is a finding recorded in the inquiry report of the Assistant Block Development Officer, where he has said that some natives of the village have said that the petitioner does not undertake his official duties and undertakes private work, a fact which has been verified by the former District Panchayat Raj Officer, Shamli. It is then remarked in the report that the explanation submitted by the petitioner is not satisfactory and one where the petitioner has not come forward with any firm evidence or has he appeared himself in person. It has further been concluded that during his period of posting at the Gram Panchayat in question, he never discharged his duties of a Sweeper, himself. On the basis of the said report, the impugned order has been passed where quoting the said report, it has been recorded as follows:

"अतः श्री अनुज कुमारए सेवा समाप्त सफाईकर्मी को मा0 उच्च न्यायालय इलाहाबाद द्वारा निर्गत किये गये आदेशों के क्रम में एक अवसर पुनः प्रदान किया गया। जिसमें श्री अनुज कुमारए सेवा समाप्त सफाईकर्मी द्वारा अपने बचाव में कोई ठोस साक्ष्य प्रस्तुत नहीं किये गये एवं सहायक विकास अधिकारी ;पं0द्ध काँधला द्वारा अन्तिम जाँच में उक्त दोषी पाये गये। जिससे स्वतः ही स्पष्ट होता है किए श्री अनुज कुमार पुत्र श्री सेवाराम ;सेवा समाप्तद्धए सफाईकर्मीए ग्राम पंचायत.बधुपुरा विकास खण्ड.कैरानाए जनपद. शामली उच्चाधिकारियों के आदेशों की अवहेलना के आदि है तथा इन्हें शासकीय सेवा की कोई आवश्यकता नहीं है। अतः इनके सेवा समाप्ति के आदेश दिनांक 10ण्04ण्2017 यथावत रहेगें।"

8. A reading of the impugned order as well as the inquiry report shows that the District Panchayat Raj Officer, as well as the Inquiry Officer, do not seem to have the slightest idea of how an inquiry is to be undertaken and how disciplinary proceedings are to be disposed of, particularly, in a matter relating to imposition of a major penalty. In an inquiry relating to a major penalty, the procedure is now by far well settled. After issue of a charge sheet and the receipt of a reply, a date, time and venue of the inquiry have to be fixed. On the appointed date and time, whether the delinquent employee

appears or does not, it is for the establishment to prove its case by examining evidence in support of the charges. Mostly, this kind of a charge cannot be established, unless the establishment examines witnesses and gets their oral evidence recorded. In addition, if there are certain documentary evidence on which the establishment wishes to rely, they have to lead that evidence before the Inquiry Officer through their Presenting Officer. It is only after the establishment discharge their onus on the charges that burden shifts to the delinquent employee, to produce evidence in support of his case, all of which would be ultimately evaluated by the Inquiry Officer to reach his conclusion, one way or the other.

9. In this connection, the law as to the manner in which disciplinary proceedings are to be undertaken in a matter involving major punishment has been laid down by the Hon'ble Supreme Court in **Chamoli District Co-operative Bank Ltd. Through its Secretary/Mahaprabandhak and another vs. Raghunath Singh Rana and others, 2016 (12) SCC 204,** where in paragraph 22 of the report, the following principles have been culled out by their Lordships:

22. From the propositions of law, as enunciated by the Apex Court as noted above, and the facts of the present case, we arrive at the following conclusions:

22.1. After service of charge-sheet dated 16-1-1993 although the petitioner submitted his reply on 4-2-1993 but neither inquiry officer fixed any date of oral inquiry nor any inquiry was held by the inquiry officer.

22.2. Mandatory requirement of a disciplinary inquiry i.e. is holding of an inquiry when the charges are refuted and serving the inquiry report to the delinquent has been breached in the present case.

22.3. Respondent 1 employee having not been given opportunity to produce his witnesses in his defence and having not been given an opportunity of being heard in person, the statutory provisions as enshrined in Regulation 85*(i)(b)*, have been violated.

22.4. The disciplinary authority issued show-cause notice dated 4-5-1993 to Respondent 1 employee without holding of an inquiry and subsequent resolution by disciplinary authority taken in the year 2000 without there being any further steps is clearly unsustainable. The High Court has rightly quashed the dismissal order by giving liberty to the Bank to hold de novo inquiry within a period of six months, if it so desires.

22.5.The Bank shall be at liberty to proceed with the disciplinary inquiry as per directions of the High Court in para 1 of the judgment. The High Court has already held that the petitioner shall be deemed to be under suspension and shall be paid suspension allowance in accordance with the rules.

10. In **State of U.P. and Ors. vs. Saroj Kumar Sinha, 2010 (2) SCC 772,** it has been held by their Lordships of the Supreme Court thus:

27. A bare perusal of the aforesaid sub-rule shows that when the respondent had failed to submit the explanation to the charge-sheet **it was incumbent upon the inquiry officer to fix a date for his appearance in the inquiry. It is only in a case when the government servant despite notice of the date fixed failed to appear that the inquiry officer can proceed with the**

inquiry ex parte. Even in such circumstances it is incumbent on the inquiry officer to record the statement of witnesses mentioned in the charge-sheet. Since the government servant is absent, he would clearly lose the benefit of cross-examination of the witnesses. But nonetheless in order to establish the charges the Department is required to produce the necessary evidence before the inquiry officer. This is so as to avoid the charge that the inquiry officer has acted as a prosecutor as well as a judge.

28. An inquiry officer acting in a quasi-judicial authority is in the position of an independent adjudicator. He is not supposed to be a representative of the department/disciplinary authority/Government. **His function is to examine the evidence presented by the Department, even in the absence of the delinquent official to see as to whether the unrebutted evidence is sufficient to hold that the charges are proved.** In the present case the aforesaid procedure has not been observed. Since no oral evidence has been examined the documents have not been proved, and could not have been taken into consideration to conclude that the charges have been proved against the respondents.

(Emphasis by Court)

11. The aforesaid position of law has been succinctly laid down by a Division Bench of this Court, sitting at Lucknow, in **State of U.P. vs. Aditya Prasad Srivastava and another, 2017 (2) ADJ 554 (DB)(LB)** where in paragraph 17 of the report it has been held:

17. It is trite law that the departmental proceedings are quasi judicial proceedings. **The Inquiry Officer functions as quasi judicial officer. He is not merely a representative of the department.** He has to act as an independent and impartial officer to find out the truth. The major punishment awarded to an employee visit serious civil consequences and as such the departmental proceedings ought to be in conformity with the principles of natural justice. **Even if, an employee prefers not to participate in enquiry the department has to establish the charge against the eployee by adducing oral as well as documentary evidence. In case charges warrant major punishment then the oral evidence by producing the witnesses is necessary.**

(Emphasis by Court)

12. In the present case nothing of the kind has been done. The Inquiry Officer has submitted his report by reading the charge sheet and the petitioner's explanation, with no evidence recorded. On the basis of this inquiry report, the impugned order has been passed mechanically where it is said in rather objectionable terms that the order of termination of service earlier passed by the District Panchayat Raj Officer stands restored. Once the order of the District Panchayat Raj Officer earlier passed, had been quashed, there was no jurisdiction with the District Panchayat Raj Officer to revive an order that the High Court had quashed. It is quite another matter that at the conclusion of a valid inquiry, a fresh order may be to the same effect, could have been passed again. An order quashed by this Court or any Court, Tribunal or Judicial Authority can be revived by a competent Court of appellate jurisdiction, empowered by law to hear and decide an appeal from the order quashing the administrative order, like the one here, made in exercise of disciplinary

jurisdiction. No Administrative Authority is possessed of jurisdiction to revive an order that has been quashed or set aside by a Court of competent jurisdiction, while redetermining a matter on remand by the Court. To pass the same order afresh or reach the same conclusions, on determining a matter after remand by a Court setting aside the order of an Administrative Authority is permissible. But, that determination is to be expressed in a fresh order to be made by the Authority. Decidedly, an Administrative Authority cannot revive an order earlier made by it and quashed by a Court or Judicial Authority.

13. The said issue apart, the first part of the infirmity in the impugned order that it is based upon proceedings where no evidence on behalf of the establishment has been recorded and the fact that the establishment have not discharged their burden on the charges, the entire edifice of the impugned order is non existent.

14. In the result, this petition succeeds and is **allowed.**

15. The impugned order dated 28.09.2018 passed by the District Panchayat Raj Officer, Shamli is hereby **quashed.** The petitioner shall be reinstated in service forthwith and shall be paid his salary together with arrears. It will, however, be open to the respondents to proceed afresh from the stage the charge sheet was issued to the petitioner in accordance with law, if they so deem fit, and pass fresh orders.

16. The personal presence of Arun Atri, the then District Panchayat Raj Officer, Shamli (now Additional District Panchayat Raj Officer) is exempted.

17. The records produced by the District Panchayat Raj Officer, Shamli are ordered to be returned to him in original.

(2020)02ILR A1689

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 17.12.2019

BEFORE
THE HON'BLE ASHWANI KUMAR MISHRA, J.

Writ A No. 19367 of 2018

Hridesh Kumar & Ors. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Abhishek Gupta, Sri Chandra Bhan Gupta

Counsel for the Respondents:
C.S.C., Sri Ramendra Pratap Singh

A. Service Law – regularization of contract employees - Contract Labour (Regulation and Abolition) Act, 1970 - Section 10 – notification - Constitution of India - Article 226 – Constitution Bench judgment of the Apex Court in *Steel Authority of India Ltd. and others v. National Union Waterfront Workers and others* - held - no right of absorption of the contract labours - further enquiry into question of fact cannot be made in exercise of jurisdiction under Article 226 of Constitution of India - appropriate forum for regularization of contract employees is the Industrial Adjudicator - nature of enquiry warranted in the facts of the present case falls within the exclusive jurisdiction of the *Industrial Adjudicator* - writ petition – not maintainable. (Para 16,17)

Petitioners' claim for regularization has been rejected after returning a specific finding that no employer-employee relationship exists between the petitioners and the authority and

that no records are maintained in respect of engagement of persons through contractor. (Para 11)

Held :- Petitioners' be relegated to the remedy of approaching Industrial Adjudicator in light of the law laid down by the Apex Court in the case of Steel Authority of India Ltd. - it would be appropriate to direct the State Government to forthwith refer petitioners' claim to the appropriate Industrial Adjudicator for proceedings to be concluded at the earliest. (Para-22)

Writ Petition dismissed. (E-7)

List of cases cited:-

1. Steel Authority of India Ltd. Vs. National Union Waterfront Workers , 2001 (7) SCC 1, **(Precedent followed),(Para-18)**

2. Secretary, Haryana State Electricity Board v. Suresh , 1999 (3) SCC 601, **(Precedent overruled), (Para-18)**

3. Air India Statutory Corporation v. United Labour Union and Ors., AIR 1997 SC 645, **(Precedent overruled), (Para-18)**

4. R. K. Panda and Ors. v. Steel Authority of India and Ors. , 1994 (5) SCC 304, **(Precedent overruled), (Para-15)**

5. Balwant Rai Saluja v. Air India Ltd. ,2014 (9) SCC 407, **(Precedent distinguished), (Para-21)**

(Delivered by Hon'ble Ashwani Kumar Mishra, J.)

1. Petitioners have filed the present writ petition challenging an order passed by Chief Executive Officer, Greater Noida Industrial Development Authority (hereinafter referred to as "the authority') dated 16.10.2018, whereby their claim for regularization has been rejected. This order has been passed pursuant to a direction issued by this Court in Writ Petition No. 15985 of 2018, dated 27.07.2018, which is reproduced hereafter:-

"Heard learned counsel for the petitioners and the learned counsel for the respondents Shri Mayank Singh holding brief of Shri B.B.Jauhari.

Shri B.B.Jauhari has filed memo of appearance on behalf of Greater NOIDA, which is taken on record.

Shri Mayank Singh has informed this Court that the petitioners had earlier filed a writ petition which was decided by a detailed order on 10.07.2013. He has raised preliminary objection regarding maintainability of the writ petition.

Learned counsel for the petitioners however says that a fresh cause of action has arisen after the Government Order dated 24.02.2016 and the petitioners may be allowed to make a representation in accordance with the aforesaid Government Order before the authority concerned i.e. the Chief Executive Officer, Greater NOIDA (respondent no. 3), which may be directed to be decided in accordance with law.

Accordingly, this writ petition is disposed of without entering into the controversy raised with a direction to the petitioners to make a representation to the respondent no. 3 within a period of two weeks from today. The respondent no. 3 shall consider the grievance of the petitioner and pass appropriate reasoned and speaking order within a further period of two months."

2. Petitioners have asserted in para 3 that they are working against different posts like Technician, Telephone operator, Electrician etc. and that some of them have also been promoted to higher posts. In para 4 of the writ petition it is stated that petitioners are continuously working

without any break, to the satisfaction of the officers concerned, against permanent posts and are qualified for appointment to the posts in question. In para 7 of the writ petition it is disclosed that petitioners had earlier filed Writ Petition No. 36607 of 2013, which was dismissed on 10.07.2013, but a Special Appeal preferred against it, is pending. The order dated 10.07.2013, dismissing Writ Petition No. 36607 of 2013, is reproduced hereinafter:-

"The petitioner claims to be an association titled as Dainik Vetan Bhogi Karamchari Sangh, U.P. Greater Noida Audyogik Vikas Pradhikaran, has approached this Court with request to direct the respondents to consider the case of the members of the petitioner association for regularization on respective posts and further prayer has been made to extend all benefits to the members of the petitioner association as other regular employees are getting since the date of joining of their service.

On the matter being taken up today, Learned counsel appearing on behalf of Greater Noida Development Authority had made categorical statement to the effect that till today no policy for extending the benefit of regularization has been framed who are working in the establishment of the Authority. Once there is no policy decision to extend the benefit of regularization of service, the request made by the petitioner cannot be accepted as daily wagers even otherwise have no right to claim reglarization, unless and untill there is a scheme.

The law on the said subject has been laid down by Apex Court in the Case of Secretary State of Karnataka and Others Vs. Umadevi and others [2006 (4) SCC 1] that exercise of regularization shall not be taken as a matter of right.

It has been further contended on behalf of the petitioner Association that Rajkiya Vahan Chalak Mahasangh representing the drivers working in the respondent authority preferred Writ Petition No. 27557 of 2005 before this Court and the same was disposed of with a direction to the Authority to consider the case of the members of the petitioner therein for regularization on the post of driver. Against the said order of this Court the respondent Authority approached the Apex Court by means of Special Leav Petition. Apex Court in the said matter directed the Authority to undertake the exercise of recruitment for the posts of Drivers strictly as per the procedure prescribed in Greater Noida Industrial Development Authority Service Regulations, 1993 and that till the said process is completed, the services of the members of respondent therein shall not be terminated. Even in the said order of Apex Court, claim of regularisation has not been accepted.

In the facts of the present case when such is the accepted position that there is no policy formulated for extending the benefit of regularization, the request as has been made by the members of the petitioner association cannot be adhered to.

Here in the present case, once no process whatsoever for recruitment had taken place and there is no policy for extending the benefit of regularization, therefore, aforementioned judgment of the Apex Court will not come to the rescue and respite of the petitioner.

The writ petition is accordingly dismissed."

3. In para 9 of the writ petition it is contended that petitioners are working under the supervision and control of

respondent authority as also its officers and wages are also being paid to them by the authority. Paragraphs 10 and 11 of the writ petition are relevant and are extracted hereinafter:-

"10. That it is pertinent to mention here that the appointment letter has not been issued to the petitioners by the respondent authority since they were working on different post under the supervision and control of respondent authorities and their works are in permanent nature thus they are entitled to be regularized/absorbed in the respondent department.

11. That it is stated that now the petitioners have come to know that the respondent authorities have issued some letter in respect of appointment of contractor through e-tendering and now respondents are interested to take work from the petitioner through contractor."

4. In paragraph 12 of the writ petition it is asserted that petitioners have worked for more than twenty years with the hope that they shall be regularized in the employment of authority. In para 13 it is alleged that work performed by petitioners are permanent in nature and the authority is not justified in undertaking work from them through E-tender (apparently referring to contract system). In para 15 petitioners state as under:-

"15. That the respondents were going to take work from the petitioners through contractor, under these circumstances petitioners were compelled to file Writ Petition No. 15985 of 2018."

5. Petitioners contend that a Government Order dated 24.02.2016 has now been issued which provides for regularizing the services of daily wagers, including contractual employees, in different departments and, therefore, a new cause of action has arisen for the petitioners to approach this court, notwithstanding, the dismissal of their earlier writ petition against which a Special Appeal is pending. Submission is that the Chief Executive Officer without taking note of the Government Order dated 24.02.2016 has proceeded to reject petitioners' claim for regularization. In para 22 it is stated that Chief Executive Officer has not discussed evidence of appointment of petitioners and the order impugned is illegal. In para 23 petitioners claim that they are working in Greater Noida for the last 20 years. In para 25 petitioners assert as under: -

"25. That it is stated that in view of the aforesaid fact the petitioners are to be treated as contractual employee of the Greater NOIDA and hence the order impugned passed by respondent No.3 is illegal."

6. In support of their claim petitioners have relied upon a Division Bench Judgment of this Court in Special Appeal No. 790 of 2018, decided on 12.04.2018, which shall be referred to, later.

7. Petitioners claim for regularization is rejected by the authority on following grounds:-

(i) A finding is returned that none of petitioners have ever been appointed directly by the authority, nor there exits any contract of employment in respect of petitioners. It is observed in the order that depending upon the requirement of the work the authority has been

engaging persons through registered contractors, for a period of three months, and the payment of wages to such employees is also made by the contractors.

(ii) The authority only maintains records with regard to engagement of contractors, as also the number of persons engaged and the wages paid to them. Since petitioners have neither been appointed by the authority, nor there exist any contract of employment between the petitioners and the authority as such the petitioners are not liable to be treated as the employees of authority.

(iii) Order impugned further records that from time to time regular recruitment has been undertaken by the authority and it was open for persons such as petitioners, who claim to have been engaged through contractor, to have applied against it but the petitioners have not availed of such opportunity.

(iv) The order impugned further records that authority being a public authority any employment in it can only be granted after due advertisement of vacancy and persons engaged on contract basis, otherwise cannot be regularized against posts meant to be filled by direct recruitment.

(v) As per the order impugned the Government Order dated 24.02.2016, providing for regularization of contract employees is not found to be applicable upon the petitioners as necessary ingredients to invoke the provisions of the government order do not exist. It has also been observed that the provisions of newly created Centralized Service Rules of 2018 also would not be applicable since the appointing authority under the rules is the Government and not the authority.

8. Sri Ramendra Pratap Singh, who has appeared for the authority submits that the nature of enquiry which would be warranted in order to assail the findings contained in the order impugned would require leading of evidence for which the writ petition is not the appropriate forum. Learned counsel for the respondents places reliance upon a judgment of the Apex Court in case of Steel Authority of India Ltd. Vs. National Union Waterfront Workers, reported in 2001 (7) SCC 1, in order to submit that nature of enquiry warranted in the facts of the present case falls within the exclusive jurisdiction of the *Industrial Adjudicator* and a writ petition would not lie.

9. I have heard Sri C. B. Gupta, learned counsel for the petitioner; Sri Ramendra Pratap Singh, learned counsel for the respondent authority whereas learned Standing counsel on behalf of the State authorities and have perused the materials on record.

10. The pleadings made in the writ petition have already been noticed above. Although it is asserted that petitioners have been working for the last about 20 years but the averments made in that regard are absolutely vague. There is no date of appointment disclosed for any of the petitioner. It is also not specified as to which of the petitioner is working against which post. The petitioners have not specified as to who is the contractor through whom they have been engaged for performing work in the authority. The pleadings made in the writ petition, particularly in para 15 and 25 of the writ petition, would clearly go to show that petitioners admit that their engagement is through a contractor for performing different works in the authority. Petitioners do not dispute that no letters of appointment are issued to them by the

authority, nor any contract of employment exists between petitioner and the authority.

11. Petitioners' claim for regularization has been rejected after returning a specific finding that no employer-employee relationship exists between the petitioners and the authority and that no records are maintained in respect of engagement of persons through contractor.

12. Engagement of persons through contractor is regulated by the provisions of the Contract Labour (Regulation and Abolition) Act, 1970 (hereinafter referred to as the Act of 1970). Engagement of worker through a contractor per se is not illegal under the Act of 1970. The Act merely regulates such engagement and it is only where the appropriate Government prohibits engagement of worker through contractor, by way of a notification issued under Section 10 of the Act of 1970, that such engagement would become impermissible in law.

13. Whether or not necessary safeguards contemplated in the Act of 1970 have been adhered to by the authority, while engaging persons through contractor, is also an aspect which would require leading of evidence. Petitioners contention that the contractor was merely a ploy employed by the authority to absolve itself of its responsibility in law also remains a matter of evidence to be led by the parties. It would be for the Industrial Adjudicator to ascertain, on the basis of evidence adduced before it, whether the engagement of workers through contractor is in accordance with the Act of 1970; that the provisions of the Act of 1970 have been complied with or that the engagement is sham or farce.

14. Question as to whether any contract of employment would come into existence, directly, between the principal employer and the contract worker can only be answered by the Industrial Adjudicator on the basis of evidence led by the parties before it. Whether such issues can be adjudicated directly in proceedings under Article 226 of the Constitution of India has been a subject matter of consideration in different cases before the Supreme Court. In some of the earlier decisions it was held that a writ petition would lie for such purposes (see:- Secretary, Haryana State Electricity Board v. Suresh, 1999 (3) SCC 601).

15. However, in R. K. Panda and Ors. v. Steel Authority of India and Ors., 1994 (5) SCC 304, the Apex Court held that the question whether the contract employees have become the employees of principal employer and the contractor is merely a camouflage are questions of fact which cannot be decided in writ jurisdiction. Paragraph 7 of the aforesaid judgment is reproduced hereinafter:-

"7. It is true that with the passage of time and purely with a view to safeguard the interests of workers, many principal employers while renewing the contracts have been insisting that the contractor or the new contractor retains the old employees. In fact such a condition is incorporated in the contract itself. However, such a clause in the contract which is benevolently inserted in the contract to protect the continuance of the source of livelihood of the contract labour cannot by itself-give rise to a right to regularisation in the employment of the principal employer. Whether the contract labourers have become the employees of the principal employer in course of time

and whether the engagement and employment of labourers through a contractor is a mere camouflage and a smoke screen, as has been urged in this case, is a question of fact and has to be established by the contract labours on the basis of the requisite material. It is not possible for the High Court or this Court, while exercising writ jurisdiction or jurisdiction under Article 136 to decide such questions, only on the basis of the affidavits. It need not be pointed out that in all such cases, the labourers are initially employed and engaged by the contractors. As such at what point of time a direct link is established between the contract labourers and the principal employer eliminating the contractor from the scene, is a matter which has to be established on material produced before the Court. Normally, the labour court and Industrial Tribunal, under the Industrial Dispute Act are the competent for a and to adjudicate such dispute on the basis of the oral and documentary evidence produced before them."

16. The issue ultimately came up for consideration before a Constitution Bench judgment of the Apex Court in Steel Authority of India Ltd. and others v. National Union Waterfront Workers and others (supra). The entire law relating to right of contract employees, in the light of the provisions of the Act of 1970, including claim of absorption in the employment of principal employer has been examined. It has been held that the Legislature never intended absorption of contract employees upon issuance of abolition notification under Section 10(1) of the 1970 Act. The Apex Court further held that neither Section 10 nor any other provision in the Act provide for automatic absorption of contract employees in the employment of principal employer. It has further been held that the provisions of the Act of 1970 neither contemplate creation of direct relationship of master and servant between the principal employer and the contract employees nor can such relationship be implied from the provisions of the Act. It would be worth noticing paragraphs 105, 120, 125 (3) and 126 of the Constitution Bench Judgment in Steel Authority of India (supra), which are reproduced hereinafter:-

"105. The principle that a beneficial legislation needs to be construed liberally in favour of the class for whose benefit it is intended, does not extend to reading in the provisions of the Act what the Legislature has not provided whether expressly or by necessary implication, or substituting remedy or benefits for that provided by the Legislature. We have already noticed above the intendment of the C.L.R.A. Act that it regulates the conditions of service of the contract labour and authorises in Section 10(1) prohibition of contract labour system by the appropriate Government on consideration of factors enumerated in Sub-section (2) of Section 10 of the Act among other relevant factors. But, the presence of some or all those factors, in our view, provides no ground for absorption of contract labour on issuing notification under Sub-section (1) of Section 10. Admittedly, when the concept of automatic absorption of contract labour as a consequence of issuing notification under Section 10(1) by the appropriate Government, is not alluded to either in Section 10 or at any other place in the Act and the consequence of violation of Sections 7 and 12 of the C.L.R.A. Act is explicitly provided in Sections 23 and 25 of the C.L.R.A. Act, it is not for the High Courts or this Court to

read in some unspecified remedy in Section 10 or substitute for penal consequences specified in Sections 23 and 25 a different sequel, be it absorption of contract labour in the establishment of principal employer or a lessor or a harsher punishment. Such an interpretation of the provisions of the statute will be far beyond the principle of ironing out the creases and the scope of interpretative legislation and as such, clearly impermissible. We have already held above, on consideration of various aspects, that it is difficult to accept that Parliament intended absorption of contract labour on issue of abolition notification under Section 10(1) of the C.L.R.A. Act."

"120. We have also perused all the Rules and forms prescribed thereunder. It is clear that at various stages there is involvement of the principal employer. On an exhaustive consideration of the provisions of the C.L.R.A. Act we have held above that neither they contemplate creation of direct relationship of master and servant between the principal employer and the contract labour nor can such relationship be implied from the provisions of the Act on issuing notification under Section 10(1) of the C.L.R.A. Act, a fortiori much less can such a relationship be found to exit from the rules and the forms made thereunder."

"125 (3). Neither Section 10 of the C.L.R.A. Act nor any other provision in the Act, whether expressly or by necessary implication, provides for automatic absorption of contract labour on issuing a notification by the appropriate Government under Sub-section (1) of Section 10, prohibiting employment of contract labour, in any process, operation or other work in any establishment. Consequently the principal employer cannot be required to order absorption of the contract labour working in the establishment concerned.

126. We have used the expression "industrial adjudicator as determination of the questions aforementioned requires enquiry into disputed questions of facts which cannot conveniently be made by High Courts in exercise of Jurisdiction under Article 226 of the Constitution. Therefore, in such cases the appropriate authority to go into those issues will be the Industrial Tribunal/ Court whose determination will be amenable to juridical review."

17. The above judgment of the Constitution Bench clearly lays down that even where prohibition notification has been issued under Section 10 of the Act, 1976, there is no right of absorption of the contract labours and further enquiry into question of fact cannot be made in exercise of jurisdiction under Article 226 of Constitution of India and the appropriate forum to go into these issues is the Industrial Adjudicator.

18. The Constitution Bench judgment in Steel Authority of India (supra) has specifically overruled the earlier judgment of the Apex Court in Air India Statutory Corporation v. United Labour Union and Ors. (supra) which had taken a view similar to what is held in Secretary, Haryana State Electricity Board v. Suresh and Ors. (supra). As a matter of fact the Apex Court in Secretary, Haryana State Electricity Board vs. Suresh and others (supra) had followed the view taken in the Air India Statutory Corporation case which stood specifically overruled in Steel Authority of India Ltd. (supra).

19. The remedy for petitioners, in light of the law settled by the Supreme

Court in Steel Authority of India (supra) would be to approach the Industrial Adjudicator, where all issues of facts can be examined by the competent forum with reference to the applicable provisions of law. The powers of Industrial Adjudicator are otherwise extremely wide by virtue of Section 11-A of the Industrial Disputes Act, 1947.

20. Coming to the Division Bench judgment of this Court in Special Appeal No. 790 of 2018, it transpires that facts had been adverted to by this Court in Special Appeal and the plea of alternative remedy came to be rejected. The respondents plea based upon a later judgment of the Apex Court in the case of Balwant Rai Saluja v. Air India Ltd., (2014) 9 SCC 407 was also rejected.

21. The judgment of the Apex Court in Balwant Rai Saluja (supra) was delivered by the Apex Court in a matter relating to canteen employees upon whom the provisions of Section 46 of the Factories Act were applicable. Provisions of the Factories Act required the management to set up a canteen. The Apex Court distinguished the previous judgment in the case of Steel Authority of India (supra) as the employees of statutory canteen were distinctly placed in the statutory scheme. This judgment apparently would have no applicability in the facts of the present case since petitioners are not the employees of statutory canteen. The Constitution Bench Judgment in Steel Authority of India (supra), however, was not placed before the Division Bench in special appeal no. 790 of 2018. In light of what has been observed above, as also the lack of specific pleading on the part of the petitioners with regard to the nature of their engagement and continuance etc., I am not inclined to entertain petitioners grievance directly in this writ petition by passing the law laid down by Constitution Bench in the case of Steel Authority of India Ltd. (supra).

22. In the aforesaid factual backdrop, this Court is of the considered opinion that petitioners' be relegated to the remedy of approaching Industrial Adjudicator in light of the law laid down by the Apex Court in the case of Steel Authority of India Ltd. (supra). However, in the facts of the present case it would be appropriate to direct the State Government to forthwith refer petitioners' claim to the appropriate Industrial Adjudicator for proceedings to be concluded at the earliest.

23. Writ petition, accordingly, fails and is dismissed. It is, however, provided that in case petitioners approach the appropriate authority of the State, their claim shall be referred to the appropriate Industrial Adjudicator, forthwith. The concerned Industrial Adjudicator shall make all endeavours to conclude the proceedings, at the earliest possible, without granting unnecessary adjournment except on payment of costs, by fixing early dates. In the facts of the case parties shall bear their own costs.

(2020)02ILR A1698

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 12.12.2019

BEFORE
THE HON'BLE J.J. MUNIR, J.

Wrti A No. 19592 of 2019

Smt. Renu Mishra ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Sheetala Prasad Pandey

Counsel for the Respondents:
C.S.C.

A. Service Law – dismissal - Uttar Pradesh Government Servants (Discipline and Appeal) Rules, 1999 - Rule 11 – appeal - Commissioner placed restricted construction - on the provisions of sub-Rule (2) of Rule 11 - arbitrary and discriminatory - violation of Article 14 of the Constitution - defeat the very purpose for which a departmental appeal has been provided from orders of the Disciplinary Authority - well settled cannon of statutory construction - if a statute is capable of being interpreted in two ways - one that exposes it to the vice of unconstitutionality should be eschewed - statute (including statutory Rules) ought to construed in a manner that renders it constitutionally valid - unless that construction is impossible on the terms of it - order 16.08.2019 passed by respondent no.2, the Commissioner – quashed.(Para8)

Petition is directed against an order passed by respondent no.2, the Commissioner, declining to entertain an appeal against the order passed by respondent no.3, the District Magistrate, whereby the petitioner's husband who was employed as a Copyist in *Tehsil* , was dismissed from service. (Para-1)

Held :- If a Government servant dies post the order passed by the Disciplinary Authority, it is certainly open to his heirs and legal representatives to whose benefit the consequences of that order being set aside by the Appellate Authority would go, to move an Appeal and question the order passed by the Disciplinary Authority . (Para-8)

Writ Petition allowed. (E-7)

List of cases cited:-

1. Marimuthu (K.P.) (deceased) (by legal representatives) and others vs. Superintendent of Police, Dharmapuri and others, (1985) 2 LNN 762

(Delivered by Hon'ble J.J. Munir, J.)

1. This writ petition is directed against an order dated 16.08.2019 passed by respondent no.2, the Commissioner, Basti Division, Basti declining to entertain an appeal against the order dated 09.07.2015 passed by respondent no.3, the District Magistrate, Basti, whereby the petitioner's husband who was employed as a Copyist in *Tehsil* Bhanpur, District Basti, was dismissed from service.

2. The order dated 09.07.2015 was challenged before this Court by the petitioner's husband, Akhilesh Kumar Mishra, vide Writ - A No.53587 of 2017. The said writ petition was dismissed on the ground that an alternative remedy of appeal under Rule 11 of the Uttar Pradesh Government Servants (Discipline and Appeal) Rules, 1999 was available. The aforesaid order was passed in the writ petition on 16.11.2017. The petitioner's husband passed away on 02.12.2017 as he was suffering from cancer. The petitioner preferred an Appeal under Rule 11 of the Uttar Pradesh Government Servants (Discipline and Appeal) Rules, 1999 on 07.02.2018 raising various grounds of fact and law, and asking the order of dismissal passed against her husband to be set aside in her right of an heir and legal representative of the deceased employee, Akhilesh Kumar Mishra. The said Appeal has been dismissed by means of the impugned order dated 16.08.2019 on ground that the said Appeal is not maintainable under Rule 11(2) of the Uttar Pradesh Government Servants (Discipline and Appeal) Rules, 1999 as the Appeal has been preferred by the deceased employee's wife.

3. On 15.12.2019, the following order was passed:

"Sri Dinesh Singh, learned Standing Counsel appears on behalf of all the respondents and is granted a week's time to seek instructions specifically showing cause as to how the Commissioner, Basti Division Basti, has held an appeal filed by a deceased employee's wife against his dismissal from service as not maintainable.

Lay as fresh again on 12.12.2019."

4. Dr. Amar Nath Singh, learned Standing Counsel along with Sri Sharad Chandra Upadhyay, learned State Law Officer on behalf of the State has produced written instructions that they have received. The instructions are signed by Anil Kumar Sagar, Commissioner, Basti Division, Basti. He has done little more than to paraphrase the provisions of Rule 11(2) of the Uttar Pradesh Government Servants (Discipline and Appeal) Rules, 1999, and on that basis has put forward a case that the said sub-Rule envisages an Appeal under the Rules being available to the Government servant concerned, and not to a member of his family.

5. Rule 11 of the Uttar Pradesh Government Servants (Discipline and Appeal) Rules, 1999 are quoted in extenso:

"**Appeal-** (1) Except the orders passed under these rules by the Governor, the Government servant shall be entitled to appeal to the next higher authority from an order passed by the Disciplinary Authority.

(2) The appeal shall be addressed and submitted to the appellate authority. A Government servant preferring an appeal shall do so in his own name. The appeal shall contain all material statements and arguments relied upon by the appellant.

(3) The appeal shall not contain any intemperate language. Any appeal, which contains such language may be liable to be summarily dismissed.

(4) The appeal shall be preferred within 90 days from the date of communication of impugned order. An appeal preferred after the said period shall be dismissed summarily."

6. Sub-Rule (2) of Rule 11 is a provision that regulates the exercise of the right of Appeal by a Government servant aggrieved by an order made by the Disciplinary Authority against him. It prescribes the procedure and the manner of exercise of that right. Sub-Rule (1) of Rule 11 by contrast envisages that every order passed by a Disciplinary Authority shall be appealable by a Government servant, except an order passed by the Governor. The right to Appeal provided from an order of the Disciplinary Authority to a Government servant flows from sub-Rule (1) of Rule 11, whereas sub-Rules (2), (3) and (4) detail the procedure for exercise of that right. Rule 11 envisages a situation where a Government servant, who is alive and about, is aggrieved by an order of the Disciplinary Authority, and it is in that situation that the Government servant alone has been given the right to prefer an Appeal from the order of the Disciplinary Authority. Sub-Rule (2) of Rule 11, where it says that a Government servant preferring an Appeal shall do so in his own name, to borrow the phraseology of the statute, is designed to eschew those situations where on behalf of a Government servant, members of the family come forward, and carry Appeals from orders of the Disciplinary Authority. Rule 11(2), however, does not envisage or

intend that the right to Appeal from an order of the Disciplinary Authority should be lost to his heirs and legal representatives, where they would be beneficiaries, in case the order passed by the Disciplinary Authority were to be set aside in Appeal, in an eventuality where the Government servant is no more. An appeal by the heirs of the deceased government servant from an order of the Disciplinary Authority, is an appeal in the same right as that of the government servants that survives to his heirs. It is very different from the exercise of a right to appeal by proxy on behalf of the government servant while he is alive and around. It is in the latter kind of case that sub-rule (2) of Rule 11 debars anyone but the government servant concerned from appealing a decision of the Disciplinary Authority; the prohibition there bears no reference to the former contingency.

7. Though, in the context of a petition under Article 226 *vis-a-vis* rights of the heirs of a deceased government servant who had challenged his dismissal from service but died *pendente lite*, to prosecute a writ petition against the order of dismissal from service, albeit for the relief of all monetary benefits that the deceased government servant would be entitled to, except reinstatement, it was held by a Division Bench of the Madras High Court in **Marimuthu (K.P.) (deceased) (by legal representatives) and others vs. Superintendent of Police, Dharmapuri and others, (1985) 2 LNN 762:**

"15. It is undoubtedly true that if a relief of reinstatement is to be asked, such a relief will be personal to the Government servant concerned and if a Government servant dies, the personal action in respect of this personal relief will also abate. The maxim *actio personalis moritur cum persona* is, however, as pointed by the Supreme Court in *Girijanandini v.Bijendra Narain, [A.I.R. 1967 S.C. 1124],* of a very limited application. In Para. 14 of the judgment, the Supreme Court observed as follows:

"... The maxim *actio personalis moritur cum persona* a personal action dies with the person, has a limited application. It operates in a limited class of action, ex delicto such as actions for damages, for defamation, assault or other personal injuries not causing the death of the party, and in other actions where after the death of the party the relief granted could not be enjoyed or granting it would be nugatory".

The maxim, therefore, applies among other cases to a case where after the death of the party the relief granted could not be enjoyed or granting it would be nugatory. A relief of reinstatement undoubtedly cannot be granted after the death of a Government servant because if it is granted, it would be nugatory because the person who is reinstated in service is no more alive. Therefore, while it could be said that the doctrine that a personal action dies with the person is true in the case of relief of reinstatement, in the case of other reliefs such as salary that would have been earned and the benefits which would have accrued if the order of dismissal would not have been made, they cannot be said to abate on the ground that these are personal actions. It would also not be correct to characterise the relief of arrears of salary and the relief which the dependants of the deceased Government servant could claim under the Pension Rules as consequential reliefs. The relief of arrears of salary is a substantive relief in view of the fact that it is not necessary to ask for an order of

reinstatement. We are not, therefore, inclined to take the view that a writ petition filed by a Government servant for setting aside his dismissal cannot be prosecuted by his legal representative in view of the benefits which the legal representatives would be entitled to have as a result of the setting aside of the order of dismissal. We are supported in the view which we have taken by the decisions of the Gujarat, Punjab and Haryana and the Kerala High Court referred to above, on which the learned counsel for the appellants has relied. We will shortly refer to those decisions. Before that, we may refer to the decision of the Supreme Court in *State of Uttar Pradesh v. Mohammed Sharif,* [1982 - II L.L.N. 408](vide supra), relied upon by the appellants. This short decision shows that a dismissed Government servant had filed a suit challenging his dismissal on the ground that the said order was illegal and void. The suit was dismissed. This decree was reversed by the appellate Court. The State appealed against the decree of the first appellate Court, but the appeal was dismissed. The State Government then filled an appeal to the Supreme Court. While upholding the judgment of the first appellate Court and the High Court that the plaintiff was denied reasonable opportunity to defend himself at the disciplinary enquiry, some observations were made to the effect that the plaintiff had died during the pendency of the proceedings. It is not very clear as to at what stage the plaintiff had died. The only observations made and which are relied upon by the learned counsel for the appellants before us are as follows in Para. 3, at page 409 of 1982-II L.L.N.:

"...Since the plaintiff has died during the pendency of the proceedings the only relief that would be available to the legal heirs of the deceased is the payment of arrears of salary and other emoluments payable to the deceased".

This decision does not seem to be of much assistance to us.

16. In *Ibrahimbhai v. State,* [A.I.R. 1968 Guj. 202], a Division Bench of the Gujarat High Court has taken the view that the legal representatives of a petitioner who had filed a petition under Art. 226 for a declaration that the order of reversion of the petitioner was null and void were entitled to prosecute the petition because if the reversion was held void, the petitioner would have been entitled to a salary on an enhanced scale. The Division Bench took the view that the order of reversion had resulted in pecuniary loss to the original petitioner and after his death, the present petitioners were entitled to the estate of the deceased and hence the right of the present petitioners was also effected and they were, therefore, aggrieved parties. This decision of the Gujarat High Court, was followed by the Punjab and Haryana High Court in *Manmohan Anand v. State of Punjab,* [1972 S.L.R. 852]. The original petitioner before that Court had filed a petition under Art. 226 of the Constitution challenging an order, dated 6 June, 1970, by which the Governor of Punjab had removed the petitioner from the Office of the Chairman and non-official Member of the Punjab Khadi and Village Industries Board. The petitioner died on 30 October, 1970, leaving behind his widow, married daughters and a son. The question was whether the legal representatives were entitled to continue the proceedings. On behalf of the State Government, reliance was placed on the decision of this Court in *Vridhachalam case,* [A.I.R. 1966 Mad. 260] (vide supra). The Division Bench dissented from the view taken in*Vridhachalam case* (vide supra), and observed as follows:

"... If the Government passes an unconstitutional or a wrong or a void

order, which is sought to be declared null and void by the Court, it is no legal right of the Government to say that the order should not be annulled merely because in the changed circumstances the Government would not be able to pass a fresh order in accordance with law. In case of an annulment of an order of removal or dismissal from service, the fresh order cannot possibly be passed retrospectively but can take effect only from the date on which such on order is passed. If the delinquent official is dead before the annulment of the previous order, there is nobody in existence against whom a fresh order can be passed. Moreover any difficulty of the defendant or the respondent which is of his own creation cannot in my opinion take away the legal rights of heirs of a deceased to claim emoluments to which the deceased would have been entitled if the order of his removal or dismissal from service were found to be illegal".

It was conceded before the Division Bench that the legal representatives of the original petitioner can institute a suit claiming emoluments to which the original petitioner would have been entitled for the period commencing from 6 June, 1970, the date of his purported removal, to the date of his death. After referring to this concession, the Division Bench further observed as follows:

"... Once this is granted it goes without saying that no such claim can be decreed unless it is first held that the purported order of removal of the original petitioner from the membership and the chairmanship was illegal and ineffective. This is the basic relief without obtaining which no claim of the legal representatives for salary or emoluments can succeed. It is that basic relief which is being claimed in the present petition. To that extent, therefore, the right to sue survives to the legal representatives. If the original petitioner had claimed declaration to the effect that he continues in service or had asked for a *mandamus* for being issued to the respondents, I would have held that right to claim such relief was personal to the deceased and died with him and that the right to sue in respect of those reliefs did not survive to the legal representatives..."

The Division Bench of the Punjab and Haryana High Court, therefore, took the view that the legal representatives of a deceased Government servant were entitled to prosecute a petition challenging the validity of the dismissal order."

8. If a Government servant dies post the order passed by the Disciplinary Authority, it is certainly open to his heirs and legal representatives to whose benefit the consequences of that order being set aside by the Appellate Authority would go, to move an Appeal and question the order passed by the Disciplinary Authority. To place the kind of restricted construction that the Commissioner has done on the provisions of sub-Rule (2) of Rule 11 would work to defeat the very purpose for which a departmental appeal has been provided from orders of the Disciplinary Authority. It also does not appear to be the intendment of Rule 11 that for the same relief the Government servant, if alive would have the remedy of an Appeal to the Departmental Appellate Authority, but his heirs who are entitled in law to question the validity of the order passed by the Disciplinary Authority, would be required to do so by invoking the extraordinary jurisdiction of this Court, or resort to some other judicial remedy. This construction if placed on the provisions of

Rule 11(2) of the Uttar Pradesh Government Servants (Discipline and Appeal) Rules, 1999, would expose it to the peril of being arbitrary and discriminatory and in violation of Article 14 of the Constitution. It is a well settled cannon of statutory construction that if a statute is capable of being interpreted in two ways, the one that exposes it to the vice of unconstitutionality should be eschewed. The statute (including statutory Rules) ought to construed in a manner that renders it constitutionally valid; unless that construction is impossible on the terms of it.

9. This Court does not find that Rule 11(2) is incapable of that construction where the wife of a deceased Government servant, who is entitled to claim the benefits that would flow in case the order passed against him by the Disciplinary Authority were set aside, is contemplated to be excluded from exercising the right of Appeal.

10. In this view of the matter, this writ petition succeeds and is **allowed**. The impugned order 16.08.2019 passed by respondent no.2, the Commissioner, Basti Division, Basti is hereby **quashed.** The Commissioner, Basti Division, Basti is ordered to decide the petitioner's Appeal, dated 07.02.2018 afresh in accordance with law on merits within a period of **six weeks** from the date of receipt of a certified copy of this judgment.

11. There shall be no order as to costs.

(2020)02ILR A1703

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 14.02.2020

BEFORE
THE HON'BLE PIYUSH AGRAWAL, J.

Writ A No. 25338 of 2016

Smt. Krishna Srivastava ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Dileep Kumar Mishra, Sri R.S. Upadhyay

Counsel for the Respondents:
C.S.C., Sri Arun Kumar, Sri Anoop Kumar

A. Natural Justice - no recovery can be made from a retired employee without providing an opportunity of hearing - it is impermissible to recover the extra payment made for a period in excess of five years before the order of recovery is issued (para 11)

Writ Petition allowed.

List of cases cited:

1. State of Punjab and ors V. Rafiq Masih (White Washer) and ors (2015) 4 SCC 332 *(followed)*

2. Brijendra Kumar Tripathi & ors V. State of U.P. & ors 2019 (4) ADJ 690 (LB) *(followed)*

(Delivered by Hon'ble Piyush Agrawal, J.)

1. This writ petition has been filed, inter alia, for the following reliefs:-

"(i) Issue a writ, order or direction in the nature of mandamus commanding and directing the respondent no. 4to refund the illegally deducted amount of Rs. 3,74,745/- from G.P.F. of the petitioner with interest."

2. Heard learned counsel for the petitioner, learned standing counsel for the State - respondents and Shri Anoop Kumar, holding brief of Shri Arun Kumar, learned counsel for the respondent nos. 4, 5 & 6.

3. The brief facts of the case are that the petitioner was appointed as Assistant Teacher in Ramrati Devi Kanya Junior High School, Maniram Maharajganj, Gorakhpu (hereinafter referred to as, "the Institution') vide appointment letter dated 16.10.1991. The Institution was recognized in the year 1988 and came into the grant-in-aid list in the year 2006. It is averred that the petitioner continued on the post of Assistant Teacher. After the coming into the grant-in-aid list, as per the rules & regulations, the GPF as well as other fund were continuously deducted from the salary of the petitioner and the petitioner worked for 6 to 7 years pursuant to coming into the Institution under the grant-in-aid list. The petitioner superannuated on 30.06.2013 from the post of Assistant Teacher.

4. It is further averred that after the petitioner's retirement, when she was not getting the retiral benefits, approached the authority concerned, but in vain. It is further averred that on 03.12.2013, on the Tehsil Diwas, the petitioner personally apprised the concerned Officer about her grievances, but in spite of the direction for granting retiral benefits, no action has been taken by the authority concerned for redressal of the petitioner's grievance. When no heed was paid to the grievance of the petitioner, she approached the Lokayukt, Uttar Pradesh on 18.02.2014 against the arbitrary and prejudicial action of the respondents. On the notice of the Lokayukt, the respondent nos. 4, 5 & 6, vide letter dated 21.04.2014, stated that a report was called from the Finance & Account Officer, in which it came to the notice that the salary of the petitioner was being paid more than the exact salary by wrong calculation and therefore, after her retirement, the recovery was to be made from her GPF amount, which was above Rs. 4,00,000/-. It is further averred that out of Rs. 4,12,414/-, a sum of Rs. 3,74,745/- has been deducted from the petitioner's GPF account and only Rs. 44,769/- was paid to the petitioner. It is further averred that the said amount had been withdrawn/adjusted without the consent of the petitioner. Hence, the present writ petition seeking refund of illegal deduction of Rs. 3,74,745/- from the GPF account of the petitioner, along with interest.

5. Learned counsel for the petitioner submits that the petitioner, who was appointed in the year 1988 on the post of Assistant Teacher in the Institution, had been working as Assistant Teacher even after the Institution came under the grant-in-aid list in the year 2006 on the same post. He further submits that it is not the case of the respondents that the alleged excess payment has been made to the petitioner by misrepresenting or playing fraud for getting the salary on the post of Assistant Teacher for which she was not entitled for. It is further submitted that re-fixation of salary has been done without providing any opportunity of being heard to the petitioner. Learned counsel for the petitioner has placed reliance upon the judgement of the Apex Court in ***State of Punjab and others Vs. Rafiq Masih (White Washer) and others*** reported in (2015) 4 SCC 332. He prays that a direction may be issued to the respondents for refund of Rs. 3,74,745/-, along with interest, which was illegally deducted from the GPF account of the petitioner.

6. *Per contra*, learned counsel for the respondents submits that before taking action against the petitioner, notices were issued, but the petitioner chose not to reply the said notices. Therefore, the deduction

has rightly been made as the amount has wrongly been paid to the petitioner, for which she was not entitled to and under such circumstances, re-fixation was done and order was passed for deducting the amount from the petitioner's GPF account. Learned counsel for the respondents tries to justify the action of the respondents.

7. The Court has considered the rival submissions of the learned counsel for the parties and has perused the record.

8. The record reveals that the petitioner was appointed as an Assistant Teacher in the Institution in the year 1988 and worked till the date of her superannuation, i.e., 30.06.2013, on the said post. During the said period, the salary of the petitioner has been paid without any break. The record further reveals that the salary of the petitioner was being paid as per the Rules & regulations applicable at that time. The petitioner is entitled for the retiral benefit after the date of superannuation. It is also not the case of the respondents that the petitioner has misrepresented or played fraud for getting the pay scale, for which she was not entitled to. The record further reveals that the notices alleged to have been issued by the Institution under the signature of the Principal of the Institution without there being any reference of any letter of respondent nos. 4 & 6, i.e., District Basic Education Officer, Gorakhpur and Finance & Account Officer, Basic Education, Gorakhpur. Letters have also been handwritten and without there being any number on it. The averment in the counter affidavit for issuance of notice to the petitioner has specifically been denied in the rejoinder affidavit in paragraph no. 4 thereof by the petitioner and specifically stated that no such show cause notice was ever received to the petitioner. The record further reveals that with regard to the alleged notice, which has stated to have been sent, no material has been brought on record to show that any such notice was issued by the respondent nos. 4 to 6 and how the same was dispatched and when received. In absence of such material on record, it cannot be presumed that the notice was given to the petitioner before making deduction of Rs. 3,74,745/- from GFP account of the petitioner.

9. The Apex Court in ***State of Punjab and others Vs. Rafiq Masih (White Washer) and others*** reported in (2015) 4 SCC 332, has held that recovery from the employee would be impermissible in law after his retirement, while payments have been made mistakenly by an employer. Para 12 of the aforesaid judgment reads as under:

"12. It is not possible to postulate all situations of hardship, which would govern employees on the issue of recovery, where payments have mistakenly been made by the employer, in excess of their entitlement. Be that as it may, based on the decisions referred to herein above, we may, as a ready reference, summarise the following few situations, wherein recoveries by the employers, would be impermissible in law:

(i) Recovery from employees belonging to Class-III and Class-IV service (or Group 'C' and Group 'D' service).

(ii) Recovery from retired employees, or employees who are due to retire within one year, of the order of recovery.

(iii) Recovery from employees, when the excess payment has been made for a period in excess of five years, before the order of recovery is issued.

(iv) Recovery in cases where an employee has wrongfully been required to

discharge duties of a higher post, and has been paid accordingly, even though he should have rightfully been required to work against an inferior post.

(v) In any other case, where the Court arrives at the conclusion, that recovery if made from the employee, would be iniquitous or harsh or arbitrary to such an extent, as would far outweigh the equitable balance of the employer's right to recover."

10. Recently, this Court in the case of ***Brijendra Kumar Tripathi & Others Vs. State of U.P. & Others*** reported in 2019 (4) ADJ 690 (LB) has held as under:-

".....that the opposite parties have not provided the opportunity of hearing to the petitioners to place their case/defence in support of their fixation of pay by the erstwhile Rural Development Department and being so as well as keeping in view the facts of the case in hand that the pecuniary benefits earlier provided to the petitioners have been affected and serious pre-judice has been caused to the petitioners by the orders dated 11.05.2016, 13.06.2017 and 17.10.2017 as well as consequential orders of recovery of excess amount paid to the petitioners and the principle that an order which involves civil consequence must be passed after following principles of natural justice and after affording opportunity of hearing, this Court feels that orders dated 11.05.2016, 13.06.2016 and 17.10.2017 are unsustainable being violative to Article 14 of the Constitution of India as have been passed without providing opportunity of hearing to the petitioners and are against the principle of natural justice and fair play and as such, liable to be interfered by this Court."

11. From the perusal of the aforesaid judgements, the position of law, which emerges, is that no recovery can be made from a retired employee without providing him/her an opportunity of hearing. Further, it is also impermissible in law to recover the amount of excess payment made for a period in excess of five years before the order of recovery is issued.

12. In the case in hand, after the Institution has come under the grant-in-aid list in the year 2006, the petitioner continued in service for more than six years on the same post. After the Institution, in which the petitioner was working, came under the grant-in-aid list, the GPR as well as other funds of the petitioner were continuously deducted from her salary as per the Rules and regulations, which means that there was no dispute with regard to fixation of salary and payment made thereof to the petitioner.

13. In view of the aforesaid factual and legal position, no recovery can legally be made from the petitioner after her retirement on 30.06.2013. The amount, which has been recovered by way of deducting from the petitioner's GPF account, is liable to be refunded, along with interest, to the petitioner.

14. In the result, the writ petition succeeds and is allowed. The District Basic Education Officer, Gorakhpur is directed to refund the deducted amount from the petitioner's GPF, along with 6% per annum interest, within a period of one month from the date of production of a certified copy of this order.

15. The respondents are free to recover the amount of interest paid to the petitioner from the erring Officer(s) in accordance with law.

(2020)02ILR A1707

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 21.01.2020

BEFORE
THE HON'BLE YASHWANT VARMA, J.

Writ A No. 44407 of 2012

Phool Singh ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Vinod Kumar Yadav, Sri Abhishek Kumar Yadav

Counsel for the Respondents:
C.S.C., Sri J.R. Pandey

A. Exchange of land - Section 161 & 132 - U.P. Zamindari Abolition & Land Revenue Act, 1950 - conjoint reading of both the Sections manifests that the exchange may be sought in respect of land generally vesting in Gaon Sabha by virtue of Section 117, but it cannot be applicabile to those categories of land which are covered and fall within the ambit of Section 132

Section 161 is not envisaged to be a tool or measure to camouflage, overcome, legalise or legitimise an illegality. It is not meant to be a used as an instrument or device to regularise or validate an illegality. It cannot possibly be viewed as a provision enabling a usurper or encroacher of public utility land to attempt to legalise wrongful possession. As this Court reads that provision, it primarily appears to put in place a mechanism to interchange land inter parties. It is principally a reciprocal arrangement. It clearly does not and cannot in law be countenanced in law as being a provision aimed at curing an illegality or according ipso facto approval to an illegal act of usurpation or encroachment. It is not entitled to be viewed as either endorsing or legitimizing an illegality. Section 161 is essentially aimed at enabling a party to switch, barter or exchange land to the mutual benefit of both parties. A party cannot first encroach, trespass or intrude and then claim a right to exchange. It is clearly not a provision aimed at legalizing an encroachment. A person who has encroached or trespassed upon land cannot subsequently turn around and seek condonation of that act or infraction by seeking an exchange. A person seeking an exchange must be one who is in lawful possession of land which is offered in exchange. Viewed in any other light, the provision may be abused as a devise to accord legitimacy upon an act which is illegal and unlawful. The institution which appears to have encroached upon public utility land cannot take shelter of an application purported to have been made under Section 161 of the 1950 Act. (para 9)

Writ petition Rejected.

List of cases cited

1. Kamal Chand Singh V State of U.P. 2016 SCC Online All. 770

2. Baba Sukku Maa Prabhudevi Inter College V. State of U.P. 2019 SCC Online 4522

(Delivered by Hon'ble Yashwant Varma, J.)

1. Heard learned counsel for the petitioner and the learned Standing Counsel for the State respondents.

2. This petition has been preferred challenging the order dated 27 March 2012 passed by the Basic Education Officer, Kaushambi rejecting the claim of the petitioner for grant of salary and other emoluments.

3. The petitioner contends that he was duly selected and appointed on the post of Clerk in the concerned institution on 10 August 1983. That institution is stated to have been taken on the grant in aid list on 2 January 2006. It is the case set

forth in the writ petition that the petitioner was being paid regular salary till it was stopped in March 2011. Aggrieved by that action the petitioner instituted **Writ Petition No. 46619 of 2011** which was disposed of with a direction commanding the fourth respondent to decide the representation. It is pursuant to those orders that the impugned order has come to be passed.

4. The impugned order records serious transgressions on the part of the institution in question. It is firstly noted that the institution is non-existent on the plots that were mentioned in the details set forth in the application relying upon which the grant in aid order came to be passed. The order records that the institution has been partly constructed on Plot No. 347, which is recorded as land reserved for a public utility. It has been further noted that the institution has illegally encroached upon public utility land on which seven temporary sheds have been constructed from which the institution is being run and administered. It has further been found that in the grant in aid application it was asserted that the institution existed on Plot Nos. 329, 349 and 351 which too are recorded as "banjar". It is in that backdrop that the Basic Education Officer notes that the order for taking the institution on the grant in aid list was obtained by concealment of facts and by practicing fraud. He then proceeds to note that in the Management Returns that were filed it was stated that more than 225 students were studying in the institution. However, on the date of inspection it was found that only 13 students in Class -VI, 9 students in Class VII and 6 students in Class VIII, were present. More seriously the Basic Education Officer proceeds to note that various employees including the petitioner here were direct relations of the members of the Committee of Management. He also records that in light of the material, which was found in the enquiry and is referred to above, a proposal has been sent to the State Government for the removal of the institution from the grant in aid list. Presently, the learned counsel is unable to apprise the status of that proposal or whether the institution continues to enjoy the facility of grant in aid.

5. Insofar as the objections taken by the Basic Education Officer to the establishment of the institution on public utility land is concerned, learned counsel seeks to draw sustenance from an interim order passed by a learned Judge on **Writ Petition No. 10497 of 2011** preferred by the Committee of Management in which an order of *status quo* operates. That petition basically deals with the request of the institution in question for an exchange being offered by the petitioner in light of the provisions contained in Section 161 of the **U.P.Z.A. & L.R. Act, 1950**. The petition also refers to the powers conferred under Section 198(4) of the 1950 Act and the request for exchange as made by the petitioner institution on 4 May 2010.

6. The Court however finds itself unable to countenance the submission addressed since it is not disputed before this Court that the power of exchange as extended by Section 161 of the 1950 Act can have no application to land which is reserved for public utility purpose. Regard must be had to the fact that Section 161 of the 1950 Act confers a power to sanction exchange of land as offered by a bhumidhar with land vesting in the Gaon Sabha by virtue of Section 117 of that Act. Section 161 reads thus:-

"161. Exchange.-- (1) A [bhumidhar] may exchange with--

(a) any other [bhumidhar] land held by him, or

(b) any [Gaon Sabha} or local authority lands for the time being vested in it under section 117:

Provided that no exchange shall be made except with the permission of an Assistant Collector who shall refuse permission if the difference between the rental value of land given in exchange and of land received in exchange calculated at hereditary rates is more than 10 per cent of the lower rental value.

(1A) Where the Assistant Collector permits exchange he shall also order the relevant annual registers to be corrected accordingly.

(2) On exchange made in accordance with sub-section (1) they shall have the same rights in the land so received in exchange as they had in the land given in exchange."

7. As is evident from a reading of the said provision, the exchange is subject to permission being accorded in that respect by the Assistant Collector. In terms of Section 161(2), once the exchange is duly permitted by the competent authority, it vests on the individual the same rights in the land exchanged as may have existed upon the land given in exchange. Consequently, once a bhumidhar exchanges his holding or part thereof with any land vesting in the Gaon Sabha he would be entitled to assert and exercise all rights as conferred upon a bhumidhar by the 1950 Act upon such land. However this provision can have no application to land which stands reserved for public purposes as enumerated in Section 132 of the 1950 Act. That provision in unambiguous terms provides that *"bhumidhari rights shall not accrue in...."*. On a conjoint reading and harmonious construction of Sections 132 and 161 of the 1950 Act, it is manifest that while exchange may be sought in respect of land generally vesting in the Gaon Sabha by virtue of Section 117, that can have no application to those categories of land which are covered and fall within the ambit of Section 132. Dealing with an identical question, a learned Judge in **Kamal Chand Singh Vs. State of U.P.1** and 3 others held:-

"8. In my considered opinion, the application for exchange of the area of plot no. 753 Ga, in unauthorized occupation of the petitioner with his bhumidhari land cannot be legally permitted. Plot no. 753 Ga, as already noticed herein above is land recorded as a pond. It is, therefore, land governed by the provisions of Section 132 of the U.P. Zamindari Abolition and Land Reforms Act, wherein no rights can accrue in favour of any person. In case, this land is permitted to be exchanged, it would amount to granting bhumidhari rights to the petitioner in land covered by Section 132 of the Act. This is not permissible under law. The application for exchange filed by the petitioner, is therefore, entirely misconceived and necessarily has to be rejected."

8. Dealing with pari material provisions as introduced by virtue of the U.P. Revenue Code, 2006, a learned Judge of the Court in **Baba Sukku Maa Prabhudevi Inter College Vs. State of U.P.2** noticing the provisions made in the subsequent legislation has explained the legal position as follows: -

"25. This situation is further compounded by the fact that the land over which, the institution is running is public utility land, governed by the provisions of

Section 132 of the U.P. Zamindari Abolition and Land Reforms Act and/or the parallel provisions contained in Section 77 of the U.P. Revenue Code, 2006.

26. In so far as the application for exchange under Section 101 of the U.P. Revenue Code, 2006 filed by the petitioner is concerned, the same has been dismissed vide order dated 23.05.2018 passed by the Sub Divisional Officer. Although, it is stated that a revision against this order is pending consideration before the Commissioner, Varanasi Division, Varanasi, this Court does not consider it appropriate to interfere with the impugned orders on the plea aforesaid because no rights can accrue in favour of any person over land which is land of public utility as is the situation in the case at hand. The embargo in this regard under the U.P. Zamindari Abolition and Land Reforms Act was absolutely categorical. However, this embargo has been watered down to an extent by the proviso to Section 101(2) of the U.P. Revenue Code, 2006.

27. In view of the proviso, the State Government can permit exchange also of land of public utility, but on the matter being referred to it by the Sub Divisional Officer. No reference has been made by the Sub Divisional Officer. The Sub Divisional Officer has, in fact, rejected the application for exchange. Therefore, the proviso aforementioned does not come into play in the case at hand.

28. Even otherwise, this Court has in earlier decision in Writ Petition No. 26070 of 2019 *Amar Nath Singh v. State of U.P.* decided on 20.08.2019 held that the proviso stipulates that the State Government may permit exchange of land of public utility on conditions and in the manner prescribed. However, the rules framed thereunder are absolutely silent with regard to the manner in which, the power is to be exercised by the State Government. The power provided to the State Government by the proviso aforesaid can be exercised only after relevant provisions have been incorporated in the rules and or the existing rules are suitably amended/modified."

9. On a more fundamental plane, the provisions made in Section 161 of the 1950 Act are principally aimed at respective parties arriving at a mutually acceptable position that is beneficial to both. It essentially enables the Gaon Sabha to effectively manage its land bank and use it to the optimal in public interest. At the same time it also facilitates the landowner or the bhumidhar to enter into a settlement which is beneficial to both parties. Notwithstanding the above, Section 161 is not envisaged to be a tool or measure to camouflage, overcome, legalise or legitimise an illegality. It is not meant to be a used as an instrument or device to regularise or validate an illegality. It cannot possibly be viewed as a provision enabling a usurper or encroacher of public utility land to attempt to legalise wrongful possession. As this Court reads that provision, it primarily appears to put in place a mechanism to interchange land inter partes. It is principally a reciprocal arrangement. It clearly does not and cannot in law be countenanced in law as being a provision aimed at curing an illegality or according ipso facto approval to an illegal act of usurpation or encroachment. It is not entitled to be viewed as either endorsing or legitimizing an illegality. Section 161 is essentially aimed at enabling a party to switch, barter or exchange land to the mutual benefit of both parties. A party cannot first encroach,

trespass or intrude and then claim a right to exchange. It is clearly not a provision aimed at legalizing an encroachment. A person who has encroached or trespassed upon land cannot subsequently turn around and seek condonation of that act or infraction by seeking an exchange. A person seeking an exchange must be one who is in lawful possession of land which is offered in exchange. Viewed in any other light, the provision may be abused as a devise to accord legitimacy upon an act which is illegal and unlawful. The institution which appears to have encroached upon public utility land cannot take shelter of an application purported to have been made under Section 161 of the 1950 Act. In any case the pendency of a purported application for exchange cannot confer any benefit to the petitioner here.

10. Insofar as the relation of the petitioner with the members of the Committee of Management is concerned, the attention of the Court is drawn to a document appearing at page -41 which according to the learned counsel is a list of members of the Committee as existing in 1983-84. No authenticity stands appended to this document since it is not shown to have been issued either by the concerned educational authorities or the authorities constituted under the **Societies Registration Act, 1860.** The attention of the Court is also not drawn to any other material which may establish that the Committee of Management as duly recognized by the respondents in 1983-84 did not comprise of persons who may have been related to the petitioner. Viewed in that light it is manifest that the adverse findings as recorded in the impugned order relating to the validity of the appointment of the petitioner remain unaffected. On an overall consideration of the aforesaid aspects, the Court is of the considered view that the grant of the prayers as framed would not only be unjustified, it would clearly amount to perpetuation of an illegality and the placement of an illegal burden on public resources.

11. The petition shall consequently stand **dismissed.**

(2020)02ILR A1711

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.12.2019

BEFORE

THE HON'BLE NEERAJ TIWARI, J.

Writ A No. 55606 of 2008

Mahesh Narayan & Ors. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Ashok Khare, Sri Siddharth Khare

Counsel for the Respondents:
C.S.C.

A. Service Law – appointment – any delay in issuance of appointment letter by the management during which the UP Retirement Benefits Rules, 1961 stand amended cannot put the petitioner into disadvantage of any type

The petitioner applied for the post of Junior Engineer (Civil) which was advertised as pensionable. Certain litigation suspended the selection process. Even after the direction of this Hon'ble Court to the Commission to declare results which shall be contingent upon the Court's order, the Commission did not declared the results. There was no legal impediment in completion of recruitment process, but due to inaction on part of the respondents, it was completed only after dismissal of writ petition

on 05.07.2005. Final list of selected candidate was published in daily newspaper "Dainik Jagaran" dated 12.03.2006 and thereafter appointment letters were issued. The inaction of the respondents cannot deprive a candidate their legitimate right. (para 22)

Writ Petition Partly Allowed

List of cases cited

1. Pramod Kumar Gupta and ors V. Public Service Commission, U.P. Allahabad and ors Writ Petition No. 7062 (S/S) of 2001

2. U.P. Public Service Commission V. State of U.P. and ors Special Appeal No. 485 (S/B) of 2001

3. Anoop Ratan Awasthi V Public Service Commission, Allahabad and ors Writ Petitio No. 7012 (S/S) of 2001

4. Ashutosh Joshi & ors V. State of Uttarakhand and ors Writ Petition (S/S) No. 1170 of 2010

5. Balwant Singh and ors V. State of Uttarakhand and ors Writ Petition No. 16 and 944 of 2011 (S/S)

6. State of Uttarakhand and ors V. Balwant Singh and ors Special Appeal No. 330 of 2013

7. State of Uttarakhand and ors V. Chandra Shekhar Singh and ors Special Appeal No. 523 of 2013

8. Inspector Rajendra Singh V. UOI 2017 SCC Online Del 7879

9. Government of National Capital Territory of Delhi & ors V. Ajay Kumar & ors Writ Petition (C) No. 838 & CM Appl. No. 3656/2016

10. Government of National Capital Territory of Delhi & ors V. Vijay Singh and ors Writ Petition(C) No. 839/2016 & CM Appl. No. 3659/2016

11. Government of National Capital Territory of Delhi & ors etc. V. Ajay Kumar & ors etc. Special Leave to Appeal (C) Diary No. 15658/2019

12. Satyesh Kumar Mishra and ors V. State of U.P. and ors 2016 (6) ADJ 808(LB)

13. Satyesh Kumar Mishra & 4 ors (Inre 3150 S/S 2010) V. State of U.P. thru. Prin. Secy., Education (Madhyamik) and 2 ors Special Appeal Defective No. 480 of 2016 (overruled/ per incurium)

14. Firangi Prasad V. State of U.P. and ors (2011) 2 UPLBEC 987 *(followed)*

15. Naveen Kumar Jha V. UOI and ors 2012 SCC Online Delhi 5606 (W.P.(C) No. 3827 of 2017)

16. Ajit Kumar Chaudhary V. UOI & ors W.P. (C) 4496/2014

(Delivered by Hon'ble Neeraj Tiwari, J.)

1. Heard Sri Siddharth Khare, learned counsel for the petitioners and Sri Brajesh Pratap Singh, learned standing counsel for respondents.

2. Brief facts of the case are that Irrigation Department of State of U.P. has sent a requisition dated 20.10.1999 to Uttar Pradesh Public Service Commission (hereinafter referred to as the 'Commission') notifying 954 posts of Junior Engineer (Civil) to hold selection and in the notification dated 20.10.1999, it was clearly mentioned that posts are pensionable. After receiving requisition, Commission issued an advertisement No. A-3/E-1/2000 dated 22.12.2000 inviting application for Junior Engineer (Civil) Irrigation Department (Screening) Examination, 2000. Last date of submission form was 27.01.2001 and petitioners being fully eligible, have submitted the application. In the advertisment, it was provided that there would be preliminary screening test for selection of candidates to appear in the

mains examination. However, subsequently aforesaid preliminary screening test was done away and all applicants permitted to appear straightway in the mains written examination which was held on 22.12.2001 and all the petitioners appeared in the said examination. Prior to the holding of written examination, ***Writ Petition No. 7062 (S/S) of 2001 (Pramod Kumar Gupta and others Vs. Public Service Commission, U.P. Allahabad and others)*** was filed by some candidates possessing Civil Engineering Degree and claiming permission to participate in the said examination. In the said petition, stay order was granted by learned Single Judge vide order dated 18.12.2001 restraining the holding of examination, which was scheduled for 22/23.12.2001. Against the interim order dated 18.12.2001, Commission preferred ***Special Appeal No. 485 (S/B) of 2001 (U.P. Public Service Commission Vs. State of U.P. and others),*** in which vide order dated 19.12.2001, interim order was modified and a direction was issued to permit the petitioners also to appear in the said examination whereas their results shall not be declared. There was no restrain order with regard to declaration of result of remaining candidates and there was only observation that declaration of result shall be only provisional subject to final decision of writ petition. Thereafter, written examination was held on 22/23.12.2001 but result of the said examination could not be declared immediately. ***Writ Petition No. 7062 (S/S) of 2001 was connected with Writ Petition No. 7012 (S/S) of 2001 (Anoop Ratan Awasthi Vs. Public Service Commission, Allahabad and others)*** and the said petitions were dismissed by learned Single Judge of this Court vide order dated 05.07.2005. After dismissal of writ petitions, result of written examination was declared on 05.10.2005 and petitioners were shown as having qualified and called for participating in interview. Interview was held between 21.11.2005 to 12.01.2006 and final select list of selected candidates was published in daily newspaper 'Dainik Jagran' on 12.03.2006 having the roll numbers of all the petitioners and they have been finally selected for appointment. Ultimately, vide office order dated 14.06.2006, appointment was granted to total 113 persons including petitioner Nos. 2 & 3 and another office order dated 20.07.2006 was issued granting appointment to total 125 persons including the name of petitioner No. 1. Pursuant to the appointment letters, all the petitioners submitted their joining on 25.07.2006, 30.06.2006 and 24.06.2006 respectively.

3. Learned counsel for the petitioners submitted that presently all petitioners are working at different places in the State of U.P.

4. It is further submitted that grievance of the petitioners is with regard to their exclusion from the benefit of pension payable under the provisions of Uttar Pradesh Retirement Benefits Rules, 1961 (hereinafter referred to as the 'Rules, 1961') and benefit of provident fund under the General Provident Fund (Uttar Pradesh) Rules, 1985. State Government issued Notification dated 28.03.2005 replacing the 'Old Pension Scheme' with 'New Pension Scheme' with effect from 01.04.2005. For implementation of notification dated 28.03.2005, State Government has amended Uttar Pradesh Retirement Benefits Rules, 1961 (hereinafter referred to as the 'Rules, 1961') by Uttar Pradesh Retirement

Benefits (Amendment) Rules, 2005 (hereinafter referred to as the 'Rules, 2005'). Vide Notification dated 07.04.2005, in Rule 2 of Rules, 1961, Clause-3 has been inserted providing that Rules, 1961 shall not apply to employees entering in service on or after 01.04.2005.

5. Learned counsel for petitioners is assailing the Notifications dated 28.03.2005, 07.04.2005 as well as amended Rules, 2005 on the ground that same shall not be applicable in the case of petitioners. In the Notification dated 20.10.1999, it was clearly mentioned that posts are pensionable and advertisment was issued on 22.10.2000. There was certain litigations, due to which selection process could not be finalized and even after clearance given by the Division Bench of this Court vide order dated 19.12.2001. Commission, after holding the examination on 22/23.12.2001 has not declared result though there is no restrain imposed by the Division Bench of this Court rather it has been permitted to declare the result which shall be abide by the order of Court and shall be provisional. It is next submitted that after interim order dated 19.12.2001 passed by Division Bench of this Court, delay from December 2001 to December, 2005 in declaring the result is solely attributable to the respondents for which petitioners are not responsible. Subsequent to the advertisment in the matter of petitioners, post of Junior Engineer (Civil) was again notified by Irrigation Department and advertised by Commission through (Special Recruitment) Advertisement No. A-3/E-1/2002. Thereafter all selected candidates had been granted appointment prior to 01.04.2005 and such persons belonging to the subsequent selection are getting benefit of 'Old Pension Scheme'. It is further submitted that there is no rational justification for persons appointed on the basis of subsequent recruitment being permitted to avail benefits of earlier pension scheme whereas petitioners are denied for such benefits for their no fault. This action of respondents are violative of Article 14 of Consititution of India.

6. In support of his contention, learned counsel for the petitioners has placed reliance upon the judgments of High Court of Uttrakhand dated 17.06.2013 in the case of ***Ashutosh Joshi & others Vs. State of Uttrakhand and others in Writ Petition (S/S) No. 1170 of 2010,*** judgment dated 20.11.2012 passed in ***Writ Petition Nos. 16 and 944 of 2011 (S/S) (Balwant Singh and Ors. Vs. State of Uttarakhand and Ors.)*** and judgment dated 26.06.2014 passed in ***Special Appeal No. 330 of 2013 (State of Uttarakhand and others vs. Balwant Singh and others)*** with ***Special Appeal No. 523 of 2013 (State of Uttarakhand and others vs. Chandra Shekhar Singh and others)*** filed against the judgment dated 20.11.2012 and judgment dated 27.03.2017 of Delhi High Court in the matter of ***Inspector Rajendra Singh vs. Union of India*** reported in ***2017 SCC Online Del 7879*** . He has also placed reliance upon the judgment of Delhi High Court dated 13.09.2018 in ***Writ Petition(C) No. 838 & CM Appl. No. 3656/2016 (Government of National Capital Territory of Delhi & others Vs. Ajay Kumar & others)*** along with ***Writ Petition(C) No. 839/2016 & CM Appl. No. 3659/2016 (Government of National Capital Territory of Delhi & others vs. Vijay Singh and others)*** which was affirmed by the Apex Court passed in ***Special Leave to Appeal (C).....Diary No. 15658/2019 (Government of National Capital Territory of Delhi & ors. Etc. Vs.***

Ajay Kumar & others etc.) vide order dated 10.07.2019.

7. Sri Brajesh Pratap Singh, learned standing counsel for respondents has not disputed the facts of the case as submitted by learned counsel for the petitioners, but so far as legal submission is concerned, he has submitted that once vide Notification dated 28.03.2005, Rules, 1961 is amended, petitioners are not entitled for benefit of 'Old Pension Scheme' and in support of his contention, he has placed reliance upon the judgment of this Court in the matter of ***Satyesh Kumar Mishra and others vs. State of U.P. and others,*** reported in ***2016(6) ADJ 808 (LB).***

8. In the rejoinder argument, learned counsel for the petitioners submitted that the said judgment of ***Satyesh Kumar Mishra (Supra)*** relied upon by learned standing counsel is under challenge in ***Special Appeal Defective No. 480 of 2016 (Satyesh Kumar Mishra & 4 others (Inre 3150 S/S 2010) vs. State of U.P. Thru. Prin.Secy., Education (Madhyamik) and 2 others),*** which is pending. He next submitted that very similar controversy based on similar facts was involved in the matter of ***Firangi Prasad Vs. State of U.P. and others reported in (2011) 2 UPLBEC 987*** and in that case, after order of District Inspector of Schools dated 18.01.1993, appointment letters could not be issued by the Management of the Institution and in the mean time, U.P. Secondary Education Services Selection Board Act, 1982 was amended fixing the date of joining for regularization. As petitioner was not issued appointment letter by the Management within the time, therefore, he could not submit his joining before the cut off date and ultimately denied from the benefit of regularization. **Division Bench** of this Court has adjudicated the matter and clearly held that such candidates are also entitled for regularisation irrespective of cut off date fixed for regularisation from the date of appointment. The case of ***Firangi Prasad (Supra)*** was not considered by the Court while deciding the case of ***Satyesh Kumar Mishra (Supra),*** therefore, judgment of ***Satyesh Kumar Mishra (Supra)*** is per incuriam.

9. Learned counsel for the petitioners submitted that petitioners are not at fault, therefore, in the light of judgment of ***Firangi Prasad (Supra),*** petitioners cannot be put into disadvantage of any type due to amendment in the Rules and further this fact should also be considered that candidates appointed pursuant to the subsequent advertisement, have been given benefit of 'Old Pension Scheme' as they had been issued appointment letters prior to cut off date and submitted their joining. In the present case, there was no legal impediment in completion of selection process prior to cut off date but even though same has not been completed due to total inaction on the part of respondets resulting in denial of 'Old Pension Scheme' due to late joining, which could not be accepted in the light of judgment of ***Firangi Prasad (Supra)*** and petitioners are fully entitled for 'Old Pension Scheme'.

10. I have considered the rival submissions advanced by learned counsel for the parties and perused the record as well as judgments relied upon.

11. So far as facts of the case are concerned, there is no dispute between the parties, therefore, I am coming to the legal submission of learned counsel for parties as well as judgments relied upon by them.

12. Learned counsel for the petitioners placed reliance upon the judgment of ***Ashutosh Joshi (Supra)***. In that matter against same advertisement, appointments were made and female candidates were given appointment prior to the date from which 'New Pension Scheme' was implemented whereas the male candidates have been given appointment after the cut off date. The Court has considered the matter and ultimately allowed the writ petition. Relevant paragraph No. 6 of the judgment is quoted below.

"6. After hearing the rival submission of the petitioners and the State, this Court is of clear view that denial of pensionable benefits to the petitioners is wholly unjustified, arbitrary and violative of Article 14 of the Constitution of India. It is so first and foremost for grounds that it has created a wholly unreasonable classification between women and men candidates. Whereas in the same selection process women candidates who were given appointment prior to 1.10.2005 have been given pensionary benefits, the men candidate i.e. the petitioners have not given pensionary benefits. This clearly cannot be accepted. Moreover, as fas as application of Rules is concerned, since the selection process of the petitioners had already begun, the Rules will not be effective in this selection process as any enforcement would give rise to anomalous situation which is clearly in violation of Article 14 of the Constitution of India. Secondly, in the advertisement the Government had clearly stated that all the posts are pensionable posts. The Government therefore cannot go back on its promise. There would be an estoppel against it. Finally the admitted classification between men and women candidates, in the same selection process, is not a reasonable classification. It has no nexus with the objects sought to be achieved. Hence it is Violative of Article 14 of the Constitution of India."

13. Next judgment relied upon by learned counsel for the petitioners in the case of ***Balwant Singh and Ors. Vs. State of Uttarakhand and Ors. {Writ Petition Nos. 16 and 944 of 2011 (S/S)}***. In this matter too, against the very same advertisement, there are two sets of selected candidates, one submitted their joining before cut of date, whereas petitioners have submitted their joining after cut of date i.e. 01.10.2005 and second sets of candidates were denied the benefit of 'Old Pension Scheme'. The Court has allowed the writ petition directing the respondents to accord the benefit of 'Old Pension Scheme' to the petitioners, also who have submitted their joining after the cut of date. Against the said order, Special Appeal No. 330 of 2013 along with Special Appeal No. 523 of 2013 was also filed by State of Uttarakhand which was dismissed by the Division Bench of Uttarakhand High Court vide common order dated 26.06.2014. Relevant part of the judgment is quoted below:-

" Undisputedly, when petitioners applied for the post, old pension scheme was in existence, therefore, petitioners had every reasonable expectation that they would be governed by the service conditions prevailing on the date posts were advertised and recruitment process was commenced. In our considered view, service conditions, prevailing on the date recruitment process commenced, cannot be permitted to be altered in disadvantage of the recruitees. Moreover, in our considered opinion, Government Order

dated 25.10.2005 is prospective in nature and cannot be made applicable retrospectively for the persons who had applied for the post prior to 25.10.2005. Therefore, we do not find any reason to take contrary view to the view taken by the learned Single Judge.

Consequently, both the appeals fail and are hereby dismissed."

14. Learned counsel for the petitioners has also relied upon judgment of Delhi High Court in the matter of ***Inspector Rajendra Singh (Supra)*** in which Delhi High Court held that selection was started for Para Military Forces, petitioners along with other candidates participated in the said process and ultimately petitioners were rejected being declared medically unfit. After being declared medically unfit, the petitioners got themselves medically examined in other reputed medical institutions, where they were declared medically fit. The petitioners thereafter applied for medical re-examination by a Review Medical Board. In the mean time, while the appeals of the petitioners for medical re-examination in want of constitution of a Review Medical Board were pending, the Staff Selection Commission declared the results of all other candidates except the petitioners, and depending upon the option exercised by them and their merit position, the empanelled candidates were allocated different paramilitary forces, that is BSF, CISF, CRPF and ITBP. It is stated that candidates selected to the CRPF, CISF, and ITBP were issued letters of appointment on diverse dates and they all joined the respective forces on or before 31.12.2003 whereas the candidates selected for appointment as Sub Inspectors in the BSF were issued offers of appointment in October 2003 and asked to join the BSF in January 2004. On 22.12.2003, before the sub inspectors selected for appointment in the BSF were required to join, a new Contributory Pension Scheme was introduced with effect from January 2004. The Sub Inspectors selected to the BSF, who were directed to join in January, 2004, were deprived of the benefit of the Old Pension Scheme as existing under the Central Civil Services (Pension) Rules 1972. Delhi High Court, after considering the facts of the case and law, allowed the writ petition directing the respondent to treat the petitioners as members of 'Old Pension Scheme' under the Central Civil Services (Pension) Rules 1972. Relevant Paragraph Nos. 13, 14, 18, 20, 21, 22, 23, 24, 25, 30, 31 and 40 are quoted below:-

"13. Having regard to the facts and circumstances of this case, where advertisements for recruitment to the posts of Sub Inspectors in CAPFs were issued in November, 2002, written examinations were held on 12.01.2003, Physical Efficiency Test had been held in or before April, 2003, and the petitioners appeared before the Medical Board between April, 2003, to June, 2003, and declared fit upon medical re-examination by Review Medical Board in December, 2003, it would be grossly unjust and arbitrary to deny the petitioners the benefit of the Old Pension Scheme, applicable at the time when the posts were advertised, only because of the fortuitous circumstance of their joining service after the enforcement of the New Pension Scheme, for reasons not attributable to them.

14. As observed above, the authorities concerned took six months' time to decide the appeal against the decision of the Medical Board, declaring the petitioners medically unfit. The

petitioners were found fit by other Medical institutions of repute and ultimately found fit by a Review Medical Board constituted by the respondent authorities themselves on 28.12.2003. The respondent authorities unnecessarily delayed constitution of a Review Medical Board. Had the respondent authorities and in particular Staff Selection Commission acted with diligence, the petitioners could have been appointed within 31.12.2003.

18. In our view, basic terms and conditions of service, such as the right to receive pension upon superannuation, as applicable at the time of notification of the posts, cannot later be altered to the prejudice of the incumbents to the post, after commencement of the selection process.

20. In WP(C) No.3834/2013 (Parmanand Yadav and Others Vs. Union of India and others) the Division Bench held:-

"8. In the case of BSF, of which petitioners are enrolled members of the Force, letters offering appointment were delayed by three months, a fact admitted by the respondents, and as to be found in the DG BSF admitting said fact in the counter affidavit filed.

9. Thus, for parity of reasons, same relief as was granted to Naveen Kumar Jha and Avinash Singh must flow to the writ petitioners, and thus we adopt the reasoning in the two decisions, and hence we have reproduced the same hereinabove.

10. The petition is allowed issuing a mandamus to the respondents to treat the petitioners as a member of the pension scheme which was in vogue till December 31, 2003 and not to treat them as members of the new pension contributory fund scheme."

21. In Naveen Kumar Jha Vs. Union of India and Others decided on 02.11.2012, a Division Bench of this Court had held:-

3. The Staff Selection Commission invited applications to fill up posts of Sub-Inspector in Central Para Military Forces and titled the selection process as „SSC Combined Graduate Level 2000". The petitioner applied and took the examination. He cleared the written examination as also the Physical Efficiency Test.

4. Required to appear before a Medical Board for fitness to be ascertained, the petitioner was declared medically unfit as per medical examination conducted on February 04, 2002. Since the procedures of the law entitled the petitioner to seek a re-medical examination by being brought before a Review Medical Board and for which he had to file an appeal within 30 days of unfitness being intimated, on February 25, 2002 the petitioner submitted the necessary appeal. Unfortunately, for him he heard nothing from the respondents on the subject i.e. the date and the place where petitioner was required to be present to be re-examined by the Review Medical Board and in the meanwhile the candidature of others was processed. It was only on January 18, 2003 that the petitioner was intimated to be present before the Review Medical Board and the petitioner duly presented himself before the Board and upon examination was declared fit. By March 2003 others who were successful had joined the respective Para Military Force to which they were allocated to. The petitioner was called for interview on July 2003 and thereafter having cleared the interview was issued letter offering appointment as a Sub-Inspector in CRPF in April 2004. The petitioner thereafter successfully completed the induction training and was attached to the 72nd Bn.CRPF.

5. The problem which the petitioner has highlighted is of not only being placed junior to the entire batch which joined CRPF pursuant to the SSC Combined Graduate Level 2000 Examination but even junior to those who took the SSC Combined Graduate Level

2001 and SSC Combined Graduate Level Examinations held thereafter; the petitioner being placed at the top of the list of the 2004 year batch.

6. This has affected the petitioner adversely because Sub- Inspectors of his batch have earned promotions to the rank of Inspector and are being considered for further promotion to the post of Assistant Commandant.

7. Though the petitioner has earned promotion to the post of Inspector but even in said rank has lost out in seniority and right to be considered along with his batchmates for promotion to the post of Assistant Commandant.

8. Another injury suffered by the petitioner is the change in the policy of the Central Government to do away with old Pension Scheme which automatically made eligible all those who joined Central Government prior to December 31, 2003. The petitioner has been held entitled to the new Pension Scheme.

9. With respect to the Pension Scheme it assumes importance to note that petitioner's batchmates were issued letters offering appointment in March 2003 and had petitioner likewise been issued a letter offering appointment, he too would have been a member of the old Pension Scheme. As a result of petitioner being offered employment in April 2004, he has perforce been made a member of the new Pension Scheme.

10. On the subject of delay in conducting Review Medical Boards, in the decision dated May 26, 2011 deciding WP(C) No.5400/2010 Avinash Singh Vs. UOI, a Division Bench of this Court held, in para 17 to 20 as under:-

"17. It is settled law that if appointment is by selection, seniority of the entire batch has to be reckoned with respect to the merit position obtained in the selection and not on the fortuitous circumstance on the date on which a person is made to join.

18. We highlight in the instant case the fortuitous circumstance of the petitioners being made to join as Assistant Commandant on 08.08.2005 is not the result of anything created by the petitioners but is a result of a supine indifference and negligence on the part of the ITBP officials.

19. Thus, petitioners would be entitled to their seniority as Assistant Commandant with respect to their batch-mates in the context of the merit position in the select panel. We make it clear, the seniority as Assistant Commandant of the entire batch would be a reflection of the merit position in the select list and not the date of joining.

20. It is trite that where a thing is deemed to come into existence everything which logically flows therefrom has to be followed and the imagination cannot boggle down. In other words, the effect of the petitioners‟ seniority being reckoned with reference to the select panel would mean that the petitioners would come at par with their brethren who joined on 02.11.2004. Since their brethren were granted 1 year qualifying service relaxation, petitioners would be entitled to the same benefit and additionally for the reason the next below rule requires that if a person junior in the seniority position acquires the necessary qualifying service, the person above has also to be considered for promotion."

11. On facts it needs to be noted that the seven petitioners of WP(C) No.5400/2010 had lost out on their seniority with reference to their merit position in the Select List due to delay in conducting their Review Medical Evaluation and in the interregnum their batchmates had joined ITBP.

12. On parity of reasoning and application of law the petitioner is held

entitled to his seniority being refixed as a Sub-Inspector in CRPF with reference to his merit position at the SSC Combined Graduate Level 2000 Examination i.e. those who joined CRPF pursuant to the said examination in March 2003. The petitioner has already earned promotion to the post of Inspector and accordingly we direct that he would be entitled to seniority refixed in said rank with reference to his revised seniority position in the rank of Sub-Inspector, and this would mean that the petitioner would be considered for promotion to the post of Assistant Commandant as per the revised seniority list.

13. The respondents are therefore directed to revise the seniority position of the petitioner in the two ranks within a period of four weeks from today and thereafter consider the petitioner along with other eligible persons for promotion to the post of Assistant Commandant.

14. As regards wages, on the principle of not having shouldered responsibility for the higher post, we do not direct backwages to be paid.

15. On the subject of the petitioner being entitled to the old Pension Scheme, in similar circumstances, deciding WP(C) No.10028/2009 Amrendra Kumar vs. UOI & Ors., where the petitioner therein was also similarly deprived the opportunity to join with his batch on account of delay in conducting medical re-examination, the Court had directed that said writ petitioner would be entitled to the benefit of the old Pension Scheme which remained in force till December 31, 2003.

16. The petitioner would be entitled to similar benefit and accordingly the next mandamus issued is by way of a direction to the respondents to treat the petitioner as a member of the pension scheme which remained in vogue till December 31, 2003."

22. It is true that in this case the appointment letters were issued in 2005. However, the petitioners had applied pursuant to the same advertisement as Parmanand and 24 others, who were granted the relief, and gone through the same selection process which commenced a few years before the New Pension Scheme was notified. The medical examination was also held within 31.12.2003, before the new scheme came into effect. Unfortunately, the appointment took time.

23. The issue of whether Sub Inspectors similarly circumstanced, as the petitioners, who had been cleared in medical examinations in 2003, but issued with appointment letters and joined the BSF in 2004 or 2005, could be denied pensionary benefits under the old pension scheme, which ended on 21.12.2003, was decided by a Division Bench of this Court in WP(C) No.5830/2015 (Shoorvir Singh Negi Vs. Union of India and others) heard with five other writ petitions.

24. By a judgment and order dated 17.09.2015, the Division Bench held:-

"As far as the claim for pensionary benefits based upon the old pension scheme which ended on 31.12.2003 is concerned, we are of the opinion that a somewhat different result would have to follow. Undoubtedly, all the petitioners were declared medically fit by 2003. However, they would not be issued with appointment letters and joined subsequently in 2004 or 2005. It is here that the observations in Avinash Singh (supra) quoted with approval in Naveen Kumar Jha (supra) become relevant. Although the petitioners were declared fit earlier - at least much before the cessation

of the old pension rules, there was an administrative delay in the issuance of the appointment letter asking them to join training. In these circumstances, in the interests of justice, we hold that they should be entitled to the benefits of the old pension scheme."

25. In Shoorvir Singh Negi (Supra), the petitioners had claimed seniority as also pensionary benefits under the Old Pension Scheme as per the CCS (Pension) Rules 1972. While the prayer to seniority over persons who joined earlier, was disallowed, but the claim of those petitioners for pensionary benefits under the Old Pension Scheme, as per CCS(Pension) Rules 1972, was allowed.

30. The respondents have contended that the final results of the petitioners had been declared by the Staff Selection Commission in November, 2004 long after the New Pension Scheme was given effect. If there was delay in declaration of the results and issuance of letters of appointment, the incumbents are not to suffer. May be, as contended by the respondents, the petitioners had been declared unfit. However, in the Review Medical Examination by Review Medical Board, they were found fit. It is not the case of the respondents that they were unfit earlier by reason of any ailment or disorder, of which they were cured later. Even otherwise, there was no reason for delaying the Review Medical Examination and the Interview. In any case, as observed above, the issues are covered in favour of the petitioners, by the judgment of the Supreme Court in Shoorvir Singh Negi (supra).

31. In our considered opinion, there can also be no discrimination between batchmates, only because some were, at the time of appointment, informed that the New Pension Scheme would apply, while others were not.

40. The writ petition is allowed. The respondent shall treat the petitioners as members of the Old Pension Scheme under the Central Civil Services (Pension) Rules 1972.

15. Learned counsel for the petitioners next placed reliance upon judgment of Delhi High Court passed in the case of ***National Capital Territory (Supra)*** which is based upon the judgment of Division Bench of Delhi High Court in the matter of ***Naveen Kumar Jha vs. Union of India and others, 2012 SCC Online Delhi 5606 (W.P.(C) No. 3827 of 2012)*** decided on 02.11.2012 and ***Ajit Kumar Choudhary vs. Union of India & others, W.P. (C) 4496/2014*** decided on 21.07.2017. In this matter again issue was the same that arising out of same advertisement, some of the candidates were given appointment prior to cut of date for 'New Pension Scheme' whereas another set of persons were given joining after the cut of date. Such candidates approached Central Administrative Tribunal (CAT) by filing Original Application which was allowed against which the Government of National Capital Territory of Delhi & others filed Writ Petition(C) No. 838 & CM Appl. No. 3656/2016 along with Writ Petition(C) No. 839/2016 & CM Appl. No. 3659/2016 before Delhi High Court and Delhi High Court after considering the facts of the case as well as law, dismissed the writ petitions by common order dated 13.09.2018. Relevant paragraphs of the judgment is quoted below:-

" The grievance of the Government of National Capital Territory of Delhi (GNCTD) in these two petitions is that Central Administrative Tribunal (CAT) granted relief to the respondents, who claimed benefit of pre-revised pension scheme applicable to class of service they belonged to. It is a common

ground of both the parties that the previously existing scheme- i.e. before 01.01.2004, entitled public servants to a monthly pension and other attendant terminal pension prescribed under the CCS (Pension) Rules, 1972 for payment of gratuity which was subsequently amended. The rationale for grant of relief by the impugned order was that the applicants (who were respondent in this case) had issued an advertisement through Delhi Subordinate Services Selection Board (DSSSB) in the year 2002 for various classes of posts. Common merit list was drawn pursuant to the recruitment process - sometime in 2003. Concededly, some of the applicants though senior and higher in the merit list were not issued appointment letter as they did not belong to the reserved communities in GNCTD. Subsequently, controversy arose whether status claimed by the Scheduled Caste/Scheduled Tribe (SC/ST) could be given to them since they did not belong to GNCTD and in some instances castes were not notified in GNCTD. Eventually, they were issued appointment letters but after 01.01.2004. The controversy as to whether they were entitled to be treated as SC/ST was resolved by Full Bench of this Court in Deepak Kumar & Ors. vs. District and Sessions Judge, Delhi & Ors., (2012) 132 DRJ (FB) and recently by a Constitution Bench in Bir Singh vs. Delhi Jal Board, 2018 SCC Online SC 1241.

The denial of parity with their juniors/batchmates vis-a-vis applicability of old pension scheme became the subject matter of proceedings before CAT where they were successful. Learned counsel for the GNCTD urges that CAT's decision- which has relied upon previous judgment of this Court ought to be set aside since so called juniors/batchmates were in fact appointees prior to the applicants. It is contended that since the appointment of the applicants took place after the appointed date i.e. 01.01.2004; they could not claim any benefit to prescribed individual pension rule. Learned counsel relied upon a decision of Division Bench in Ashok Mudgal vs. Govt. Of NCT of Delhi & Ors., 2010 SCC Online Del 2357-W.P. (C) 12246/2009 (decided on 14.07.2010).

This Court is of the opinion that the present writ petitions are without merit. The very same issue which is sought to be agitated by the GNCTD was subject matter of two Division Bench judgment in Naveen Kumar Jha v. Union of India and others, 2012 SCC Online Delhi 5606 (W.P.(C) No. 3827 of 2012) decided on 02.11.2012 and Ajit Kumar Choudhary vs. Union of India & others, W.P. (C) 4496/2014 decided on 21.07.2017. In Naveen Kumar Jha (supra), the Court firstly granted the benefit of seniority on the basis of common merit-list published by the recruitment agency even though the individual was appointee of later date after 01.01.2004. The Court also held that the old pension scheme would apply, on the ground that the petitioner "was deprived the opportunity to join to his batch on account of delay in conducting the medical re-examination". Likewise, in Ajit Kumar Choudhary (supra), this Court held that the "department's position was illogical and irrational given that the petitioners have been granted seniority and granted parity from their date of actual joining. Their specific grievance was denial of the old pension scheme which was specifically referred to in the final order of this Court. The refusal to grant the old pension scheme is untenable in law.

....."

16. It is next submitted that judgment of Delhi High Court was also challenged before the Apex Court by filing ***Special***

Leave to Appeal (C).....Diary No. 15658/2019, which was dismissed by the Apex Court vide order dated 10.07.2019.

17. Per contra, learned standing counsel placed reliance upon the judgment of this Court in the matter of ***Satyesh Kumar Mishra and others vs. State of U.P. and others,*** reported in ***2016(6) ADJ 808 (LB)*** and submitted that in present case too, the selection was made prior to issuance of 'New Pension Scheme' whereas the appointment was issued at later stage and this Court after considering the facts, vide order dated 01.06.2016, dismissed the writ petition. Brief facts of the case as observed by the Court is given in Paragraph Nos. 4 to 10 which are quoted below:-

"4. According to the petitioners, after empaneling, the District Inspector of Schools, Baghpat, vide letter dated 13.12.2004, directed the Manager/Committee of Management, Sri Vidya Mandir Inter College, Chhaprauli, Baghpat, to issue appointment letter to petitioner No.1-Satyesh Kumar Mishra but the letter of appointment was not issued to petitioner No.1 and subsequently, on 18.12.2004, Manager/Committee of Management, Sri Vidya Mandir Inter College, Chhaprauli, Baghpat, refused to issue appointment letter to petitioner No.1. However, on 21.2.2005, the District Inspector of School, Raebareli issued direction to Sri Ganesh Vidyalaya Inter College, Aehar, Raibareli, which is a Government aided College, to issue appointment letter to petitioner No.1. In compliance of the letter dated 21.2.2005, the Manager/Committee of Management, Sri Ganesh Vidyalaya Inter College, Aehar, Raibareli, issued letter of appointment to the petitioner No. 1 on 16.4.2005. Consequently, the petitioner No.1 joined as Assistant Teacher in Sri Ganesh Vidyalaya Inter College, Aehar, Raibareli on 16.4.2005.

5. Inso far as petitioner No.2 is concerned, it has been stated by the Counsel that the District Inspector of Schools, Mathura, vide letter dated 10.11.2004, issued letter to the Manager/Committee of Management, Sri Brij Aadarsh Inter College, Mathura, to issue letter of appointment to petitioner No.2-Ravindra Bahadur Srivastava but the same was not issued to petitioner No.2 and, subsequently, vide letter dated 22.1.2005, the issuance of appointment letter was refused by the Manager/Committee of Management, Sri Brij Aadarsh Inter College, Mathura. Thereafter, the District Inspector of Schools, vide letter dated 20.4.2005, directed the Manager, Mahatma Gandhi Inter College, Raebareli to issue letter of appointment to petitioner No.2. In compliance of the letter dated 20.4.2005, the Manager, Mahatma Gandhi Inter College, Raebareli issued letter of appointment to petitioner No.2 on 13.5.2005. Similarly, with regards to petitioner No.3, a direction was issued by the District Inspector of Schools, Muzaffarnagar to the Manager/Committee of Management, D.A.V. Inter College, on, Muzaffarnagar for issuance of appointment letter to petitioner No.3-Chhote Lal but the same was refused by the Manager/Committee of Management, D.A.V. Inter College, on, Muzaffarnagar vide letter dated 15.1.2005. Subsequently, petitioner No.3 was given appointment letter by the Manager, Gayatri Inter College, Rustampur Raebareli and in pursuance thereof, the petitioner No.3 joined in the institution on 4.5.2005.

6. It has been stated by the Counsel that initially the District Inspector of Schools, Pratapgarh had issued letter

dated 30.9.2004 to the Manager of the institution situate at Pratapgarh, requiring him to issue letter of appointment to petitioner No.4-Zaheer Ahmad but the same was refused on 29.11.2004. Subsequently, in pursuance of the letter dated 9.6.2005 issued by the District Inspector of Schools, Raibareli, the Manager, Chandrapal Inter College, Shera Gangaganj, Raebareli issued letter of appointment to the petitioner No.4 and in pursuance thereof, the petitioner No.4 joined the institution on 16.4.2005.

7. As regard to petitioner No.5-Ram Singh, it has been stated that initially, the District Inspector of Schools, Ghaziabad directed the Manager, Nehru Smarak Inter College, Surana, Ghaziabad to issue a letter of appointment to the petitioner No.5 but the same was refused by the Manager, Nehru Smarak Inter College, Surana, Ghaziabad on 13.11.2004. Later on, in pursuance of the appointment letter, petitioner No.5 had joined Chandrapal Inter College, Shora Gangaganj, Raibareli on 14.8.2006.

8. As regards to petitioners Nos. 6, 7 and 8, it has been stated that the District Inspectors of Schools had initially issued letter to the concerned Manager of the Institution for issuance of appointment letters in the month of January, 2005 but the concerned Manager of the institution had refused to issue letter of appointment to petitioners Nos. 6, 7 and 8. Later on, in pursuance of the appointment letters, petitioners Nos. 6, 7 and 8 joined on 16.4.2005 and 25.4.2005, respectively.

9. According to the petitioners, since after completion of probation period satisfactorily, no necessary deduction towards General Provident Fund etc. are being made from their salary inter alia on the grounds that petitioners do not come within the purview of Old Pension Scheme and are covered by the new Pension Scheme i.e. Uttar Pradesh Retirement Benefits (Amendment) Rules, 2005 and General Provident Fund (Uttar Pradesh) Amendment Rules, 2005. Therefore, petitioners are constrained to approach this Court by filing the present writ petition, seeking the relief for making necessary deduction of General Provident Fund etc. from the salary of the petitioners.

10. Submission of the learned Counsel for the petitioners is that pursuant to the Notification dated 27.9.2002, petitioners had applied and after due process, the U.P. Intermediate Selection Board declared petitioners as successful and recommended their names for appointments in different Colleges in the State of Uttar Pradesh in the year 2003 but due to the fault and laxity on the part of the opposite parties, petitioners were given joining from April, 2005."

18. Thereafter, Court after considering the facts, dismissed the writ petition. Relevant paragraph Nos. 26 to 32 of the judgment are quoted below:-

"26. The Apex Court, in the case of Sudhir Kumar Kansal Vs. Allahabad Bank : 2011 (2) ESC 243 held, in the matter of grant of pension, either under the old rule or the new rule, proceeded to mention that in society governed by rule of law sympathies cannot override the Rules and Regulations, and in the said case view has been taken accordingly that appellant was not eligible to claim any benefit under Old Pension Scheme.

27. Inevitable conclusion thus is, that once New Pension Scheme has been introduced and it has been provided that such incumbents entering into service on or after 1st April, 2005 would would be governed under the New Scheme, then,

said category of incumbents, as matter of right, cannot claim legally to be governed under the old scheme, and their claim of pension will fall within the ambit of Rules as has been introduced w.e.f. 01.04.2005.

28. Learned Counsel for the petitioner has placed reliance upon the judgments of the High Court of Uttarakhand rendered in Writ Petition 1170 (S/S) of 2010 : Ashutosh Joshi and others Vs. State of Uttarakhand and others, decided on 17.6.2013 and Special Appeal No.330 of 2013 : State of Uttarakhand and others Vs. Balwant Singh and others, decided on 26.6.2014. These judgments will not at all come to the rescue and reprieve of the petitioners, for the reasons that once categorical cut off date has been mentioned and new entrants w.e.f. 1st of April, 2005 will have to accept new pension scheme, then, as far as petitioners are concerned, no relief can be accorded to them.

29. It may be added that during the course of arguments reliance has also been placed upon K. Manjusree (supra), in which case the High Court of Andhra Pradesh for selection of District and Sessions Judges (Grade II) introduced minimum marks for the interview after Notification. The earlier recruitment never insisted upon the minimum marks to be obtained in the interview. The Supreme Court dealing with the situation took the view that the introduction of requirement of minimum marks for interview, after the entire selection process (consisting of written examination and interview) was completed, would amount to changing the rules of the game after the game was played which is clearly impermissible. The facts in K. Manjusree (supra) are not exactly identical to the facts of the present case as in the said case before the Supreme Court, no rules were framed by the employer laying down the minimum marks for the interview and the criterion of prescribing minimum marks for the interview was introduced after completion of the written examination as well as the interview. Whereas, in the instant case, though petitioners have been selected for the appointment on the post of Assistant Teacher (L.T.) Grade in the year 2004 but they got appointments and joined on the post in question after the cut off date prescribed in the New Pension Scheme floated by the State Government i.e. after 1.4.2005. Thus, the judgment of K. Manjusree (supra) is not applicable in the present facts and circumstances of the case.

30. In Rakhi Ray and others Vs. High Court of Delhi and others : 2010 (2) SCC 637, the Apex Court in para 24 has observed that a person whose name appears in the select list does not acquire any indefeasible right of appointment. Empanelment at the best is a condition of eligibility for the purpose of appointment and by itself does not amount to selection or create a vested right to be appointed. The vacancies have to be filled up as per the statutory rules and in conformity with the constitutional mandate. In Vijoy Kumar Pandey Vs. Arvind Kumar Rai and others : 2013 (11) SCC 611, the Apex Court has observed that preparation of selection list or panel does not by itself entitle the candidate whose name figures in such a list/panel to seek appointment or claim mandamus which can for good and valid reasons be scrapped by competent authority along with entire process that culminated in preparation of such a panel.

31. In view of the aforesaid legal propositions, the assertions of the petitioners that petitioners are entitled to get the benefit of Old Pension Scheme as they were got selected in the year 2003 in

pursuance of the Notification dated 27.9.2002, has no substance as the date on which they entered into service is to be taken into account and not the year when they were declared successful..

32. For the reasons aforesaid, petitioners have failed to establish infringement of any fundamental right or statutory right so as to warrant interference under Article 226 of the Constitution of India and the writ petition is liable to be dismissed."

19. In his rejoinder argument, learned counsel for the petitioners placed reliance upon Division Bench judgment of this Court in the case of ***Firangi Prasad (Supra)*** and submitted that absolutely similar controversy came before Division Bench of this Court in which the District Inspector of Schools was empowered to get selection for appointment of teachers on ad hoc basis and appellant was appointed but due to inaction of Management, appointment letter was issued at a very belated stage and in between, Act was amended and petitioner was denied for regularisation as he has joined after cut of date fixed after amendment. The Division Bench of this Court after considering the case, has held that there is no fault on the part of petitioner in submitting his joining after cut off date as he has not been issued appointment letter by the Management, therefore, he is also entitled for regularization, therefore. Facts as observed by the Court is as follows:-

3. The admitted facts are that the appellant was appointed in a selection held by the District Inspector of Schools on 05.01.1993. Under the relevant provisions, it was the District Inspector of Schools, who was empowered to get the selection held for appointment of the teacher on ad hoc basis. There is also no dispute that the appellant was appointed against a substantive vacancy on ad hoc basis in terms of the relevant provisions and his selection and appointment was duly notified to respondent no.5-Management, vide order dated 18.1.1993.

4. The Management was called upon to allow the appellant to join as teacher on ad hoc basis within ten days and the appellant was also to accordingly join the Institution. It is to be noted that the said appointment was on ad hoc basis to continue till a candidate regularly selected joined the post.

5. The appellant appears to have approached the Management along with order dated 18.01.1993, but the Management refused to perform the said ministerial act of issuing the letter of appointment and did not allow the appellant to join in the Institution, about which complaints were made by the appellant through representations dated 16.02.1993, 18.02.1993, 23.02.1993 and several other repeated representations up to 13.08.1993. The Management ultimately on 25.08.1993 issued a letter of appointment allowing the appellant to join on 26.08.1993, whereafter he has been continuously functioning in the Institution.

6. The order of appointment has also been brought on record, which demonstrates that the same was being issued pursuant to the selection order dated 18.01.1993 and the oral discussion in the meeting held with the District Inspector of Schools.

7. The Act, 1982 was amended w.e.f. 20.04.1998 by introducing certain amendments including the provisions of Section 33-C, which is quoted herein below:-

"33-C. Regularisation of certain more appointments.-- (1) Any teacher who--

(a) (i) was appointed by promotion or by direct recruitment on or

after May 14, 1991 but not later than August 6, 1993 on ad hoc basis against substantive vacancy in accordance with section 18, in the Lecturer grade or the Trained Graduate grade;

(ii) was appointed by promotion on or after July 31, 1988 but not later than August 6, 1993 on ad hoc basis against a substantive vacancy in the post of a Principal or Head Master in accordance with Section 18;

(b) possesses the qualification prescribed under, or is exempted from such qualification in accordance with, the provisions of the Intermediate Education Act, 1921;

(c) has been continuously serving the Institution from the date of such appointment up to the date of the commencement of the Uttar Pradesh Secondary Education Services Commission (Amendment) Act, 1998;

(d) has been found suitable for appointment in a substantive capacity by a Selection Committee constituted under sub-section (2);

shall be given substantive appointment by the Management.

(2) (a) For each region, there shall be a Selection Committee comprising,-

(i) Regional Joint Director of Education of that region, who shall be the Chairman;

(ii) Regional Deputy Director of Education (Secondary) who shall be member;

(iii) Regional Assistant Director of Education (Basic) who shall be a member.

In addition to above members, the District Inspector of Schools of the concerned district shall be co-opted as member while considering the cases for regularisation of that district.

(b) The Procedure of selection for substantive appointment under sub-section (1) shall be such as may be prescribed.

(3) (a) The names of the teachers shall be recommended for substantive appointment in order of seniority as determined from the date of their appointment.

(b) If two or more such teachers are appointed on the same date, the teacher who is elder in age shall be recommended first.

(4) Every teacher appointed in a substantive capacity under sub-section (1) shall be deemed to be on probation from the date of such substantive appointment.

(5) A teacher who is not found suitable under sub-section (1) and a teacher who is not eligible to get a substantive appointment under that sub-section shall cease to hold the appointment on such date as the State Government may by order specify.

(6) Nothing in this Section shall be construed to entitle any teacher to substantive appointment, if on the date of commencement of the Ordinance referred to in clause (c) of sub-section (1) such vacancy had already been filled or selection for such vacancy has already been made in accordance with this Act."

8. By virtue of the said amendment, all ad hoc appointees either by way of promotion or direct recruitment against a substantive vacancy, not appointed later than 06.08.1993, were entitled to be regularised and placed on probation. The aforesaid provision as noted above was introduced w.e.f. 20.04.1998 and it further provides that in order to obtain the benefit of regularisation, the concerned teacher should have been appointed prior to 06.08.1993 and should have been

continuing upto the date of introduction of the said provision in the year 1998.

9. Claiming benefit under the aforesaid provision, the appellant made representations for regularisation before the competent authority and having failed to get any benefit, filed the writ petition, which has given rise to the present appeal.

10. The respondent-State appears to have filed a counter affidavit in the writ petition disputing the claim of the appellant on the ground that the appellant came to be appointed only on 25.08.1993, which is 19 days after the cut-off date mentioned in Section 33-C of the Act, 1982 and, therefore, the appellant was not entitled to the benefit of the said provision.

Thereafter, Court has considered the submissions and answered as follows:-

"14. Having considered the aforesaid submissions, it is, therefore, clear that the learned Single Judge proceeded to decline the mandamus as prayed for on a clear erroneous assumption of fact. The order in favour of the appellant dated 18.01.1993 was neither stayed nor rescinded. This is also corroborated by a perusal of the counter affidavit that was filed before the learned Single Judge where also the State did not dispute the aforesaid position. Accordingly, the finding recorded by the learned Single Judge on the strength of such facts cannot be sustained.

15. The second contention needs to be examined in the light of the facts that have emerged from the record, namely that the appellant for no fault on his part was kept out of the Institution by the inaction of the Management in spite of the District Inspector of Schools having despatched the selection order on 18.01.1993. From the facts on record, it is evident that the Manager of the Institution had to perform the ministerial act of issuing a letter of appointment to the appellant in terms of the selection order dated 18.01.1993. The Management admittedly complied with it after much persuasion on 25.08.1993, for which the appellant is nowhere at fault. On the contrary, the appellant had been continuously approaching the Management time and again expressing his willingness to join the Institution.

16. In these circumstances, teachers like the appellant fall within an altogether different class of candidates, who have been wrongfully prevented by the inaction of the Management in joining the Institution. The Management has to perform only a ministerial act and by its inaction, it cannot defeat the legitimate claim of a teacher like appellant.

17. The direction contained in the order dated 18.01.1993 was categorical to allow the appellant to join within ten days, which admittedly was scuttled by the Manager for reasons best known to him.

18. The Manager is obliged to issue a letter of appointment under the direction of the District Inspector of Schools, who is the competent authority under the Rules. Any unwarranted defiance and in the absence of any infirmity in the selection of the appellant, such inaction of the Management cannot be of any disadvantage to the appellant or to any such teacher belonging to this class.

19. The respondents cannot by their inaction, therefore, deprive a candidate of his or her legitimate right to claim continuance in service. It is, therefore, clear that there was a deliberate delay on the part of the Management in issuing the letter of appointment in the present case and accordingly, the right of the appellant to claim continuance under the selection order dated 18.01.1993 cannot be denied. The appellant will, therefore, be entitled to the benefits

flowing out of the order dated 18.01.1993 and in such a situation, the letter of appointment will relate back prior to the cut-off date i.e. 06.08.1993.

20. This, in our opinion, would be the correct interpretation of law in relation to the candidates who have been wrongfully prevented from receiving their letters of appointment for no fault of theirs.

21. Having concluded so, we, therefore, hold that the appellant was entitled for the benefit of regularisation in the circumstances narrated above and accordingly, the conclusion drawn by the learned Single Judge to refuse the mandamus cannot be sustained.

22. In view of that, the judgement and order of the learned Single Judge dated 02.04.2010 is set aside. The writ petition as well as the appeal are allowed. Respondent no.2-Regional Joint Director of Education, Basti, shall proceed to consider the claim of regularisation of the appellant in the light of the observations made hereinabove and issue appropriate orders, not later than six weeks from the date of presentation of a certified copy of this order before him, if the appellant is otherwise eligible and qualified."

20. From the perusal of judgments of ***Satyesh Kumar Mishra (Supra)*** and ***Firangi Prasad (Supra),*** there is no doubt on the point that similar dispute was before this Court in the matter of ***Satyesh Kumar Mishra (Supra),*** which was dismissed by this Court against which ***Special Appeal Defective No. 480 of 2016*** is pending. It is also not disputed that legal issue involved in the matter of ***Satyesh Kumar Mishra (Supra)*** was also before Division Bench of this Court in the matter of ***Firangi Prasad (Supra)*** where the Court has clearly held that on the fault of appointing authority in issuing appointment letter, petitioners cannot be put any type of disadvantage. It appears that at the time of deciding the matter of ***Satyesh Kumar Mishra (Supra),*** judgement of ***Firangi Prasad (Supra)*** was not placed before this Court, therefore, without considering the same, decision was given in the matter of ***Satyesh Kumar Mishra (Supra)***. Under such facts and circumstances, judgement of ***Satyesh Kumar Mishra (Supra)*** is per incuriam and cannot be treated as precedent in the present case and will not come in the rescue of respondents.

21. The controversy and question of law involved in the present case is squarely covered with the judgement of ***Firangi Prasad (Supra)*** as well as other judgments relied upon by learned counsel for the petitioners and Courts have taken consistant view that respondents cannot by their inaction deprive a candidate to his legitimate right.

22. So far as facts of the case are concerned, there is no dispute on the point that pursuant to advertisement No. A-3/E-1/2000, advertisement was issued in news paper on 22.12.2000 and as per order of this Court dated 29.12.2001 passed in ***Special Appeal No. 485 (S/B) of 2001 (supra),*** there was no legal impediment in completition of recruitment process, but dut to inaction on the part of respondents, it was completed only after dismissal of writ petition on 05.07.2005. Final selected list of selected candidate was published in daily newspaper 'Dainik Jagran' dated 12.03.2006 and thereafter appointment letters were issued. It is also not disputed that in between again in subsequent advertisement No. A-3/E-1/2002,

recruitment was completed and candidates had been granted appointment prior to 01.04.2005 and getting the benefit of 'Old Pension Scheme'.

23. Therefore, considering the facts and circumstances of the case and legal position discussed herein above, writ petition is **partly allowed** and petitioners are excluded from the effect and operation of Notification dated 28.03.2005 and 07.04.2005 as it is in violation of Article 14 of Constitution of India as well as law laid down by the Courts.

24. Respondents are directed to include the petitioners under 'Old Pension Scheme' as provided in Rules, 1961 before amendment and be given all other consequential benefits.

(2020)02ILR A1730

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 23.01.2020

BEFORE

THE HON'BLE IRSHAD ALI, J.

Writ A No. 56225 of 2016

Sanjay Kumar Philip ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Shivendu Ojha, Sri Pankaj Kumar Asthana, Sri R.K. Ojha, Sri Sanjay Kumar Singh

Counsel for the Respondents:
C.S.C., Sri Anoop Baranwal, Sri Dhruv Narayan Mishra, Sri Kaushlendra, Sri Zafar Naiyyar, Sri Rup Narayan Misra, Sri Arun Agrawal

A. Article 226 - Indian Constitution - candidate participated in a selection procedure without any demur has no right to challenge it

The petitioner after participation and defeating in the selection proceeding cannot take a U-turn by challenging the selection proceeding.

Writ Petition rejected.

List of cases cited

1. Sarita Shukla V. State of U.P. Writ Petition No. 4896 of 2015

2. Dhananjay Malik and ors. V. State of Uttaranchal and ors Civil Appeal No. 1771 of 2008

3. Ramesh Chandra Shah and ors. V. Anil Joshi and ors Civil Appeal No. 2802-2804 of 2013

(Delivered by Hon'ble Irshad Ali, J.)

1. Counter affidavit filed today may be taken on record.

2. Heard learned counsel for the petitioner, learned Standing Counsel for the respondent nos.1, 2 and 4, Sri Anup Barnwal, learned counsel for respondent no.5 and Sri Rup Naraiyan Misra, learned counsel for respondent no.6.

3. By means of the present writ petition, the petitioner is challenging the order dated 13.10.2016 passed by the Director of Education (Secondary) U.P. Lucknow. It has further been prayed to call for the record and quash entire selection proceedings of the post Principal with a further direction to initiate fresh selection proceedings in accordance with Section 16 (FF) read with Regulation 17 of the Regulation framed under the U.P. Intermediate Education Act, 1921.

4. Factual matrix of the case is that Cutting Memorial, Varanasi is an recognized institution under U.P. Intermediate Education Act, 1921. The institution is a minority institution for the purposes of Article 30(1) of the Constitution of India, thus, the provisions of Uttar Pradesh Secondary Education Services Selection Board Act, 1982 is not applicable. The institution is receiving aid from the State Government, therefore, the provisions of U.P. High School and Intermediate Colleges (Payment of Salaries of Teachers and other Employees) Act, 1971, is applicable to the said institution. Post of Principal in the aforesaid institution came into existence due to retirement of Sri Gilbert Susil Kumar on 30th June 2008.

5. The Committee of Management vide Resolution No.CM/CMIC-11(B)12-13 dated 30th August, 2012 resolved to fill up the vacancy with the request to the Regional Joint Director of Education to sent his nominee from the panel of experts appointed by him. The vacancy was advertised in two News Papers i.e. Jan Sandesh (Hindi) and "Pioneer' (English) on 14.9.2012. The Regional Joint Director of Education sent panel of expert on 08.10.2012 by constituting a Section Committee. Selection was made wherein petitioner participated without any objection. The Selection Committee on the basis of quality point marks selected the respondent no.6 on the post of Principal of the aforesaid Intermediate college. Papers were submitted before the Regional Joint Director of Education for the grant of approval as required under Section 16(FF) of the U.P. Intermediate Education Act, 1921. The Regional Joint Director of Education granted approval to the selection of the respondent no.6 vide order dated 08.11.2012.

6. The petitioner filed Writ Petitioner No.27172 of 2016 (Sanjay Kumar Phillip Vs. State of U.P. and 5 others) before this court challenging the selection of the respondent no.6 on the post of Principal of the college. The writ petition was finally disposed of with a direction to the petitioner to approach the Director of Secondary Education to ventilate his grievances with the direction to pass an appropriate order. In pursuance of the order, Director of Education after providing opportunity of hearing to the petitioner and respondent no.6 passed an order on 13.10.2016 whereby the claim of the petitioner was rejected and the selection on the post of Principal was held to be correct.

7. The order of Director of Education along with the entire selection proceedings has been assailed by the petitioner in the present writ petition.

8. The first submission of the learned counsel for the petitioner is that it is the Manager of the institution who initiated proceedings of selection on the post of Principal of the Cutting Memorial College, Varanasi which is in violation of Regulation 17 of the Regulations framed under the Act, 1921. He next submitted that the selection committee was not constituted as per the provisions contained under the Act, 1921 and Regulation framed thereunder, thus, the selection vitiates in law.

9. He next submitted that the Director of Education (Secondary) U.P. Lucknow without considering the objection has passed the impugned order on 13.10.2016, thus, the order vitiates in law and cannot be sustained. His last submission is that although, the petitioner has participated in the selection without any objection but has right to challenge the same in case he is not selected in the said selection which is completed in a arbitrary manner.

10. On the other hand, learned counsel for the Committee of Management submits that the submission advanced by the learned counsel for the petitioner that it is the Manager who initiated proceeding without any resolution, is incorrect. He submits that resolution No. CM/CMIC-11(B)12-13 dated 30th June, 2008 was passed by the Committee of Management resolving to make selection by constituting a Selection Committee on the post of Principal of the concerned college. He next submitted that once the petitioner has participated in the selection initiated in pursuance to the advertisement issued then after participation defeated in the selection he has no right to challenge the same. He next submitted that the writ petition being misconceived, is liable to be dismissed with cost.

11. Sri Rup Naraiyan Misra, learned counsel appearing on behalf of the respondent no.6 has also adopted the argument advanced by Sri Arun Agrawal, learned counsel representing the Committee of Management.

12. I have heard learned counsel for the parties and perused the material on record.

13. To resolve the controversy involved in the present writ petition, the provisions contained under 16-FF are being quoted hereinbelow:

"16-FF. Savings as to minority institutions.-(1) Notwithstanding anything in sub-section (4) of Section 16-E, and Section 16-F, the Selection Committee for the appointment of a Head of Institution or a teacher of an institution established and administered by a minority referred to in Clause (1) of Article 30 of the Constitution shall consist of five members (including its Chairman) nominated by the Committee of Management :

Provided that one of the members of the Selection Committee shall-

(a) in the case of appointment of the Head of an institution, be an expert selected by the Committee of Management from a panel of experts prepared by the Director;

(b) in the case of appointment of a teacher, be the Head of the Institution concerned.

(2) The procedure to be followed by the Selection Committee referred to in sub-section (1) shall be such as may be prescribed.

(3) No person selected under this section shall be appointed, unless-

(a) in the case of the Head of Institution the proposal of appointment has been approved by the Regional Deputy Director of Education; and

(b) in the case of a teacher such proposal has been approved by the Inspector.

(4) The Regional Deputy Director of Education or the Inspector, as the case may be, shall not withhold approval for the selection made under this section where the person selected possesses the minimum qualification prescribed and is otherwise eligible.

(5) Where the Regional Deputy Director of Education or the Inspector, as the case may be, does not approve of a candidate selected under this section the Committee of Management may, within three weeks from the date of receipt of such disapproval, make a representation to the Director in the case of the Head of Institution, and to the Regional Deputy Director of Education in the case of teacher.

(6) Every order passed by the Director or the Regional Deputy Director of Education on a representation under sub-section (5) shall be final."

The provisions contained under Regulation 17 of regulations framed under U.P. Intermediate Education Act are being quoted herein below:

"17. The procedure for filling up the vacancy of the head of institution and teachers by direct recruitment in any recognised institution referred to in Section 16-FF, shall be as follows:

(a) After the management has determined the number of vacancies to be filled up by direct recruitment, the posts shall be advertised by the manager of the institution in at least one Hindi and one English newspaper having adequate circulation in the State giving particulars as to the nature (i.e., whether temporary/permanent) and number of vacancies, descriptions of post (i.e., Principal or Headmaster, Lecturer or L.T., C.T. or J.T.C./B.T.C. grade teacher including the subject or subjects in which the lecturer or teacher is required), scale or pay and other allowances, experience required minimum qualification and age prescribed, if any, for the post and prescribing a date which should not ordinarily be less than two weeks from the date of advertisement) by which the applications shall be received by the Manager. A copy of the advertisement shall be simultaneously sent to the Inspector concerned.

Notes-(1) All vacancies in the posts of teachers and the head of institution existing at the time of advertisement shall be advertised.

(2) No new post shall be advertised unless sanction of the appropriate authority for the creation thereof has been received by the management.

(b) All applications shall be made in the form prescribed by the management and shall contain all necessary particulars about qualifications, teaching experience and other activities and be accompanied by certified copies of all the necessary certificates and testimonials. The management may charge cost of the application form not exceeding the amount referred to in Clause (2) of Regulation 10.

(c) An application by a person employed in an institution and applying for a post elsewhere or in the same institution shall not be withheld by his employer but shall be forwarded to the authority concerned immediately.

(d) All applications received from the candidates shall be serially numbered and entered in a register and particulars of the candidates noted under appropriate columns. The candidates to be called for interview shall be seven for each post (the number of applicants, permitting). The Manager shall intimate by registered post all the members of the Selection Committee as well as all such candidates as are called for interview, the date, time and place of selection at least ten days before it is held. The Selection Committee will hold the selection accordingly. If on account of any unavoidable reason, the expert selected by the Committee of Management under Clause (a) of the proviso to sub-section (1) of Section 16-FF is unable to attend the selection on the date fixed the meeting of the Selection Committee shall be postponed.

(e) The provisions of Clauses (e) and (f) of Regulation 10 and those of Regulations 11, 12 and 16 shall mutatis mutandis apply to selections made under this regulation.

(f) A panel of experts consisting of fifteen or more persons selected from category (a) referred to in Regulation 14 shall be drawn by the Director for each

region and be sent to the Regional Deputy Director of Education concerned, The Regional Deputy Director of Education shall out of the said panel communicate the names of three experts in a sealed cover to the management through its Manager as soon as he receives any request for supply of names of experts from him. The regional panel of experts shall, however, remain valid until it is replaced by a new one.

14. On perusal of provisions referred herein above, it is evident that it prescribes full fledge procedure of initiation of proceedings and constitution of selection committee to make selection.

15. On perusal of the record, it is evident that a Resolution No.CM/CMIC-11(B)12-13 dated 30th June, 2008 was passed by the Committee of Management resolving to make selection on the post of Principal by appointing a nominee from the panel of experts appointed by the Regional Joint Director of Education in the selection committee. Therefore, the submission of learned counsel for the petitioner that it is the decision of the Manager of the institution to initiate selection proceeding, cannot be accepted, and is rejected.

16. The submission of learned counsel for the petitioner that selection committee was not constituted as per the Regulations. The averment made in this regard in the writ petition has been denied in the counter affidavit filed by the committee of management. According to the provisions of Section 16-FF, five member's committee was constituted to make selection on the post of Principal. It has further been stated that the selection committee was constituted wherein one of the nominees of the Regional Joint Director of Education from the panel of experts was present and thereafter, the selection committee considered the candidature of the candidates and being placed the respondent no.6 at serial no.1, recommended for appointment on the post of Principal of the College after obtaining approval as required under Section 16-FF of the Act of 1921. The petitioner in the writ petition has not disclosed that which of the provisions of the Regulations was violated in the constitution of the selection committed. Therefore, the submission advanced by the learned counsel for the petitioner in this regard is misconceived.

17. In regard to submission that Director of Education has not considered the claim of the petitioner while passing the impugned order, I perused the impugned order and on its perusal, it is evident that by recording cogent reasons on each objection of the petitioner, the Director of Education found the claim of the petitioner to be not legally sustainable in law. Thus, the submission in this regard is not tenable in law and is hereby rejected.

18. The issue in regard to that if a candidate participated in a selection proceeding without any demur, whether he has right to challenge the same, was considered by this Court in Writ Petition No.4896 of 2015; Sarita Shukla vs. State of U.P. and others decided on 30.01.2015 and following observation has been made in paragraph No.4:

"This Court is also of the opinion that now after having participated in the counselling, it is not open to the petitioner to challenge the terms of the advertisement and the selection procedure,

of which she was fully aware. A reference may be made to a decision of the Hon'ble Apex Court in the case of Amlan Jyoti Borooah vs. State of Assam and others, (2009) 3 SCC 227, paragraph 32 of which is quoted below:

"Appellant, in our opinion, having accepted the change in the selection procedure sub silentio, by not questioning the appointment of 169 candidates, in our considered opinion, cannot now be permitted to turn round and contend that the procedure adopted was illegal. He is estopped and precluded from doing so."

This case stands on a even better footing inasmuch as there was no change in the selection procedure in the present case. Reference may also be made to various other decisions of Hon'ble Apex Court in H.V. Nirmala v. Karnataka State Financial Corporation (2008) 7 SCC 639; Sadananda Halo v. Mumtaz Ali Sheikh (2008) 4 SCC 619 (para 59); Union of India v. Vinodh Kumar and Ors. (2007) 8 SCC 100 (para 18) and Union of India v. Chandradekaran (1998) (3) SCC 694.

In view of the aforesaid discussion, I do not find any merit in this petition and the same is, accordingly, dismissed."

19. Similar view was taken by Hon'ble Supreme Court in the case of Dhananjay Malik and ors. vs. State of Uttaranchal and ors.; Civill Appeal No.1771 of 2008 decided on 05.03.2008. Paragraph No.8 and 9 of the judgment is being quoted below:

"8. In Madan Lal vs. State of J & K, (1995) 3 SCC 486, this Court pointed out that when the petitioners appeared at the oral interview conducted by the Members concerned of the Commission who interviewed the petitioners as well as the contesting respondents concerned, the petitioners took a chance to get themselves selected at the said oral interview. Therefore, only because they did not find themselves to have emerged successful as a result of their combined performance both at written test and oral interview, they have filed writ petitions. This Court further pointed out that if a candidate takes a calculated chance and appears at the interview, then, only because the result of the interview is not palatable to him, he cannot turn round and subsequently contend that the process of interview was unfair or the Selection Committee was not properly constituted. In the present case, as already pointed out, the writ petitioners- respondents herein participated in the selection process without any demur; they are estopped from complaining that the selection process was not in accordance with the Rules. If they think that the advertisement and selection process were not in accordance with the Rules they could have challenged the advertisement and selection process without participating in the selection process. This has not been done.

9. In a recent judgment in the case of Marripati Nagaraja vs. The Government of Andhra Pradesh, (2007) 11 SCR 506 at p.516 SCR this Court has succinctly held that the appellants had appeared at the examination without any demur. They did not question the validity of fixing the said date before the appropriate authority. They are, therefore, estopped and precluded from questioning the selection process."

20. In the case of Ramesh Chandra Shah and ors. Vs. Anil Joshi and others decided by Hon'ble Supreme Court on 03.04.2013 in Civil Appeal Nos.2802-

2804 of 2013 has held as under in paragraph Nos.19 to 24:.

" 19. One of the earliest judgments on the subject is Manak Lal v. Dr. Prem Chand AIR 1957 SC 425. In that case, this Court considered the question whether the decision taken by the High Court on the allegation of professional misconduct leveled against the appellant was vitiated due to bias of the Chairman of the Tribunal constituted for holding inquiry into the allegation. The appellant alleged that the Chairman had appeared for the complainant in an earlier proceeding and, thus, he was disqualified to judge his conduct. This Court held that by not having taken any objection against the participation of the Chairman of the Tribunal in the inquiry held against him, the appellant will be deemed to have waived his objection. Some of the observations made in the judgment are extracted below:

".....If, in the present case, it appears that the appellant knew all the facts about the alleged disability of Shri Chhangani and was also aware that he could effectively request the learned Chief Justice to nominate some other member instead of Shri Chhangani and yet did not adopt that course, it may well be that he deliberately took a chance to obtain a report in his favour from the Tribunal and when he came to know that the report had gone against him he thought better of his rights and raised this point before the High Court for the first time.

From the record it is clear that the appellant never raised this point before the Tribunal and the manner in which this point was raised by him even before the High Court is somewhat significant. The first ground of objection filed by the appellant against the Tribunal's report was that Shri Chhangani had pecuniary and personal interest in the complainant Dr Prem Chand. The learned Judges of the High Court have found that the allegations about the pecuniary interest of Shri Chhangani in the present proceedings are wholly unfounded and this finding has not been challenged before us by Shri Daphtary. The learned Judges of the High Court have also found that the objection was raised by the appellant before them only to obtain an order for a fresh enquiry and thus gain time.....

.....Since we have no doubt that the appellant knew the material facts and must be deemed to have been conscious of his legal rights in that matter, his failure to take the present plea at the earlier stage of the proceedings creates an effective bar of waiver against him. It seems clear that the appellant wanted to take a chance to secure a favourable report from the Tribunal which was constituted and when he found that he was confronted with an unfavourable report, he adopted the device of raising the present technical point."

20. In Dr. G. Sarna v. University of Lucknow (1976) 3 SCC 585, this Court held that the appellant who knew about the composition of the Selection Committee and took a chance to be selected cannot, thereafter, question the constitution of the Committee.

21. In Om Prakash Shukla v. Akhilesh Kumar Shukla (1986) Supp. SCC 285, a three-Judge Bench ruled that when the petitioner appeared in the examination without protest, he was not entitled to challenge the result of the examination. The same view was reiterated in Madan Lal v. State of J & K (1995) 3 SCC 486 in the following words:

"The petitioners also appeared at the oral interview conducted by the

Members concerned of the Commission who interviewed the petitioners as well as the contesting respondents concerned. Thus the petitioners took a chance to get themselves selected at the said oral interview. Only because they did not find themselves to have emerged successful as a result of their combined performance both at written test and oral interview, they have filed this petition. It is now well settled that if a candidate takes a calculated chance and appears at the interview, then, only because the result of the interview is not palatable to him, he cannot turn round and subsequently contend that the process of interview was unfair or the Selection Committee was not properly constituted. In the case of Om Prakash Shukla v. Akhilesh Kumar Shukla it has been clearly laid down by a Bench of three learned Judges of this Court that when the petitioner appeared at the examination without protest and when he found that he would not succeed in examination he filed a petition challenging the said examination, the High Court should not have granted any relief to such a petitioner."

22. In Manish Kumar Shahi v. State of Bihar (2010) 12 SCC 576, this Court reiterated the principle laid down in the earlier judgments and observed:

"We also agree with the High Court that after having taken part in the process of selection knowing fully well that more than 19% marks have been earmarked for viva voce test, the petitioner is not entitled to challenge the criteria or process of selection. Surely, if the petitioner's name had appeared in the merit list, he would not have even dreamed of challenging the selection. The petitioner invoked jurisdiction of the High Court under Article 226 of the Constitution of India only after he found that his name does not figure in the merit list prepared by the Commission. This conduct of the petitioner clearly disentitles him from questioning the selection and the High Court did not commit any error by refusing to entertain the writ petition."

23. The doctrine of waiver was also invoked in Vijendra Kumar Verma v. Public Service Commission, Uttarakhand and others (2011) 1 SCC 150 and it was held:

"When the list of successful candidates in the written examination was published in such notification itself, it was also made clear that the knowledge of the candidates with regard to basic knowledge of computer operation would be tested at the time of interview for which knowledge of Microsoft Operating System and Microsoft Office operation would be essential. In the call letter also which was sent to the appellant at the time of calling him for interview, the aforesaid criteria was reiterated and spelt out. Therefore, no minimum benchmark or a new procedure was ever introduced during the midstream of the selection process. All the candidates knew the requirements of the selection process and were also fully aware that they must possess the basic knowledge of computer operation meaning thereby Microsoft Operating System and Microsoft Office operation. Knowing the said criteria, the appellant also appeared in the interview, faced the questions from the expert of computer application and has taken a chance and opportunity therein without any protest at any stage and now cannot turn back to state that the aforesaid procedure adopted was wrong and without jurisdiction."

24. In view of the propositions laid down in the above noted judgments, it must be held that by having taken part in the process of selection with full

knowledge that the recruitment was being made under the General Rules, the respondents had waived their right to question the advertisement or the methodology adopted by the Board for making selection and the learned Single Judge and the Division Bench of the High Court committed grave error by entertaining the grievance made by the respondents."

21. In view of the above, I am of the considered opinion that the petitioner after participation and defeating in the selection proceeding cannot take U turn by challenging the selection proceeding.

22. Accordingly, no ground has been made out for interference in the impugned order in exercise of power under Article 226 of the Constitution of India.

23. The writ petition lacks merit and is hereby **dismissed.**

(2020)02ILR A1738

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 10.12.2019

BEFORE

THE HON'BLE SUDHIR AGARWAL, J.
THE HON'BLE RAJEEV MISRA, J.

Writ A No. 61227 of 2009

The Union of India & Ors. ...Petitioners
Versus
Indrajeet & Ors. ...Respondents

Counsel for the Petitioners:
Sri A.K. Gaur, Sri Rajnish Kumar Rai

Counsel for the Respondents:
S.C., Sri Ram Gopal Tripathi

A. Article 14 & 16 - Indian Constitution - positive concept - respondent's claim of parity with other selected candidates whose services were regularized by doing away with the typing skill qualification requirement is against the Circulars dated 07.04.1994 and 20.08.1997

The law as available or operating on the date of accrual of vacancies had to be applied. Admittedly, Board's Circular dated 07.04.1994. which provided for promotion from Group D to Group C Cadre was in force. Thus Railway Board's Circular dated 07.04.1994 was already operating which provided that typing skill is necessary qualification and same has to be acquired by promoted candidate. Therefore, applicant-respondents 1 & 2 could not have claimed exemption from aforesaid requirement i.e., typing skill in absence of any provision contemplating such exemption. (para 24)

B. Doctrine of sub silentio - doctrine of per incurium - does not lay a binding law - are exceptions to the rule of precedent
Writ Petition Allowed.

List of cases cited

1. Jai Prakash and ors V. Central Administrative Tribunal, Allahabad Bench and ors Writ Petition No. 65560 of 2005

2. Lancaster Motor Co. (London) Ld. V. Bremith Ltd., (1941) KB 675

3. Gerard V. Worth of Paris Ltd. (K) (1936) 2 All ER 905

4. 5Municipal Corporation of Delhi Vs. Gurnam Kaur, AIR 1989 SC 38

5. State of U.P. and Anr. Vs. Synthetics and Chemicals Ltd. and Anr., 1991(4) SCC 139

6. Arnit Das v. State of Bihar, AIR 2000 SC 2264

7. M/s. AOne Granites Vs. State of U.P. and others, AIR 2001 SC 1203

8. Bhavnagar University Vs. Palitana Sugar Mill Pvt. Ltd., AIR 2003 SC 511

9. Divisional Controller, K.S.R.T.C. Vs. Mahadeva Shetty, AIR 2003 SC 4172

10. Cement Corporation of India Ltd. Vs Purya & Ors., 2004 (8) SCC 270

11. Deb Narayan Shyam & Ors Vs. State of West Bengal & Ors, JT 2004(10) SC 320

12. State of Punjab and Anr. Vs. Devans Modern Brewaries Ltd. and Anr. 2004(11) SCC 26

13. Bharat Forge Co. Ltd. Vs. Uttam Manohar Nakate, AIR 2005 SC 947

14. Zee Tele Films Ltd., M/s. Vs. Union of India, AIR 2005 SC 2677

15. State of U.P. & Ors Vs. Jeet S. Bisht & Anr, 2007(6) SCC 586

16. Farhat Hussain Azad V. State of U.P. and ors 2005 ALJ 647

17. N. Bhargavan Pillai V. State of Kerala AIR 2004 SC 2317

18. Faujdar Vs. Deputy Director of Education and ors. 2006 (3) AWC 2243

19. J.K. Construction Engineers and ors. Vs. UOI and ors Civil Misc. Writ Petition No. 47754 of 2005

20. Brahma Prakash V. State of U.P. and ors 2006 (2) ESC 1017

21. State of Bihar and others Vs. Kameshwar Prasad Singh and another, AIR 2000 SC 2306

22. Union of India and another Vs. International Trading Co. and another, AIR 2003 SC 3983

23. Lalit Mohan Pandey Vs. Pooran Singh and others, AIR 2004 SC 2303

24. M/s Anand Buttons Ltd. etc. Vs. State of Haryana and others, AIR 2005 SC 565

25. Kastha Niwarak G. S. S. Maryadit, Indore Vs. President, Indore Development Authority, AIR 2006 SC 1142

26. Shiv Raj Singh Yadav Vs. State of U.P. and ors Special Appeal No. 375 of 2005

(Delivered by Hon'ble Sudhir Agarwal, J. & Hon'ble Rajeev Misra, J.)

1. Heard Mr. Rajnish Kumar Rai, learned counsel for petitioners and Mr. Ram Gopal Tripathi, learned counsel representing respondents -1 and 2.

2. This writ petition under Article 226 of Constitution of India has been filed against judgment and order dated 29.05.2009 passed by Central Administrative Tribunal, Allahabad Bench, Allahabad (hereinafter referred to as "Tribunal") in Original Application No. 734 of 2006 (Indrajeet and another Vs. The General Manager, North Eastern Railway and others) (hereinafter referred to as OA) whereby aforesaid OA filed by respondents-1 and 2 has been allowed with the following directions:

" 7. Accordingly, we find that orders dated 08.06.2006/ Annexure-12, 18.06.1998/ Annexure-4, 14.09.2000/ Annexure-5 AND 22.05.2000/ Annexure-6 cannot be sustained and are, accordingly, set aside, with direction to the respondents to consider the Applicants and all other persons, (who are similarly situated as the applicants), to be considered and treated similarly as jai Prakash, Nagendra Nath, Jai Singh and Ramphal Prasad and others as per order dated 03.06.2006 (Annexure-11-Compilation-II) and should not be compelled to rush to Tribunal/Court."

3. Case set up by applicants-respondents-1 and 2 is that they were

initially appointed on the post of Khalasi which is a Group 'D' Cadre Post and working in North Eastern Railway, Gorakhpur. They were promoted on the post of Junior Clerks which fall in the cadre of Group-C, against vacancies, which occurred up to 31st March, 1997. Selection process commenced vide notification dated 20.08.1997. Applicants-respondents-1 and 2 were selected pursuant to aforesaid notification. Ultimately selections so made were notified on 29.05.1998. However, as applicants-respondents-1 and 2 did not possess typing qualification, their promotions were made provisional.

4. Applicants-respondents-1 and 2 claimed to be be exempted from typing test as per judgement of this Court in **Writ Petition No. 65560 of 2005, Jai Prakash and others Vs. Central Administrative Tribunal, Allahabad Bench and others, decided on 17.10.2005.** According to applicants-respondents-1 and 2, since similarly situated Group-D, employees namely Jai Prakash, Ramphal Prasad, Jai Singh and Nagendra Nath, who were also promoted as Junior Clerks from Group D, were exempted from typing test, they (applicants-respondents 1 and 2) were also entitled to the same benefit. Petitioners did not agree to aforesaid request of applicants- respondents-1 and 2. Therefore, applicant-respondents 1 and 2 filed O.S. No. 734 of 2006 (Indrajeet and another Vs. The General Manager, North Eastern Railway and others), which has been allowed vide judgement and order dated 29.05.2009. Thus feeling aggrieved by judgement and order dated 29.08.2009 passed by Tribunal, petitioners have now approached this Court by means of present writ petition.

5. Learned counsel for petitioners contended that prior to promotion of applicants-respondents-1 and 2, on the post of Junior Clerk, which is a Group-C post, there was already, in existence, a Railway Circular dated 07.04.1994 . Aforesaid Circular provides that typing skill is compulsory for the post of Junior Clerk in the Cadre of Group-C. Such candidates, who get selected for promotion to the post of Junior Clerk in Cadre of Group-C but do not possess typing skill, be granted provisional promotion and shall have to acquire typing skill within two years of promotion. Relevant extract of Circular dated 07.04.1994 reads as under:

" In case of promotion from group 'D' to group 'C' in the ministerial cadre and promotion of clerks as Senior Clerks against LDCE quota, the employees will henceforth be required to acquire the typing skill within a period of two years and ***their promotion will be provisional subject to acquiring the prescribed typing qualification within the stipulated period."***

(Emphasis added)

6. The aforesaid Board's Circular was substituted by another Circular dated 20th August, 1997 wherein it was provided that in respect of all the vacancies of clerks, which fell vacant upto 31st March, 1997, selection for promotion from Group D to Group C employees shall be made after holding written test and Hindi or English typing test. It also provided that in case a candidate does not possess typing qualification, he will have to acquire the same within two years. The relevant extract of Board's Circular dated 20.08.1997 reads as under:-

*" **खण्ड "ग"** – अभ्यार्थी को टंकण गति हिन्दी में 25 शब्द या अंग्रेजी में 30 शब्द प्रति मिनट होना चाहिए। इस मामले को रेल परिषद के पत्र सं0 ई (एन0जी0) 1–96/सी0एफ0पी0/19* ***दिनांक 03.02.1997 के अनुसार चयनित अभ्यर्थियों को दो वर्ष के अन्दर टंकण की अर्हता पूरी कर विभागीय टेस्ट में उत्तीर्ण होना पडेगा। जो असफल पाये जायेगें उन्हें पुनः उनके पूर्व पद पर पदावनीत कर पदस्थापित कर दिया जावेगा।***

टंकण की अर्हता समय सीमा के अन्दर पूरी न करने पर उनकी पदस्थापना /पदोन्नति प पर अनन्तिम प्राविजनल मानी जायेगी।"

(Emphasis Added)

7. Applicants-respondents-1 and 2 appeared in the selection held in 1998 and were granted promotion on provisional basis.

8. The question whether applicants-respondents 1 and 2 were entitled for exemption from typing test has been answered by Tribunal in favour of applicant-respondents-1 and 2 by relying on the judgement dated 17.10.2005 of this Court in **CMWP NO. 65560 of 2005 (Jai Prakash and others Vs. Central Administrative Tribunal, Allahabad Bench and others)** wherein candidates promoted on the post of Junior Clerks (Group-C post) from Group -D posts were exempted from typing test. Accordingly, Tribunal held that applicants-respondents-1 and 2 are also entitled for the same protection as extended to other candidates by Railways granting exemption from typing test vide order dated 08.06.2006.

9. Learned counsel for petitioners submitted that High Court's judgement dated 02.09.2005 was passed in ignorance of Board's Circulars dated 07.04.1994 and 20.08.1997 as same were not placed before this Court. According to learned counsel for petitioners aforesaid Circulars, cover the field and very much in existence but unfortunately could not be considered. Therefore, aforesaid judgement in **Jai Prakash and others (Supra)** rendered by this Court is per incuriam. Even otherwise, if the view taken by this Court vide judgement dated 17th October, 2005, is applied, it covers vacancies which occurred upto 31.03.1997, and promotions made against such vacancies. In that eventuality, Board's Circular dated 20.08.1997 is liable to be ignored since it is a subsequent Law. While earlier vacancies shall be governed by old Rules new vacancies shall be governed by new Rules. Since on the date of accrual of vacancies, notification dated 20.08.1997 was not in existence, therefore same was not required to be complied with in respect of promotions made against earlier vacancies upto 30.03.1997.

10. Admittedly, Board's Circular dated 07.07.1994 was in force at the time of accrual of vacancies on 31.03.1997. Therefore, these vacancies were required to filled up in accordance with Board's Circular dated 07.07.1994. Since aforesaid circular clearly provided holding of typing test and in case, any candidate does not possess the same, he would be required to obtain typing skill within two years, it has to be followed and cannot be ignored.

11. Notification dated 20.08.1997 only reiterates the conditions prescribed in Board's Circular dated 07.07.1994. Thus typing skill was mandatory. Tribunal having ignored this aspect has erred in law in allowing O.A. filed by applicant-respondents1 and 2.

12. Mr. Ram Gopal Tripathi, learned counsel representing applicant-respondents-1 and 2 contends that since

benefit has been granted to others, therefore, applicants-respondents-1 and 2 are also entitled to the same benefit but, we do not agree with the submission made by learned counsel for applicants-respondents-1 and 2.

13. Record reveals that even at the time of earlier judgement dated 02.05.2005 passed by this Court in Writ Petition No. 65560 of 2005, Board's Circular Dated 07.07.1994 was in existence and operating, but same was not considered by this Court. It appears that the same was not brought to the notice of this Court. Thus the above judgement suffers from the vice of per 'ignorantia' & per 'incuriam' or 'sub silentio' and cannot be held to be a binding law.

14. A decision passes sub silentio, in the technical sense that has come to be attached to that phrase, when the particular point of law involved in the decision is not perceived by the Court or present to its mind. This doctrine was referred to in **Lancaster Motor Co. (London) Ltd. v. Bremith, Ltd., (1941) 1 KB 675**. Earlier in **Gerard v. Worth of Paris Ltd. (K), (1936) 2 All ER 905** the question of priority of claimant's debt was argued and only on this argument the order was passed by the Court. There was no consideration to the question whether a garnishee order could properly be made on an account standing in the name of the liquidator. In a subsequent case when this point was raised the Court held that the earlier decision would not be binding since the question that which it was confronted was not considered therein. **Sir Wilfrid Greene, M. R.,** said that he could not help thinking that the point now raised had been deliberately passed sub silentio by counsel in order that the point of substance might be decided. He further observed that point had to be decided by the earlier Court before it could make the order which it did; nevertheless, since it was decided "without argument, without reference to the crucial words of the rule, and without any citation of authority", it was not binding and would not be followed. The Court said:

"Precedents sub silentio and without argument are of no moment."

15. This principle has been recognised and followed since then in several authorities and in India also.

16. In **Salmond's Jurisprudence, 12th Edn.,** Professor P. J. Fitzgerald explains the concept of sub silentio in the following manner:

"A decision passes sub silentio, in the technical sense that has come to be attached to that phrase, when the particular point of law involved in the decision is not perceived by the Court or present to its mind. The Court may consciously decide in favour of one party because of point A, which it considers and pronounces upon. It may be shown, however, that logically the Court should not have decided in favour of the particular party unless it also decided point B in his favour; but point B was not argued or considered by the Court. In such circumstances, although point B was logically involved in the facts and although the case had a specific outcome, the decision is not an authority on point B. Point B is said to pass sub silentio."

17. This passage has been quoted as such with approval by Apex Court in **Municipal Corporation of Delhi Vs.**

Gurnam Kaur, AIR 1989 SC 38. Same principles has been followed in **State of U.P. and Anr. Vs. Synthetics and Chemicals Ltd. and Anr., 1991(4) SCC 139; Arnit Das v. State of Bihar, AIR 2000 SC 2264; M/s. A-One Granites Vs. State of U.P. and others, AIR 2001 SC 1203; Bhavnagar University Vs. Palitana Sugar Mill Pvt. Ltd., AIR 2003 SC 511; Divisional Controller, K.S.R.T.C. Vs. Mahadeva Shetty, AIR 2003 SC 4172; Cement Corporation of India Ltd. Vs Purya & Ors., 2004 (8) SCC 270; Deb Narayan Shyam & Ors Vs. State of West Bengal & Ors, JT 2004(10) SC 320; State of Punjab and Anr. Vs. Devans Modern Brewaries Ltd. and Anr., 2004(11) SCC 26; Bharat Forge Co. Ltd. Vs. Uttam Manohar Nakate, AIR 2005 SC 947; Zee Tele Films Ltd., M/s. Vs. Union of India, AIR 2005 SC 2677; and, State of U.P. & Ors Vs. Jeet S. Bisht & Anr, 2007(6) SCC 586.**

18. This doctrine of *sub silentio* is an exception to the rule of precedent.

19. Then comes the doctrine of per incurium. What constitute "per incurium" need not detain our attention since time and again it has been explained by Apex Court. Recently a Full Bench of this Court in **Farhat Hussain Azad Vs. State of U.P. and others, 2005 ALJ 647** after referring to the law with respect to "per incurium" laid down by Supreme Court in catena of decisions, has observed as under:-

"The concept of "per in curium" has been considered by the Apex Court time and again explaining that the expression means through inadvertence or a point of law is not consciously determined. If an issue is neither raised, nor argued, a decision by the Court after pondering over the issue in depth would not be precedent binding on the Courts. Per incurium are decisions given in ignorance or forgetfulness of some statutory provisions or where the Court omits to consider a binding precedent of the same Court or the superior Court rendered on the same issue or where Court presumes something contrary to the facts of the case. (Vide Mamleshwar Prasad & Anr. Vs. Kanahaiya Lal (Dead), (1975) 2 SCC 232; Rajpur Ruda Meha & Ors. Vs. State of Gujrat, AIR 1980 SC 1707; A.R. Antule Vs. R.S. Nayak, AIR 1988 SC 1531; Municipal Corporation of Delhi Vs. Gurnam Kaur, AIR 1989 SC 38; Punjab Land Development and Reclamation Corporation Ltd., Chandigarh Vs. Presiding Officer, Labour Court, Chandigarh & Ors., (1990) 3 SCC 682; State of West Bengal Vs. Synthetics and Chemicals Ltd., (1991) 1 SCC 139; Maharashtra State Cooperative Cotton Growers Marketing Federation Ltd & Anr. Vs. Employees' Union & Anr., 1994 Supp (3) SCC 385; Pawan Alloys & Casting Pvt Ltd, Meerut Vs. U.P. State Electricity Board & Ors., (1997) 7 SCC 251; Ram Gopal Baheti Vs. Girdharilal Soni & Ors., (1999) 3 SCC 112; Sarnam Singh Vs. Dy. Director of Consolidation & Ors., (1999) 5 SCC 638; Govt. of Andhra Pradesh Vs. B. Satyanarayana Rao, AIR 2000 SC 1729; Arnit Das Vs. State of Bihar (2000) 5 SCC 488; M/s. Fuerst Day Lawson Ltd. Vs. Jindal Exports Ltd., AIR 2001 SC 2293; A-One Granites Vs. State of U.P. & Ors., (2001) 3 SCC 537; Suganthi Suresh Kumar Vs. Jagdeeshan, AIR 2002 SC 681; Director of Settlements A.P. & Ors. Vs. M.R. Apparao & Anr., (2002) 4 SCC 638; S. Shanmugavel Nadar Vs. State of T.N & Anr.., (2002) 8 SCC 361; State of Bihar Vs. Kalika Kuer Kalika Singh & Ors., AIR

2003 SC 2443; and Manda Jaganath Vs. K.S. Rathnam & Ors., (2004) 7 SCC 492).

In B. Shyama Rao Vs. Union Territory of Pondichery & Ors., AIR 1967 SC 1480, the Constitution Bench of the Supreme Court observed as under:-

"It is trite to say that a decision is binding not because of its conclusions but in regard to its ratio and the principles, laid down therein."

In State of U.P. & Anr. Vs. Synthetics & Chemicals Ltd. & Anr. (1991) 4 SCC 139, the Apex Court followed the aforesaid judgment in B. Shyama Rao and held as under:-

"Any declaration or conclusion arrived without application of mind or proceeded without any reason cannot be deemed to be declaration of law or authority of a general nature binding as a precedent.....A conclusion without reference to relevant provision of law is weaker than even casual observation."

Similar view has been reiterated in Divisional Controller, KSRTC Vs. Mahadeva Shetty & Anr., (2003) 7 SCC 197, observing that casual expressions in a judgment carry no weight at all, nor every passing remark, however eminent, can be treated as an ex-cathedra statement having the weight of authority."

20. In **N. Bhargavan Pillai Vs. State of Kerala, AIR 2004 SC 2317** (para 14) Court said that if a view has been expressed without analysing the statutory provision, it cannot be treated as a binding precedent and at the most is to be considered as having been rendered per incuriam. The same law has been reiterated in **Faujdar Vs. Deputy Director of Education and others, 2006 (3) AWC 2243.**

21. In **Civil Misc. Writ Petition No. 47754 of 2005 (M/s J.K. Construction Engineers and others Vs. Union of India and others)** decided on 28.02.2006, a Division Bench of this Court held:-

*"The doctrine of per incuriam is applicable where by inadvertence a binding precedent or relevant provisions of the Statute have not been noticed by the Court."...***(Para 106)**

22. Similar view has been taken by another Division Bench in **Brahma Prakash Vs. State of U.P. & other- 2006 (2) ESC 1017.** In para 40 of the judgment this Court held as under-

"Thus in view of aforesaid discussion, it is clear that while rendering the decision in Radha Krishna Gupta's case earlier Division Bench of this Court with all respect did neither ascertain the ratio of decisions referred in the judgment, nor discussed, as to how the factual situation fits in with the fact and situation of the decision on which reliance was placed. Contrary to it the decision of Hon'ble Apex Court which requires consideration of various factors in this regard, referred herein before in our judgment has been completely ignored by the Division Bench, therefore, being a decision given per incuriam, cannot be held to be binding authority under law."

23. In the judgements referred to above, the aforesaid doctrine of per incuriam has been discussed in detail and it has been held that a judgment per incuriam does not lay down a binding precedent.

19. Even otherwise, directive of the Tribunal reads as under:

" In view of the above, as the notification-dated 20.08.1997 does not operate retrospectively, the issue ***requires to be examined as on what date the***

vacancy occurred and then to proceed in accordance with law. In case, the vacancy had occurred prior to the date of issuance of the said notification, *the respondents cannot insist for passing the typing test but if the vacancy occurred subsequent to the same, the judgement and order of the Tribunal does not require any interference."*

(Emphasis Added)

24. Above quoted observation clearly reveals that the law as available or operating on the date of accrual of vacancies had to be applied. Admittedly, Board's Circulars dated 07.04.1994, which provided for promotion from Group D to Group C Cadre was in force. Thus Railway Board's Circular dated 07.04.1994 was already operating which provided that typing skill is a necessary qualification and same has to be acquired by promoted candidate. Therefore, applicants-respondents-1 and 2 could not have claimed exemption from aforesaid requirement i.e. typing skill in absence of any provision contemplating such exemption..

25. Tribunal has thus erred in law in exempting respondents 1 and 2 from typing test.

26. We also find that in a subsequent matter, a Division Bench in **Jai Prakash and others Vs. Union of India and others, decided on 17.07.2018** had an occasion to examine this aspect and it has observed as under:

"No doubt, in the earlier round of litigation, the circular dated 7.4.1994 was not brought to the notice of either the Tribunal or the writ court and therefore the writ court, under the belief that on the date of vacancy, which was claimed to have arisen in the year 1997, there may not have been requirement to pass typing test had directed to consider eligibility for promotion as prevailing on the date of vacancy, ***but that, by itself, would not be a ground to ignore the existence of the circular dated 7.4.1994 when the same was produced in the second round of litigation.*** *Moreover, the order of the High Court was complied by the railway administration by observing that the writ court's order was without taking cognizance of railway circular dated 7.4.1994 but in due respect to the writ court's order exemption from typing test was provided as a one time exemption. "*

(Emphasis added)

27. Learned counsel appearing on behalf of applicants-respondents-1 and 2, then contended that since benefit of exemption has been granted to other selected candidates therefore, applicants-respondents-1 and 2 are also entitled to same benefit. It is further submitted that some other persons, who did not possess typing skill, have been regularized. Submission so made is wholly misconceived. We have already discussed the effect of Railway Board's Circular dated 07.04.1994 and also Circular dated 20.08.1997. Applicants-respondents-1 and 2 cannot claim any right dehors the aforesaid circulars. Applicants-respondents-1 and 2 are claiming perpetuity in illegality. It is well settled that two wrongs will not make one right. (See **State of Bihar and others Vs. Kameshwar Prasad Singh and another, AIR 2000 SC 2306; Union of India and another Vs. International Trading Co. and another, AIR 2003 SC 3983; Lalit Mohan Pandey Vs. Pooran Singh and others, AIR 2004 SC 2303; M/s Anand**

Buttons Ltd. etc. Vs. State of Haryana and others, AIR 2005 SC 565; and Kastha Niwarak G. S. S. Maryadit, Indore Vs. President, Indore Development Authority, AIR 2006 SC 1142).

28. A Division Bench of this Court (in which one of us Hon'ble Sudhir Agarwal,J. was a member) in **Special Appeal No.375 of 2005 Shiv Raj Singh Yadav Vs. State Of U.P. And Others, decided on 27.05.2011,** has considered this aspect in detail and in paragraph no.22, has held:

"22. Once it is established that the petitioner had no legal right of regularisation, merely because some irregularities and illegalities have been observed by the respondents in some other cases with respect to regularisation, that would not confer any right upon the petitioner to claim parity. The ***right of equality under Article 14 and 16 of the Constitution is a positive concept and not a negative one.*** *(See Post Master General, Kolkata and others Vs. Tutu Das, 2007(5) SCC 317; Punjab National Bank by Chairman and Anr. Vs. Astamija Dash, AIR 2008 SC 3182; Punjab State Electricity Board and others Vs. Gurmail Singh, 2008(7) SCC 245; M/s. Laxmi Rattan Cotton Mills Ltd. Vs. State of U.P. and others, 2009(1) SCC 565; Panchi Devi Vs. State of Rajasthan and others, 2009(2) SCC 589; State of Bihar Vs. Upendra Narayan Singh, 2009(5) SCC 65; State of Uttaranchal Vs. Alok Sharma and others, JT 2009(6) SC 463; State of Punjab and another Vs. Surjit Singh and others, 2009(11) SCALE 149; State of Madhya Pradesh and others Vs. Ramesh Chandra Bajpai, 2009(11) SCALE 619; Shanti Sports Club and another Vs. Union of India and others, 2009(11) SCALE 731; Ghulam Rasool Lone Vs. State of J & K and others, JT 2009(13) SC 422."(Emphasis Added).*

29. In the light of aforesaid, we find that impugned judgementand and order dated 29.05.2009 passed by Tribunal cannot be sustained. Writ petition is accordingly allowed. Judgment and order dated 29.05.2009 passed by Tribunal in O.A. No. 734 of 2006 (Indrajeet and another Vs. The General Manager, North Eastern Railway and others) is hereby set aside.

30. No costs.

(2020)02ILR A1746

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 21.01.2020

BEFORE

THE HON'BLE YASHWANT VARMA, J.

Writ A No. 63167 of 2012

Ashok Kumar Srivastava ...Petitioner
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Petitioner:
Sri Udayan Nandan, Sri Shashi Nandan

Counsel for the Respondents:
C.S.C.

A. Service Law – Promotion - Uttar Pradesh Subordinate Excise Service Rules, 1992: Rules 5, 16, 27 – In the order impugned, the State Government on the recommendations of Excise Commissioner extended the benefit of Rule 5 to Senior Clerks, who had not completed the stipulated 10 years of service. As a result of which, the claim of petitioner for promotion which was duly considered and recommended could not be given effect to. The Court while quashing the impugned orders held as follows.

B. The power of relaxation as conferred by S. 27 is liable to be construed bearing in mind the language employed therein. It is evidently liable to be invoked where the particular rule or provision causes

"..undue hardship in any particular case". **(Para 12)**

The second key or means of guidance placed on the exercise of power is use of the phrase *"in a just and equitable manner".* The expression as used in the particular rule clearly bids the respondents to balance and bear in mind the competing rights and expectations of constituents of two separate cadres, namely, Senior and Junior Clerks. The power could not have been exercised in a manner that completely annihilated the right of Junior Clerks to be considered for promotion. (Para 14)

C. A power of relaxation cannot be employed as a tool or means to completely amend the intrinsic character or content of a statutory provision. The power to amend a statutory rule is clearly and must in law be held to be distinct from a power to relax. **(Para 13)**

Writ petition allowed. (E-4)

Petition challenges orders dated 20.09.2012 and 26.09.2012, passed by State Government and the Excise Commissioner respectively, and order dated 28.12.2012, passed by Excise Commissioner.

(Delivered by Hon'ble Yashwant Varma, J.)

1. Heard Sri Udayan Nandan, learned counsel for the petitioner and the learned Standing Counsel for the State respondents.

2. This writ petition challenges the orders dated 20 and 26 September 2012 passed by the State Government and the Excise Commissioner respectively. These orders essentially expanded the field of eligibility for Senior Clerks vying for promotion to the post of Excise Inspector and a consequential annulment of the recommendations framed by the Departmental Promotion Committee. A further relief is sought for quashing of proceedings of the fresh recommendations framed by the Departmental Promotion Committee pursuant to the orders aforementioned in its meeting held on 7 November 2012 as also for quashing of an order dated 28 December 2012 passed by the Excise Commissioner rejecting the representation of the petitioner.

3. Sri Nandan, learned counsel, however submits that he chooses to give up prayer (aaaa) subject to rights being reserved to assail the order of the State Government dated 20 September 2012 which contained the principal stipulation which is assailed and led to the denial of the claim of the petitioner for promotion. Sri Nandan further pressed the prayer with respect to grant of notional promotion to the petitioner on the post of Excise Inspector. The issue itself arises in the following backdrop.

4. The petitioner was appointed as a Junior Clerk in the Department of Excise. The relevant statutory rules which governed provide for accelerated promotion to the post of Excise Inspector. These Rules are titled the **Uttar Pradesh Subordinate Excise Service Rules, 1992.** Rule 5 thereof makes the following provisions:

"5. Source of Recruitment:- Recruitment to the various categories of posts in the service shall be made from the following sources:

1. Excise Inspector

(i). Eighty percent by direct recruitment.

(ii) Ten percent by promotion from amongst the permanent sub-excise Inspectors and

(iii) Ten percent by promotion from amongst such persons who are substantively appointed Senior Assistants and Stenographers

Grade- II of the Excise Department on the first day of the year of recruitment.

Provided that if in any year of recruitment sufficient number of suitable eligible persons are not available for promotion, the field of eligibility may be extended to include the following persons, **in the order given below.**

(a.) **Substantively appointed Senior Clerks and Stenographers Grade-III, who have completed ten years service as such on the first day of the year of recruitment and**

(b) Substantively appointed Junior Clerks, who have completed fifteen years service as such on the first day of the year of recruitment."

5. Pursuant to the provisions made in those Rules, the respondents initiated a process for effecting promotions to the post of Excise Inspector. The Departmental Promotion Committee is stated to have met on 14 August 2012 in which the claim of the petitioner for promotion was duly considered and recommended. The Excise Commissioner in terms of a communication of the same date is stated to have apprised the State Government that only 5 Senior Clerks were found eligible for promotion to the post of Excise Inspector. He accordingly recommended the State Government extending the benefit of Rule 5 by relaxing the minimum period of 10 years service as stipulated in respect of Senior Clerks. The recommendation itself appears to have been framed in the backdrop of the Proviso to Rule 5 that took care of a situation where adequate number of eligible persons were not found available for promotion. In that situation the Proviso envisaged that substantively appointed Senior Clerks who had completed 10 years of service would also be considered for promotion and thereafter substantively appointed Junior Clerks who had completed 15 years of service would also be entitled to be considered for promotion. The inter se consideration of Senior and Junior Clerks in terms of the Proviso is evidently controlled by the use of the phrase ***"...in the order given below".*** The provision manifests a clear intent to firstly consider all Senior Clerks who have completed 10 years of service and only thereafter to move further below and consider Junior Engineers with 15 years of service.

6. Pursuant to the recommendation made by the Excise Commissioner, the State Government passed an order on 20 September 2012. The directions as framed and insofar as they are relevant for the purposes of disposal of the instant writ petition read thus:

"इस सम्बन्ध में मुझे यह कहने का निर्देश हुआ है कि पूर्व की भाँती ऐसे वरिष्ठ लिपिक जितने 10 वर्ष की सेवा पूर्ण कर ली हो, वह आबकारी निरीक्षक के पद पर चयन हेतु पहले पात्र होगा । तत्पश्चात वह वरिष्ठतम लिपिक पात्र होगा जिसकी वरिष्ठ लिपिक के पद पर 10 वर्ष की विहित सेवावधि पूर्ण नहीं है किन्तु वह कनिष्ठ लिपिक के पद पर 15 वर्ष की सेवा पूर्ण कर चूका हो, अथवा वह वरिष्ठ लिपिक जिसकी सेवा वरिष्ठ एवं कनिष्ठ लिपिक दोनों पदों पर कुल 15 वर्ष से अधिक हो । तत्पश्चात वे कनिष्ठ लिपिक पात्र होंगे, जो 15 वर्ष की सेवा पूर्ण कर चुके हों ।"

7. The State Government bearing in mind the provisions made in Rule 5 and the recommendation of the Excise Commissioner provided that while initially all Senior Clerks having completed 10 years of service would be considered, thereafter it would be open for the respondents to also consider the case of those Senior Clerks who had while working as a Senior Clerk and Junior Clerk cumulatively completed 15 years of

service. It basically extended the benefit to those Senior Clerks who had not completed 10 years of service as stipulated in Rule 5. While this controversy ensued, the petitioner retired on 31 October 2012 and it is in that backdrop that the prayer for notional promotion is addressed.

8. According to Sri Nandan while it was open for the State to relax a particular condition of service if the exigencies of the situation did so demand, that power could not be read as empowering the State Government to virtually amend the substantive rule itself and that too by way of an executive order. Referring to the power of relaxation as conferred on the State Government by virtue of Rule 27, Sri Nandan submitted that even that Rule could not have come to the aid of the State Government and in any case could not be read in support of the directions as framed in the impugned order of 20 September 2012. Rule 27 is extracted herein below:-

"**27. Relaxation from the Conditions of Service:-** Where the State Government is satisfied that the operation of any rule regulating the conditions of service of persons appointed to the service causes undue hardship in any particular case it may, notwithstanding anything contained in the rules applicable to the case, by order dispense with or relax the requirements of that rule to such extent and subject to such conditions as it may consider necessary for dealing with the case in a just and equitable manner."

9. According to Sri Nandan by way of the directions as framed in the impugned order of 20 September 2012, the entire construct of Rule 5 has been unsettled and various ineligible Senior Clerks were ultimately included in the field of eligibility as a consequence of which the recommendation of the Departmental Promotion Committee as framed on 14 August 2012 could not be given effect to.

10. Refuting those submission, learned Standing Counsel submitted that the State bearing in mind the recommendation of the Excise Commissioner and on finding that requisite number of Senior Clerks were not available was clearly justified in framing the directions as contained in the order dated 20 September 2012. According to the learned Standing Counsel the power as conferred by Rule 27 was validly exercised.

11. Before proceeding to deal with the rival submissions, it would also be relevant to bear in mind the provisions made in Rule 16, which envisages promotion being effected by the Committee on the relative assessment of the suitability of candidates on the basis of their service records. The Selection Committee was also granted the discretion, if thought necessary, to interview candidates.

12. Having noticed the rival submissions and the statutory regime which prevailed and governed, the Court finds substance in the submission advanced by Sri Nandan. The power of relaxation as conferred by Section 27 is liable to be construed bearing in mind the language employed therein. At the outset it is evidently liable to be invoked where the particular rule or provision causes *".. undue hardship in any particular case"*. The second key or means of guidance which is placed on the exercise of power under the rule is evidenced from the use of

the phrase *"in a just and equitable manner"*.

13. The impugned action fundamentally rests on the recommendation of the Excise Commissioner which in turn was based upon the Department noting that only 5 Senior Clerks were falling within the zone of consideration. While it may have been open to the State Government on a fundamental plane to relax the condition of 10 years of qualifying service, it clearly could not have been exercised in a manner which completely amended the rule of eligibility itself. As is manifest, the rule mandated the inclusion of only such Senior Clerks who had completed 10 years of service. It did not envisage the inclusion of Senior Clerks who had cumulatively put in 15 years of service in the cadre of Senior and Junior Clerks. A power of relaxation cannot be employed as a tool or means to completely amend the intrinsic character or content of a statutory provision. If the power to relax were to be construed in such a fashion, it would assume the character of a power to amend. The power to amend a statutory rule is clearly and must in law be held to be distinct from a power to relax.

14. The second reason why the Court finds itself unable to sustain the impugned action rests on the use of the phrase *"in a just and equitable manner"*. The expression as used in the particular rule clearly bids the respondents to balance and bear in mind the competing rights and expectations of constituents of two separate cadres, namely, Senior and Junior Clerks. The power to relax consequently could not have been exercised in a manner that completely annulled or annihilated the right of Junior Clerks to be considered for promotion. Viewed in that light it is evident that the power to relax as conferred by Rule 27 was employed in a manner which completely effaced the right of consideration of Junior Clerks. The Court finds itself unable to recognise Rule 27 as extending to the framing of directions as contained in the impugned communication of the State Government. The impugned communication and the consequential decisions taken by the respondents thus cannot be sustained.

15. The Court notes that the petitioner does not seek quashing of the ultimate promotions which were effected. In that sense the promotion accorded to individuals shall remain unaffected. However, that does not detract from the right of the petitioner for being accorded notional promotion in light of the recommendations as framed by the Departmental Promotion Committee.

16. Accordingly, the instant writ petition is **allowed**. The impugned stipulation as contained in the Government Order of 20 September 2012 is quashed. The Court also sets aside the order dated 26 September 2012 by which the recommendations of the Departmental Promotion Committee were annulled insofar as the present petitioner is concerned. The Court also sets aside the order dated 28 December 2012 by which the claim of the petitioner was rejected by the Excise Commissioner. The respondents are consequently commanded to consider the recommendations of the Departmental Promotion Committee as formulated on 14 August 2012 and to consider the grant of notional promotion to the petitioner on the post of Excise Inspector with effect from 14 August 2012.

(2020)02ILR A1751

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 17.12.2019

BEFORE

THE HON'BLE NEERAJ TIWARI, J.

Writ A No. 68437 of 2009

Satya Prakash Rai ...Petitioner
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Petitioner:
Sri Nisheeth Yadav, Sri C.B. Yadav

Counsel for the Respondents:
C.S.C.

A. Service Law – termination - U.P. Police Officers of the Subordinate Ranks (Punishment and Appeal) Rules, 1991 - Rule 8(2)(b) - Constitution of India - Article 311 (2)(b) - while dispensing with the inquiry, it is necessary to record reasons in writing - order cannot be passed on the basis of previous service record as well as without recording reasons - impugned order dated 31.8.2009 - bad in law - set aside.
(Para9, 25)

Petitioner was terminated from service by exercising the power under Rule 8(2)(b) of the U.P. Police Officers of the Subordinate Ranks (Punishment and Appeal) Rules, 1991 - no reasons have been recorded - passed only on the basis of previous service record - which is contrary to the provisions of Rule 8(2)(b) of Rules, 1991 as well as Article 311(2)(b) of the Constitution of India . (Para2,24)

Held:- Order of termination cannot be passed on the basis of punishment or past service record without providing opportunity of hearing and further while passing any order under Rule 8(2)(b) of Rules, 1991 reasons have to be recorded by authority in writing as to why inquiry is not reasonably practicable. (Para-23)

Writ Petition allowed. (E-7)

List of cases cited:-

1. Union of India and another Vs. Tulsiram Patel, AIR 1985 SC 1416,

2. Chief Security Officer and others Vs. Singasan Rabi Das, 1991 (1) SCC 729,

3. Jaswant Singh Vs. State of Punjab and others, (1991) 1 SCC 362,

4. Bishambher Singh Bhadoria Vs. State of U.P. and others, 2008 (4) ESC 2872 All,

5. Sudesh Kumar Vs. State of Haryana and others, (2005) 11 SCC 525,

6. Raksh Pal Singh Vs. State of U.P. and another,2009 (5) ADJ 735 and

7. Yadunath Singh Vs. State of U.P. and others, 2009 (9) ADJ 86 (DB)

8. Indu Bhushan Dwivedi Vs. State of Jharkhand and another , 2010 (126) FLR 994

9. Mohd Yunus Khan Vs. State of Uttar Pradesh and others , (2010) 10 SCC 539

(Delivered by Hon'ble Neeraj Tiwari, J.)

1. Heard Sri Nisheeth Yadav, learned counsel for the petitioner and learned Standing Counsel for the respondents.

2. Pleadings have been exchanged between the parties. With the consent of parties, writ petition is being decided at the admission stage itself.

3. Learned counsel for the petitioner is assailing the impugned order dated

31.8.2009 by which he was terminated from service by exercising the power under Rule 8(2)(b) of the U.P. Police Officers of the Subordinate Ranks (Punishment and Appeal) Rules, 1991 (hereinafter referred to as Rules, 1991). He submitted that petitioner is having qualification of Intermediate and he was recruited as Police Constable on 11.12.1984. During the course of service, several disciplinary proceedings were initiated against him in which he was given minor punishment. He further submitted that there is allegation against the petitioner that he was off duty, he has taken excess liquor and scuffled with the colleagues and due to this reason, considering his past conduct, impugned order has been passed by exercising power under Rule 8(2)(b) of Rules, 1991. He next submitted that in case of termination/dismissal order passed under Rule 8(2)(b), it is required on the part of Disciplinary Authority to record reasons in writing that reasonably it is not practicable to hold inquiry. Rule 8(2)(b) of Rules, 1991 is pari materia to Article 311(2)(b) of the Constitution of India. He further submitted that no such reasons was recorded and only considering his past conduct, order of termination has been passed. He next submitted that in light of judgments of Apex Court in the cases of ***Indu Bhushan Dwivedi Vs. State of Jharkhand and another*** reported in ***2010 (126) FLR 994*** and ***Mohd Yunus Khan Vs. State of Uttar Pradesh and others*** reported in ***(2010) 10 SCC 539*** wherein the Apex Court held that for imposing punishment, Disciplinary Authority cannot consider his past adverse record or punishment without giving him an opportunity to explain his position. Lastly, he submitted that in case reasons are not recorded, order passed under Rule 8(2)(b) of Rules, 1991 is bad and liable to be set aside.

4. In support of his contention, he has placed reliance upon the judgments of Apex Court as well as this Court in the cases of ***Union of India and another v. Tulsiram Patel; AIR 1985 SC 1416,*** **Chief Security Officer and others v. Singasan Rabi Das; 1991 (1) SCC 729, Jaswant Singh Vs. State of Punjab and others; (1991) 1 SCC 362,** ***Bishambher Singh Bhadoria Vs. State of U.P. and others; 2008(4) ESC 2872 All,*** **Sudesh Kumar v. State of Haryana and others; (2005) 11 SCC 525,** ***Raksh Pal Singh Vs. State of U.P. and another; 2009 (5) ADJ 735 and Yadunath Singh Vs. State of U.P. and others; 2009 (9) ADJ 86 (DB)*** in which Courts have held that even if reason is assigned that has to be based on germane grounds and not ipse dixit of the disciplinary authority. It has to be supported by the evidence.

5. Learned Standing Counsel appearing for the respondents submitted that considering the past conduct of petitioner, there is no need to conduct enquiry and order has rightly been passed by exercising power under Rule 8(2)(b) of Rules, 1991, therefore, there is no illegality in the order and Disciplinary Authority has rightly passed the order.

6. I have considered the rival submissions made by the learned counsel for the parties and perused the judgments relied upon by the learned counsel for the parties.

7. The facts of the case are not disputed. Even in the counter affidavit, there is no denial of the fact that as required under Rule 8(2)(b) of Rules, 1991 reasons have not been recorded by the

Disciplinary Authority while passing the impugned order.

8. Rule 8(2)(b) of Rules, 1991 as well as Article 311 (2)(b) of Constitution of India reads as under:-

Rule 8(2)(b) of Rules, 1991

"8 (2)(b) Where the authority empowered to dismiss or remove a person or to reduce him in rank is satisfied that for some reason to be recorded by that authority in writing, it is not reasonably practicable to hold such inquiry."

Article 311 (2)(b) of Constitution of India

"311 (2)(b) Where the authority empowered to dismiss or remove a person or to reduce him in rank is satisfied that for some reason to be recorded by that authority in writing, it is not reasonably practicable to hold such inquiry."

9. By perusal of Rule 8(2)(b) of Rules, 1991 as well as Article 311 (2)(b) of Constitution of India, it is absolutely clear that while dispensing with the inquiry, it is necessary to record reasons in writing.

10. The issues, whether on the basis of past service record any punishment order can be passed or not and recording reasons to dispense with the inquiry as provided under Rule 8 (2)(b) of Rules, 1991 as well as Article 311 (2)(b) of the Constitution of India came many times before this Court as well as Apex Court and Courts have decided the same.

11. The Apex Court in the matter of ***Indu Bhushan Dwivedi (Supra)*** has clearly held that if any employee is found guilty of misconduct, Disciplinary Authority cannot consider his past adverse record for punishment without giving opportunity of hearing. Relevant paragraph no.20 of the said judgment is being quoted hereinbelow:-

"20. An analysis of the two judgments shows that while recommending or imposing punishment on an employee, who is found guilty of misconduct, the disciplinary/competent authority cannot consider his past adverse record or punishment without giving him an opportunity to explain his position and considering his explanation. However, such an opportunity is not required to be given if the final punishment is lesser than the proposed punishment."

12. Again in the matter of ***Mohd Yunus Khan (Supra),*** Supreme Court reiterated the same ratio of law. Relevant paragraph no.34 of the said judgment is being quoted hereinbelow:-

"34. The courts below and the statutory authorities failed to appreciate that if the disciplinary authority wants to consider the past conduct of the employee in imposing a punishment, the delinquent is entitled to notice thereof and generally the charge-sheet should contain such an article or at least he should be informed of the same at the stage of the show cause notice, before imposing the punishment."

13. Apex Court in the matter of ***Tulsiram Patel (Supra)*** has considered and ruled that while dispensing with the inquiry it is incumbent upon the authority to record reasons as to why inquiry is reasonably not practicable to hold. Relevant paragraph is being quoted hereinbelow:-

"The language precedent for the application of clause(b) the satisfaction of the disciplinary authority that "it is not reasonably practicable to hold" the

inquiry contemplated by clause (2) of Article 311...

"Thus, whether it was practicable to hold the inquiry or not must be judged in the context of whether it was reasonably practicable to do so. It is not a total or absolute impracticability, which is required by clause (b). What is requisite is that the holding of the inquiry is not practicable in the opinion of a reasonable man taking a reasonable view of the prevailing situation."

".....The reasonable practicability of holding an inquiry is a matter of assessment to be made by the disciplinary authority."

".....A disciplinary authority is not expected to dispense with a disciplinary inquiry lightly or arbitrarily or out of ulterior motives or merely in order to avoid the holding of an inquiry or because the Department's case against the Government servant is weak and must fail."

14. The Supreme Court further held:-

"The second condition necessary for the valid application of clause (b) of the second proviso is that the disciplinary authority should record in writing its reason for its satisfaction that it was not reasonably practicable to hold the inquiry contemplated by Article 311(2). This is a Constitutional obligation and if such reason is not recorded in writing, the order dispensing with the inquiry and the order of penalty following thereupon would both be void and unconstitutional.

It is obvious that the recording in writing of the reason for dispensing with the inquiry must precede the order imposing the penalty."

15. The Supreme Court further went on to say:-

"If the Court finds that the reasons are irrelevant, then the recording of its satisfaction by the disciplinary authority would be an abuse of power conferred upon it by clause (b) and would take the case out of the purview of that clause and the impugned order of penalty would stand invalidated."

16. In ***Chief Security Officer (Supra),*** the Supreme Court held that there was a total absence of sufficient material or good ground for dispensing with the inquiry and accordingly held that the order of termination dispensing with the inquiry was illegal.

17. In the matter of ***Jaswant Singh (Supra)***, the Supreme Court held:-

"It was incumbent on the respondents to disclose to the Court the material in existence at the date of the passing of the impugned order in support of the subjective satisfaction recorded by respondent No.3, in the impugned order. Clause (b) of the second proviso to Article 311(2) can be invoked only when the authority is satisfied from the material place before him that it is not reasonably practicable to hold a departmental inquiry."

18. The Supreme Court further held:

"The decision to dispense with the departmental inquiry cannot, therefore, be rested solely on the ipse dixit of the concerned authority. When the satisfaction of the concerned authority is questioned in a Court of law, it is incumbent on those who support the order to show that the satisfaction is based on

certain objective facts and is not the outcome of the whim of caprice of the concerned officer."

19. Following the judgments of Apex Court, this Court in the matter of ***Bishambher Singh Bhadoria (Supra)*** has allowed the writ petition by quashing the order of termination. Relevant paragraphs no. 13 & 14 of the said judgment are being quoted hereinbelow:-

"13. In view of the aforesaid, I am of the opinion that the impugned order of termination does not contain sufficient reasons for dispensing with the inquiry. The charges so leveled are such that it can easily be enquired through a departmental enquiry. It is not a case where it could be said that it was not reasonably practicable to hold an inquiry. In my opinion, the decision of the disciplinary authority was wholly arbitrary. The reasons given for dispensing with the enquiry was wholly irrelevant. I am of the view that the disciplinary authority has misused the provision of Rule 8(2)(b) of the Rules. Similar view was taken by me in Dharam Pal Singh Vs. State of U.P. And others, 2005(1) ESC 566 and in writ petition No.33057 of 2006, Virendra Kumar Premi v. State of U.P. And another, decided on 7.8.2008.

14. In view of the aforesaid, the exercise of the powers under Rule 8(2)(b) of the Rules was totally arbitrary. Consequently, the impugned order terminating the services of petitioners cannot be sustained and is quashed. The writ petitions are allowed and the matter is remitted to the authority to proceed from the stage prior to passing of the impugned order and conclude the inquiry and pass a final order within six months from the date of the production of a certified copy of this order."

20. In the matter of ***Sudesh Kumar (Supra),*** the Supreme Court observed as follows:-

"It is now established principle of law that an inquiry under Article 311(2) is a rule and dispensing with the inquiry is an exception. The authority dispensing with the inquiry under Article 311(2)(b) must satisfy for reasons to be recorded that it is not reasonably practicable to hold an inquiry. A reading of the termination order by invoking Article 311(2)(b), as extracted above, would clearly show that no reasons whatsoever have been assigned as to why it is not reasonably practicable to hold an inquiry. The reasons disclosed in the termination order are that the complainant refused to name the accused out of fear of harassment; the complainant, being a foreign national, is likely to leave the country and once he left the country, it may not be reasonably practicable to bring him to the inquiry. This is no ground for dispensing with the inquiry. On the other hand, it is not disputed that, by order dated 23-12-1999, the visa of the complainant was extended up to 22-12-2000. Therefore, there was no difficulty in securing the presence of Mr Kenichi Tanaka in the inquiry.35

A reasonable opportunity of hearing enshrined in Article 311(2) of the Constitution would include an opportunity to defend himself and establish his innocence by cross-examining the prosecution witnesses produced against him and by examining the defence witnesses in his favour, if any. This he can do only if inquiry is held where he has

been informed of the charges levelled against him. In the instant case, the mandate of Article 311(2) of the Constitution has been violated depriving reasonable opportunity of being heard to the appellant."

21. Following the judgment of Apex Court in the matter of ***Raksh Pal Singh (Supra),*** this Court observed as follows:-

"10. In the present case the order passed by the Superintendent of Police, Badaun does not give any reason as to why it was not reasonable practicable to hold the inquiry. The impugned order merely refers to the charges leveled against the petitioner but is delightfully vague about the statutory requirement contained in the second proviso to Rule 8(2) of the 1991 Rules relating to dispensing with the inquiry. In such circumstances, the order dated 19th January, 2001 passed by the Superintendent of Police cannot be sustained."

22. Similarly again placing reliance upon the judgments of Apex Court, this Court in the matter of Yadunath Singh (Supra) has observed as follows:-

"4. It is common ground that the service of the writ petitioner-appellant is governed by the Uttar Pradesh Police Officers of the Subordinate Ranks (Punishment and Appeal) Rules, 1991 (hereinafter referred to as "the Rules"). Rule 8 of the aforesaid Rules provides for dismissal and removal of police officers of the subordinate rank only after proper inquiry. However, proviso (b) to Rule 8 (2) contemplates that where the government is satisfied, that in the interest of the security of the State, it is not expedient to hold such inquiry, it can be dispensed with. It further provides that where the authority empowered to dismiss or remove a person or to reduce him in rank is satisfied that for some reason to be recorded by that authority in writing, it is not reasonably practicable to hold such an inquiry, it may dispense with the inquiry. Here in the present case, the disciplinary had recorded its satisfaction but it is well settled that satisfaction has to be based on germane grounds and not ipse dixit of the disciplinary authority. Here the only ground to dispense with the inquiry is that if writ petitioner-appellant is allowed to continue in service, a departmental inquiry shall consume sufficient time and, therefore, such continuance will have ground recorded by the disciplinary authority while dispensing with the inquiry is not germane nor is it on any material that may be relevant, as such, the ground set forth cannot justify dispensing the inquiry at all."

5. The provisions contained under Rule 8 (2(b) have been incorporated keeping in view the provisions of Article 311 (2)(b) of the Constitution of India. The power conferred on the authority to dispense with an inquiry in a given situation where it is reasonably not practicable to hold an inquiry, has been envisaged therein. The Apex Court in the case of Union of India and another v. Tulsi Ram Patel, (1985) 3 SCC 398, had the occasion to consider the scope of the aforesaid provision and the Apex Court laid down the test of reasonableness in the said case to be reflected by the authority while proposing to dispense with an inquiry. Paragraph 130 of the said decision is reproduced below:-

"130 The condition precedent for the application of clause (b) is the satisfaction of the disciplinary authority

that "it is not reasonably practicable to hold" the inquiry contemplated by clause (2) of Article 311. What is pertinent to note that the words used are "not reasonably practicable" and not "impracticable". According to the Oxford English Dictionary "practicable" means "Capable of being put into practice, carried out in action, effected accomplished, or done; feasible. Webster's Third New International Dictionary defines the word "practicable" inter alia as meaning "possible to practice or perform: capable of being put into practice, done or accomplished: feasible". Further, the words used are not "not practicable" but "not reasonably practicable". Webster's Third New International Dictionary defines the word "reasonably" as "in a reasonable manner : to a fairly sufficient extent". Thus, whether it was practicable to hold the inquiry or not must be judged in the context of whether it was reasonably practicable to do so. It is not a total or absolute impracticability which is required by clause (b). What is requisite is that the holding of the inquiry is not practicable in the opinion of a reasonable man taking a reasonable view of the prevailing situation. It is not possible to enumerate the cases in which it would not be reasonably practicable to hold the inquiry, but some instances by way of illustration may, however, be given. It would not be reasonably practicable to hold an inquiry where the government servant, particularly through or together with his associates, so terrorizes, threatens or intimidate witnesses who are going to give evidence against him with fear of reprisal as to prevent them from doing so or where the government servant by himself or together with or through other threatens, intimidates and terrorizes the Officer who is the disciplinary authority or member of his family so that he is afraid to hold the inquiry or direct it to be held. It would also not be reasonably practicable to hold the inquiry where an atmosphere of violence or of general indiscipline and insubordination prevails, and it is immaterial whether the concerned government servant is or is not a party to bringing about such an atmosphere. In this connection, we must bear in mind that numbers coerce and terrify while an individual may not. The reasonable practicability of holding an inquiry is a matter of assessment to be made by the disciplinary authority. Such authority is generally on the spot and knows what is happening. It is because the disciplinary authority is the best judge of this that clause (3) of Article 311 makes the decision of the disciplinary authority on this question final. A disciplinary authority is not expected to dispense with a disciplinary inquiry lightly or arbitrarily or out of ulterior motives or merely in order to avoid the holding of an inquiry or because the Department's case against the government servant is weak and must fail. The finality given to the decision of the disciplinary authority by Article 311(3) is not binding upon the court so far its power of judicial review is concerned and in such a case the court will strike down the order dispensing with the inquiry as also the order imposing penalty. The case of Arjun Chaubey v. Union of India is an instance in point."

The ratio of the decision in Tulsiram Patel's case (supra) has been further explained in paragraph 128 to 132, 133, 135, 138 and 141. Applying the aforesaid test, in the present case, the question is as to whether the loss of rifle carried by the petitioner makes out a situation for not holding an enquiry. The

reason given in the impugned order that the continuance of the petitioner in service would have an adverse moral effect has absolutely no rational connection with the subject matter of inquiry. Whether the rifle was lost in transit by the petitioner or not could have been enquired into and it is not the case of the respondent that there was any threat to security or anything otherwise which may obstruct the smooth holding of an inquiry. The reason given in the impugned order, therefore, proceeds on an assumption which cannot be accepted as reasonable. It cannot stand the scrutiny as indicated by the Apex Court in the decision of Tulsi Ram Patel (supra) and we are, therefore, unable to approve the same.

23. From the perusal of judgments referred in above, this fact is very much clear that order of termination cannot be passed on the basis of punishment or past service record without providing opportunity of hearing and further while passing any order under Rule 8(2)(b) of Rules, 1991 reasons have to be recorded by authority in writing as to why inquiry is not reasonably practicable.

24. In the present case, there is no dispute that while passing the impugned order, no reasons have been recorded and it is passed only on the basis of previous service record, which is contrary to the provisions of Rule 8(2)(b) of Rules, 1991 as well as Article 311(2)(b) of the Constitution of India. The Court has repeatedly held that order cannot be passed on the basis of previous service record as well as without recording reasons. Not only this Court had gone to the extent that in case reasons are recorded that must be satisfactory and mere formality of recording reasons cannot be accepted.

25. Therefore, in light of factual and legal discussions made hereinabove, impugned order dated 31.8.2009 is bad in law and is hereby set aside.

26. Accordingly, the writ petition is **allowed**. No order as to costs.

(2020)02ILR A1758

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 04.02.2020

BEFORE

THE HON'BLE ABHINAVA UPADHYA, J.
THE HON'BLE SHAMIM AHMED, J.

Writ C No. 2248 of 2020

M/s K.D.P. Build Well Pvt. Ltd.
...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Sanjeev Kumar Pandey, Sri Rohit Nandan Pandey

Counsel for the Respondents:
C.S.C., Sri Anil Tiwari, Sri Wasim Masood Khan

A. U.P. Real Extate (Regulation and Development) (Agreement for sale/Lease) Rules, 2018; Real estate (Regulation and Development) Act, 2016- Petitioner-a private limited company-didnot delivered the possession of the flat to the Respondent purchased by him-Real Estate Regulatory Authority-diected the Petitioner-to repay all the deposited amount plus 1% interest from date of deposit-interest charged-accurate-as per clause9.2(ii) of form of agreement in Rules, 2018 -Petition dismissed.

Held,

It is further not denied by the petitioner that the order of the U.P. Real Estate Regulatory Authority, Gautam Budh Nagar was passed in

the year 2018 and since then any amount in compliance of the order impugned was paid to the respondent no.5. This conduct of the petitioner shows that he is not liable to get any sympathy by this Court while exercising extra ordinary jurisdiction under Article 226 of the Constitution of India. It is further obseraved that the law of equity and principle of natural justice go in favour of respondent No.5. **(para 29)**

Cases cited:

1. V.K. Ashokan vs. Assistant Excise Commissioner and others; (2009) 14 SCC 85

2. Union of India through Director of Income Tax vs. Tata Chemicals Limited, (2014) 6 SCC 335

3. Union of India and another Vs. Association of United Teelecom Service Providers of India and others, (2011) 10 SCC 543

4. Central Banking India Vs. Ravindra, (2002) 1 SCC 367

5. Syndicate Bank v. M/s. West Bengal Cements Limited and Ors, AIR (1989) Delhi 107

6. Thazhathe Purayil Sarabi and others Vs. Union of India and another, reported in (2009) 7 SCC 372

7. Standard Chartered Bank vs. Dharminder Bhohi & ors (2013) 15 SCC 241

(Delivered by Hon'ble Shamin Ahmad, J.)

1. Heard Shri Sanjeev Kumar Pandey, learned counsel for the petitioner, learned Standing Counsel for respondent nos.1, 3 and 4 and Shri Wasim Masood Khan holding brief of Shri Anil Tiwari, learned counsel appearing for the respondent No.2.

2. The present writ petition has been filed by the petitioner with the following prayer;

"(i) To issue a writ, order or direction in the nature of certiorari for quashing the order dated 13.06.2018 and 29.06.2018 passed by U.P. Real Estate Regulatory Authority, Lucknow and citation dated 22.08.2019 issued by Tehsildar, Dadri, District Gautam Budhh Nagar.

(ii) Issue any other writ, order or direction as this Hon'ble Court may deem fit and proper in the facts and circumstances of the case;

(iii) Award the cost of the writ petition to the petitioner."

3. Learned counsel for the petitioner submits that the petitioner is a private limited company under the Companies Act, 1956 and petitioner is dealing in Real-Estate, which provides facility of constructed Flats to public at large and has been developing Group Housing Project under the name and style of "MGI Maple" in Govindpuram, Gautam Budh Nagar. The company obtained 'No Objection Certificate' from the concerned authorities including the Development Autuority of Gautam Budh Nagar.

4. Learned counsel for the petitioner further submits that the respondent no.5 purchased a Flat in the petitioner's project but due to unavoidable circumstances, the petitioner could not deliver the possession of the Flat. However, without waiting for sometime, the respondent no.5 filed a complaint before the Real Estate Regulatory Authority, Gautam Budh Nagar, which was registered as Complaint No.1120172878 by which respondent No.5 demanded his amount with 24% annual interest on the ground that project of the petitioner is now cancelled. The U.P. Real Estate Regulatory Authority, Gautam Budh Nagar has passed the impugned

orders dated 13.06.2018 and modified order dated 29.06.2018, by which a direction was issued to the petitioner to repay all the amount deposited by the respondent no.5 with MCLR+1 percent interest from the date of deposit till the date of payment of the amount, copy of the order dated 13.06.2018 and 29.06.2018 passed by the U.P. Real Estate Regulatory Authority, Gautam Budh Nagar is filed as Annexure No.3 to the writ petition.

5. Learned counsel for the petitioner further submits that in the first prayer the date of impugned order is wrongly transcribed as 29.06.2012 in place of 29.06.2018. He prays and allowed to correct the date of impugned order dated 29.06.2018.

6. Learned counsel for the petitioner further argued that the orders dated 13.06.2018 and 29.6.2018 passed by the U.P. Real Estate Regulatory Authority, Gautam Budh Nagar is without jurisdiction and the same is liable to be quashed on the ground that the order was not passed by the Competent Authority and the same is passed by one member which is against the provision of Section 21 of the Real Estate (Regulation and Development) Act, 2016 (hereinafter referred to as the 'Act, 2016"), which provides the composition of authority and as per section 21, the authority shall consist of a Chairperson and not less than two whole-time members to be appointed by the appropriate Government and therefore, the impugned order dated 13.06.2018 and 29.06.2018 were not passed as per Section 21 of the Act, 2016 and further he submits that the order is ex parte order.

7. Learned counsel for the petitioner further argued that the impugned order is arbitrary, illegal and not sustainable in the eyes of law and U.P. Real Estate Regulatory Authority, Gautam Budh Nagar has committed gross illegality while passing the impugned orders.

8. Learned counsel for the petitioner further argued that in pursuance of the order dated 13.06.2018 and 29.06.2018 passed by the U.P. Real Estate Regulatory Authority, Gautam Budh Nagar, a recovery certificate was issued for a tune of Rs.6,55,764.26 against the petitioner, which has been sent to the Collector, Gautam Budh Nagar for realization from the petitioner. Thereafter, Tehsildar, Dadri, Gautam Budh Nagar has issued citation dated 22.08.2019 for recovery of the above amount. The recovery certificate and citation issued are also illegal, arbitrary and not sustainable in the eyes of law.

9. Shri Wasim Masood Khan, learned counsel for the U.P. Real Estate Regulatory Authority, Gautam Budh Nagar, Respondent No.2 countered all the arguments raised by the learned counsel for the petitioner and submitted that the orders passed by the U.P. Real Estate Regulatory Authority, Gautam Budh Nagar dated 13.06.2018 and 29.06.2018 are rightly passed by the single member and there is no illegality in passing the said orders and the orders are not without jurisdiction in view of the provisions contained under Section 81 of the Real Estate (Regulation and Development) Act, 2016, wherein it speaks about the '**delegation**', which says that *"The Authority may, by general or special order in writing, delegate to any member, officer of the Authority or any other person subject to such conditions, if any, as may be specified in the order, such of its powers and functions under this Act (except the power to make regulations under section 85), as it may deem necessary."*

10. Shri Wasim Masood Khan, learned counsel further submits that in view of Section 81 of the Act, the U.P. Real Estate Regulatory Authority in its 5th meeting dated 05.12.2019 delegated the power as per Agenda No.1, to a single member to hear the cases on the basis of the complaint in both the Benches sitting at Lucknow and Gautam Budh Nagar, therefore, the single member has full jurisdiction to decide the cases on the basis of complaint filed before the U.P. Real Estate Regulatory Authority and the objection raised by the counsel for the petitioner has no valid reason in the eyes of law and the impugned order passed by the single member is valid and in accordance with law and the same could not be said to be passed without jurisdiction, no interference is required by this Court under Article 226 of the Constitution of India and the present writ petition is liable to be dismissed. He has placed the copy of the minutes of fifth meeting dated 05.12.2018 of the U.P. Real Estate Regulatory Authority before the Court, the same is taken on record.

11. Learned counsel for the respondent No.2 further brought our attention towards Sections 18, 34, 38, 40 and 71 of the Real Estate (Regulation and Development) Act, 2016 and Clause 9.2(ii) of the form of agreement contained in the Annexure to the U.P. Real Estate Regulation (Agreemet for sale/lease) Rule, 2018 for adjudication of the present case.

12. Learned Standing Counsel who represent respondent Nos. 1, 3 and 4 also supports the case argued by Shri Wasim Masood Khan, learned counsel for the respondent No.2 and submitted that the impugned orders were rightly passed by single member and no interference is required by this Court.

13. We have heard learned counsel for the parties and perused the record, in our view before dealing the case on merit, it is necessary to code the provisions of Sections 18, 34, 38, 40, 71 and 81 of the Real Estate (Regulation and Development) Act, 2016, which help us for adjudicating the present case.

Section 18. Return of amount and compensation- *"(1) If the promoter fails to complete or is unable to give possession of an apartment, plot or building,--*

(a) in accordance with the terms of the agreement for sale or, as the case may be, duly completed by the date specified therein; or

(b) due to discontinuance of his business as a developer on account of suspension or revocation of the registration under this Act or for any other reason,

he shall be liable on demand to the allottees, in case the allottee wishes to withdraw from the project, without prejudice to any other remedy available, to return the amount received by him in respect of that apartment, plot, building, as the case may be, with interest at such rate as may be prescribed in this behalf including compensation in the manner as provided under this Act:

Provided that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of the possession, at such rate as may be prescribed.

(2) The promoter shall compensate the allottees in case of any loss caused to him due to defective title of the land, on which the project is being developed or has been developed, in the manner as provided under this Act, and the claim for compensation under this subsection shall not be barred by limitation provided under any law for the time being in force.

(3) If the promoter fails to discharge any other obligations imposed on him under this Act or the rules or regulations made thereunder or in accordance with the terms and conditions of the agreement for sale, he shall be liable to pay such compensation to the allottees, in the manner as provided under this Act.

*"**Section 34. Functions of Authority**-The functions of the Authority shall include-*

(a) to register and regulate real estate projects and real estate agents registered under this Act;

(b) to publish and maintain a website of records, for public viewing, of all real estate projects for which registration has been given, with such details as may be prescribed, including information provided in the application for which registration has been granted;

(c) to maintain a database, on its website, for public viewing, and enter the names and photographs of promoters as defaulters including the project details, registration for which has been revoked or have been penalised under this Act, with reasons therefor, for access to the general public;

(d) to maintain a database, on its website, for public viewing, and enter the names and photographs of real estate agents who have applied and registered under this Act, with such details as may be prescribed, including those whose registration has been rejected or revoked;

(e) to fix through regulations for each areas under its jurisdiction the standard fees tobe levied on the allottees or the promoter or the real estate agent, as the case may be;

(f) to ensure compliance of the obligations cast upon the promoters, the allottees and the real estate agents under this Act and the rules and regulations made thereunder;

(g) to ensure compliance of its regulations or orders or directions made in exercise of its powers under this Act;

(h) to perform such other functions as may be entrusted to the Authority by the appropriate Government as may be necessary to carry out the provisions of this Act."

*"**Section 38. Power of Authority-** (1) The Authority shall have powers to impose penalty or interest, in regard to any contravention of obligations cast upon the promoters, the allottees and the real estate agents, under this Act or the rules and the regulations made thereunder.*

(2) The Authority shall be guided by the principles of natural justice and, subject to the other provisions of this Act and the rules made thereunder, the Authority shall have powers to regulate its own procedure.

(3) Where an issue is raised relating to agreement, action, omission, practice or procedure that--

(a) has an appreciable prevention, restriction or distortion of competition in connection with the development of a real estate project; or

(b) has effect of market power of monopoly situation being abused for affecting interest of allottees adversely, then the Authority, may suo motu, make

reference in respect of such issue to the Competition Commission of India"

"Section 40. Recovery of interest or penalty or compensation and enforcement of order, etc.- *(1) If a promoter or an allottee or a real estate agent, as the case may be, fails to pay any interest or penalty or compensation imposed on him, by the adjudicating officer or the Regulatory Authority or the Appellate Authority, as the case may be, under this Act or the rules and regulations made thereunder, it shall be recoverable from such promoter or allottee or real estate agent, in such manner as may be prescribed as an arrears of land revenue.*

(2) If any adjudicating officer or the Regulatory Authority or the Appellate Tribunal, as the case may be, issues any order or directs any person to do any act, or refrain from doing any act, which it is empowered to do under this Act or the rules or regulations made thereunder, then in case of failure by any person to comply with such order or direction, the same shall be enforced, in such manner as may be prescribed."

Section 71 "Power to adjudicate" -

(1) For the purpose of adjudging compensation under sections 12, 14, 18 and section 19, the Authority shall appoint in consultation with the appropriate Government one or more judicial officer as deemed necessary, who is or has been a District Judge to be an adjudicating officer for holding an inquiry in the prescribed manner, after giving any person concerned a reasonable opportunity of being heard:

Provided that any person whose complaint in respect of matters covered under sections 12, 14, 18 and section 19 is pending before the Consumer Disputes Redressal Forum or the Consumer Disputes Redressal Commission or the National Consumer Redressal Commission, established under section 9 of the Consumer Protection Act, 1986, on or before the commencement of this Act, he may, with the permission of such Forum or Commission, as the case may be, withdraw the complaint pending before it and file an application before the adjudicating officer under this Act.

(2) The application for adjudging compensation under sub-section (1), shall be dealt with by the adjudicating officer as expeditiously as possible and dispose of the same within a period of sixty days from the date of receipt of the application:

Provided that where any such application could not be disposed of within the said period of sixty days, the adjudicating officer shall record his reasons in writing for not disposing of the application within that period.

(3) While holding an inquiry the adjudicating officer shall have power to summon and enforce the attendance of any person acquainted with the facts and circumstances of the case to give evidence or to produce any document which in the opinion of the adjudicating officer, may be useful for or relevant to the subject matter of the inquiry and if, on such inquiry, he is satisfied that the person has failed to comply with the provisions of any of the sections specified in sub-section (1), he may direct to pay such compensation or interest, as the case any be, as he thinks fit in accordance with the provisions of any of those sections."

"Section 81. Delegation.- *The Authority may, by general or special order in writing, delegate to any member, officer of the Authority or any other person subject to such conditions, if any, as may be specified in the order, such of its*

powers and functions under this Act (except the power to make regulations under section 85), as it may deem necessary."

14. From the arguments raised by the learned counsel for the petitioner and admission made in the paragraph No. 35 of the writ petition, it is not disputed that the respondent No.5 has booked his Flat on 28.12.2012 in the petitioner project, apart from petitioner 280 other persons also booked the Flats and it is also not disputed that from that date till filing of the present writ petition, the petitioner has not delivered the possession of the Flat to respondent No.5 and due to arbitrary and illegal action of the petitioner, respondent No.5 filed the complaint before the U.P. Real Estate Regulatory Authority, Gautam Budh Nagar as per the provision of the Act, 2016 regarding his grievances and after considering the grounds raised in the complaint, the U.P. Real Estate Regulatory Authority, Gautam Budh Nagar passed the impugned orders dated 13.6.2018 and 29.6.2018 directing the petitioner to refund the entire amount deposited by the respondent no. 5 along with MCLR+1 per cent interest within 45 days. When the said amount was not paid by the petitioner to the respondent No.5, the recovery certificate was issued and thereafter a citation was issued for a sum of Rs.6,55,764.26 plus other charges.

15. We have no hesitation to say that the petitioner has received the cost of the Flat from the respondent No.5 but was adopting delaying tactics for not giving the possession of the Flat to the respondent No.5 and also keeping the money of respondent no.5 since 2012. The respondent No.5 was running from pillar to post for taking possession of the Flat, the action of the petitioner appears to be illegal, arbitrary and with a bad intention to grab the entire amount of the respondent No.5, for this action of the petitioner, this Court will not shut its eye. It is also not out of place to mention here that in the society were we are living having own shelter, the common people has to invest their entire saving with the hope to live remaining life in their own house with mental satisfaction, but the builders like petitioner is throwing the hope and feelings of purchaser, like a *hot potato in the hand.*

16. We are further not inclined to interfere in the impugned orders on the ground taken by the learned counsel for the petitioner that the order passed by a single member is without jurisdiction as contemplated under Section 21 of the Act and has not been passed in accordance with the provisions of Section 21 of the Act. The arguments of the learned counsel for the petitioner appears us to be misconceived. The proposition of Section 21 is not that the complaint could not be decided by a single member of the Authority, whereas it could be decided by a single member or by two members, whichever is better in the interest of justice as per availability of the members and we further observed that Section 81 of the Real Estate (Regulation and Development) Act, 2016 provides **"delegation",** which says that *"The Authority may, by general or special order in writing, delegate to any member, officer of the Authority or any other person subject to such conditions, if any, as may be specified in the order, such of its powers and functions under this Act (except the power to make regulations under section 85), as it may deem necessary"* and having regard to the provision of Section 81 of the Real Estate (

Regulation and Development) Act, 2016, the authority vide their 5th meeting dated 5.12.2018 as per Agenda 1 delegated the power to a single member to decide the cases in both the Benches sitting at Lucknow and Gautam Budh Nagar, the delegation of power of the 5th meeting dated 5.12.2018 of U.P. Real Estate Regulatory Authority is quoted as under:

"उ०प्र० भू- सम्पदा विनियाम प्राधिकरण की पंचम बैठक दिनांक 05.12.18 का कार्यवृत्त

दिनांक 05.12.2018 को प्राधिकरण कि बैठक निम्नलिखित एजेण्डा बिन्दुओं पर विचार-विमर्श किया गया:-

क्र०सं०	*एजेण्डा*
5.01	***उ०प्र भू० सम्पदा विनियामक प्राधिकरण की दोनों पीठ द्वारा माह दिसम्बर,2018 तथा बाद में भी आवश्यकता अनुसार एकल पीठ के रूप में भी कार्य करते हुए लखनऊ तथा गौतमबुद्धनगर में एक ही दिवस पर शिकायतों की सुनवाई का प्रस्ताव।***
5.02	*उ०प्र भू० सम्पदा विनियामक प्राधिकरण में शासन को 3 अतिरिक्त उपयुक्त न्यायिक अधिकारियों के नाम एड्ज्युडिकेटिंग आफिसर्स के पैनल हेतु चयनित करने का प्रस्ताव।*
5.03	*उ०प्र भू० सम्पदा (विनियामक एवं विकास) नियमावल- 2016 के नियम- 2(1)(h) तथा नियम-15 में संशोधन का प्रस्ताव।*
5.04	*उ०प्र भू० सम्पदा (विनियामक एवं विकास) नियमावली- 2016 के नियम-15 में संशोधन करने का प्रस्ताव।*
5.05	*अन्य कोई बिन्दु मा० अध्यक्ष की अनुमति से।*

एजेन्डा बिन्दुवार निर्णय निम्नवत हैं:-

एजेन्डा बिन्दु-1

उ0 प्र0 भू-सम्पदा विनियामक प्राधिकरण की दोनों पीठ द्वारा माह दिसम्बर, 2018 तथा बाद में भी आवश्यकता अनुसार एकल पीठ के रुप में भी कार्य करते हुए लखनऊ तथा गौतमबुद्धनगर में एक ही दिवस पर शिकायतों की सुनवाई के सम्बन्ध में।

निर्णय

प्राधिकरण द्वारा प्रस्ताव अनुमोदित किया गया।

एजेण्डा बिन्दु -2

उ०प्र० भू-सम्पदा विनियामक प्राधिकरण में एड्जुडिकेटिंग आफिसर्स के पैनल में शासन को 3 अतिरिक्त उपयुक्त न्यायिक अदिकारियों के नाम भेजने हेतु चयन का प्रस्ताव।"

निर्णय

प्राधिकरण द्वारा सम्यक विचारोपारान्त निम्नलिखित 3 अतिरिक्त न्यायिक अधिकारियों को प्राधिकरण में एडज्यूडिकेटिंग आफीसर्स के पैनल हेतु चयनित किया गया:-

1- श्री गोपाल कुलश्रेष्ठ

2- श्री सैय्यद सरवत महमूम

3- श्री मुकेश प्रकाश

एजेण्डा बिन्दु-3

उ०प्र० भू-सम्पदा (विनियमन एवं विकास) नियमावली- 2016 के नियम 2(1)(h) तथा नियम० 15 में संशोधन का प्रस्ताव।

निर्णय

प्राधिकरण द्वारा प्रस्ताव अनुमोदित किया गया।

एजेण्डा बिन्दु-4

उ०प्र० भू- सम्पदा (विनियमन एवं विकास) नियमावली- 2016 के नियम-15 में संशोधन करने का प्रस्ताव।

निर्णय

प्राधिकरण द्वारा प्रस्ताव अनुमोदित किया गया।

बैठक सधन्यावाद समाप्त हुई।

ह० अपठनीय

(राजीव कुमार)

अध्यक्ष,

उ०प्र० भू-सम्पदा विनियामक प्राधिकरण।

उ०प्र० भू- सम्पदा विनियामक प्राधिकरण

पत्रांकः 4702/यू०पी० रेरा/बैठक-कार्यवृत्त/2018-19 दिनांकः 05.12.2018

प्रतिलिपिः- निम्नलिखित को सूचनार्थ एवं आवश्यक कार्यवाही हेतु।

1. मा० अध्यक्ष, उ०प्र० भू- सम्पदा विनियामक प्राधिकरण।

2. मा० सदस्यगण, उ०प्र० भू- सम्पदा विनियामक प्राधिकरण।

3. प्रमुख सचिव, आवास एवं शहरी नियोजन विभाग, उ०प्र० शासन।

4. समस्त सम्बन्धित अधिकारी, उ०प्र० भू- सम्पदा विनियामक प्राधिकरण।

ह० अपठनीय
(अबरार अहमद)
सचिव
उ०प्र० भू- सम्पदा विनियामक प्राधिकरण।"

17. Therefore, in view of the provision contained under Section 81 of the Real Estate (Regulation and Development) Act, 2016 and as per decision taken by the U.P. Real Estate Regulatory Authority in Agenda No.1 of meeting dated 05.12.2018 the impugned orders dated 13.6.2018 and 29.06.2018 passed by the U.P. Real Estate Regulatory Authority, Gautam Budh Nagar has been rightly passed by the single member and the arguments raised by learned counsel for the petitioner that the impugned order was passed without jurisdiction has no force and is declined. In support of the his arguments, learned counsel for the petitioner referred the judgment passed by the Hon'ble Apex Court in the case of ***Standard Chartered Bank Vs. Dharminder Bhohi and others,*** reported in ***(2013) 15 SCC 341*** and attention of the Court was brought on para no.38 of the aforesaid judgment, which is quoted as under:-

"38. Section 34 of RDB Act provides that the said Act would have overriding effect. We have referred to the aforesaid provisions to singularly highlight that the sacrosanct between the banks and the borrowers and any third party who has acquired any interest. They have been conferred jurisdiction by special legislations to exercise a particular power in a particular mannter as provided under the Act. They cannot assume the role of a court of different nature which really can grant " liberty to initiate any action against the bank". They are only required to decide the lis that comes within their own domain. If it does not fall within their sphere of jurisdiction they are required to say so. Taking note of a submission made at the behest of the auction-purchaser and then proceed to say that he is at liberty to file any action against the bank for any omission committed by it has no sanction of law. The said observation is wholly bereft of jurisdiction, and indubitably is totally unwarranted in the obtaining factual matrix. Therefore, we have no hesitation in deleting the observation, namely, "liberty is also given to the auction-purchaser to file action against the bank for any omission committed by it."

18. Learned counsel for the petitioner further referred the decision of Hon'ble Apex Court in the case of ***V.K. Ashokan vs. Assistant Excise Commissioner and others, (2009) 14 SCC 85*** and drawn our attention on paragraph no. 42 of the judgment, which is quoted as under:-

"Functions of the Board and/or its power under the Act have not been specified under the Act. The Board, indisputably, derives its power to act in a supervisory capacity only in terms of the provisions of the Kerala Board of Revenue Act and not under the said Act. Board, thus, did not have any supervisory jurisdiction under the Act, apart from the

functions of the Excise Commissioner as contained in the provisions of Section 4(b) of the Act. Even otherwise, the Board vis-a-vis the Excise Commissioner does not have any power to take cognizance of a matter suo motu. It is accepted at the Bar that only when the question as regards confirmation of the resale was placed before the Commissioner of Excise, he purported to have noticed that apart from violating the conditions of licence as also the Rules wherefor proceedings for cancellation of licence was initiated, appellants have also allegedly failed and/or neglected to pay their kist and as such they made themselves liable for action in terms of Section 6(28) of the Rules. It is neither denied nor disputed that apart from the lack of inherent jurisdiction to initiate such a suo motu proceeding, neither any notice was issued to the licensees nor any proceeding was initiated therefor. The principles of natural justice had, thus, not been complied with."

19. We have gone through the judgments cited by the learned counsel for the petitioner. With due regard to the aforesaid judgments, we say that they are not applicable in the facts and circumstances of the present case, we further say that the merits of the case would be sustained, even in absence of jurisdiction and learned counsel for petitioner fails to demonstrate that the impugned orders were passed in breach of the legal proposition of law and is without jurisdiction and is against the principles of natural justice.

20. Learned counsel for the respondent no.2 draw our attention of the Hon'ble Apex Court judgment passed in the case of ***Union of India and another Vs. Association of United Teelecom Service Providers of India and others, (2011) 10 SCC 543*** and referred paragraph nos.63 and 67 of the aforesaid judgment, which are quoted as under:-

"63. Section 14 (a)(i) of the TRAI Act, as we have seen, provides that the Tribunal can adjudicate any dispute between the licensor and the licensee. One such dispute can be that the computation of Adjusted Gross Revenue made by the licensor and the demand raised on the basis of such computation is not in accordance with the license agreement. This dispute however can be raised by the licensee, after the license agreement has been entered into and the appropriate stage when the dispute can be raised is when a particular demand is raised on the licensee by the licensor. When such a dispute is raised against a particular demand, the Tribunal will have to go into the facts and materials on the basis of which the demand is raised and decide whether the demand is in accordance with the license agreement and in particular the definition of Adjusted Gross Revenue in the license agreement and can also interpret the terms and conditions of the license agreement. We, however, find from the order dated 07.07.2006 that instead of challenging any demands made on them, the licensees have questioned the validity of the definition of Adjusted Gross Revenue in the licenses given to them and the Tribunal has finally decided in its order dated 30.08.2007 as to what items of revenue would be part of Adjusted Gross Revenue and what items of revenue would not be part of Adjusted Gross Revenue without going into the facts and materials relating to the demand on a particular licensee.

67.We have delivered today the judgment in these cases and while

answering the last substantial question of law, we have held that when a particular demand is raised on a licencee, the licensee can challenge the demand before the Tribunal and the Tribunal will have to go into the facts and materials on the basis of which the demand is raised and decide whether the demand is in accordance with the license agreement and in particular the definition of Adjusted Gross Revenue in the license agreement and can also interpret the terms and conditions of the license agreement."

21. We are in full agreement with the above judgment cited by learned counsel for the respondent no.2 against the petitioner that the order of Authority is not without jurisdiction.

22. We are also not inclined to accept the arguments of the learned counsel for the petitioner that the impugned orders were passed Ex- parte.

23. Considering the arguments raised by the learned counsel for the respondent no.2 that the complaint was filed by respondent no.5 before the U.P. Real Estate Regulatory Authority, Gautam Budh Nagar in the year 2012. Since then several notices were issued and adequate opportunity was afforded to the petitioner by the authorities concerned but th petitioner was avoiding the appearance and hearing of the case being no alternative the U.P. Real Estate Regulatory Authority, Gautam Budh Nagar passed the impugned orders.

24. We are also not inclined to accept the arguments of the learned counsel for the petitioner that the interest charged by the U.P. Real Estate Regulatory Authority (i.e. MCLR + 1%) is to excessive, whereas it is the admitted case of the petitioner that the respondent No.5 has booked the Flat on 28.12.2012 and till the filing of the writ petition, the possession of the Flat was not given on the ground that the project of the petitioner was cancelled, from our opinion the interest charged by the U.P. Real Estate Regulatory Authority is accurate and not excessive, the same is fixed as per clause 9.2 (ii) of the Form of agreement contained in the U.P. Real Estate (Regulation and Development) (Agreement for Sale/Lease) Rules, 2018, which seems to be proper.

25. We Honour and accept the views taken by the Hon'ble Apex Court in the judgment of **Central Banking India Vs. Ravindra, (2002) 1 SCC 367,** and was pleased to observe in para 23, which is quoted as under :-

"In Syndicate Bank v. M/s. West Bengal Cements Limited and Ors., AIR (1989) Delhi 107, Y.K. Sabharwal, J. (as his Lordship then was) rejected the contention of learned counsel for the borrower that the interest can never become principal and the words 'principal sum' in Section 34, Code of Civil Procedure should be given the ordinary meaning as given in the dictionaries, and termed as misconceived the argument that the interest under section 34 could be awarded only on the original sum advanced as the argument ran counter to the normal banking practice, and which, if accepted, would act as a premium for those not paying the amount of interest when it is due at the cost of those making payment of interest when it is due. It was held that the bank was entitled to the sum claimed as due from and payable by the defendants as the principal sum with future interest on such amount from the

date of suit to the date of realisation. Reliance was placed on Division Bench decision of Madras High Court in Sigappiachi v. M.A.P.A. Palaniappa Chettiar, AIR (1972) Madras 463, holding that the 'principal sum adjudged' (within the meaning of Section 34 of the Code of Civil Procedure) is the amount found due as on the date of the suit."

26. We further place reliance of judgment of the Hon'ble Apex Court in the case ***Thazhathe Purayil Sarabi and others Vs. Union of India and another,*** reported in ***(2009) 7 SCC 372,*** and the Hon'ble Apex Court was pleased to observe that the interest be paid from the date of application till the date of recovery, this view is taken in paragraph nos. 37 and 38, which are quoted as under :-

"37. Even if, the appellants may not be entitled to claim interest from the date of the accident, we are of the view that the claim to interest on the awarded sum has to be allowed from the date of the application till the date of recovery, since the appellant cannot be faulted for the delay of approximately 8 years in the making of the Award by the Railway Claims Tribunal. Had the Tribunal not delayed the matter for so long, the appellants would have been entitled to the beneficial interest of the amount awarded from a much earlier date and we see no reason why they should be deprived of such benefit.

38. As we have indicated earlier, payment of interest is basically compensation for being denied the use of the money during the period which the same could have been made available to the claimants. In our view, both the Tribunal, as also the High Court, were wrong in not granting any interest whatsoever to the appellants, except by way of a default clause, which is contrary to the established principles relating to payment of interest on money claims. "

27. We further place reliance of the judgment of the Hon'ble Apex Court in the case of **Union of India through Director of Income Tax Vs. Tata Chemicals Limited, (2014) 6 SCC 335,** and the Hon'ble Apex Court was pleased to observe in paragraph nos. 37 and 38 of the judgment, which are quoted as under:

"37. A "tax refund" is a refund of taxes when the tax liability is less than the tax paid. As per the old section an assessee was entitled for payment of interest on the amount of taxes refunded pursuant to an order passed under the Act, including the order passed in an appeal. In the present fact scenario, the deductor/assessee had paid taxes pursuant to a special order passed by the assessing officer/Income Tax Officer. In the appeal filed against the said order the assessee has succeeded and a direction is issued by the appellate authority to refund the tax paid. The amount paid by the resident/ deductor was retained by the Government till a direction was issued by the appellate authority to refund the same. When the said amount is refunded it should carry interest in the matter of course. As held by the Courts while awarding interest, it is a kind of compensation of use and retention of the money collected unauthorizedly by the Department. When the collection is illegal, there is corresponding obligation on the revenue to refund such amount with interest in as much as they have retained and enjoyed the money deposited. Even the Department has understood the object behind insertion of Section 244A, as that, an assessee is entitled to payment of

interest for money remaining with the Government which would be refunded. There is no reason to restrict the same to an assessee only without extending the similar benefit to a resident/ deductor who has deducted tax at source and deposited the same before remitting the amount payable to a non-resident/ foreign company.

38. Providing for payment of interest in case of refund of amounts paid as tax or deemed tax or advance tax is a method now statutorily adopted by fiscal legislation to ensure that the aforesaid amount of tax which has been duly paid in prescribed time and provisions in that behalf form part of the recovery machinery provided in a taxing Statute. Refund due and payable to the assessee is debt-owed and payable by the Revenue. The Government, therebeing no express statutory provision for payment of interest on the refund of excess amount/tax collected by the Revenue, cannot shrug off its apparent obligation to reimburse the deductors lawful monies with the accrued interest for the period of undue retention of such monies. The State having received the money without right, and having retained and used it, is bound to make the party good, just as an individual would be under like circumstances. The obligation to refund money received and retained without right implies and carries with it the right to interest. Whenever money has been received by a party which ex ae quo et bono ought to be refunded, the right to interest follows, as a matter of course."

28. While concluding our opinion, we have no hesitation to observe that the undisputed fact is that the respondent no.5 has paid the entire amount towards the cost of Flat yet possession of the Flat was not given to the respondent no.5 since 2012 till filing of this writ petition. It is further not denied by the petitioner that the order of the U.P. Real Estate Regulatory Authority, Gautam Budh Nagar was passed in the year 2018 and since then any amount in compliance of the order impugned was paid to the respondent no.5. This conduct of the petitioner shows that he is not liable to get any sympathy by this Court while exercising extra ordinary jurisdiction under Article 226 of the Constitution of India. It is further obseraved that the law of equity and principle of natural justice go in favour of respondent No.5.

29. In view of the discussion made above and considering the legal proposition as contemplated under sections 18, 21 and 81 of the Act, 2016 and in view of clause 9.2 (ii) of the form of agreement contained in Annexure to the U.P. Real Estate (Regulation and Development) (Agreement for Sale/Lease) Rules, 2018, we are of the view that the present writ petition is liable to be dismissed due to lack of merit.

30. The writ petition is, accordingly, **dismissed.**

31. No order as to cost.

(2020)02ILR A1770

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 16.11.2019

BEFORE
THE HON'BLE PRADEEP KUMAR SINGH BAGHEL, J.
THE HON'BLE PIYUSH AGARWAL, J.

Writ C No. 4633 of 2019

Rajendra Prasad Arora & Ors.
...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:

Sri Rajendra Kumar Sharma, Sri Ashutosh Srivastava, Sri S.K. Garg, Sri Shailesh Kumar Yadav, Sri Ravi Kant

Counsel for the Respondents:

C.S.C., Sri Anoop Trivedi, Sri Devi Prasad Mishra, Sri Vibhu Rai.

Uttar Pradesh Urban Planning and Development Act, 1973-Section 8 and 9-Prayagraj Development Authority (PDA) has failed to comply statutory provisions-section 8 and 9-zonal development plans of all the zones-not prepared yet-current zonal development plan is against master plan-till preparation of zonal development plans-no further commercial activity shall be allowed in residential areas without impact assesment-no further maps be sanctioned-no freehold applications in respect of parks and open spaces be allowed.

CASES CITED:

1. Smt. Malti Kaul and another vs. Allahabad Development Authority and another AIR 1995 All 397

2. Virendra Kumar Tyagi vs. Ghaziabad Development Authority, W.P. no. 46706/1999, decided on 27.10.2005

3. Smt. Rekha Rani vs. State of U.P. and Ors. 2014 ILR 1 All 70

4. Nisha Kumari vs. State of U.P. 2015 1 AWC 339 All.

5. R.K. Mittal and Ors. vs. State of Uttar Pradesh and Ors. AIR 2012 SC 389.

6. Chairman Indore Vikas Pradhikaran vs. Pure Industrial Coke & Chemicals Limited and ors, (2007) 8 SCC 705

7. Machavarapu Srinivasa Rao and Ors. vs. The Vijayawada, Guntur, Tenali, Mangalagiri Urban Development Authority and Ors. 2011 (6) UJ 3775

8. Dipak Kumar Mukherjee vs. Kolkata Municipal Corporation and Ors. AIR 2013 SC 927.

9. K. Ramadas Shenoy vs. Chief Officers, Town Municipal Council, Udipi and Ors. AIR 1974 SC 2177

10. Virender Gaur and Ors. vs. State of Haryana and Ors. JT 1997 (10) SC 600.

11. Pleasant Stay Hotel and Ors. vs. Palani Hills Conservation Council andOrs. JT 1995 (6) SCC 600.

12. Cantonment Board, Jabalpur and Ors. vs. S.N. Awasthi and Ors. 1995 Supp (4) SCC 595.

13. Pratibha Co-operative Housing Society Ltd. And Ors. vs. State of Maharashtra and Ors. AIR 1991 SC 1453

14. G.N. Khajuria and Ors. vs. Delhi Development Authority and Ors. AIR 1996 SC 253

15. Manju Bhatia and Ors. vs. New Delhi Municipal Council and Ors. AIR 1998 SC 223

16. M.I. Builders Pvt. Ltd. vs. RadheyShyamSahu and Ors. AIR 1999 SC 2468

17. Friends Colony Development Committee vs. State of Orissa and Ors. AIR 2005 SC 1

18. Shanti Sports Club and Ors. vs. Union of India (UOI) and Ors. AIR 2010 SC 433

19. Priyanka Estates International Pvt. Ltd. And Ors. vs. State of Assam and Ors. AIR 2010 SC 1030.

20. M.C. Mehta vs. Union of India (UOI) and Ors. (2006) 4 CompLJ 450 (SC).

21. Bombay Dyeing and Mfg. Co. Ltd. vs. Bombay Environmental Action Group and Ors. AIR 2006 SC 1489.

22. Chairman, Indore Vikas Pradhikaran vs. Pure Industrial Cock and Chem. Ltd. And Ors. AIR2007 SC 2458

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

1. The petitioners have instituted this writ proceedings for quashing of the demand notice dated 20th September, 2018 issued by the Allahabad Development Authority, Allahabad (now Prayagraj Development Authority, Prayagraj)1, the second respondent, whereby the petitioners have been called upon to deposit a sum of Rs.50,62,774.00 for compounding of their construction, which is commercial, and other charges.

2. The relevant facts may briefly be stated: the petitioners are owners of a part, an area of 285.32 square meter, of Nazul Free hold Site No. 'Z', Civil Station, Allahabad, which is a part portion of Premises Nos. 14 and 18, New Lal Bahadur Shastri Marg, Allahabad. The said plot was purchased by the petitioners vide registered sale-deed dated 11th December, 2009. The petitioners made an application to the second respondent for sanctioning of map of the residential accommodation, which was sanctioned. Later, the petitioners submitted a revised map for change of use of the building from residential to commercial. Upon the said application, the second respondent has issued a fresh notice dated 20th September, 2018, whereby apart from other fees the compounding fee for a sum of Rs.21,61,086.00 and the impact fee to a tune of Rs.33,04,148.00 have been demanded.

3. The petitioners have averred in the writ petition that the demand notice has been issued on the ground that it relates to commercial use of the building and not for sanctioning the building map afresh. It is stated that demand of impact fee of Rs.33,04,148.00 is totally illegal as it is not provided anywhere in the Uttar Pradesh Urban Planning and Development Act, 19732. Similarly, the compounding fee is also arbitrary and illegal.

4. It is stated that for the area where the petitioners' plot is situated no zonal development plan has been prepared by the development authority. It is further stated that Section 9 of the Act contemplates preparation of zonal development plan in terms of the master plan and the compounding contrary to the zonal development plan cannot be permitted. Therefore, unless zonal development plan is sanctioned, compounding fee cannot be charged. The development authority has not framed any rule prescribing the rate of imposition of the compounding fee.

5. It is also stated that the demand of the permit fee, inspection fee and Malwa fee is illegal and against the judgment of this Court in **Smt. Malti Kaul and another v. Allahabad Development Authority and another3.** It is averred that the development fee and betterment fee have been highly excessive, arbitrary and contrary to the law laid down by the judgment in the cases of **Virendra Kumar Tyagi v. Ghaziabad Development Authority4, Smt. Rekha Rani v. State of U.P. and others5, Smt. Nisha Kumari v. State of U.P. and others6, and Smt. Malti Kaul (supra).**

6. It is averred in the writ petition that there is a nexus between the local builders and the officials of the development authority in demanding the arbitrary and illegal demand against the provisions of the Act. The petitioners have also demanded a free and fair judicial

enquiry in this matter, otherwise situation leads to a disastrous development and the purpose and object of the Act would be defeated.

7. The petitioners have also prayed that this writ petition be converted into the public interest litigation as the authorities are arbitrarily converting the residential areas, which have been earmarked as such in the master plan, into the commercial area. It is stated in a supplementary affidavit that there are only nine bungalows remained on the Elgin Road, which are used purely as residential, and rest of the buildings on the said road are involved in the commercial activities such as marriage hall, nursing home, etc. The second respondent has sanctioned the map for the commercial activities in the residential areas contrary to the master plan. The details of those commercial buildings have been mentioned in Paragraph-7 of the supplementary affidavit.

8. A counter affidavit has been filed on behalf of the second and third respondents, i.e. the PDA, sworn by the Zonal Officer, Prayagraj Development Authority, Prayagraj. It is stated in the counter affidavit that the development fee, stacking fees, mutation charges and water fees are defined under Sections 2 (ggg), 2 (kk), 2(hhh)(ii) and 2(ll) of the Act respectively. It is also stated that Master Plan-2021 is currently in force with effect from 12th August, 2006 and the PDA has also framed the zonal plan for some portion of its development area and it has also framed building bye-laws, which are known as 'Bhawan Nirman Evam Vikas Upvidhi 20087' (as amended upto 2016). The Building Bye-laws have been framed for planned development of the area and so long the zonal development plans are not prepared under Section 9 of the Act, the authority with the previous approval of the State Government may make bye-laws consistent with the Act. The demand of sub-division charges and other charges have been justified in the counter affidavit. It is further stated that the compounding bye-laws have been circulated by the State Government vide order dated 14th January, 2010 in the form of model compounding bye-laws. It was placed before the Board of the PDA for consideration of the matter in its Board Meeting dated 07th May, 2010 and it was adopted. Hence, no further approval of the State Government is required. In Paragraph-51 of the counter affidavit it has been admitted that the zonal development plans are not prepared, hence in view of the provisions of Section 57(e) of the Act the bye-laws may provide for approval for division of any site into plots. The Building Bye-laws have been approved by the Board in its meeting dated 22nd December, 2011. For the sake of convenience, Paragraphs-52, 67 and 68 of the counter affidavit are reproduced as under:

"52. That, the Allahabad Development Authority, Allahabad has, with the previous approval of the State Government, already adopted the Building Bye-laws in its Board meeting dated 22.12.2011. The Building Bye-laws contain provisions regarding the division of any site into plots for the erection of building. Chapter 2.2 of the Building Bye-laws contains provisions for open spaces (park, etc.) which are required when the layout plan is sanctioned for sub-division of any site. Thus sub division of any land can only be carried out after obtaining permission from the Vice Chairman of the

Authority, in accordance with the provisions of the Building Bye-laws. A true copy of the relevant portion of Building Bye-laws, framed by the Allahabad Development Authority, as referred to above is being filed herewith and marked as ***Annexure 'CA-1'*** *to this Counter Affidavit.*

67. That as regards change of the residential area to the commercial area and approval of the State Government to such action of the Development Authority, provision have been made in Section 13 and section 38-A of the Act.

68. That furthermore Master Plan 2021 and Zone Plan B-4 permits certain commercial and other activities in residential area subject to fulfillment of certain conditions laid down in the Master/Zonal Plan itself and on payment of impact fees."

9. A supplementary counter affidavit has also been filed on behalf of the PDA. It is stated therein that the Master Plan-2021, which is in force at present, has been amended four times on 11th July, 2011, 20th June, 2013, 30th June, 2015 and 01st May, 2018 after following the procedure. By the amendment dated 11th July, 2011 the land use of the land contained in certain areas have been changed from industrial (Kuteer Udyog) to residential (R-2). Similarly, by the amendment dated 20th June, 2013 the land use pertaining to Village Abusa and Sarfuddinpur, Prayagraj has been changed from agricultural to technical/management institution. Vide amendment dated 30th June, 2015 the land use pertaining to Village Jalalpur Ghosi, Tehsil Sadar, Allahabad has been changed from agricultural to residential. By the amendment dated 01st May, 2018 the land use pertaining to Village Ravatpur and Jalalpur Ghosi, Tehsil Sadar, Prayagraj has been changed from agricultural to educational institutions/ technical institutions. In the Master Plan-2021 the city has been divided into 12 zones and the zones have been further divided into sub-zones.

10. We have heard Sri Ravi Kant, learned Senior Advocate, assisted by Sri S.K. Garg and Sri Rajendra Kumar Sharma, learned counsel appearing for the petitioners, and Sri Anoop Trivedi, learned Senior Advocate, assisted by Sri Vibhu Rai, learned Advocate, for the second and third respondents- PDA.

11. Sri Ravi Kant, learned Senior Counsel appearing for the petitioners, has submitted that the PDA has failed to prepare the zonal development plan even after lapse of 13 years. Only one zonal development plan for one zone has been prepared recently, that too is contrary to the master plan. He has invited our attention to the Master Plan-2021, Table No. 9.1 at Page 30, to demonstrate that 36.11 per cent land is earmarked for residential areas and only 2.43% area is shown for commercial activities. This ratio has been drastically changed in the zonal development plan of Zone B-4, which has been prepared, wherein commercial area has been arbitrarily increased to 12%, which is unreasonable and illegal.

12. He has also invited our attention to the zonal development plan for Zone B-4, wherein it is mentioned that in civil lines zone there are already several shopping and commercial establishments to cater the need of the residents of the zone, hence there is no need to allow commercial activities in the

residential areas under the garb of the mixed zones.

13. It is next urged that the concept of mixed zone is contrary to the master plan having regard to the fact that in Zone B-4 there are several markets, hotels, big-bazar and several shopping complexes. He has drawn our attention to Page 12 of the zonal development plan, wherein this fact is recorded. He has further urged that in larger interest of the city this Court can examine the other issues relating to planned development of the city. The Court has summoned the records and sufficient opportunity has been furnished to the respondents, therefore, the Court can examine the issue regarding mixed zone and changing residential areas to mixed area, which is contrary to the master plan.

14. It is submitted that under Article 226 of the Constitution this Court has ample power to examine the legality of the action of the development authority if it is found that its action is against the provisions of the Act.

15. Sri Anoop Trivedi, learned Senior Counsel appearing for the PDA, has submitted that it is true that the zonal development plan for only one zone has been prepared in 2011 but under Section 57(e) of the Act the development authority has power that so long the zonal development plans are not prepared, the development can be made in terms of the bye-laws. He has justified the imposition of various charges such as permit fee, inspection fee, malwa fee, development fee and betterment fee. He has submitted that the issue with regard to some of the above mentioned charges is pending before the Supreme Court, hence it would be appropriate to wait the judgment of the Supreme Court in respect of those charges.

16. Sri Trivedi has very fairly submitted that he has no explanation to offer in respect of the inordinate delay in preparing the zonal development plans in terms of Section 9 of the Act.

17. Sri Anoop Trivedi with the help of the Town Planner, who is present in the Court, has placed before us the original records, master plan, one of the zonal development plans and various other records.

18. Before we advert to the rival submissions advanced at the Bar, we think it appropriate to examine the relevant statutory provisions at play in the instant case.

19. The Act i.e. the Uttar Pradesh Urban Planning and Development Act, 1973 was enacted with an object for the development according to plan of the area, which is declared as development area. Chapter II of the Act deals with declaration of the development areas, constitution of the development authority, etc.. Section 7 under Chapter II of the Act enumerates the objects of the authority, it provides that the object of the authority shall be to promote and secure the development of the development area according to the plan and to execute works in connection with supply of water and electricity, to dispose of sewage and to provide and maintain other services and amenities.

20. Chapter III of the Act deals with the Master Plan and Zonal Development Plan. The provisions under this chapter of the Act are material for our purposes. Section 8 of the Act provides for master plan for the development area. It lays down that the development area shall be divided in various zones indicating the manner in which the land in each zone is proposed to be used. It also provides that the master plan shall be a basic pattern of

the framework within which the zonal development plans of various zones may be prepared. Section 8 of the Act reads thus:

***"8. Civil survey of, and master plan for the development area.**--(1) The Authority shall, as soon as may be, prepare a master plan for the development area.*

(2) The master plan shall--

(a) define the various zones into which the development area may be divided for the purposes of development and indicate the manner in which the land in each zone is proposed to be used (whether by the carrying out thereon of development or otherwise) and the stages by which any such development shall be carried out; and

(b) serve as a basic pattern of framework within which the zonal development plan of the various zones may be prepared.

(3) The master plan may provide for any other matter which may be necessary for the

proper development of the development area."

21. Section 9 of the Act deals with zonal development plans. Under Section 8 the master plan provides a basic pattern within which the zonal development plans are prepared. It gives more details about the land uses proposed in the zones, such as, public buildings, industry, business, markets, schools, hospitals and open spaces, etc. The zonal development plan is to be prepared simultaneously with the master plan or soon thereafter. Section 9 of the Act reads as under:

***"9. Zonal Development Plans.**--(1) Simultaneously with the preparation of the master plan or as soon as may be thereafter, the Authority shall proceed with the preparation of a zonal development plan for each of the zones into which the development area may be divided.*

(2) A zonal development plan may--

(a) contain a site-plan and use-plan for the development of the zone and show the approximate locations and extents of land uses proposed in the zone for such things as public buildings and other public works and utilities, roads, housing, recreation, industry, business, markets, schools, hospitals and public and private open spaces and other categories of public and private uses;

(b) specify the standards of population density and building density;

(c) show every area in the zone which may, in the opinion of the Authority, be required declared for development or re-development; and

(d) in particular, contain provisions regarding all or any of the following matters, namely--

(i) the division of any site into plots for the erection of buildings;

(ii) the allotment or reservation of land for roads, open spaces, gardens, recreation-grounds, schools, markets and other public purposes;

(iii) the development of any area into a township or colony and the restrictions and conditions subject to which such development may be undertaken or carried out;

**** *** ****

(vii) the number of residential buildings which may be erected on plot or site;

**** *** ****

(ix) the prohibitions or restrictions regarding erection of shops,

workshops, warehouses or factories or buildings of a specified architectural feature or buildings designed for particular purposes in the locality;

*** *** ***

(xi) the restrictions regarding the use of any site for purposes other than erection of
buildings;"

22. Section 11 of the Act enjoins the procedure to be followed in the preparation and approval of the master plan and the zonal development plan. It says that the authority shall prepare a plan in draft and publish it inviting suggestions/ objections from the residents with respect to the draft plan. Similar opportunity is to be given to the local authorities. After considering all the objections, suggestions and representations received by the authority, a final plan is prepared and is submitted to the State Government for its approval. Once the plan is approved by the State Government, the plan comes into operation. Chapter III-A of the Act provides for the arterial roads in development area. Chapter IV of the Act deals with amendment of the master plan and the zonal development plan. Section 13 of the Act says that the authority may make any amendment in the master plan or the zonal development plan, but it shall not effect the important alterations in the character of the plan and which do not relate to the extent of land uses or the standards of population density. The State Government also can make the amendments in the master plan or zonal development plan. Sub-section (3) of Section 13 provides that before making any amendment in the plan, the State Government or the authority, as the case may be, shall publish a notice in at least one newspaper having circulation in the development area inviting objections and suggestions in respect of the proposed amendment from the residents. Similarly, if the authority makes any amendment in the plan, it shall report to the State Government the full particulars of such amendments within the stipulated period i.e. thirty days.

23. Chapter V deals with development of the land. Basically this chapter is meant for sanctioning of the maps for the residential and commercial activities. Section 14 prohibits that no development of the land shall be undertaken by any person or body unless permission for such development has been obtained in writing from the Vice-Chairman. Section 15 of the Act provides the procedure for permission. Chapter VI of the Act deals with acquisition and disposal of the land. Chapter VII provides for finance, accounts and audit. Chapter VIII provides for supplemental and miscellaneous provisions. Section 26 prescribes the penalties. Section 27 provides for order for demolition of building. Section 28-A gives power to seal such buildings and Section 32 speaks for composition of offences. The other provisions under this Chapter deal with assessment of betterment charges, additional stamp duty, toll for amenities, mode of recovery. Section 41 enumerates the power of control by the State Government.

24. A perusal of Sections 8 and 9 of the Act shows that the master plan and the zonal development plans are inter dependent. The master plan is a basic pattern of the framework, which indicates that a development area/ city shall be divided in various zones and the manner in which the land in each zone is proposed to

be used. Section 9 enjoins that the zonal development plans shall be prepared simultaneously with the master plan or as soon as may be thereafter for the reason that the master plan broadly lays down the use of the land in each zone. It also indicates the manner in which the land is to be utilized in each zone. Thus, the master plan only provides to define the various zones, into which the development area may be divided for the purpose of development. It serves as basic pattern. The other details such as industry, business, markets, schools, hospitals, open spaces, etc. are not provided in the master plan but it is provided in the zonal development plans. Thus, from the scheme of the Act it is evident that the master plan and the zonal development plans are complimentary to each other. Without zonal development plan the main object of the provisions of the Act will be frustrated as the open spaces, markets, residential areas and other public works utilities are not provided in the master plan. The zonal development plan contains a site plan which indicates the existence of the land use proposed in the zone regarding markets, business and housing, etc., but it cannot change the manner indicated in the master plan in each zone. If the master plan indicates that a portion of the area has to be utilized for residential or commercial, that cannot be altered in the zonal development plan. In any view of the matter, the zonal development plan cannot override the master plan. The development is to be done within the manner indicated in the master plan.

25. Learned counsel for the PDA has produced the Allahabad Master Plan-2021 and the Zonal Development Plan, Zone B-4 prepared under the Master Plan-2021, which have been taken on the record with the consent of learned counsel for the parties.

26. The current master plan for the Allahabad/ Prayagraj has been approved by the State Government under Section 12 of the Act on 13th July, 2006 and the notice has been published stating therein that the State Government has approved the master plan and the plan has come into operation.

27. The PDA in its Board meeting dated 23rd July, 2003 proposed the Draft Master Plan-2021 and the objections were invited by public notice published in the Northern India Patrika. The Board in its meeting held on 13th October, 2005 finalized the Master Plan and it was sent for approval to the State Government. In the master plan, which is on the record, it is clearly mentioned that in the last ten years more than 50 land uses have been changed by the development authority and the matter has been referred to the State Government. The change of the land use is in respect of about 200-250 hectares, which indicates that not only the PDA but the private builders also have illegally and unauthorisedly made the development contrary to the master plan. The relevant part of the Master Plan-2021 under its Part-1, Paragraph '2.0 Mahayojna ka Mulyankan' is extracted below:

"--. इस विश्लेषण से यह स्पष्ट है कि न केवल इलाहाबाद विकास प्राधिकरण द्वारा बल्कि निजी बिल्डर्स/ कोलोनाइजर्स द्वारा भी भू–उपयोगों के विपरीत अनधिकृत विकास किया गया है। इसके अतिरिक्त वर्तमान परिप्रेक्ष्य में इलाहाबाद पुनरीक्षित महायोजना–2001 से सम्बंधित तथ्यों का विस्तृत विवेचन नयी महायोजना बनाने का औचित्य सुस्पष्ट करता है, जिसका विवरण अधोलिखित प्रस्तरों में दिया गया है।"

28. In the master plan, Table No. 3.1 deals with comparison of land use in the earlier Master Plan-2001 and the current master plan. In the Master Plan-2001 the total proposed area was 21,689.53 hectares, out of which an area of 7622.24 hectares i.e. 35.14% of the total was earmarked for residential area; the commercial area was only 545.43 hectares i.e. 2.51%; industrial area was 1217.81 hectares i.e. 5.61%; for office the area was 1871.09 hectares i.e. 8.63%; and park/open space was 1541.40 hectares (7.11%). For the sake of convenience, Table No. 3.1 given at page-11 of the Master Plan-2021 is reproduced below:

"तालिका संख्या–3.1

पूर्व महायोजना में प्रस्तावित एवं वर्तमान भू–उपयोगों का

तुलनात्मक विवरण

सम्पूर्ण नगर क्षेत्र क्षेत्रफल ;

(हेक्टेयर में)

क0 सं0	भू–उपयोग	पूर्व महायोजना में प्रस्तावित भू–उपयोग वर्ष 2001	प्रतिशत	वर्तमान भू–उपयोग वर्ष 2002 (विकसित क्षेत्र)	प्रतिशत	अन्तर (अविकसित क्षेत्र)	प्रतिशत
1	2	3	4	5	6	7	8
1.		7622.24	35.14	5831.46	61.91	-1790.78	-14.59
2.	व्यावसायिक	545.43	2.51	393.68	4.18	-151.75	-1.24
3.	उद्योग	1217.81	5.61	482.80	5.13	-735.01	-5.99
4.	कार्यालय	1871.09	8.63	315.44	3.35	-1555.65	-12.68
क	कार्यालय	335.09	1.54	315.44	3.35	-19.65	0.16
ख	अपरिभाषित क्षेत्र	1536.00	7.08	-	-	-1536.00	-12.52
5.	पार्क/खुले स्थल	1541.40	7.11	140.14	1.49	-1401.26	-11.42
6.	कुम्भ मेला	921.08	4.25	-	-	-921.08	-7.51
7.	सांस्कृतिक एवं धार्मिक स्थल	69.00	0.32	19.00	0.20	-50.00	-0.41
8.	सार्व0 एवं अर्द्ध सार्व0 सुविधायें	571.24	2.63	607.84	6.45	36.60	0.30
क	शिक्षा	495.52	2.28	524.60	5.57	29.08	0.24
ख	स्वास्थ्य	75.72	0.35	83.24	0.88	7.52	0.06
9.	सार्व0 उपयोगिगताएं एवं सेवायें	1660.35	7.66	39.37	0.42	-1621.16	-13.21
10.	यातायात एवं परिवहन	2434.80	11.23	1588.76	16.87	-840.04	-6.89
11.	अन्य उपयोग	3234.91	14.91	-	-	-3234.91	-26.36
योग		21689.53	100.00	9418.49 (43.42)	100.00	12271.04 (56.58%)	100.”

29. Table No. 10.7 of the Master Plan-2021 has divided the residential area in the low density area, medium density area and high density area. Likewise, the commercial area has also been divided in retail business, wholesale business, district center, warehouse, etc.

30. In the entire counter affidavit filed on behalf of the PDA sworn by the Zonal Officer it has not been mentioned that when the Master Plan-2021 has been

approved by the State Government nor the date of commencement of the zonal development plan has been mentioned. However, to the specific query of the Court, in the supplementary counter affidavit it is mentioned that the State Government has approved the Master Plan-2021 on 13th July, 2006.

31. On 26th August, 2019 during the course of hearing when the Court was apprised that the Master Plan-2021 was enforced in the year 2006 but the zonal development plan is yet to be prepared, the PDA was directed to file a better affidavit indicating the following facts:

"After hearing learned counsel for the parties we deem it appropriate to direct the development authority to file an affidavit indicating the following facts:

(1) If the Master Plan of the Allahabad (now Prayagraj) has been amended, the order of the State Government/ development authority be brought on the record giving the detail of the procedure adopted for the said amendment.

(2) It is stated that the Zonal Plan has been approved only in respect of one zone i.e. Zone B-4(1). There are total 7 zones in Allahabad. Zone-B has five sub-zones. However, the Zonal Plan for one of the sub-zones B-4 has been prepared. Regard may be had to the fact that Section 9 of the Uttar Pradesh Urban Planning and Development Act, 1973 requires that zonal plan should be prepared simultaneously with the master plan or as soon as possible. The respondent-development authority shall furnish the reason for the delay of more than five years and shall also state that under which Zonal Plan the maps in respect of the residential and commercial areas have been sanctioned between 2006, when the Master Plan was notified, and 2011, when the Zonal Plan for one of the sub-zones B-4(1) has been notified. During this period how the maps have been sanctioned in absence of zonal plan?

(3) When the Zonal Plan in respect of the entire city shall be prepared?

(4) Learned counsel for the development authority has apprised us that the State Government vide various Government orders has permitted the change of the land use. All the orders of the State Government changing the land use be brought on the record.

*The aforesaid facts be brought on the record by way of a co*unter affidavit sworn by the *Vice-Chairman/ Secretary of the development authority."*

32. In compliance with the said order, a supplementary counter affidavit has been filed on behalf of the PDA sworn by the Secretary of the PDA. In the supplementary counter affidavit it is mentioned that the Master Plan-2021, which is in force, has been amended four times i.e. on 11th July, 2011, 20th June, 2013, 30th June, 2015 and 01st May, 2018 after following the procedures. It is mentioned in the supplementary affidavit that by the amendment dated 11th July, 2011 the land use of the land contained in Mauzas (Villages) Sulem Saray, Harwara and Jayrampur, Tehsil Sadar, District Allahabad have been changed from Industrial (Kuteer Udyog) to Residential (R-2). Similarly, by the amendment dated 20th June, 2013 also the land use has been changed from agricultural to technical/ management institution and by the amendment dated 30th June, 2015 the land use has been changed from agricultural to residential. Vide amendment dated 01st

May, 2018 the land use has been changed from agricultural to educational institutions/ technical institutions. It is also mentioned that the current master plan was prepared in 2006 and it is still in operation till 2021.

33. It is further averred in the supplementary counter affidavit that in the Master Plan-2021 the city has been divided into 12 zones. It is also averred that the zones have been further divided into sub-zones. Sub-Zone 4 is having an area of 606.40 hectares. However, the zonal development plan could be prepared for only one sub-zone i.e. B-4, which has been approved on 07th March, 2011. For the sake of clarity, Paragraph-13 of the supplementary counter affidavit is quoted below:

"13. That it is stated that the present Master Plan 2021 has been approved by the State Government on 13.07.2006. It is stated that though there are 12 zones in which the city has been divided however the zonal development plan could be prepared on only one sub-zone i.e. B-4 which has been approved on 7.3.2011."

34. In Paragraph-18 of the supplementary counter affidavit it is stated that the zonal development plan is highly technical process but still the authority is under process for completing two more zonal development plan of Zone- 'I' & 'J'. Paragraph-18 of the supplementary counter affidavit is also reproduced below:

"18. That further the zonal plan which is highly technical process but still the authority is under process for completing two more zonal development plan of zone 'I' & 'J'."

35. From the aforesaid averments made in the supplementary counter affidavit it is evident that although the master plan has been sanctioned by the State Government on 13th July, 2006, the zonal development plan except for one zone has not been prepared. Even the only zonal development plan, which has been prepared, was approved on 07th March, 2011 i.e. after about five years and in respect of rest 11 zones there is no zonal development plan of the development area and all the development works are carried out or are still in progress or have been made without any development plan since 2006 onwards i.e. about 13 years.

36. Pertinently, in a public interest litigation, being **Public Interest Litigation (PIL) No. 67235 of 2014 (Ashok Kumar and others v. Nagar Nigam Allahabad and others),** the issue with regard to increased commercialization in the residential areas cropped up. A Division Bench of this Court, after furnishing opportunity to the respondents therein, vide order dated 01st September, 2016 has observed that approval of maps for construction of non-residential buildings is given only on the basis of width of the road and no impact assessment has been made before sanctioning of the map. It was mentioned that while sanctioning a new project the development authority has to consider the viability and compatibility in the area in question and whether the existing municipal facility and infrastructure were sufficient to warrant the creation of additional commercial or mixed use

establishment. In this regard certain directions were issued to the development authority. The relevant part of the order is extracted below:

"...ADA had been required to disclose the nature of the impact assessment study, which it undertook, if at all, before the sanctioning of maps. The impact assessment which was envisaged by this Court was with respect to an empirical exercise being undertaken by the Authority while sanctioning a new project bearing in mind its viability and compatibility in the area in question and whether the existing municipal facilities and infrastructure were sufficient to warrant the creation of an additional commercial or mixed use establishment. An impact assessment of a new structure cannot be said to have been achieved on the back of mere NOC's being obtained from other departments. When the Authority proceeds to accord permission to a particular plan, it is presumed to have assessed the viability of the project coming up in the area concerned. This would necessarily entail a study with regard to the number of additional units or persons who would occupy the area, the additional burden on existing infrastructure in the area, whether the existing facilities would sustain the creation of new buildings and structures and other allied aspects. Unfortunately we note that no such exercise is presently undertaken by the ADA nor does such a study appear to precede its decision to sanction a new project. It was in the above backdrop that we had called upon the ADA to disclose on affidavit the reasons and justifications for the proposed change of user of residential pockets in the city to either commercial or mixed use purposes. We find that the disclosure made fails to address these issues and we would perhaps be justified in recording our conclusion that no impact assessment is actually undertaken by it.... The sanction of a map in our opinion would necessarily involve an examination of the project both from a micro as well as macro angle. Merely because a particular area is earmarked as commercial or for mixed use does not empower the Authority to permit the creation of any number of new structures without an empirical impact assessment being undertaken. We therefore, direct the Chief Town Planner as well as the Vice Chairperson of the ADA to forthwith formulate appropriate guidelines for impact assessment which must be undertaken before the sanction of a map. The draft guidelines shall be placed upon the affidavit of the Vice Chairperson before this Court on the next date fixed. We further put the Authority to notice to comply with the earlier directions issued by the Court on 27 May 2016 and 14 July 2016 and file a complete and full disclosure in respect of the issues which have remained unanswered. The Vice Chairperson, shall while filing his affidavit also bring on record the interpretation which the Authority seeks to accord to Bye-law 1.2.26 in respect of sanction of maps for residential, commercial and mixed use constructions."

37. The Chief Town Planner, who was present in the Court with the record to assist us along with Sri Anoop Trivedi, learned Senior Counsel appearing for the PDA, has failed to satisfy us regarding compliance of the directions issued by the Division Bench in the above mentioned case of **Ashok Kumar (supra).** Moreover, from the material on the record and the original record, which was produced before us, we find that there is no material to demonstrate that the said direction has

been complied with by the development authority. A large number of multi-storied buildings, hospitals, showrooms, banks and other commercial activities have been sanctioned by the development authority in the last few years indiscriminately in the residential areas without any impact assessment.

38. Recently, a Division Bench of this Court, presided over by Hon'ble the Chief Justice, in a writ petition, being **Misc. Bench No. 22182 of 2019, Smt. Radha Rani Singh v. State of U.P. and others,** vide order dated 16th September, 2019 has found that the Lucknow Development Authority has also failed to prepare the zonal development plans as provided under Section 9 of the Act. The Division Bench in the said case has observed as under:

"The non-preparation of the zonal plan for more than 50 years is clearly a case of frustrating the mandate cast by the 1973 Act. This Court cannot overlook the fact that the 1973 Act casts a duty on the development authorities which have to be discharged in terms of the mandate and not doing so for a period of 46 years, cannot be accepted."

39. The Division Bench has issued directions to all the development authorities in the State of Uttar Pradesh, which are governed under the provisions of the Act, in the following terms:

"...In view of the statutory provisions, the facts brought before us as well as the judgment of the Apex Court in the case of ***Chairman, Indore Vikas Pradhikaran8*** *(supra), we issue the following directions at this stage:*

(i) The development authorities in the entire State of Uttar Pradesh shall take steps for preparation, its finalization and approval of the Master Plan of all the development areas notified till date, if not already done.

(ii) All the development authorities in the State of Uttar Pradesh shall initiate the steps for preparation of the zonal plan for all the development areas in accordance with the procedures specified in the Act and in consonance with Section 9 of Uttar Pradesh Urban Planning and Development Act, 1973 within a period of one year from today. The Urban Planning Department of the State of Uttar Pradesh shall ensure the compliance of the directions given above and it shall be the duty of the Secretary, Urban Planing Development to ensure that the directions given by us are complied with within the specified time frame.

(iii) The Secretary, Urban Development, State of Uttar Pradesh, is directed to file a report with regard to steps taken in pursuance to the directions given above by the next date."

Mixed Area:

40. As can be seen from the master plan of the city of Prayagraj, there is no provision in the master plan for the mixed use of the land. In other States in some of the master plans there are provisions for the concept of mixed use but that is also based on subject to socio-economic status of the neighbourhood and in case the mixed area is allowed in the residential areas, the environmental impact and

providing of safe and convenient circulation and parking are also taken into consideration. One of the main objects to allow such mixed use is to allow access to commercial activity in the proximity of the residential area and to reduce the need for the travelling across the zone in the city. While allowing mixed area, the associated adverse impacts relating to traffic congestion, increased parking and increased pressure on civic amenities have also to be taken into consideration.

41. The affidavits filed on behalf of the PDA and the original records produced before the Court do not show that any such impact has been considered by the PDA, with the result that in most of the residential areas the residents are made to suffer due to traffic congestion and pollution in their area on account of the commercial activities.

42. It is also significant to mention that initially in the residential areas there was no permission to carry out the commercial activities. The people have built their houses in the residential areas for peaceful living in proper environment. If indiscriminate permission is granted under the fresh decision taken by the development authority on the ground of mixed area and in the residential areas the commercial activities are allowed, it would not be safe for the children of the residential areas to come out from their houses as in their neighborhood, where the commercial activities are allowed, a large number of vehicles will ply with the result that the children will have to be indoor for the entire day for their safety. This will adversely affect their proper development and health.

43. In addition to safety of the children, the senior citizens of the residential areas would also suffer. There would be an environmental impact on the quality of air in the area due to movement of the cars, two wheelers and other vehicles. The mixed zone can be allowed in those cities where the residents have to cover a long distance for the purposes of shopping of essential commodities and as such, even in the master plan where mixed area is allowed, only a limited shops of the public utility such as petty general merchant shops, stationary, milk booth, STD/ fax/ internet centres/ATMs, hair-dressers and beauty parlours, bakery and sweetmeat, mutton stalls, small repairing centres of electrical and mechanical items, etc. are allowed.

44. Regard may be had to the fact that in Civil Lines (B-4 Zone) it is mentioned that a large number of commercial facilities like malls, shopping centers, etc. are existing. The relevant part of Chapter-2 of the Zonal Development Plan, Zone B-4, at its page-12 under Paragraph-2.1.4 is extracted below:

"2-1-4 **व्यवसायिक**

महायोजना में सामान्य व्यवसाय एवं नगर/जिला केन्द्र के अन्तर्गत 64.53 हेक्टेयर भूमि आरक्षित की गई है, जिसके सापेक्ष वर्तमान में 29.80 हेक्टेयर भूमि विकसित की जा चुकी है। वर्तमान में सिविल लाइन्स जोन में प्रमुख रूप से बिग बाजार, सिटी स्आइल तथा विशाल मेगा मार्ट सालासर एवं पी0वी0आर0 माल आदि अत्याधुनिक सुविधाओं से युक्त प्रतिष्ठान विद्यमान है। उपरोक्त के अतिरिक्त इस क्षेत्र में कई बड़े होटल, रेस्टोरेन्ट एवं अनेक व्यावसायिक प्रतिष्ठान भी स्थित है।"

45. As discussed above, the master plan of Allahabad/ Prayagraj does not envisage the mixed area in the residential areas. The zonal development plan has not been prepared for the entire city. The zonal development plan has been prepared for only one zone i.e. Zone B-4, wherein the commercial area is shown to be 12%, whereas the total

commercial area in the master plan of the city is 2.4%.

46. It is significant to mention that Table No. 10.1 of the master plan indicates, amongst other, total zonal area, residential area in the zone, population in the zone and the average population density which are also relevant for the issue at hand. The total area of the main city has been shown to be 13249.02 hectares, its residential area is 5270.48 hectares, population is shown to be 950000 and the density of the population is 72. In Zone-A total area is shown to be 639.00 hectares, residential area is 343.00 hectares, its total population is 69900 and population density is 109; in Zone-B total area is 2531 hectares, residential area is 1051.78 hectares, population is 180400, density is 71; in Zone-C total area is given as 822.00 hectares, residential area is 426.00 hectares, its population is 82300 and density is 100; in Zone-D total area is 1005.00 hectares, residential area is 269.00 hectares, its population is 44800 and density is 45. The population density in these zones clearly indicate that these are the high density areas. In such situation if the commercial activities are allowed in high density and medium density areas, there would be serious impact on the environment and the residents of these areas shall suffer due to environmental problems. The most adversely affected persons will be the senior citizens and the children, who would not be able to move freely even in front of their houses due to haphazard traffic and movement of the vehicles in their neighborhood due to commercial activities.

47. Our attention has been drawn to the provisions of Section 26-D of the Act, which provides penalty for not preventing encroachment. This Section has been inserted by Section 7 of the U.P. Act No. 3 of 1997. Section 26-D of the Act reads as under:

"26-D. Penalty for not preventing encroachment.--*Whoever specially entrusted with the duty to stop or prevent the encroachment or obstruction under this Act or any other Act, rules or bye-laws wilfully or knowingly neglects or deliberately omits to stop or prevent such encroachment or obstruction shall be punishable with simple imprisonment for a term which may extend to one month or with fine which may extend to ten thousand rupees or with both."*

48. From a perusal of the said section it is evident that if the official, who is entrusted with the duty to prevent the encroachment or obstruction, fails to stop or prevent encroachment, he/she shall be punishable with the simple imprisonment or fine.

49. We have asked the learned Standing Counsel and the learned counsel for the PDA that after insertion of the said section whether final action in terms of Section 26-D of the Act has been taken, we are informed that not even in a single case action against the officials, who neglects to prevent or stop encroachment or obstruction, has been taken.

50. The intention of the Legislature in inserting Section 26-D in the Act in the year 1997 appears to be to fix the responsibility on the official(s), who fails to perform his duty. One of the objects of this section is for the deterrence that if the encroachments or the illegal constructions are checked at the very initial stage, in that event no further consequential action such

as sealing of the building or demolition will be necessary. As observed by the Supreme Court in the above mentioned cases, the encroachment and illegal constructions in haphazard way cannot be possible without the connivance of the State officials. We are surprised to note that although the State has carried out a demolition drive in this city and the other parts of the State rigorously and a spate of writ petitions have been filed in this Court against the order of demolition, yet the provisions of Section 26-D have not been resorted to. This fact itself indicates that a large number of illegal constructions have been allowed to take place, which has necessitated for the demolition but no action in terms of Section 26-D of the Act has been taken by the State. If the Legislature has amended the Act and has provided the penalty, it cannot be frustrated by the inaction on the part of the State and its functionaries. The inaction on the part of the State functionaries to take recourse to Section 26-D of the Act against the erring officials has made the said provision redundant and meaningless. The object of the Legislature cannot be frustrated by the casual approach of the State functionaries by ignoring the negligence on the part of its officials, who have failed to perform their statutory duties cast upon them under Section 14 of the Act.

51. In our opinion, if an illegal construction is raised without sanction of the map, the State and the development authorities should take note of Section 26-D of the Act and the corresponding responsibility should be fixed against the erring official in whose period the illegal construction was allowed to be raised and appropriate action in term of Section 26-D of the Act be taken against the official concerned.

52. In addition to Civil Lines, there are other big markets in this city such as Katra, Chowk, Jonhstonganj, Khuldabad, Govindpur, Teliyarganj, Sulem Sarai, Mundera, Rajapur, Mutthiganj, etc. These commercial areas are situated within a short distance from each other and it hardly takes 5-10 minutes to reach these markets. For instance, one of the oldest shopping places i.e. Civil Lines and Katra market are situated hardly at a distance of 1 Km.; distance from Katra to Teliyarganj is less than 2 Kms.; Civil Lines to Jonhstonganj is barely 1 Km.; distance between Civil Lines and Chowk is less than 1 Km.. The entire area of Rajapur is commercial. In such background, the decision of the PDA to further allow the mixed area in the residential areas is unreasonable and unjustified. It shall have a serious environmental impact on the residents of the residential areas especially on the health of the senior citizens and the children, who will be affected by the pollution. Hence, in our opinion, having regard to the harsh ground level reality in the city of Prayagraj no further commercial activities should be allowed in the residential areas.

53. The Supreme Court in a long line of decisions has considered the impact of violation of the master plan and the commercial activities in the residential areas.

54. In **R.K. Mittal and others v. State of Uttar Pradesh and others9** the Supreme Court in Paragraphs-56, 58, 68 and 72 has observed as under:

"56. The running of a bank or a commercial business by a company in the residential sector is certainly not permissible. In fact, it is in patent violation of the Master Plan, Regulations and the provisions of the Act. We see no power vested in the Development Authority to permit such user and ignore the misuse for such a long period.

*** *** ***

58. The conduct of the authorities, prior to institution of the writ petitions in the High Court, showed uncertainty and wavering of mind in its decision-making processes. In fact, it was expected of the Development Authority to take a firm and final decision and put at rest the unnecessary controversy raised by its proposal. However, once the writ petitions were filed, thereafter, the stand of the Development Authority has been consistent and unambiguous. In the counter affidavit filed in this Court, it has been stated that even in case of grant of permission to the above stated two banks, no extension was granted and in fact show cause notices have been issued to all the banks in the residential sector to wind up their activities and move out of the residential sector. It is the definite case of the Development Authority that banking activity is a commercial activity and therefore, cannot be carried on in the residential sector, more particularly on the plots in question. In regard to Sector 19, a specific averment has been made in the affidavit of the Development Authority that the land use is residential alone and is neither commercial nor mixed. As per the Master Plan, its primary use is "residential" where plots are planned for residential purpose alone. It is, therefore, abundantly clear from the pleadings on record that commercial activity of any kind in the residential sector is impermissible. These pleadings are in conformity with the statutory provisions and the Master Plan.

*** *** ***

68. The Master Plan and the zonal plan specify the user as residential and therefore these plots cannot be used for any other purpose. The plans have a binding effect in law. If the scheme/Master Plan is being nullified by arbitrary acts and in excess and derogation of the power of the Development Authority under law, the Court will intervene and would direct such authorities to take appropriate action and wherever necessary even quash the orders of the public authorities.

*** *** ***

72. From the above dictum of this Court, it is clear that environmental impact, convenience of the residents and ecological impact are relevant considerations for the Courts while deciding such an issue. The law imposes an obligation upon the Development Authority to strictly adhere to the plan, regulations and the provisions of the Act. Thus, it cannot ignore its fundamental duty by doing acts impermissible in law. There is not even an iota of reason stated in the affidavits filed on behalf of the Development Authority as to why the public notice had been issued without amending the relevant provisions that too without following the procedure prescribed under law."

55. In **Machavarapu Srinivasa Rao and another v. Vijayawada, Guntur, Tenali, Mangalagiri Urban Development Authority and others10** the Supreme Court has held thus:

"20. An analysis of the above noted provisions shows that once the master plan or the zonal development plan

is approved by the State Government, no one including the State Government/ Development Authority can use land for any purpose other than the one specified therein. There is no provision in the Act under which the Development Authority can sanction construction of a building, etc. or use of land for a purpose other than the one specified in the master plan/zonal development plan. The power vested in the Development Authority to make modification in the development plan is also not unlimited. It cannot make important alterations in the character of the plan. Such modification can be made only by the State Government and that too after following the procedure prescribed under Section 12(3)."

56. The Supreme Court in the case of **Dipak Kumar Mukherjee v. Kolkata Municipal Corporation and others11** has held in Paragraphs- 2 of the judgment in the following terms:

"2. In the last four decades, the menace of illegal and unauthorised constructions of buildings and other structures in different parts of the country has acquired monstrous proportion. This Court has repeatedly emphasized the importance of planned development of the cities and either approved the orders passed by the High Court or itself gave directions for demolition of illegal constructions as in K. Ramadas Shenoy v. Town Municipal Council, Udipi12, Virender Gaur v. State of Haryana13, Pleasant Stay Hotel v. Palani Hills Conservation Council14, Cantonment Board, Jabalpur v. S.N. Awasthi15, Pratibha Coop. Housing Society Ltd. v. State of Maharashtra16, G.N. Khajuria v. DDA17, Manju Bhatia v. NDMC18, M.I. Builders (P) Ltd. v. Radhey Shyam Sahu19, Friends Colony Development Committee v. State of Orissa20, Shanti Sports Club v. Union of India21 and Priyanka Estates International (P) Ltd. v. State of Assam22."

57. In **M.C. Mehta v. Union of India and others23** the Supreme Court in Paragraphs- 46 and 51 of the judgment has held as under:

"46. In the present case, the land cannot be permitted to be used contrary to the stipulated user except by amendment of the master plan after due observance of the provisions of the Act and the Rules. Non taking of action by the Government amounts to indirectly permitting the unauthorized use which amounts to the amendment of the master plan without following due procedure.

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51. The growth of illegal manufacturing activity in residential areas has been without any check and hindrance from the authorities. The manner in which such large scale violations have commenced and continued leaves no manner of doubt that it was not possible without the connivance of those who are required to ensure compliance with law and reasons are obvious. Such activities result in putting on extra load on the infrastructures. The entire planning has gone totally haywire. The law abiders are sufferers. All this has happened at the cost of health and decent living of the residents of the city violating their constitutional rights enshrined under Article 21 of the Constitution of India. Further, it is necessary to bear in mind that the lawmakers repose confidence in the authorities that they will ensure implementation of the laws made by them. If the authorities breach that confidence

and act in dereliction of their duties, then the plea that the observance of law will now have an adverse effect on the industry or the workers cannot be allowed. Within the framework of law, keeping in view the norms of environment, health and safety, the Government and its agencies, if there was genuine will, could have helped the industry and workers by relocating industries by taking appropriate steps in last about 15 years. On the other hand, it encouraged illegal activities."

58. The Supreme Court in **Shanti Sports Club and another v. Union of India and others24** has observed that if a building is used for the purpose other than one specified in the master plan, such construction is not only burden on the infrastructure like water, sewerage, etc., but they also create chaos on the roads. "The pollution caused due to traffic congestion affects the health of the road users. The pedestrians and people belonging to weaker sections of the society, who cannot afford the luxury of air-conditioned cars, are the worst victims of pollution. They suffer from skin diseases of different types, asthma, allergies and even more dreaded diseases like cancer. The relevant part of the judgment reads as under:-

"74. ...The pollution caused due to traffic congestion affects the health of the road users. The pedestrians and people belonging to weaker sections of the society, who cannot afford the luxury of air-conditioned cars, are the worst victims of pollution. They suffer from skin diseases of different types, asthma, allergies and even more dreaded diseases like cancer. It can only be a matter of imagination how much the government has to spend on the treatment of such persons and also for controlling pollution and adverse impact on the environment due to traffic congestion on the roads and chaotic conditions created due to illegal and unauthorized constructions. This Court has, from time to time, taken cognizance of buildings constructed in violation of municipal and other laws and emphasized that no compromise should be made with the town planning scheme and no relief should be given to the violator of the town planning scheme etc. on the ground that he has spent substantial amount on construction of the buildings etc..."

59. In the said judgment the Supreme Court has noticed that despite repeated judgments of the Supreme Court and the High Courts the authorities have shown scant respect for the master plan, zonal development plans and they have received the encouragement and support from the State apparatus.

60. It is apt to mention that clean air is one of the facets of the fundamental rights of a citizen under Article 21 of the Constitution of India. In this regard, the observations of the Supreme Court in the case of **Bombay Dyeing & Mfg. Co. Ltd. (3) v. Bombay Environmental Action Group and others25** are apposite, which are quoted below:

"100. Both open space as also the other factors relevant for making the regulation would be in public interest. The question would, however, be as to which is of greater public interest. Public interest, thus, would be a relevant factor also for interpretation of the statute. Public interest so far as maintenance of ecology is concerned pertains to a constitutional scheme comprising Articles 14, 21, 48-A and 51-A(g) of the Constitution, the other factors are no less significant...

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115. Furthermore, interpretation of a town planning statute which has an environmental aspect leading to application of Article 14 and 21 of the Constitution cannot be held to be within the exclusive domain of the executive."

61. Applying the principles enumerated above, we are of the view that the PDA has failed to comply with the statutory provisions as the zonal development plans of all the zones have not been prepared as yet. The current zonal development plan only in respect of Zone B-4 is also against the provisions of the master plan. The decision of the PDA regarding mixed area needs a revisit of its policy in the light of discussions made above and the judgments of the Supreme Court referred above. The city is amongst 20 worst polluted cities in the world. Allowing the commercial activities in the residential areas shall make the situation worst and shall be irreversible. It will violate the fundamental rights of the citizens to have clean air and clean atmosphere to live a healthy and dignified life.

62. We are also concerned that several open spaces and parks, which are nazul land, are being allowed to be utilized for other purposes and buildings after obtaining the freehold converting the land for the other purposes, which is contrary to the law laid down by the Supreme Court in **M.I. Builders (Pvt.) Ltd. v. Radhey Shyam Sahu26,** which has been consistently followed by the Courts.

63. Before we part, we must express our deep concern over the manner in which the authorities have turned blind eyes to traffic congestion in the city. Despite several directions issued by this Court in suo motu public interest litigation, being **Public Interest Litigation (PIL) No. 1289 of 2019, In re: Parking Problem in Civil Lines Prayagraj and other places,** the situation appears to be irreversible for amongst one of the reasons that commercial buildings are not using their parking space shown in their sanctioned building plan, with the result the cars/ vehicles of their customers are parked on the roads. The parking space shown in their sanctioned maps are being used for other purposes such as godown and has been converted into shops.

64. During the course of arguments our attention was drawn to the facts that in recent years a large number of nursing homes and hospitals' building maps have been sanctioned, which do not have parking space in accordance with the building bye-laws of the PDA. The vehicles of their customers/ users are parked on roads causing serious inconvenience to pedestrians.

65. In view of the above, we issue following directions:

(1) The PDA shall prepare the zonal development plans strictly in accordance with the provisions of Sections 8 and 9 of the Act as well as the directions issued by the Division Bench of this Court in **Smt. Radha Rani Singh (supra).**

(2) Till the zonal development plans are prepared in terms of the master plan, no further commercial activity shall be allowed in the residential areas without assessment of the impact as directed in the public

interest litigation in **Ashok Kumar (supra)** and in the light of observations made in this judgment.

(3) While preparing the zonal development plans, the PDA shall pay regard to the law laid down by the Supreme Court in the judgments noted above regarding commercial use in the residential areas.

(4) The PDA shall ensure that all the commercial buildings, which have been sanctioned and made in the residential areas, shall strictly comply with the sanctioned building plan, wherein the parking area has been shown in their building plan. In case the parking area is used for the other purpose, they shall be given the notice to provide the parking space directly in accordance with their sanctioned map, failing which the establishment shall be sealed after expiry of the time.

(5) Till the fresh zonal development plan is prepared, no further map shall be sanctioned for commercial purpose in residential areas.

(6) The State Government/ District Magistrate shall not allow freehold applications in respect of parks and open spaces shown in earlier zonal development plan of Master Plan-2001 (which was enforced on 19.11.1995). The State shall cancel the freehold order of parks after furnishing opportunity to affected persons and restore the parks in the light of the law laid down by the Supreme Court in **M.I. Builders (supra)** within six months.

66. Coming back to the facts of this case, we find that the petitioners have challenged the impact fee for a sum of Rs.33,04,148.00 on the ground that the impact fee is not provided anywhere in the Act and the word itself is foreign to the legislation and as such, the fee having burden of more than Rs.33 lakhs is wholly illegal and without any authority of law. Similar argument has been raised in respect of the compounding fee. The petitioners have relied on the judgments of **Smt. Rekha Rani (supra), Smt. Nisha Kumari (supra)** and **Smt. Malti Kaul (supra).**

67. Learned counsel for the respondents has submitted that insofar as the judgments passed by this Court in the cases of **Smt. Rekha Rani (supra)** as well as **Smt. Nisha Kumari (supra)** are concerned, the PDA has filed special leave petitions in the Supreme Court, wherein interim orders have been passed. Hence, the PDA is entitled to realize the said fees.

68. We are of the view that the demand raised by the PDA shall be subject to the decision in the special leave petitions pending before the Supreme Court. Any deposit made by the petitioners shall abide by the result of the special leave petitions.

69. Learned counsel for the petitioners submits that the petitioners may be granted liberty to file a representation before the authority concerned in respect of the impact fee and compounding fee.

70. Having due regard to the facts of this case, we permit the petitioners to make a representation before the authority concerned of the PDA in respect of the impact fee, compounding fee, development charges and other fee. The representation of the petitioners shall be considered by the authority concerned in accordance with law expeditiously.

71. With the aforesaid observations and directions, this writ petition is disposed of.

72. No order as to costs.

(2020)02ILR A1792

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 20.09.2019

BEFORE

THE HON'BLE BALA KRISHNA NARAYANA, J.
THE HON'BLE PRAKASH PADIA, J.

Writ C No. 11960 of 2016

Smt. Seeta Devi & Ors. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Manoj Yadav

Counsel for the Respondents:
C.S.C.

A. Urban land (Ceiling and Regulation) Act, 1976-Proceedings initiated against Petitioners under the Act, 1976-17172.14 sq.meters land declared surplus on the basis of exparte survey report-appeale against the report-entire proceeedings abated-review filed-review rejected-no further proceedings initiated-possessions with the Petitioners-name of the Petitioners is to be recorded in place of 'State land'-W.P. allowed

Cases Cited:

1. PT. Madan Swaroop Shrotiya Public Charitable Trust vs. State of U.P. and Others reported in (2000) 6 SCC 325

2. Ram Chandra Pandey vs. State of U.P.reported in 2010 (82) ALR 136

3.State of U.P. vs. Hari Ram [JT 2013 (4) SC 275: 2013 (4) SCC 280]

4.Gajanan Kamlya Patil vs. Addl. Collector & Comp. Auth. & Ors. Reported in JT 2014 (3) SC 211

5.Yasin vs. State of U.P. and others reported in 2014 (4) ADJ

(Delivered by Hon'ble Prakash Padia, J.)

1. Heard Sri Manoj Yadav, learned counsel for the petitioners and learned Standing Counsel on behalf of all the respondents.

2. The petitioners have preferred the present writ petition with the following prayers:-

"i) to issue a writ, order or direction in the nature of certiorari quashing the impugned order dated 23.11.2015 passed by Sub Divisional Magistrate, Tehsil Sadar, District Allahabad/respondent no. 4 (Annexure No. 9 to the writ petition)

ii) to issue a writ, order or direction in the nature of Mandamus directing the respondents to correct the revenue record by deleting "State Land" in the Revenue Record against the name of the petitioners in respect of the land in dispute.

iii) to issue any other and further order or direction as this Hon'ble Court may deem fit and proper in the circumstances of the case.

iv) to award cost of the petition to the petitioner."

3. Facts in brief as contained in the writ petition are that the dispute relates to Khasra No. 119 area 297.26 square meter, 102 area 1561.76 square meter, 103 area 4561.76 square meter, 121 area 2508.97 square meter, 101 area 3531.73 square meter, 108 area 684.26 square meter, 109 area 1026.40 square meter, total area 17172.14 square meters situated in village

and Pargana Meerapur, District Allahabad. The proceedings under the provisions of Urban Land (ceiling and Regulation) Act 1976 (hereinafter called as Act, 1976) were initiated against the petitioners in which an area of 17172.14 square meters of land in dispute was declared surplus on the basis of ex-parte survey report dated 10.10.1995. Against the aforesaid report an appeal being appeal no. 332 of 1995 was preferred by the predecessors of the petitioners namely Sri Kanhee Lal as provided under section 33 of the Act of 1976 before the District Judge, Allahabad. The District Judge, Allahabad abated entire proceedings relating to the land in dispute vide order dated 17.12.2000 order passed in the aforesaid appeal which is reproduced below:-

"लोक अदालत में पुकार लगवायी गयी। उभय पक्षों के अधिवक्तागण उपस्थित है। अपीलार्थी की ओर से अबेटमेन्ट के सम्बन्ध में प्रस्तुत प्रार्थना पत्र एवं संलग्न शपथ पत्र की सुनवाई की गयी। विपक्षी/प्रतिउत्तरदाता की ओर से कोई आपत्ति या प्रतिशपथ पत्र प्रस्तुत नहीं किया गया।

भारत सरकार अरबन सीलिंग 1976 को अर्बन लैण्ड (सीलिंग एण्ड रेगुलेशन) रिपील एक्ट 1999 की धारा 4 के अन्तर्गत नगर भूमि सीमारोपण मूल अधिनियम को समाप्त कर दिया है और जिन वादों से सम्बन्धित भूमि का मुआवजा नहीं दिया गया है तथा कब्जा व दखल नहीं लिया गया वह सभी कार्यवाही स्वंय में समाप्त हो गयी और सभी जमीनें नगर भूमि सीमारोपण से मुक्त हो गयी। तद्नुसार यह सम्पूर्ण कार्यवाही अबेट किये जाने योग्य है।

आदेश

प्रार्थना पत्र स्वीकार किया जाता है। यह अपील अबेट होने के कारण इसकी समस्त कार्यवाही समाप्त की जाती है।"

4. The Saksham Adhikari, Nagar Nigam, Seema Ropan, Allahabad preferred a review petition against the order dated 17.12.2000, the same numbered as Misc. Case No. 930 of 2002 before the District Judge, Allahabad. During the pendency of the aforesaid review petition the predecessors of the petitioners namely Kanhee Lal Yadav died on 10.04.2003. District Judge, Allahabad rejected the aforesaid review petition vide his order dated 08.08.2008. It is further stated in paragraph no. 13 of the writ petition that the possession of the land in dispute was earlier with the predecessors of the petitioners and after their death the same is with the petitioners and the possession of the land in dispute was never taken from the petitioners.

5. It is further stated that due to the fact that the petitioners are in actual possession of the land in dispute the entire proceedings stood abated and the revenue records were liable to be corrected accordingly. It is further stated that against the aforesaid order dated 08.08.2008, no further proceedings were initiated by the respondents and as such in view of the provisions contained under Urban Land (Ceiling and Regulation) Repeal Act, 1999, revenue entry made in the Revenue Record in favour of the state is liable to be expunged. After the aforesaid order dated 08.08.2008 was passed various representations were made by the petitioners before the respondent nos. 2 to 4 to correct the entry in the Revenue Record and delete the word "State Land" from the revenue records in respect of the land in dispute. Since no orders were passed on the aforesaid representations, a writ petition was preferred by the petitioners before this Court being Writ Petition No. 68554 of 2011 (Smt. Seeta Devi and others vs. State of U.P. and others). On the said writ petition, following order was passed on 06.02.2015:-

"Heard learned counsel for the petitioners and learned standing counsel appearing for the respondents.

During course of arguments, learned counsel for the petitioners states that he is only pressing his prayer that a direction be issued to respondent no. 3 to decide the representation dated 19.09.2011 filed for the purpose of mutation of their names in the revenue record. He further states that by order dated 17.12.2000 the District Judge, Allahabad in Ceiling Appeal No. 332 of 1995 allowed his application praying for abatement of appeal to the effect that the appeal abates and all the proceedings with regard to the Urban Ceiling Act shall come to an end. Learned counsel for the petitioners further states that even review application no. 930 of 2001 filed by the State for reviewing the order dated 17.12.2000 was also dismissed by the learned District Judge on 8.8.2008 and the said order has become final as the same was not further challenged by the State/competent authority.

In the circumstances, without entering into the merits of the case, we dispose of this petition directing respondent no. 3 to decide the representation dated 19.09.2011 which is said to be still pending before him, by a reasoned and speaking order within a period of three months from the date of production of a certified copy of this order along with copy of order dated 17.12.2000 before the respondent no. 3."

6. The aforesaid order was duly served, in the office of opposite party. Since no action was taken in terms of the aforesaid judgment dated 06.02.2015 a contempt petition was preferred by the petitioners being Civil Misc. Contempt Application No. 4178 of 2015. The said contempt petition was finally disposed of by this Court vide its order dated 17.07.2015. By the aforesaid order the opposite party was granted three months further time to comply with the judgment and order dated 06.02.2015 passed in writ C No. 68554 of 2011 (Smt. Seeta Devi) Supra.

7. Pursuant to the aforesaid orders now a decision has been taken by the Sub Divisional Magistrate, Tehsil Sadar District Allahabad/respondent no. 4 on 23.11.2015. By the aforesaid decision the claim set up by the petitioners was finally decided and rejected by the respondent no. 4. It is stated in the aforesaid order that letters were already written by the District Magistrate, Allahabad to the State Government on 28.05.2015 and 17.11.2014 asking for the comments from the office of District Magistrate. Challenging the aforesaid order the petitioners have preferred the present writ petition.

8. It is argued by Sri Manoj Yadav, learned counsel for the petitioners that the order dated 23.11.2015 passed by the respondent no. 4 is an absolutely illegal order liable to be set aside by this Court. It is further argued that it has already been decided by the Apex Court in the case of **PT. Madan Swaroop Shrotiya Public Charitable Trust vs. State of U.P. and Others** reported in **(2000) 6 SCC 325** that if possession has not been taken of the land declared as surplus, the entire proceedings would be abated. It is further argued that the order dated 08.08.2008 passed by the District Judge, Allahabad in the appeal preferred by the respondents has became final and as such petitioners became entitled for their names being recorded in the revenue records in place of "State Land". It is further argued that in

large number of similar cases guidelines were duly issued by the Supreme Court from time to time for making necessary corrections in the revenue records by deleting the name of the State Government and substituting the name of original tenure holders.

9. A counter affidavit has been filed by the respondent nos. 2 and 4. In the counter affidavit it is stated that land to the extent of 17172.14 square meters of Beni Prasad son of Aloopi at residence of 126 Meerapur Allahabad was declared surplus under the provisions of Urban Land (Ceiling and Regulation) Act, 1976 on the basis of survey report submitted under section 8(4) of the Act of 1976 vide order dated 15.03.1982 and thereafter the final statement was issued as provided under section 9 of the Act of 1976. It is further stated in the counter affidavit that land holder filed an appeal being appeal no. 384 of 1982 before the District Judge, which was allowed by the order dated 24.05.1983 and the order dated 15.03.1982 was set aside and the matter was remanded to the Prescribed Authority. Thereafter the Prescribed Authority again passed an order dated 17.09.1985 declaring the land in dispute as surplus. Against the aforesaid order the tenure holder Benni Prasad filed a Review Petition before the Prescribed Authority which was dismissed on 21.03.1988. Against the order dated 21.03.1988 passed by the Prescribed Authority the land holder namely Benni Prasad filed an appeal being Appeal No. 253 of 1988 and on the said appeal an order dated 10.04.1989 was passed by the Prescribed Authority by which the matter was again remanded before the Prescribed Authority. At this point of time Prescribed Authority passed an order dated 10.10.1995 and rejected the objections. After the order dated 10.10.1995 was passed a Gazette notification was published on 19.08.1997 and 03.01.1998 as provided under section 10(1) and Section 10(3) of the Act of 1976. An order was passed for possession on 13.02.1998 as provided under section 10(5) of the Act of 1976 and the name of the State Government was recorded in the Revenue Records in place of the land holders.

10. Against the order dated 10.10.1995 an appeal was preferred by the land holders before the District Judge which was numbered as Ceiling Appeal No. 332 of 1995. District Judge in Lok Adalat has abated the appeal filed by the land holders vide judgment and order dated 17.12.2000. A Review Petition was preferred by the State Government before the District Judge, Allahabad for reviewing the order dated 17.12.2000 passed in Ceiling Appeal No. 332 of 1995 which was rejected by the District Judge vide his judgment and order dated 08.08.2008. After the aforesaid judgment dated 08.08.2008 was passed an application was submitted by the Prescribed Authority to the Urban Ceiling before State Government seeking permission from State Government for filing writ petition before this Court challenging the order dated 08.08.2008. It is argued that the permission is still awaited and as such writ petition could not be filed till date.

11. In the circumstances, it is argued by the learned Standing Counsel that no relief can be granted to the petitioners as prayed for by them in the present writ petition.

12. In the Rejoinder affidavit it is stated by the petitioners that once the Review Petition filed by the respondents

were rejected by the District Judge and since the aforesaid order has became final, the order passed by the respondent no. 4 dated 23.11.2015 is liable to be set aside and a mandamus is liable to be issued directing the State Government to correct the Revenue Records accordingly. It is further argued that the petitioners are in actual physical possession upon the land in question and as such in view of the Repealing Act, 1999 the entire proceedings are deemed to be abated.

13. Heard learned counsel for the parties and perused the record.

14. From perusal of the record, it is clear that an order dated 08.08.2008 was passed by the District Judge, Allahabad on the Review Petition filed by the State authorities. The said Review Petition was rejected by the District Judge, Allahabad. Against the aforesaid order dated 08.08.2008 no proceedings whatsoever has been initiated by the respondents till date. Complete procedure has been prescribed under section 10(5) and Section 10(6) of the Act of 1976.

15. The case of the petitioners is that though the land of the petitioners was declared as surplus under the provisions of the Act of 1976, but actual physical possession of the same was never taken and thus, the petitioners became entitled to the benefit of Section 3 of the Repeal act, 1999.

16. Specific case of the petitioners is that actual physical possession has not been taken and mere symbolic possession would not be sufficient as the petitioners continue in possession of the plot in question.

17. The issue was considered by the Division Bench of this Court in the case of ***Ram Chandra Pandey vs. State of U.P. reported in 2010 (82) ALR 136,*** wherein it was held that mere symbolic possession does not amount to taking over actual physical possession. It was further held that unless actual physical possession has been taken by the State, the party would be entitled to the benefit of the Repeal Act, 1999.

18. The same view has been taken by the Apex Court in the case of ***State of U.P. vs. Hari Ram [JT 2013 (4) SC 275: 2013 (4) SCC 280].*** The question for consideration before the Apex Court in the said case was whether deemed vesting of surplus land under section 10(3) of the Act would amount taking over de facto possession depriving the landholders of the benefit of the saving clause under sub-section (3) of the Repeal Act. This issue was answered by the Apex Court in para 39 of the said judgment, which reads as under:-

"The mere vesting of the land under sub-section (3) of Section 10 would not confer any right on the State Government to have de facto possession of the vacant land unless there has been a voluntary surrender of vacant land before 18.3.1999. State has to establish that there has been a voluntary surrender of vacant land or surrender and delivery of peaceful possession under sub-section (5) of Section 10 or forceful dispossession under sub-section (6) of Section 10. On failure to establish any of those situations, the land owner or holder can claim the benefit of Section 3 of the Repeal Act."

19. The same issue was considered by the Apex Court in the case of ***Gajanan Kamlya Patil vs. Addl. Collector & Comp.***

Auth. & Ors. reported in JT 2014 (3) SC 211.

20. There is no material in the counter affidavit to demonstrate that the State has taken peaceful possession, nor there is any material to demonstrate that the possession was handed over by the petitioners voluntarily or was taken over by use of force. There is not even a whisper in respect of any notice having been issued under section 10(6) of the Act. The facts clearly indicates that only dejure possession has been taken by the State, not de facto possession, before coming into force of the Repeal Act.

21. From perusal of the record, it is further clear that the procedure for taking over the possession has not been adopted by the State Government at any point of time. Moreover nothing has been stated in the entire counter affidavit whether any proceedings were taken by the State Government as provided under the Act of 1976. In Civil Misc. Writ Petition No. 13218 of 2008, **Yasin vs. State of U.P. and others** reported in **2014 (4) ADJ page 305** connected with two other writ petitions. It was pointed out that directions were issued by the State Government in the year 1983 namely Uttar Pradesh Urban Land and Ceiling (Taking Of Possession, Payment Of Amount and Allied Matters) Directions, 1983. It has already been held in the aforesaid case that the register should be maintained by the State Government maintaining therein the procedure adopted by them for taking over the possession for surplus land.

22. The twin questions which arise for our consideration in this writ petition, inter-alia, are that whether on the date of the coming into force of the Repeal Act, 1999, actual physical possession of the disputed land was with the petitioner or the same stood delivered to the State and; whether the petitioner is entitled to the benefit of the Repeal Act?

23. In order to examine the aforesaid questions, it would be useful to reproduce the provisions of The Urban Land (Ceiling and Regulation) Act, 1976 and The Urban Land (Ceiling and Regulation) Repeal Act, 1999 which are relevant for our purpose :-

6. Persons holding vacant land in excess of ceiling limit to file statement-

(1) Every person holding vacant land in excess of the ceiling limit at the commencement of this Act shall, within such period as may be prescribed, file a statement before the competent authority having Jurisdiction specifying the location, extent, value and such other particulars as may be prescribed of all vacant land and of any other land on which there is a building, whether or not with a dwelling unit therein, held by him (including the nature of his right, title or interest therein) and also specifying the vacant land within the ceiling limit which he desires to retain: Provided that in relation to any State to which this Act applies in the first instance, the provisions of this sub-section shall have effect as if for the words "Every person holding vacant land in excess of the ceiling limit and the commencement of this Act", the words, figures and letters "Every person who held vacant land in excess of the ceiling limit on or after the 17th day of February, 1975 and before the commencement of this Act and every person holding vacant land in excess of the ceiling limit at such commencement" had been substituted. Explanation.--In this section, "commencement of this Act" means,--

(i) the date on which this Act comes into force in any State;

(ii) where any land, not being vacant land, situated in a State in which this Act is in force has become vacant land by any reason whatsoever, the date on which such land becomes vacant land;

(iii) where any notification has been issued under clause (n) of section 2 in respect of any area in a State in which this Act is in force, the date of publication of such notification.

(2) If the competent authority is of opinion that--

(a) in any State to which this Act applies in the first instance, any person held on or after the 17th day of February, 1975 and before the commencement of this Act or holds at such commencement; or

(b) in any State which adopts this Act under clause (1) of article 252 of the Constitution, any person holds at the commencement of this Act, vacant land in excess of the ceiling limit, then, notwithstanding anything contained in sub-section (1), it may serve a notice upon such person requiring him to file, within such period as may be specified in the notice, the statement referred to in sub-section (1).

(3) The competent authority may, if it is satisfied that it is necessary so to do, extend the date for filing the statement under this section by such further period or periods as it may think fit; so, however, that the period or the aggregate of the periods of such extension shall not exceed three months.

(4) The statement under this section shall be filed,--

(a) in the case of an individual, by the individual himself; where the individual is absent from India, by the individual concerned or by some person duly authorised by him in this behalf; and where the individual is mentally incapacitated from attending to his affairs, by his guardian or any other person competent to act on his behalf;

(b) in the case of a family, by the husband or wife and where the husband or wife is absent from India or is mentally incapacitated from attending to his or her affairs, by the husband or wife who is not so absent or mentally incapacitated and where both the husband and the wife are absent from India or are mentally incapacitated from attending to their affairs, by any other person competent to act on behalf on the husband or wife or both;

(c) in the case of a company, by the principal officer thereof;

(d) in the case of a firm, by any partner thereof;

(e) in the case of any other association, by any member of the association or the principal officer thereof; and

(f) in the case of any other person, by that person or by a person competent to act on his behalf. Explanation.--For the purposes of this sub-section, "principal officer"--

(i) in relation to a company, means the secretary, manager or managing- director of the company;

(ii) in relation to any association, means the secretary, treasurer, manager or agent of the association, and includes any person connected with the management of the affairs of the company or the association, as the case may be, upon whom the competent authority has served a notice of his intention of treating his as the principal officer thereof.

7. Filing of statement in cases where vacant land held by a person is situated within the jurisdiction of two or more competent authorities.--

(1) Where a person holds vacant land situated within the jurisdiction of two or more competent authorities, whether in

the same State or in two or more States to which this Act applies, then, he shall file his statement under sub-section (1) of section 6 before the competent authority within the jurisdiction of which the major part thereof is situated and thereafter all subsequent proceedings shall be taken before that competent authority to the exclusion of the other competent authority or authorities concerned and the competent authority, before which the statement is filed, shall send intimation thereof to the other competent authority or authorities concerned.

(2) Where the extent of vacant land held by any person and situated within the jurisdiction of two or more competent authorities within the same State to which this Act applies is equal, he shall file his statement under sub-section (1) of section 6 before any one of the competent authorities and send intimation thereof in such form as may be prescribed to the State Government and thereupon, the State Government shall, by order, determine the competent authority before which all subsequent proceedings under this Act shall be taken to the exclusion of the other competent authority or authorities and communicate that order to such person and the competent authorities concerned.

(3) Where the extent of vacant land held by any person and situated within the jurisdiction of two or more competent authorities in two or more States to which this Act applies is equal, he shall file his statement under sub-section (1) of section 6 before any one of the competent authorities and send intimation thereof in such form as may be prescribed to the Central Government and thereupon, the Central Government shall, by order, determine the competent authority before which all subsequent proceedings shall betaken to the exclusion of the other competent authority or authorities and communicate that order to such person, the State Governments and the competent authorities concerned.

8. Preparation of draft statement as regards vacant land held in excess of ceiling limit-

(1) On the basis of the statement filed under section 6 and after such inquiry as the competent authority may deem fit to make the competent authority shall prepare a draft statement in respect of the person who has filed the statement under section 6.

(2) Every statement prepared under sub-section (1) shall contain the following particulars, namely:--

(i) the name and address of the person;

(ii) the particulars of all vacant land and of any other land on which there is a building, whether or not with a dwelling unit therein, held by such person;

(iii) the particulars of the vacant lands which such person desires to retain within the ceiling limit;

(iv) the particulars of the right, title or interest of the person in the vacant land; and

(v) such other particulars as may be prescribed.

(3) The draft statement shall be served in such manner as may be prescribed on the person concerned together with a notice stating that any objection to the draft statement shall be preferred within thirty days of the service thereof.

(4) The competent authority shall duly consider any objection received, within the period specified in the notice referred to in sub-section (3) or within such further period as may be specified by the competent authority for any good and

sufficient reason, from the person whom a copy of the draft statement has been served under that sub-section and the competent authority shall, after giving the objector a reasonable opportunity of being heard, pass such orders as it deems fit.

9. Final Statement.--After the disposal of the objections, if any, received under sub-section (4) of section 8, the competent authority shall make the necessary alterations in the draft statement in accordance with the orders passed on the objections aforesaid and shall determine the vacant land held by the person concerned in excess of the ceiling limit and cause a copy of the draft statement as so altered to be served in the manner referred to in sub-section (3) of section 8 on the person concerned and where such vacant land is held under a lease, or a mortgage, or a hire-purchase agreement, or an irrevocable power of attorney, also on the owner of such vacant land.

10. Acquisition of vacant land in excess of ceiling limit-

(1) As soon as may be after the service of the statement under section 9 on the person concerned, the competent authority shall cause a notification giving the particulars of the vacant land held by such person in excess of the ceiling limit and stating that--

(i) such vacant land is to be acquired by the concerned State Government; and

(ii) the claims of all person interested in such vacant land may be made by them personally or by their agents giving particulars of the nature of their interests in such land, to be published for the information of the general public in the Official Gazette of the State concerned and in such other manner as may be prescribed.

(2) After considering the claims of the persons interested in the vacant land, made to the competent authority in pursuance of the notification published under sub-section (1), the competent authority shall determine the nature and extent of such claims and pass such orders as it deems fit.

(3) At any time after the publication of the notification under sub-section (1) the competent authority may, by notification published in the Official Gazette of the State concerned, declare that the excess vacant land referred to in the notification published under sub-section (1) shall, with effect from such date as may be specified in the declaration, be deemed to have been acquired by the State Government and upon the publication of such declaration, such land shall be deemed to have vested absolutely in the State Government free from all encumbrances with effect from the date so specified.

(4) During the period commencing on the date of publication of the notification under sub-section (1) and ending with the date specified in the declaration made under sub-section (3)--

(i) no person shall transfer by way of sale, mortgage, gift, lease or otherwise any excess vacant land (including any part thereof) specified in the notification aforesaid and any such transfer made in contravention of this provision shall be deemed to be null and void; and

(ii) no person shall alter or cause to be altered the use of such excess vacant land.

(5) Where any vacant land is vested in the State Government under sub-section (3), the competent authority may, by notice in writing, order any person who may be in possession of it to surrender or

deliver possession thereof to the State Government or to any person duly authorized by the State Government in this behalf within thirty days of the service of the notice.

(6) If any person refuses or fails to comply with an order made under sub-section (5), the competent authority may take possession of the vacant land or cause it to be given to the concerned State Government or to any person duly authorised by such State Government in this behalf and may for that purpose use such force as may be necessary. Explanation.--In this section, in sub-section (1) of section 11 and in sections 14 and 23, "State Government", in relation to--

(a) any vacant land owned by the Central Government, means the Central Government;

(b) any vacant land owned by any State Government and situated in the Union territory or within the local limits of a cantonment declared as such under section 3 of the Cantonments Act, 1924 (2 of 1924), means that State Government.

Section 3 and 4 of the Repeal Act, 1999 are as hereunder :-

3. Saving.--

(1) The repeal of the principal Act shall not affect--

(a) the vesting of any vacant land under sub-section (3) of Section 10, possession of which has been taken over the State Government or any person duly authorised by the State Government in this behalf or by the competent authority;

(b) the validity of any order granting exemption under sub-section (1) of Section 20 or any action taken thereunder, notwithstanding any judgment of any court to the contrary;

(c) any payment made to the State Government as a condition for granting exemption under sub-section (1) of Section 20.

(2) Where--

(a) any land is deemed to have vested in the State Government under sub-section (3) of Section 10 of the principal Act but possession of which has not been taken over by the State Government or any person duly authorised by the State Government in this behalf or by the competent authority; and

(b) any amount has been paid by the State Government with respect to such land then, such land shall not be restored unless the amount paid, if any, has been refunded to the State Government.

4. Abatement of legal proceedings.--All proceedings relating to any order made or purported to be made under the principal Act pending immediately before the commencement of this Act, before any court, tribunal or other authority shall abate: Provided that this section shall not apply to the proceedings relating to sections 11, 12, 13 and 14 of the principal Act in so far as such proceedings are relatable to the land, possession of which has been taken over by the State Government or any person duly authorised by the State Government in this behalf or by the competent authority.

Upon perusal of the aforesaid provisions of the principal Act, it transpires that Section 6 provides that every person holding vacant land in excess of the ceiling limit was required to file a statement before the competent authority having jurisdiction specifying the location, extent, value and such other prescribed particulars of the vacant land and of any other land on which there was a building, whether or not with a dwelling unit therein, held by him.

Section 7 provides the procedure for filing of statement in cases where

vacant land held by a person was situated within the jurisdiction of two or more competent authorities.

Section 8 provides that on the basis of the statement filed u/s 6 and after such inquiry as the competent authority may deem fit to make, the competent authority shall prepare the draft statement.

Section 8 (3) stipulates that the draft statement prepared u/s 8 shall be served on the person concerned together with a notice stating that any objection to the draft statement shall be prepared within 30 days of the service thereof.

Section 9 provides that after disposal of the objections, if any, received under sub-section (4) of Section 8, the competent authority shall prepare the final statement.

Section 10 (1) provides that after the service of the statement u/s 9 on the person concerned, the competent authority shall cause a notification giving the particulars of the vacant land held by such person in excess of the ceiling limit to be published in the Official Gazette of the State concerned for the information of the general public.

Section 10 (2) empowers the competent authority to decide the claims of the persons interested in the vacant land filed in pursuance of the notification published under sub-section (1).

Section 10 (3) provides that the competent authority concerned may, by notification published in the Official Gazette of the State concerned, anytime after the publication of the notification under sub-section (1) declare that excess vacant land referred to in the notification published under sub-section (1) with effect from such date as may be specified in the declaration, be deemed to be have been acquired by the State Government. Such land shall be deemed to have vested absolutely in the State Government free from all encumbrances.

Section 10 (4) prohibits transfer by way of sale, mortgage, gift, lease or otherwise by any person any excess vacant land (including any part thereof) specified in the notification aforesaid and any such transfer made in contravention of this provision shall be deemed to be null and void and no person shall alter or cause to be altered the use of such excess vacant land.

Section 10 (5) empowers the competent authority to order any person by notice in writing who is in possession of any vacant land vested in the State Government under sub-section (3) to surrender or deliver possession thereof to State Government or to any person duly authorized by the State Government in this behalf within thirty days of the service of the notice.

Section 10 (6) states where any person refuses or fails to comply with an order made under sub-section (5), the competent authority may take possession of the vacant land or cause it to be given to the concerned State Government or to any person duly authorized by such State Government in this behalf and may for that purpose use such force as may be necessary.

24. From Perusal of the facts as stated above, it is clear that the actual physical possession of the land in dispute was never taken by the respondents at any point of time. Nothing has been stated in the entire counter affidavit regarding the procedure by which the actual physical possession of the petitioners were taken by the respondents. Moreover as stated above an order dated 17.12.2000 has already been passed by the District Judge, Allahabad in Ceiling Appeal No. 332 of

1995 by which the benefit of the Repealing Act of 1999 has already been provided to the petitioners. Further from perusal of the record it is clear that against the aforesaid order dated 17.12.2000 a Review Petition was preferred by the State Government before the District Judge, Allahabad which was numbered as Misc. Case No. 930 of 2002, the same was rejected by the District Judge, Allahabad vide its order dated 08.08.2008. The aforesaid order has became final between the parties. The entries in the Revenue records were not corrected by the State Authorities, a writ petition was preferred by the petitioners before the Court being Writ Petition No. 68554 of 2011 (Smt. Seeta Devi and Others Supra). On the basis of the directions given by this Court in the aforesaid writ petition on 06.02.2015 a decision has been taken by the respondent no. 4 dated 23.11.2015 rejecting the claim set up by the petitioners. The only reason given in the aforesaid order is that the letters were already written by the District Magistrate to the State Government seeking their comments in the matter. Record further reveals that till date no order whatsoever has been passed by the State Government pursuant to the letters written by the District Magistrate, Allahabad in the matter.

25. In the facts and circumstances of the case, we are of the opinion that the order passed by the respondent no. 4 dated 23.11.2015 which is under challenge in the present writ petition is liable to be quashed and the same is hereby quashed. A mandamus is issued to the respondents to correct the Revenue Records accordingly pertaining to the land in dispute by deleting the words 'State Land' from the Revenue Records and record the names of the petitioners in place of 'State Land'. The aforesaid exercise shall be completed by the respondents specially the respondent no.2/District Magistrate, Allahabad within a period of three months from the date of production of certified copy of this order before him.

26. With the aforesaid directions, the writ petition is allowed. No order as to cost.

(2020)02ILR A1803

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 11.11.2019

BEFORE

THE HON'BLE RAMESH SINHA, J.
THE HON'BLE AJIT KUMAR, J.

Writ C No. 20776 of 2019

All India Transformer Manufacturers Association & Anr. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Vivek Saran

Counsel for the Respondents:
C.S.C., Sri Krishna Agrawal

Government order -guidelines for quality check of transformers-if on inspection found defective-actions provided-challenged-as it amounts to modification of the conditions under agreement -between the parties-held-guidelines to be read in acclamation to terms and conditions provided under each agreement between the parties-impugned order not arbitrary-W.P. dismissed.

Cases cited:

Delhi Transport Corporation vs. D.T.C. Mazdoor Congress & ors, (1991) Suppl)1) Sec 600

(Delivered by Hon'ble Ramesh Sinha, J. & Hon'ble Ajit Kumar, J.)

1. Heard Sri Vivek Saran, learned counsel for the petitioners Sri Krishna Agrawal, learned counsel appearing for respondent Nos.2 and 3-Corporation and learned Standing Counsel for respondent No.1.

2. By means of this writ petition under Article 226 of the Constitution of India the petitioner has challenged the Government Order dated 23.05.2019 whereby certain guidelines have been provided for *qua* quality check of transformers and on inspection such transformers, if detected be defective, certain actions have been further provided for.

3. Assailing the Government Order the grievance raised by the petitioner is that the Government Order directly affects each individual contract entered between the tenderer and the Corporation *qua* the supply of product and, therefore, no separate directions can be issued as they would amount to modification of the conditions under the agreement between the two parties. He has taken us to the relevant provisions of notice inviting tender subject to which the supply has to made and in which various stages of inspections have been provided for. He further submits that since under the contract there is specific provision for maintenance in case of supply of the transformers and also there are certain guarantees that stand *qua* the transformers installed, it amounts to specific precautions to check quality control. He, therefore, submits that there was no occasion to issue a Government Order over and above the terms and conditions subject to which tender was accepted and agreement reached.

4. He has further assailed the order on the ground that the time period prescribed for black listing as minimum three years is also not in public interest. He submits that each individual case is to be tested and if the transformer supplied are found to be defective one and the terms of contract have been found to be violated, obviously it will lead to penal action. Thus, he submits that each case should be tested on its facts particular to that case and then only any order should be passed.

5. *Per contra*, the argument advanced by learned Standing Counsel as well as learned counsel appearing for the Corporation is that the Government Order has been issued only providing guidelines and these guidelines not in derogation to the agreemententered into between the parties. He, therefore, submits that challenge to the Government Order is an absolutely misplaced grounds. He further submits that these are only by way of precautionary measures that have been adopted for by the Government and it cannot under any circumstance be read as eroding the principles governing privity of contract between the parties.

6. Having heard learned counsel for the parties and having perused the records and having gone through specific provisions of the Government Order, we find that the Government Order lays down certain conditions for the purposes of testing and inspection of the transformers and provides certain measures to be adopted so that the transformers supplied are qualitative one. In fact, the Government Order is only by way of a measure for quality control.

7. There is always presemption of legislative action being valid and lawful and so also in respect of a Government Order if it is issued in the field not already covered by any legislation.

8. A Government Order providing law in a field not already occupied by any Act or Rule would fall in the category of primary legistation (Nawal Kishor Mishra Vs. High Court of Judicature at Allahabad, (2015) 5 SCC 479).

9. Constitution too vide Article 13(3)(a) defines laws as an Ordinance Order, by-laws, regulation, notification etc. If legislature has not enacted law and executive government issues any Government Order, it raises presumption of its validity. In the case of **Delhi Transport Corporation Vs. D.T.C. Mazdoor Congress and others, (1991) Suppl (1) Sec 600** the Apex Court laid down a very broad test *qua* judicial review of a legislative action while its constitutional validity is under challenge vide para 255 thus:

"255. It is thus clear that the doctrine of reading down or of recasting the statute can be applied in limited situations. It is essentially used, firstly, for saving a statute from being struck down on account of its unconstitutionality. It is an extension of the principle that when two interpretations are possible ? one rendering it constitutional and the other making it unconstitutional, the former should be preferred. The unconstitutionality may spring from either the incompetence of the legislature to enact the statute or from its violation of any of the provisions of the Constitution. The second situation which summons its aid is where the provisions of the statute are vague and ambiguous and it is possible to gather the intentions of the legislature from the object of the statute, the context in which the provision occurs and the purpose for which it is made. However, when the provision is cast in a definite and unambiguous language and its intention is clear, it is not permissible either to mend or bend it even if such recasting is in accord with good reason and conscience. In such circumstances, it is not possible for the court to remake the statute. Its only duty is to strike it down and leave it to the legislature if it so desires, to amend it. What is further, if the remaking of the statute by the courts is to lead to its distortion that course is to be scrupulously avoided. One of the situations further where the doctrine can never be called into play is where the statute requires extensive additions and deletions. Not only it is no part of the court's duty to undertake such exercise, but it is beyond its jurisdiction to do so."

10. Applying the above test to the provisions contained under the Government Order, we do not find any ambiguity in the language and the intention behind it.

11. On pointed query being made to learned counsel for the petitioner as to what malice in law can be detected if the Government Order is to be tested on the testing *anvil* of Article 14 of the Constitution, learned counsel for the petitioner only submitted that it is encroaching upon the field of an agreement which is governed by the principles of privity of contract between the two parties and thus, Government Order virtually amounts to modifying the terms of contract.

12. Under the Government Order in its very first paragraph it indicates that it is in the form of guidelines and so we would be holding that these guidelines are to be

read in acclamation to terms and conditions provided under each agreement between the parties.

13. Thus, we do not find any merit in the arguments advanced by learned counsel for the petitioner that the Government Orders suffers from an illegality as such so as to hold it bad. Neither the exercise in issuing such Government Order is found arbitrary nor content thereof in any manner are found to be against the public policy and/or public interest. We do not find it to be in any manner vitiated for any bias or perversity in providing for a period black listing. Thus, we decline to interfere in the present writ petition.

14. However, we hastened to add that every agreement has its own sanctity which is to be maintained and in case if the terms and conditions are violated and during inspection the transformers are found to be defective the action shall be taken strictly in accordance with law within the four corners of the terms and conditions entered between the parties qua the contract. And we may further observe that in case, if the individual has been visited with the penalty of black listing, it is always open for such individual to approach this Court against the order of the black listing and each case is to be tested on its own facts.

15. The writ petition, with the aforesaid observations, is consigned to records.

(2020)02ILR A1806

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 02.12.2019

BEFORE

THE HON'BLE AJAY BHANOT, J.

Writ C No. 26755 of 2019

Mohammad Ghayas ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Sri Arvind Kumar Upadhyay, Sri Sanjay Pathak

Counsel for the Respondents:
C.S.C., Sri Shashank Shekhar Singh, Sri Abrar Ahmad, Sri Rizwan Ali, Sri Vinod Kumar Shukla

Petitioner debarred over an alleged incidence of voilence-debarred by University-order debarring bad-passed in mechanical manner-prospects of reformation of young adult to be considered-W.P. partly allowed.

Cases Cited

1. Rattan Chand Hira Chand v. Askar Nawaz Jung, reported at (1991) 3 SCC 67

2. Vishaka Vs. State of Rajasthan, reported at 1997 (6) SCC 241

3. Avinash Negara vs. Navodaya Vidyalaya Samiti and others (1997) 2 SCC 534

4. Ajay Singh Vs. Union of India and Others

5. Sajjan Singh v. State of Rajasthan, reported at AIR 1965 SC 845

6. Kesavananda Bharati v. State of Kerala, reported at (1973) 4 SCC 225.

7. Maneka Gandhi v. Union of India, (1978) 1 SCC 248

8. Olga Tellis v. Bombay Municipal Corpn. Reported at (1985) 3 SCC 545)

9. Prem Shankar Shukla v. UT of Delhi, reported at (1980) 3 SCC 526

10. Francis Coralie Mullin v. UT of Delhi

11. Bandhua Mukti Morcha v. Union of India, reported at (1984) 3 SCC 161

12. Khedat Mazdoor Chetna Sangath v. State of M.P., reported at (1994) 6 SCC 260

13. M.Nagaraj v. Union of India, reported at (2006) 8 SCC 212

14. Shabnam v. Union of India, reported at (2015) 6 SCC 702

15.Jeeja Ghosh v. Union of India, reported at (2016) 7 SCC 761

16. National Legal Services Authority v. Union of India, reported at (2014) 5 SCC 438.

17. Maharasthra University of Health Sciences v. Satchikitsa Prasarak Mandal reported at (2010) 3 SCC 786

18. T.K. Gopal v. State of Karnataka, reported at (2000) 6 SCC 168

19. Bijoe Emmanuel and others vs. State of Kerala and others, reported at (1986) 3 SCC 615

20. Asfaq v. State of Rajasthan and Others, reported at (2017) 15 SCC 55

21. K.S. Puttaswamy v. Union of India reported at (2017) 10 SCC 1

22. Armoniene v. Lithuania, reported at (2009) EMLR 7

23. ET AL. Vs. Martinez ET AL. reported at 416 U.S. 396 (1974) (US Supreme Court)

24. Avinash Nagra Vs. Navodaya Vidyalaya Samiti and Others, reported at (1997) 2 SCC 534

25. Devarsh Nath Gupta Vs. State of U.P. and Others, reported at 2019(6) ADJ 296 (DB)

26. Ranjit Thakur Versus Union of India, reported at (1987) 4 SCC 611

(Delivered by Hon'ble Ajay Bhanot, J.)

1. This judgment has been structured by dividing it into various sections to facilitate analysis and for easy read. They are:

A.	Reliefs sought
B.	Arguments of learned counsels for the parties
C.	Facts
D.	Legal Issues common in all writ petitions
E.	Stands of various respondents on affidavits (i).Response of IIT BHU (ii).Response of AMU (iii).Response of BHU (iv).Response of UGC (v).Response of UoI
F.	Evolution of Fundamental Rights by courts (i) Legislative lag, executive inertia and fundamental rights
G.	Process of law and the courts : Current State & Contemporary challenges
H.	Education (i). Importance and scope (ii). Role and obligation of universities
I.	Discipline in Universities: Concept, Need & Challenges (i). Violence, intimidation and moral turpitude (ii). Communal disturbances in universities (iii). Discipline in universities (iv). Statutory approach to maintaining discipline
J.	Statutory Regime of Punishments in light of Article 21 & Doctrine of Proportionality
K.	Punishments & Article 21 (i). Right to human dignity (ii). Supreme Court on human dignity (iii). Comparative International Jurisprudence (iv). Constitutionality of punishments under the statutes

	(v). Systemic responses : Responsibilities of the State and the universities
L.	Reform, Self Development & Rehabilitation: (i). Role of universities in achieving behavioural change (ii). Imbibing constitutional values and purging communal hatred (iii). Present discontents of students and solutions (iv). Creation of reform/self development/rehabilitation programmes (v). Concerns of universities regarding discipline, & restraints during the reformation, self development & rehabilitation programme
M.	Proportionality and Punishment
N.	Conclusions & Reliefs
O.	Appendix

A. Reliefs sought

2. By order dated 22/23.08.2016, the petitioner was debarred from the University for six academic sessions 2016-17.

3. By order dated 23.03.2019, the representation of the petitioner for revocation of the debarment of the petitioner for admission in any course in the AMU for six academic sessions commencing from 2016-17 which he intends to pursue in University, was rejected.

4. The petitioner has passed his Diploma in Engineering (Mechanical Production) from the respondent University.

5. The petitioner has assailed the order dated 23.03.2019 passed by the respondent no. 4, Proctor, Aligarh Muslim University, Aligarh and the order dated 22/23.08.2016 passed by the respondent no. 2, Vice Chancellor, Aligarh Muslim University, Aligarh, in the instant writ petition.

6. The petitioner has also prayed for a writ in the nature of mandamus to command the respondents to permit him for further studies in the University.

B. Arguments of the learned counsel for parties

7. Sri R. K. Ojha, learned Senior Counsel assisted by Sri Ratnakar Upadhyay, learned counsel for the petitioner submits that the impugned order was passed in violation of the statutes of the university. The punishment imposed upon the petitioner is disproportionate. There is no provision for reform and rehabilitation of delinquent students in the statutes, which has resulted in violation of the fundamental right of the petitioner guaranteed under Article 21 of the Constitution of India.

8. Sri Anish Kumar, Sri Pankaj Misra and Sri Gaurav Pundir, learned counsels for the petitioner in connected writ petitions adopt the aforesaid arguments of the learned Senior Counsel, apart from raising factual issues peculiar to the respective writ petitions in which they appear.

9. Sri V. K. Upadhyaya, learned Senior Counsel assisted by Sri V.D. Chauhan, learned counsel for the BHU submits that the BHU has taken action as per law.

10. The learned Senior Counsel relied on the affidavits filed by the B.H.U., on creation of a reform and rehabilitation programme for delinquent students.

11. Sri Ajit Kumar Singh, learned Senior Counsel assisted by Sri V. D. Chauhan, learned counsel for the IIT BHU, contends that the IIT BHU, as a matter of policy accepts and is willing to adopt a professionally designed reform and rehabilitation programme for delinquent students. However, good order and discipline have to be maintained in the

university, at all costs. In fact IIT BHU is currently even running a reform programme. He fairly conceded that the programme is not fully developed and does not have a supporting statutory/legal frame work.

12. Sri Shashank Shekhar Singh, learned counsel for the respondent-AMU, submits that the AMU fully accepts the idea of a reform and rehabilitation programme for delinquent students on an institutional basis. He however contends that no compromise with the good order, discipline, and the stability of the academic atmosphere can be made in any manner.

13. Sri Rizwan Akhtar, learned counsel for the UGC, Sri Rakesh Srivastava, and Sri Abrar Ahmed, learned counsels for the Union of India, have also been heard.

C. Facts

14. The order of expulsion and debarment dated 22/23.08.2016 was passed on the foot of an incident of violence, which happened on 07.12.2015. The office memo dated 22.08.2016, records that some persons including one Osama Javed, an anti-social element brutally assaulted some students of the University namely Mohd. Sadiq and and Aatif Afaq. They also opened fire with a country made pistol (Katta). The finding of disciplinary committee against the petitioner is set forth below:

"Aforementioned student, Mohd. Ghayas has recently completed his Diploma Engineering and presently doing a job in Gurgaon. He was a NRSC student and had no reason to be involved in the assault with Naved Ahmad Khan on 07.12.2015."

15. The incident of violence happened on 07.12.2015, when some persons while possessing a country made pistol (Katta), baseball bat and iron rod and physically assaulted Naved Ahmad Khan, an ex-student, causing severe injuries. Injured Naved Ahmad Khan had undergone an ankle fracture surgery.

16. The proceedings were instituted against the accused, including the petitioner, by registration of FIR No. 780/15, under Section 323, 325 and 506 IPC. The petitioner was expelled from the University and barred from admission to any courses for six academic sessions by order dated 22/23.08.2016.

17. The petitioner was acquitted of the charges against him by learned trial court in criminal case no. 8479 of 2016, State Vs. Mohd. Khalid and others, by the learned Chief Judicial Magistrate, Aligarh. Despite the acquittal, the petitioner was not permitted, to pursue his studies in the University.

18. Thus aggrieved, the petitioner upon his acquittal, approached this Court, by instituting a writ petition. The petitioner wanted pursue his academic courses, and evolve into a law abiding citizen of the country. The aforesaid writ petition instituted by the petitioner is Mohd. Ghayas Vs. Rajya Uttar Pradesh Dwara Pramukh Sachiv Shiksha and others, registered as Writ C No. 5403 of 2019 was disposed of by a judgment and order rendered on 15.02.2019. The the judgment is being extracted hereunder in extenso:

"The petitioner was debarred from the University for six academic sessions from 2016-17 on the count that the petitioner involved in a criminal case.

Submission of learned counsel for the petitioner is that the petitioner has been exonerated in the criminal case by the competent trial court. The petitioner has moved an application for reinstatement in the University to enable him to pursue his course.

Learned counsel for the petitioner submits that the petitioner has made an application to the Vice Chancellor, Aligarh Muslim University, Aligarh for revocation of the order of debarment. He submits that the petitioner is desirous to further pursue his academic career.

The only prayer made by the learned counsel for the petitioner is that the application for revocation of the order of debarment of the petitioner and for admission in any other course which he intends to pursue in the University, may be decided within a stipulated period of time.

Sri Shashank Shekhar Singh, learned counsel for the respondent University in his usual fairness does not dispute the aforesaid prayer.

Matter is remitted to the respondent no. 2 Vice Chancellor, Aligarh Muslim University, Aligarh.

A writ of mandamus is issued commanding the respondent no. 2, Vice Chancellor, Aligarh Muslim University, Aligarh to decide the application of the petitioner for revocation/recalling of the order of debarment within a period of one month. While deciding the representation of the petitioner, the Vice Chancellor, Aligarh Muslim University, Aligarh shall keep in mind the prospects of reformation of a young adult. The petitioner may be given a chance to redeem himself and efface the taint of the past by good conduct in future.

However, it is clarified that this Court has not prejudged the issue. It is open to the Vice Chancellor, Aligarh Muslim University, Aligarh to decide the matter as per law.

The writ petition is disposed of finally."

19. In compliance of the order, the Proctor, AMU passed an order dated 23.03.2019, which is also impugned in this writ petition.

D. Legal Issues common in all writ petitions

20. Absence of any reform and rehabilitative measures, in the administrative and legal frameworks of the universities, has serious legal and constitutional implications.

21. The impugned action and the statutory regime, of imposing punishments, will also be judged in such constitutional and legal perspectives. The discussion on these issues, shall be common in all the companion writ petitions.

22. Calling attention to the statutes of the universities namely, BHU, IIT BHU and AMU, the learned counsels for the petitioners; contended that the said statutes do not contain provisions for reform and rehabilitation of delinquent students. The action against delinquent students, is governed and regulated, solely by the penal provisions of the statutes of the respective universities. The punitive scheme is a common thread, in the statutes of all the three universities.

23. In response, all the counsels for the various respondents universities', in

fact conceded, that as on date no structured and professionally designed programmes for reform, self development and rehabilitation of delinquent students, backed by a proper legal frame work, exist in the respective universities.

24. Accordingly, various orders were passed by this Court, from time to time, requiring the respective universities namely, Banaras Hindu University, Indian Institute of Technology Banaras Hindu University, and Aligarh Muslim University, as well as the University Grants Commission and the Union of India through the Ministry of Human Resource Development, New Delhi, to submit their responses in regard to creation of a reform and rehabilitation frame work, for delinquent students in universities and institutions of higher learning. The respondents were also required to indicate, whether they had any opposition or even reservation, in regard to the creation of the reform and rehabilitative programme for delinquent students in the universities.

25. All the respondents namely Banaras Hindu University (hereinafter referred to as BHU), Indian Institute of Technology, Banaras Hindu University (hereinafter referred to as IIT BHU), Aligarh Muslim University (hereinafter referred to as the AMU) as well as Union of India through Ministry of HRD and University Grants Commission (hereinafter referred to as UGC) have submitted their responses to the aforesaid issues.

E. Stands of respective respondents on affidavits

(i) The response of IIT BHU

26. The IIT BHU in its affidavit has recorded its full agreement with a reform oriented approach, to deal with deviant behaviour in students. Thus IIT, B.H.U., has made a ringing endorsement, of the need to adopt a reform and rehabilitation programme for delinquent students. However, it has also underscored the need for punitive action, to maintain a peaceful environment in the campus. The relevant paras of the affidavit are quoted hereinunder:

"2. That the present affidavit is being filed in compliance of the order dated 19.9.2019 passed by this Hon'ble Court.

4. That the Institute as indicated in the foregoing paragraph, is in full agreement with a reform oriented approach. However, in cases where reformative steps do not yield the desired corrections in behavior and actions of erring students, the Institute has to resort to punitive action in order to maintain the peaceful environment in the campus."

27. By categorically stating its commitment to reform of delinquent students, the IIT BHU has been true to its founding principles, and has faithfully discharged its obligations, under law and to the society.

(ii) Response of AMU

28. Upon orders being passed by this Court, the AMU to its credit, constituted an expert committee. The report of the expert committee has been submitted, and is made part of the record of the Court. The relevant parts of the Committee Report are extracted hereinbelow:

"In the light of the above the committee observes as under:

1. Our criminal justice system envisages two type of laws: one for Juveniles and second for other than Juveniles. There is a separate law for Juveniles known as Juvenile Justice Act, 2015 whereas others are covered under Code of Criminal Procedure, 1. 1976 and Indian Penal Code, 1860. The application of AMU Discipline and Conduct Rules, 1985 does not come primarily under the definition of Juvenile therefore the protection available to Juveniles are not available to the Students of the university in general. It becomes more relevant in view of the fact that at the time of admission every the disciplinary jurisdiction of the Vice Chancellor and the other authorities of the University is required to sign a declaration to the effect that he submits himself to the disciplinary jurisdiction of the Vice Chancellor and the other authorities of the University.

2. That it is also pertinent to mention here that Aligarh Muslim University is primarily a RESIDENTIAL UNIVERSITY and there are approximately 36,665 Students [22.593 University Students and departments/courses/Schools in the Aligarh Muslim University. Among these students 12,158 students reside in 56 Hostels (22 for girls) in the campus within the radius of 10 KM. Therefore, the future career of thousands of the students cannot be allowed to be jeopardized for the sake of handful of students who are involved in the indiscipline act and are destroying the whole atmosphere of the University.

3. In principle that criminal activity has no role to play in our education system therefore the students who are involved in the criminal activity have also no role to play in our education system. The students who are indulged in the criminal activity have different mind-set and have nothing to do with their studies. They are not at all interested to pursue their studies and their presence only hampers the study of the other students who are interested to pursue their study. It is the duty of the University to marginalize such type of students so that the students at large, who are more interested to pursue their studies, may pursue their studies in cordial and peaceful/ atmosphere.

4. That as per existing rules of the University, there is no compulsory/ mandated counselling available to students against whom the discipline and conduct rules are invoked. These rules are also not invoked in a routine way but being a residential University there are day-today interactions/counselling with the Wardens, Provost Tutors, Teachers and Senior Students holding positions of Senior Hall/Food etc.

5. That the extreme punishments as provided in the 1985 rules are invoked when there is an extreme situation and continuance/presence of the students became a threat to the academic environment and campus life of the University.

6. At the same time the observations of the Hon'ble Mr. Justice Ajay Bhanot in this matter are highly appreciable in the context to infuse a reformative approach that the solution lies in engaging with the students, and harnessing their energies creatively. Errant behavior has to be reformed and not condemned. Erring students have to be transformed and not judged. The purpose of education is to unlock the immense potentiality in the human resource of the nation. This is possible by bringing about a conceptual shift in the concept of

enforcing discipline, in the portals of the University. Indiscipline unchecked is indiscipline unleashed. But it is equally true. that expelling students from the University is a short term, if not a myopic view of the issue. A balance has to be drawn by the University authorities. The University has to create an ecosystem, with qualified staff and detailed programs of engaging with such students, with a view to give them an opportunity to reform themselves. Expulsion of students would abandon them to their own devices, close the doors of reformation to them, and shut them out from the redeeming light of knowledge. Leaving children accused of misconduct or deviant behavior, to fend for themselves would create issues for the society at large. In case Universities decline to shoulder the responsibilities of bringing such children back to the correct path, and do not provide the frame work for mainstreaming this class of students, the consequences would be detrimental to the society at large. There is no better institution in our democratic frame work, to embrace the young and questing spirits who have strayed from their path of morally upright and correct conduct. The Universities are uniquely equipped to deal with the challenge on an institutional basis. The Universities are repositories of knowledge, resources and experience to meet the challenge at hand. What is at stake, is not merely the future of an individual, but stability of the society The concerns of the society have to be handled by the University. The magnitude of the challenge is large, but it is imperative for the Universities to accept it and provide the adequate response.

After detailed deliberations and in the backdrop of above the committee proposes that:

1. Structural reformative approach may be included in the AMU Students Conduct and Discipline Rules of 1985 as this committee has identified some areas (not all inclusive) for counselling by a psychologist as enumerated above.

2. As the misconduct offences/crimes related to internet and cyberspace were not available when the Discipline Rules were framed, the same needs to be identified and appropriately included in the AMU Students Conduct and Discipline Rules of 1985 as it is growing among young and youth.

3. Outside campuses were not established when these rules were framed, hence, there is also need to amend these rules to include a structure for those centres.

The committee therefore recommends to the Vice-Chancellor as follows:

AMU Students Conduct and Discipline Rules 1985 were framed almost 30 years back and in the light of the observations given above, a detailed and exhaustive exercise may be undertaken by a committee to be appointed by the Vice-Chancellor under the convenorship of the Proctor of the University to formulate and propose a draft of revised AMU Students Conduct and Discipline Rules, inclusive of reformative approach, after exploring similar rules already enforced by sister universities and institutions in India and abroad for further consideration of the Vice-Chancellor and Academic Council of the University."

29. The AMU has thus in principle, recognized the need for a reform and rehabilitation programme for delinquent students in some areas in the university. The AMU too has accorded top priority, to the maintenance of discipline in the campus, and is rightly unwilling to compromise with the same.

(iii) Response of BHU

30. The initial affidavit filed by the BHU, in regard to their stand on a reformative and rehabilitation programme for delinquent students, stated in effect that the reformation of the students indulging deviant behaviour is achieved, by providing for various categories of punishments, depending upon the nature of indiscipline. It further asserted, that in the name of reformation, the University cannot give a "go by", to the objectives of the university. The relevant paras 17 and 18 of the affidavit dated 17.09.2019 are extracted hereunder:

"17. In the present case no such conditions exist and as such the continuance of the order of suspension of the petitioner from the privileges of the University and Hostel is in accordance with law. That 17. it is the University humbly that submitted administration and the Vice-Chancellor in particular is the custodian of the interests of all the students involved in various academic pursuits in the University. In the case of Banaras Hindu University the number of all the students at various levels runs into more than 30 thousand. For the smooth functioning of the University and maintenance of an environment conducive to academic pursuits the interest of an individual student must give way to the larger interests of all the students as a whole. This is not only in the interest of the students themselves but also in public interest. In the of reformation of the students the University name administration cannot give a go by to the objectives of the University nor can it take an action which may have the potential of destroying the smooth functioning of the University embroiling the University in large scale unrest both in the student as well as in the teaching community. If the University such situation is brought about a administration would be failing in its duty. The fact that Banaras Hindu University is the largest residential University in the country if not the world cannot be lost sight of. Even small spark has the potential of turning into a conflagration which may become difficult to contain.

18. That the facility and provisions aimed at reformation of the erring students found indulging in deviant behavior is inherent in the Ordinances of the University dealing with students' indiscipline by providing for various categories of punishments depending upon the nature of indiscipline."

31. However, subsequently, the BHU filed an affidavit on 26th September, 2019, easing its reservations, against a reform and rehabilitation programme. The affidavit exhibited a shift in stand, indicating a willingness to consider a reformative approach. The para 7 of the affidavit is extracted hereunder:

"7. That all the aforesaid mechanisms and provisions exist in the University for creation and preservation of an academic ambience conducive to teaching and learning and vibrant and peaceful community life. However, there exist no provision in the Rules of the

University for any formal reformative mechanism or process for such students as are found involved in an offence involving moral turpitude or heinous crime and hence are suspended from the privileges of the University. However, the University is not averse to considering this aspect, if it is found appropriate by the University through Constitution of a Committee of stakeholders which may look into as to whether such a mechanism is desirable in principle in the context of maintenance of academic ambience of the University or it may be detrimental to it, particularly, to the interest of larger group of the students, teachers and employees."

32. In substance the BHU was open to the concept of a structured reformative programme. It has however, desisted from taking a categorical position, on this most critical issue. While openness to new ideas is appreciated, failure to take a specific stand is also noticed. The Court will go no further.

(iv) Response of UGC

33. Sri Rizwan Ali Akhtar, learned counsel for the UGC has relied on the affidavit filed by the UGC. The UGC in its affidavit, stated that the universities are autonomous institutions. The academic and administrative decisions, are to be taken by the universities concerned, as per law. It was also stated that "the UGC has no role to play on day to day function of the Central Universities".

(v) Response of UoI

34. The Ministry of Human Resource Development, Government of India has chosen not to file any affidavit, despite orders passed by the Court and opportunities granted by the Court. The Court has to proceed, with the hearing in the interests of justice.

35. It was informed that the Ministry of Human Resource Development, Government of India, on its part had sent communications to the AMU and BHU, to protect its interests. The Court finds that the interests of the Union of India, are in no manner adversely affected. In these cases the interests of the Union of India, are not converse to the universities.

"The best lack all conviction."
~WB Yeats

36. Present discontents cannot be addressed by rote responses. Contemporary problems cannot be resolved by jejune formulae.

37. The universities cannot avoid a stand at the decision point. By prevarication at the decision point, the university may postpone the reckoning, but cannot escape responsibility.

38. Law has to hold institutions accountable to their obligations, to the founding purposes, to the students and to the society at large.

39. Universities of eminence cannot justify present inertia on the foot of past glory. Universities have to be aware of the risks, of basking in the reflected glory of the past. Eminence is achieved by past glory, however, reputation is retained by present endeavours.

40. Universities at certain critical decision points, would be true to their founding purposes and extant obligations by making clear and creative interventions. The universities as well as other authorities cannot show ineptitude in the face of crises, and equivocation in the face of solutions. In these critical situations the universities as well as other authorities,

have to stand up and intervene and not stand by and equivocate.

F. Evolution of Fundamental Rights by courts

41. The fundamental rights of citizens are stated in Part III of the Constitution of India. But as in all cases, text of the rights can never be the exhaustive description of all rights. Rights have to be interpreted from the text of the Constitution. The process of interpretation of the text, often results in the evolution of rights. The Constitution is the textual origin of fundamental rights. Constitutional law defines the substance of fundamental rights.

(i) Legislative lag, executive inertia and fundamental rights

42. The fast pace of life in modern times often, outstrips the capacity of the legislature, to cope with the consequences of social change. There is a limit to human foresight, but the possibilities of life are limitless. The limits of legislation are the constraints of human foresight. The legislative process is complex and even time taking. Human affairs do not wait on the legislative process. These facts frequently create a legislative lag. It is almost inevitable in the nature of things.

43. The first intersection of life with law, at times happens in courts, even before the legislature grapples with the problems. The courts are often seized, of various emerging issues in social and individual lives, before the legislatures are cognizant of them.

44. A legislative hiatus or executive lethargy, cannot cause a constitutional stasis. The enforcement of fundamental rights, cannot be forestalled by a legislative lag or executive inertia. Constitutional guarantees and Fundamental Rights, have to be enforced on demand. Constitutional overhang is perpetual. Law is always in motion, and never on a holiday.

45. The text of the Constitution, is a conceptual philosophy of fundamental rights, and not an exhaustive guide to fundamental rights. The text of the Constitution is fixed, fundamental rights are always evolving. This is the essence of constitutional law jurisprudence. There is a method in the evolution of constitutional law jurisprudence.

46. Evolution of constitutional law rights are guided and controlled by the text of the constitution, long settled judicial principles of interpretation of the constitution, and judicial precedents in point. The march of law is also assisted by consensus of values, in the comity of civilized nations. These universal values are often manifested in International Conventions and Treaties. Another source of such values is comparative international jurisprudence. The felt needs of the times are also factored in by the courts. Development of constitutional law happens on these sure foundations. Constitutional rights are distilled from this process. In this process, the courts discharge their constitutional obligations. This is not judicial activism by courts. It is judging.

47. The Hon'ble Supreme Court in the case of ***Vishaka Vs. State of Rajasthan,*** reported at ***1997 (6) SCC 241,*** issued various guidelines for the safety of women at working places. The guidelines held the field, till the Parliament enacted the legislation in that regard. Judicial directions in that case preceded, the legislative enactment. Infact the legislature was alerted, to the need of a legislation to cover the field, by the judgment of the Hon'ble Supreme Court.

48. This narrative will profit from the observations of the Hon'ble Supreme Court, in the case of ***Rattan Chand Hira Chand v. Askar Nawaz Jung,*** reported at ***(1991) 3 SCC 67:***

"The legislature often fails to keep pace with the changing needs and values nor is it realistic to expect that it will have provided for all contingencies and eventualities. It is, therefore, not only necessary but obligatory on the courts to step in to fill the lacuna. When courts perform this function undoubtedly they legislate judicially. But that is a kind of legislation which stands implicitly delegated to them to further the object of the legislation and to promote the goals of the society. Or to put it negatively, to prevent the frustration of the legislation or perversion of the goals and values of the society. So long as the courts keep themselves tethered to the ethos of the society and do not travel off its course, so long as they attempt to furnish the felt necessities of the time and do not refurbish them, their role in this respect has to be welcomed.

All courts have at one time or the other felt the need to bridge the gap between what is and what is intended to be. The courts cannot in such circumstances shirk from their duty and refuse to fill the gap. In performing this duty they do not foist upon the society their value judgments. They respect and accept the prevailing values, and do what is expected of them. The courts will, on the other hand, fail in their duty if they do not rise to the occasion but approve helplessly of an interpretation of a statute or a document or of an action of an individual which is certain to subvert the societal goals and endanger the public good."

G. Process of law and the courts : Current State & Contemporary Challenges

49. The pace of technological, social and economic developments, often pose a challenge to the courts. Courts of today often have to deal with complex issues ranging from science, technology, economics, archaeology, medicine, social sciences and across other fields of highly specialized knowledge.

50. Lawyers on occasions lack the expertise, to grasp and simplify issues of varying complexity, from fields unrelated to law. Judges do not fare any better. Parties have their interests to protect.

51. The intellectual capital created by traditional resources of the judicial process, may not be adequate to manage such contemporary challenges. The judicial process would have to evolve, to meet the felt needs of the time. The rising tides of human knowledge, cannot pass the courts by. This shall require change in procedures, and development of infrastructure.

52. The intellectual resource base has to be widened. The debate has to be broadbased, to include direct inputs from experts as well. This would also entail well equipped libraries, which are staffed by qualified personnel and research assistants, and may be even experts. Institutional arrangements for interface of the courts with experts, have to be in place to ensure procedural propriety.

53. Debate on these issues will pave the way for the most important change, i.e.

change in mindset. For the process to be credible and efficacious, a change has to come from within the judicial system. But change is inevitable, if judicial adjudication is to be just and remain relevant. In this regard, the High Court has a responsibility to fulfill, if not an obligation to discharge.

H. Education

(i) Importance and scope

"Where the mind is without fear
and the head is held high,
Where knowledge is free".
~Tagore

54. In education mankind discovered the message of unquenchable optimism, that humans could be separated from the cycle of repetitive thought and action. Learning was the key to the uninterrupted progress of any society. Knowledge instilled the belief that human life could be improved. Through knowledge alone, the hope is realized that humans can be reformed, and humanity can be transformed. Education is the supreme act of nation building, which essentially means nurturing of constitutional values, realization of constitutional goals, and strengthening the rule of law.

55. The idea of the Indian nation is founded, on the ideals of the Indian civilization. Many of these ideals are manifested in the Constitution, and find expression in constitutional law.

56. The quest for knowledge defines the Indian civilization. A salient feature in the search for learning, distinguishes the Indian civilization. Knowledge in Hellenic civilization was founded on reason. The human thirst for knowledge was also quenched by revelation. The distinctive feature of learning in Indian civilization, is that India's search for knowledge, while always embracing reason as a method and never denying revelation as a source, insists on realization as its goal.

57. The diversity of thought is reflected in the plurality of discourse in India. The enduring values which define India, have been preserved and propagated by the tradition of civilized debate. The unity of our nation is protected by respect and affirmation of a multi hued cultural heritage and embracement of varied traditions of thought.

(ii) Role and obligation of universities

"Where the mind is led forward by thee
Into ever widening thought and action."
Tagore

58. The universities are the custodians of the old values, even as they ceaselessly push the boundaries of modern knowledge.

59. In universities students of diverse backgrounds, and different beliefs, congregate in a common pursuit of knowledge. Through knowledge they will learn, that humanity unites more than diversity differentiates. With learning they will understand, that diversity enriches human life, and does not divide humankind. University experience will help them, cultivate constitutional values, and transcend violent and other aberrational tendencies.

60. Universities are not teaching shops, nor are they mere examining bodies. Universities nurture the intellect

and develop the character of the young citizens in a wholesome manner. Students gain knowledge and imbibe values in universities. These dual pursuits constitute the founding purpose of a university, in fact its raison detre.

61. A unifocal approach promoting scholastic achievements, to the exclusion of character building, would undermine the founding principles of a university. A failure of character or deficit of values in students, may impel action against the delinquent student, but should also cause introspection in university authorities.

62. University education is not an arm's length transaction, between the teachers and the taught. Nor is university education an exact contractual relation, in the likeness of a consumer and a service provider.

I. Discipline in Universities: Concept, Need & Challenges

(i) Violence, intimidation and moral turpitude

"Where the clear stream of reason has not lost its way into the dreary desert sand of dead habit"

~Rabindranath Tagore

63. Violence degrades human life. Intimidation stifles human thought. Moral turpitude is the low ebb of human conduct. These are the scourges and yet inescapable facts of human life. Our society faces these issues, and our varsities grapple with them.

64. Violence, intimidation, and acts of moral turpitude, are not conducive to the academic atmosphere of a varsity, and pose a mortal threat to the values of a university. They retard the growth of free thought and reasoned debate. These evils have no place in our universities. The universities can prosper only when such evils are got rid of.

(ii) ***Communal disturbances in universities***

"Where the world has not been broken up into fragments by narrow domestic walls".

~Rabindranath Tagore

65. In Writ C No. 32955 of 2019, (Ajay Singh Vs. Union of India and Others), the petitioner is charged with disturbing the communal harmony in the university.

66. Stoking communal hatred not only disrupts peace and order in a university, but can roil the foundations of law and harmony in our society. The problem cannot be tackled as a "discipline" issue alone. A composite and a conceptual approach has to be adopted. The roots of communal hate have to be analyzed and addressed. Communal hatred is a narrative, which stands in direct opposition, to our civilizational ethos and constitutional values. Communal hatred holds a threat, to the rule of law. Communal hatred cannot be countenanced in our universities, nor can be given any space in our society.

(iii) ***Discipline in universities***

67. Discipline is the bedrock of any organization. In a university, discipline does not mean conformity of thought, or creation of a regimented class of people. In a varsity discipline is not the residue, after dissent is stifled and dissenters purged.

68. Discipline in a university is the consensus among all stakeholders, to live by the universal values which define the

academic world. Discipline in a varsity is common allegiance and unshakable adherence, to values which nurture free thought, respect dissentient opinions, and create an environment of unimpeded academic pursuits. Hate and true debate cannot co-exist. Violence and true learning cannot cohabit.

69. Discipline has to be preserved at all costs, if the raison detre of the University is to be protected at all times. Indiscipline unchecked is indiscipline unleashed. However in our constitutional scheme, the means of ensuring discipline, is as important as the end of keeping discipline.

(iv) ***Statutory approach to maintaining discipline***

70. The universities have created legal frameworks, to deal with acts of indiscipline, and to maintain discipline and order.

71. The power to take disciplinary action, and impose punishment upon delinquent students, is vested in the competent authorities, by the statutes of the concerned university. The following statutes govern and regulate, the process of initiating disciplinary action against delinquent students, and imposition of penalty for misconduct.

BHU -The Banaras Hindu University Act No. XVI of 1915 {Section 60}

ii. Chapter VIII, Ordinances Governing Maintenance of Discipline and Grievances Procedure.

iii. Notification, New Delhi, 31st July, 2017, BHU

AMU- The Aligarh Muslim University (Act No. XL of 1920), [Amendment] Act, 1981 (62 of 1981)

ii. Section 35 (5) of the AMU

iii. The Statutes of the University (as adapted under Section 28 of the Act) amended upto December, 2012).

IIT BHU - i. The Institutes of Technology Act, 1961

ii. The Institutes of Technology Amendment Act, 2012.

iii. Section 17(2) of the Act, 1961 (already quoted)

(The relevant extracts of the statutes are appended as appendix 1 to the writ petition.)

J. Statutory Regime of Punishments in light of Article 21 & Doctrine of Proportionality

72. The statutes of all the three universities contemplate only penal action, to deal with all forms of indiscipline or deviant conduct. The penal action may lead to suspension, and can even extend to expulsion and debarment.

73. The punitive provisions of the Statutes of the respective universities, manifest the deterrent intent of the law. A reformist approach to the problem is absent in the statutes. The makers of statutes have solely adopted a punitive or deterrent approach to the exclusion of other methods of dealing with issues of indiscipline or deviant conduct.

74. The aforesaid ordinances of the universities and the affidavits of the respondents have been perused. Submissions of the learned counsel for the universities have been considered. This Court finds that there is no structured, professionally designed reform, self development and rehabilitation programme, or therapeutic support system backed by a legal frame work, to deal with

the delinquent students and like issues in the universities.

75. The statutory monopoly of a punitive approach, to deviant behaviour, and the exclusion of all other responses, often creates a lack of balance in the actions of the concerned University. In such cases, the punishment becomes disproportionate, not because the decision maker was incapable of measured action, but because the ordinances/statutes preclude a proportional response.

76. It is clarified, that the requirement of punitive provisions in the statutes is a given. The need to empower the authority, to take disciplinary action in law is undisputed. There is no infirmity in the statutory provisions. The inadequacy is in the reach of the statutory provisions.

77. The decision maker is constrained in his choices, by the absolute dominance of punitive provisions, and complete omission of reformative measures in the ordinances.

78. The impact of absence of reformative provisions and the presence of a statutory bias in favour of a punitive approach, on the fundamental rights of the petitioners, shall also be assessed in the next part of the judgment.

K. ***Punishments and Article 21***

(i) ***Right to human dignity***

79. A life without dignity is robbed of its meaning. Absent self worth, life is devoid of content.

80. Human dignity as a concept, was created by an international consensus, on universal human values. "Human dignity" and "self worth" are used, in close proxmity in international instruments, reflecting the affinity between the concepts.

81. The comity of nations, first pledged commitment to protecting the "dignity and worth" of the human person, in the charter of the United Nations. These eternal values were reiterated, in subsequent international instruments and conventions including the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others (1951); the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (1956); the Convention on the Elimination of All Forms of Discrimination against Women (1979); the Convention on the Rights of the Child (1989); and the Convention on the Rights of Persons with Disabilities (2006).

82. Human dignity and self worth, were increasingly incorporated in the jurisprudence of all liberty loving nations in the post World War II era.

83. The complexity of the concept of human dignity, never diluted the usefulness of the theory of human dignity in enhancing the worth of the human person. Human dignity made a decisive contribution in the development of the rights of life and liberty, in jurisprudential systems of free societies across the world.

84. However, the Court would do well to observe the caution, that a sweeping judicial definition of human dignity, would make an abstract theory, unintelligible. An unduly wide judicial construct of human dignity, would create unworkable judicial tests.

85. Likewise if the courts adopt too narrow a view of human dignity, a concept which has made stellar contribution to the advancement of human rights will be lost.

86. Keeping these pitfalls in mind, a balance has to be maintained, between attempting too much and recoiling from the task altogether.

87. The applicability of human dignity, would be determined in this case, by evolving a workable test or construct of human dignity and self worth applicable to these cases.

88 Human dignity is not inserted in the text of the fundamental rights under the Constitution of India. Human dignity occurs in the Preamble to the Constitution of India.

89. The Preamble to the Constitution, reflects the resolve of the People of India, to secure to all its citizens

> "Justice social, economic and political;
> Liberty of thought, expression, belief, faith and worship;
> Equality of status and of opportunity; and to promote among them all and
> Fraternity assuring the dignity of the individual and the unity of the Nation."

The Preamble to the Constitution is not analogous, to a preamble to any legislative enactment.

90. The unique place of the Preamble, in the Constitution came to be noticed very early, in ***Sajjan Singh v. State of Rajasthan,*** reported at ***AIR 1965 SC 845.*** The Hon'ble Supreme Court found that the Preamble to our Constitution is "not of the common run". Further the Preamble bore the "stamp of deep deliberation" and precision.

91. This feature shines light on the special significance, attached to the Preamble by the framers of the Constitution. The Preamble was held to be a part of the Constitution, by the Hon'ble Supreme Court in ***Kesavananda Bharati v. State of Kerala,*** reported at ***(1973) 4 SCC 225.***

92. The words 'life, law and liberty' in Article 21 of the Constitution of India, were freed from the confines of narrow and literal interpretation by the Courts. (See ***Maneka Gandhi v. Union of India, (1978) 1 SCC 248)***

93. A defining moment came when the Hon'ble Supreme Court, liberated "life" from the fetters of mere physical existence. (see **Olga Tellis v. Bombay Municipal Corpn. Reported at (1985) 3 SCC 545).**

94. Over the years human dignity, has been read into the meaning of life and liberty, under Article 21 of the Constitution of India, by consistent pronouncements of the courts.

95. A broad overview of some of the leading pronouncements of the Hon'ble Supreme Court, elevating human dignity to the status of a fundamental right, are discussed in the succeeding paragraphs.

(ii) *Supreme Court on human dignity*

96. The concept of human dignity forming a part of Article 21, was

introduced in ***Prem Shankar Shukla v. UT of Delhi,*** reported at ***(1980) 3 SCC 526.*** While construing the constitutional rights of prisoners, in ***Prem Shankar Shukla (supra)***, Krishna Iyer, J. speaking for a three-Judge Bench of the Hon'ble Supreme Court held:

"1. ... the guarantee of human dignity, which forms part of our constitutional culture, and the positive provisions of Articles 14, 19 and 21 spring into action when we realise that to manacle man is more than to mortify him; it is to dehumanise him and, therefore, to violate his very personhood, too often using the mask of "dangerousness" and security.

21. The Preamble sets the humane tone and temper of the Founding Document and highlights justice, equality and the dignity of the individual."

97. Undermining the human dignity of a detenue, under the Conservation of Foreign Exchange and Prevention of Smuggling Activities (COFEPOSA) Act, 1974 was not countenanced by the Hon'ble Supreme Court in ***Francis Coralie Mullin v. UT of Delhi,*** reported at ***(1981) 1 SCC 608*** by ruling thus:

"6. ... The fundamental right to life which is the most precious human right and which forms the ark of all other rights must therefore be interpreted in a broad and expansive spirit so as to invest it with significance and vitality which may endure for years to come and enhance the dignity of the individual and the worth of the human person.

7. ... the right to life enshrined in Article 21 cannot be restricted to mere animal existence. It means something much more than just physical survival."

98. The right to live with human dignity flowing from Article 21, was employed by the Hon'ble Supreme Court to unlock the fetters of those living in bondage and setting them free in ***Bandhua Mukti Morcha v. Union of India,*** reported at ***(1984) 3 SCC 161.*** The Hon'ble Supreme Court in ***Bandhua Mukti Morcha (supra)*** observed that:

"10. ...This right to live with human dignity enshrined in Article 21 derives its life breath from the directive principles of State policy and particularly clauses (e) and (f) of Article 39 and Articles 41 and 42 and at the least, therefore, it must include protection of the health and strength of the workers, men and women, and of the tender age of children against abuse, opportunities and facilities for children to develop in a healthy manner and in conditions of freedom and dignity, educational facilities, just and humane conditions of work and maternity relief. These are the minimum requirements which must exist in order to enable a person to live with human dignity, and no State -- neither the Central Government nor any State Government -- has the right to take any action which will deprive a person of the enjoyment of these basic essentials."

99. Dehumanizing treatment given to the arrested activists of an organization by the police authorities was called out by the Hon'ble Supreme court, in ***Khedat Mazdoor Chetna Sangath v. State of M.P.,*** reported at ***(1994) 6 SCC 260***, wherein it was recognized:

"10. ... It is, therefore, absolutely essential in the interest of justice, human dignity and democracy that this Court must intervene; order an investigation,

determine the correct facts and take strongest possible action against the respondents who are responsible for these atrocities."

100. The right of human dignity was also construed by the Hon'ble Supreme Court in ***M.Nagaraj v. Union of India,*** reported at ***(2006) 8 SCC 212.*** In that case the right was held to be intrinsic to and inseparable from human existence:

"26. ... The rights, liberties and freedoms of the individual are not only to be protected against the State, they should be facilitated by it. ...It is the duty of the State not only to protect the human dignity but to facilitate it by taking positive steps in that direction. No exact definition of human dignity exists. It refers to the intrinsic value of every human being, which is to be respected. It cannot be taken away. It cannot give(sic be given).It simply is. Every human being has dignity by virtue of his existence.

42. India is constituted into a sovereign, democratic republic to secure to all its citizens, fraternity assuring the dignity of the individual and the unity of the nation. The sovereign, democratic republic exists to promote fraternity and the dignity of the individual citizen and to secure to the citizens certain rights. This is because the objectives of the State can be realised only in and through the individuals. Therefore, rights conferred on citizens and non-citizens are not merely individual or personal rights. They have a large social and political content, because the objectives of the Constitution cannot be otherwise realised."

101. The Hon'ble Supreme Court in Shabnam v. Union of India, reported at (2015) 6 SCC 702 elaborated the following elements of the human dignity;

"14. This right to human dignity has many elements. First and foremost, human dignity is the dignity of each human being "as a human being". Another element, which needs to be highlighted, in the context of the present case, is that human dignity is infringed if a person's life, physical or mental welfare is harmed. It is in this sense torture, humiliation, forced labour, etc. all infringe on human dignity. It is in this context many rights of the accused derive from his dignity as a human being." (emphasis in original)

102. Aharon Barak (former Chief Justice of the Supreme Court of Israel), discussed the constitutional value of human dignity, in the following celebrated passage:

"The constitutional value of human dignity has a central normative role. Human dignity as a constitutional value is the factor that unites the human rights into one whole. It ensures the normative unity of human rights. This normative unity is expressed in the three ways: first, the value of human dignity serves as a normative basis for constitutional rights set out in the constitution; second, it serves as an interpretative principle for determining the scope of constitutional rights, including the right to human dignity; third, the value of human dignity has an important role in determining the proportionality of a statute limiting a constitutional right. "

103. The views of the Judge Aharon Barak, were approved and incorporated in the corpus of human dignity jurisprudence, in our country by the Hon'ble Supreme court in ***Jeeja Ghosh v. Union of India,*** reported at ***(2016) 7 SCC 761.***

104. The consequences of loss of human dignity in an individual's life, were

noted by the Hon'ble Supreme Court in ***Mehmood Nayyar Azam v. State of Chhattisgarh,*** reported at ***(2012) 8 SCC 1.***

105. Similar sentiments were expressed on human dignity, by the Hon'ble Supreme Court in ***National Legal Services Authority v. Union of India,*** reported at ***(2014) 5 SCC 438.***

106. In ***Maharasthra University of Health Sciences v. Satchikitsa Prasarak Mandal*** reported at ***(2010) 3 SCC 786,*** the Hon'ble Supreme court upon consideration of good authority, reiterated the dignity of the individual as a core constitutional concept.

107. While in ***Selvi v. State of Karnataka*** reported at ***(2010) 7 SCC 263,*** the Hon'ble Supreme Court ruled thus:

"244.....we must recognize that a forcible intrusion into a person's mental processes is also an affront to human dignity and liberty, often with grave and long-lasting consequences."

108. Even prisoners have been found entitled to the fundamental rights while in custody by the Hon'ble Supreme Court (see ***Sunil Batra (II) Vs. Delhi Administration, reported at 1980 (3) SCC 488).***

109. The importance of therapeutic approach in dealing with the criminal tendencies of prisoners and the necessity for reform, was considered by the Hon'ble Supreme Court in ***T.K. Gopal v. State of Karnataka,*** reported at ***(2000) 6 SCC 168,*** by holding that:

"15. The therapeutic approach aims at curing the criminal tendencies which were the product of a diseased psychology. There may be many factors, including family problems. We are not concerned with those factors as therapeutic approach has since been treated as an effective method of punishment which not only satisfies the requirements of law that a criminal should be punished and the punishment prescribed must be meted out to him, but also reforms the criminal through various processes, the most fundamental of which is that in spite of having committed a crime, maybe a heinous crime, he should be treated as a human being entitled to all the basic human rights, human dignity and human sympathy. It was under this theory that this Court in a stream of decisions, projected the need for prison reforms, the need to acknowledge the vital fact that the prisoner, after being lodged in jail, does not lose his fundamental rights or basic human rights and that he must be treated with compassion and sympathy."

110. In **Asfaq v. State of Rajasthan and Others,** *reported at* ***(2017) 15 SCC 55***, the Hon'ble Supreme Court emphasizing the need for reform of a convict held that "redemption and rehabilitation of such prisoners for good of societies must receive due wightage while they are undergoing sentence of imprisonment."

111. The judicial authorities can be multiplied, reiterating the above holdings. However, the same will add volume, but not value to the narrative.

112. Consistent and high authority have thus entrenched human dignity as fundamental to right to life, which flows from Article 21 of the Constitution of India.

113. The narrative would not be complete without reference to the most authoritative pronouncement, of the Hon'ble Supreme Court in the case of ***K.S. Puttaswamy v. Union of India*** reported at ***(2017) 10 SCC 1***

114. Dr. D. Y. Chandrachud, J. speaking for the Constitution Bench, firmly and irrevocably, reiterated that human dignity is a fundamental right under Article 21 of the Indian Constitution, with customary eloquence, in ***K.S. Puttaswamy (supra)***. Dr. D. Y. Chandrachud, J., upon consideration of the judicial precedents in point distilled the concept of human dignity and its place in part III of the Constitution:

"Jurisprudence on dignity

"108.Over the last four decades, our constitutional jurisprudence has recognised the inseparable relationship between protection of life and liberty with dignity. Dignity as a constitutional value finds expression in the Preamble. The constitutional vision seeks the realisation of justice (social, economic and political); liberty (of thought, expression, belief, faith and worship); equality (as a guarantee against arbitrary treatment of individuals) and fraternity (which assures a life of dignity to every individual). These constitutional precepts exist in unity to facilitate a humane and compassionate society. The individual is the focal point of the Constitution because it is in the realisation of individual rights that the collective well-being of the community is determined. Human dignity is an integral part of the Constitution. Reflections of dignity are found in the guarantee against arbitrariness (Article 14), the lamps of freedom (Article 19) and in the right to life and personal liberty (Article 21).

118. Life is precious intself. But life is worth living because of the freedoms which enable each individual to live life as it should be lived. The best decisions on how life should be lived are entrusted to the individual. They are continuously shaped by the social milieu in which individuals exist. The duty of the State is to safeguard the ability to take decisions. "Life" within the meaning of Article 21 is not confined to the integrity of the physical body. The right comprehends one's being in its fullest sense. That which facilitates the fulfillment of life is as much within the protection of the guarantee of life.

119. To live is to live with dignity. The draftsmen of the Constitution defined their vision of the society in which constitutional values would be attained by emphasising, among other freedoms, liberty and dignity. So fundamental is dignity that it permeates the core of the rights guaranteed to the individual by Part III. Dignity is the core which unites the fundamental rights because the fundamental rights seek to achieve for each individual the dignity of existence. Privacy with its attendant values assures dignity to the individual and it is only when life can be enjoyed with dignity can liberty be of true substance. Privacy ensures the fulfilment of dignity and is a core value which the protection of life and liberty is intended to achieve."

(iii) Comparative International Jurisprudence

115. A survey of comparative international jurisprudence, on the point of human dignity and the rights flowing therefrom, shows convergence in the values of human dignity across the free world.

116. The foreign authorities can be cited to show that human dignity is an accepted universal value in the comity of nations.

117. In ***Rosenblatt v. P Baer,* reported at 1966 SCC OnLine US SC 22 : 383 US 75 (1966),** the US Supreme Court found that "The essential dignity and worth of every human being" was at the root of any system of "ordered liberty".

"The right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being- a concept at the root of any decent system of ordered liberty."

118. In the case of ***Armoniene v. Lithuania,*** reported at ***(2009) EMLR 7,*** the European Court of Human Rights set its face against an act of disclosure of a person's state of health, causing "exclusion from social life", and found it violative of the right to privacy by holding thus:

"The Court takes particular note of the fact that the family lived not in a city but in a village, which increased the impact of the publication on the possibility that the husband's illness would be known by his neighbours and his immediate family, thereby causing public humiliation and exclusion from village social life."

119. The human dignity rights of prisoners included rehabilitation, in the opinion of the US Supreme Court in ***Procunier, Corrections Director, ET AL. Vs. Martinez ET AL***. reported at ***416 U.S. 396 (1974):***

"The Court today agrees that "the weight of professional opinion seems to be that inmate freedom to correspond with outsiders advances rather than retards the goal of rehabilitation."

Balanced against the State's asserted interests are the values that are generally associated with freedom of speech in a free society - values which "do not turn to dross in an unfree one." Sostre v. McGinnis, supra, at 199. First Amendment guarantees protect the free and uninterrupted interchange of ideas upon which a democratic society thrives. Perhaps the most obvious victim of the indirect censorship effected by a policy of allowing prison authorities to read inmate mail is criticism of prison administration. The threat of identification and reprisal inherent in allowing correctional authorities to read prisoner mail is not lost on inmates who might otherwise criticize their jailors. The mails are one of the few vehicles prisoners have for informing the community about their existence and, in these days of strife in our correctional institutions, the plight of prisoners is a matter of urgent public concern. To sustain a policy which chills the communication necessary to inform the public on this issue is at odds with the most basic tenets of the guarantee of freedom of speech.

The First Amendment serves not only the needs of the polity but also those of the human spirit - a spirit that demands self-expression. Such expression is an integral part of the development of ideas and a sense of identity. To suppress expression is to reject the basic human desire for recognition and affront the individual's worth and dignity.14Cf. Stanley v. Georgia, 394 U.S.[416 U.S. 396, 428]557 (1969). Such restraint may be "the greatest displeasure and indignity to a free and knowing spirit that can be put upon him." J. Milton, Aeropagitica 21 (Everyman's ed. 1927). When the prison gates slam behind an inmate, he does not lose his human quality; his mind does not become closed to ideas; his intellect does not cease to feed on a free and open interchange of opinions; his yearning for

self-respect does not end; nor is his quest for self-realization concluded. If anything, the needs for identity and self-respect are more compelling in the dehumanizing prison environment. Whether an O. Henry writing his short stories in a jail cell or a frightened young inmate writing his family, a prisoner needs a medium for self-expression. It is the role of the First Amendment and this Court to protect those precious personal rights by which we satisfy such basic yearnings of the human spirit."

120. The validity of a punishment causing loss of nationality, for an act of desertion in military service, was in issue before the US Supreme Court, in ***Trop Vs. Dulles,*** reported at **356 US 86 (1958)**. The US Supreme Court in **Trop (supra)** reiterated the importance and role of rehabilitation in a penal system, while dealing with the validity of the punishment. The principle holding of the US Supreme Court on these points is as under:

"Expatriation, in this respect, constitutes anespecially demoralizing sanction. The uncertainty, and the consequent psychological hurt, which must accompany one who becomes an outcast in his own land must be reckoned a substantial factor in the ultimate judgment.

The novelty of expatriation as punishment does not alone demonstrate its inefficiency. In recent years we have seen such devices as indeterminate sentences and parole added to the traditional term of imprisonment. Such penal methods seek to achieve the end, at once more humane and effective, that society should make every effort to rehabilitate the offender and restore him as a useful member of that society as society's own best protection. Of course, rehabilitation is but one of the several purposes of the penal law. Among other purposes are deterrents of the wrongful act by the threat of punishment and insulation of society from dangerous individuals by imprisonment or execution. What then is the relationship of the punishment of expatriation to these ends of the penal law? It is perfectly obvious that it constitutes the very antithesis of rehabilitation, for instead of guiding the offender back into the useful paths of society it excommunicates him and makes him, literally, an outcast. I can think of no more certain way in which to make a man in whom, perhaps, rest the seeds of serious antisocial behavior more likely to pursue further a career of unlawful activity than to place on him the stigma of the derelict, uncertain of many of his basic rights. Similarly, it must be questioned whether expatriationcan really achieve the other effects sought by society in punitive devices. Certainly it will not insulate society from the deserter, for unless coupled with banishment the sanction leaves the offender at large. And as a deterrent device this sanction would appear of little effect, for the offender, if not deterred by thought of the specific penalties of long imprisonment or even death, is not very likely to be swayed from his course by the prospect of expatriation.However insidious and demoralizing may be the actual experience of statelessness, its contemplation in advance seems unlikely to invoke serious misgiving, for none of us yet knows its ramifications."

(iv) Constitutionality of punishments under the statutes

"Universities are made by love, love of beauty and learning."

~ Annie Besant

121. The engagement of human dignity and Article 21 will now be examined in the context of punishment, imposed on a delinquent student.

122. The statutory scheme of enforcing discipline by imposition of punishments and suspension has a salutary purpose, but it needs to be compliant with the requirements of fundamental rights.

123. Punishment has to be effective to serve its purpose; however, it cannot be purblind to human dignity, if it is to retain its constitutionality.

124. Severity of a punishment is not sufficient basis for holding it unconstitutional. The enquiry into the constitutionality of a punishment, will examine the relationship between the punishment and its purpose, and whether the penalty can achieve the purpose. The enquiry will also determine whether the punishment degrades the human person, and whether it devalues human dignity against established norms of decency, or has a dehumanizing effect.

125. Degree of injuries to self esteem, extent of degradation of human worth, depth of humiliation caused by the punishment, are facts to be probed in an enquiry into the validity of the punishment.

126. Experience teaches the fact of human fallibility, but knowledge holds the hope of human redemption. If error is part of human nature, reform is an element of human spirit. The capacity of human beings to introspect on erring ways and the power of human will to reform deviant conduct are building blocks of the concept of human dignity. "Every sinner has a future, many a saint had a past."

127. Punishment for deviant conduct, cannot be so severe as to degrade human life. Every form of punishment should protect the essential sanctity of human life and comport with fundamental norms of decency evolved by a civilized society. Any act which dehumanizes life cannot be countenanced by societies and courts which value life and liberty. The degrading or dehumanizing elements of the punishment have to be eliminated to bring it in conformity with requirement of human dignity, contemplated by Article 21 of the Constitution of India.

128. Failure to consider susceptibility to reform, while denying the right to access privileges and activities of the university, negates the possibility of rehabilitation. Absence of an environment of reform, self development and rehabilitation in a university, denies the opportunity of redeeming one's reputation. Termination of dialogue with the delinquent student, without offering an opportunity to reform, makes him an outcaste. The individual is permanently discarded by the institution, and loss of human self worth is total. This system of punishment is destructive of fundamental elements of human dignity, and violative of Article 21 of the Constitution of India.

129. Another aspect of the punishment which needs consideration, is

the consequence exclusion from higher education.

130. Education is a most credible and effective mode of restoring self esteem and enhancing self worth. By denying opportunities of education to a delinquent student, without looking at the possibility of reform, the power to redeem one's errors and enhance self worth is taken away from an individual. In these cases, closure of avenues of education, extinguishes the hope for a better tomorrow. Loss of hope and its sequitor perpetual condemnation are fatal blows to the human spirit and self esteem.

131. Acts of deviant conduct, violence or intimidation, do not cease the need for social engagement or knowledge. Such needs are more acutely felt and require satisfaction in these cases.

132. Order may be enforced by punishments. Causes of deviant conduct can be addressed only by engagement. Punishments deal with the offence, reform deals with the offender.

133. Public interest however demands that the claim for further education, and engagement with delinquent students, should be guided and controlled by the authorities.

134. Statutory regimes in universities, dealing with delinquent behaviour and university environments, which are bereft of therapeutic and reform based support systems, are incompatible with the constitutional mandate to uphold human dignity. The violations of human dignity, in such cases, are summed up hereinunder:

135. Dignity violations occur when a punishment meted out to a student, does not consider his susceptibility to reform, and degrades his person by exclusion to the point where his diminished self worth cannot be reinstated due to systemic inadequacies or institutional shortcomings.

136. By denying further education, and neglecting to create an institutional system of reform, self development and rehabilitation, the university in effect tells the delinquent student, that it does not recognize the student's need to re-establish his self esteem. In other words, the student is not only impervious to reform, but incapable of enhancing his self esteem.

137. Dignity of an individual/student is injured, when it is found that the punishment precludes reform by rehabilitative measures, and prevents self enhancement by further education.

138. The punitive consequences of the action, cannot go beyond the requirements of the case. In this case they do.

An institutional reform, self development and rehabilitation programme, will enable a delinquent student to introspect on errors, express remorse and correct course.

139. Neglect by the universities to create an institutional reform, self development and rehabilitation programme thus places substantial obstacles in the enjoyment of the fundamental right of human dignity under Article 21.

140. The result of the preceding narrative is as follows:-

(i) The impugned action taken by the university, against the petitioner is violative of the fundamental right of human dignity of the petitioner, guaranteed under Article 21 of the Constitution of India, as it fails to consider his susceptibility to reform, and does not enable the petitioner to undergo a reform and self development process to redeem himself.

(ii) The statutory omission of reform measures, is an inadequacy which renders the university incapable of rectifying the violation made by it. The systemic fault-line is contrary to the mandate of Article 21 of the Constitution of India.

(v) Systemic responses : Responsibilities of the State and universities

141. Exercise of judicial power is the prerogative of the courts; but upholding the Constitution is not the monopoly of the courts.

142. To realize the fundamental rights guaranteed under the Constitution and to achieve the goals contemplated under the Preamble, all stakeholders have to play their part and all organs of governance have to perform their obligations. Constitutional ideals will become meaningful only if constitutional values animate the functioning of all institutions of governance. Universities have a special role to play.

143. The State and in this case the universities too, have the obligation to create an **enabling environment,** *(emphasis supplied)* where life and life enhancing attributes under Article 21 of the Constitution of India flourish and where constitutional ideals become a reality.

144. The importance of "therapeutic approach" in solving social dysfunctions, the growth in role of the State to give away public recognition in the way they treat their citizens, the evolution of law on the subject, and the contribution of universities were analyzed by **Francis Fukuyama** in his book **"Identity"**. Some of the instructive passages are extracted below:

"The therapeutic turn in the popular culture of advanced liberal democracies such as the United States was inevitably reflected in its politics, and in an evolving understanding of the role of the state. In the classical liberalism of the nineteenth century, the state was held responsible for protecting basic rights such as freedom speech and association, for upholding a rule of law, and for providing essential public services such as police, roads, and education. The government "recognized" its citizens by granting them individual rights, but the state was not seen as responsible for making each individual feel better about himself or herself."

"Under the therapeutic method, however, an individual's happiness depends on his or her self-esteem, and self-esteem is a by-product of public recognition. Governments are readily able to give away public recognition in the way that they talk about and treat their citizens, so modern liberal societies naturally and perhaps inevitably began to take on the responsibility for raising the self-esteem of each and every one of their citizens".

"Therapeutic services came to be deeply embedded in social policy, not just in California but throughout the United States and in other liberal democracies.

States began to offer psychological counseling and other mental health services, and schools began to incorporate therapeutic insights into the way that they taught children."

"In the early twentieth century, social dysfunctions such as delinquency or teen pregnancy were seen as deviant behaviour that needed to be dealt with punitively, often through the criminal justice system".

"But with the rise of therapeutic approaches by mid century, they were increasingly seen as social pathologies that needed to be treated through counseling and psychiatric intervention".

"The 1956 amendments to the Social Security Act allowed for federal reimbursements of a range of therapeutic services to strengthen family life and self-support."

"The therapeutic state metastasized across a wide number of institutions, including a large non-profit sector that by the 1990s had become the delivery vehicle for state-funded social services".

"Universities found themselves at the forefront of the therapeutic revolution."

(emphasis supplied)

145. These special needs of citizens have to be addressed by State action, and also through judicial interventions in a nuanced manner, and in a larger perspective. Exclusive reliance on coercive powers of the law, shall be inadequate and an unsatisfactory way of dealing with the problem. The therapeutic jurisprudence draws heavily from concept of human dignity and self worth for its philosophical underpinning.

146. Disciplinary action should also be supported by reformative philosophy. Reformative philosophy does not undermine the deterrent approach.

147. The statutory regime imposes punishment for delinquent acts. The reform programme will address the cause of delinquency itself. Framing the approach to discipline as a choice between punishment or reform is misleading. A just corrective system needs both. Both approaches complement each other and can be pursued simultaneously. Deterrent aspect may also be reinforced, by making grant of the degree contingent upon successful completion of the reform programme.

148. The ordinances providing for punishments for deviant conduct need to be duly supported by a legal framework for structured reform, self development and rehabilitation programmes. This environment will accord social recognition to the need for reform of delinquent students. The degrading effect of punishment will be ameliorated. Dialogue will end isolation, reform will reinstate self worth and education will enhance self esteem.

149. Structured reform, self development and rehabilitation programmes and therapeutic support, within a legal framework, will create an ***enabling environment*** *(emphasis supplied)* in the universities, to realize the fundamental right of human dignity, flowing from Article 21 of the Constitution of India.

L. Reform, Self Development & Rehabilitation

(i) Role of universities in achieving behavioral change

"You must be the change you wish to see in the world"

~Mahatma Gandhi

150. Non violence as a philosophy of thought, and a creed of conduct, was developed in India on a scale wider than elsewhere. From the Buddha to Ashoka and the Mahatma, behavioral change in adopting non violence as a way of life, at the national scale was greatly accomplished in India.

151. The response of the Indian civilization, to the challenges of communal hatred and communal otherness, was profound and without parallel. The unique response of the Indian society was fashioned by the universal philosophy of the Indian civilization; of affirming the unity of the human race, of embracing diversity, of respecting dissent, and creating a harmonious dialogue of faiths. The lives and teachings of saints and thinkers like Guru Nanak, Kabir, Vivekananda, Tagore and Mahatma Gandhi, bear testimony to this composite culture.

152. For each generation to produce such individuals of excellence is an exorbitant demand. Today behavioral change is achieved in a different manner, albeit more incrementally and less dramatically. Institutions like universities have a critical role to play. Universities have an obligation to the society and the individual. The universities have an irrevocable compact, and an organic connect with the society.

153. University is a paternal institution. By the act of suspension or debarment of a delinquent student, the university abandons its ward. The university has solved its problem, but the society has one at its hands. The downstream effects of the punishments, have not been considered by the respondents. Clearly there are direct costs to the society as well. There are no other institutions of equal standing, to engage with the youth, deal with the discontent or aberration, and channelize youthful energies.

154. The role of the University does not end in punishing perpetrators of violence. It begins with the identification of the causes of violence, communal hatred, and other forms of deviant conduct. Thereafter the responsibility to achieve behavioral change commences. The fruit of knowledge imparted by the universities lies in the manifestation of human values in the human personality and expression of humanity in human conduct. Knowledge which does not change human behaviour in this manner is futile.

(ii) Imbibing Constitutional values and purging communal hatred

155. The Indian civilizational ethos and the Indian constitutional values are congruent. The Supreme Court distilled the essence of Indian values, when it emphasised "our tradition teaches tolerance, our philosophy preaches tolerance and our Constitution practises tolerance; let us not dilute it" while upholding the religious rights of Jehovah's witnesses in ***Bijoe Emmanuel and others vs. State of Kerala and others,*** reported at ***(1986) 3 SCC 615.***

156. Universities have to protect the space for open dialogue, respectful engagement and reasoned debate. Universities need to ensure that the space for constitutional values, is not encroached by communal hatred.

157. The universities have the responsibility, to preserve this heritage, and the obligation to nurture these constitutional values. University experience has to inculcate these values in the students.

158. The universities may consider holding seminars, workshops, heritage festivals, cultural festivals, literature festivals, and encourage other activities to achieve this end. This has to be a part of the larger programme of value creation and self development.

(iii) Present discontents of students and solutions

159. The preceding discussion shows how a reform, self development and rehabilitation programme, will create an enabling environment, for realization of the fundamental rights of the individual under Article 21. How such programme, will yield tangible benefits for the society, will now be examined.

160. The paradox of the digital age is a plethora of devices and a dilution of dialogue, the substitution of conversation by chatter. There is the ever present danger of growth of knowledge and diminution of thought. The young are empowered by technology, but made restless by the void in values, and lack of direction.

161. The dilemmas of the digital age were acutely summed up by Yuval Noah Harari in his profound and acclaimed work "Homo Deus":

> "Today our knowledge is increasing at breakneck speed, and theoretically we should understand the world better and better. But the very opposite is happening. Our new-found knowledge leads to faster economic, social and political changes; in an attempt to understand what is happening, we accelerate the accumulation of knowledge, which leads only to faster and greater upheavals. Consequently we are less and less able to make sense of the present or forecast the future."

162. In this situation lack of avenues of engagement, absence of a structured reform, self development and therapeutic support system, leaves the students with little options. The choices available in the society, to satisfy their need for belonging, to recover self esteem, and to channelize youthful energies are not very encouraging.

163. Re-establishing meaningful dialogue, recreating an environment of fruitful conversation, and making empathetic engagement are some of the present challenges. The responsibility of reaching out and engaging with the students, and increasing quality interface with them, lies with the universities and the teachers.

164. These obligations can be accomplished by a meticulously created reform/self development programme and

high quality of academic leadership within a comprehensive legal framework.

165. Universities are a microcosm of the society. They are laboratories of social change, and also agents of social transformation.

166. The manner in which the universities deal, with aberrations of violence other forms of deviant conduct, and deficit of values in students, has repercussions for the society at large. The divergent pulls of primordial instincts of hate and violence, against a citizen's duties in a nation ruled by law can best be managed by universities.

167. The universities are uniquely placed to deal with these issues. The universities have the intellectual capital, institutional framework and moral leadership, which puts them in the front rank of institutions to effect such change. The environment in the University should encourage and engender reflective actions instead of automatic choices.

168. The reform/self development and rehabilitation programme, will give an individual student correct direction in life, and prevent one from drifting away. The student will be anchored in constitutional values, and will not be led astray by social evils. The support and aid by the university will give one a sense of ownership and belonging. No harvest is richer for a nation, than citizens empowered by a constitutional value system.

169. The high pedestal at which teachers are placed in Indian traditions and thoughts, was recalled to explain the current role of teachers in Indian society, by the Hon'ble Supreme Court in the case of **Avinash Nagra Vs. Navodaya Vidyalaya Samiti and Others,** reported at **(1997) 2 SCC 534.** The relevant extracts were succinctly summed up by a Division Bench of this Court, in the case of **Devarsh Nath Gupta Vs. State of U.P. and Others,** reported at **2019(6) ADJ 296 (DB):**

"22. Special status of teacher has been reminded by Court inAvinash Nagra vs. Navodaya Vidyalaya Samiti and others(1997) 2 SCC 534. Quoting Father of the Nation, Court said that a teacher cannot be without character. If he lacks it, he will be like salt without its savour. A teacher must touch the hearts of his students. Boys imbibe more from the teacher's own life than they do from books. If teachers impart all the knowledge in the world to their students but do not inculcate truth and purity amongst them, they will have betrayed them. Quoting Shri Aurobindo, Court said that it is the teacher's province to hold aloft the torch, to insist at all times and at all places that this nation of ours was founded on idealism and that whatever may be the prevailing tendencies of the times, our children shall learn to live among the sun-lit peaks. Court also referred Dr. S. Radhakrishanan saying that we, in our country, look upon teacher as gurus or, as acharyas. An Acharya is one whose achar or conduct is exemplary. He must be an example of Sadachar or good conduct. He must inspire the pupils who are entrusted to his care with love of virtue and goodness. The ideal of a true teacher is "andhakaraniridhata gurur itya bhidhiyate" (Andhakar is not merely intellectual ignorance, but is also spiritual blindness). He, who is able to remove that kind of spiritual blindness, is called a

'guru'. Swami Vivekananda was also quoted saying that student should live from his very boyhood with one whose character is a blazing fire and should have before him a living example of the highest teaching. In our country, the imparting of knowledge has always been through men of renunciation. The charge of imparting knowledge should again fall upon the shoulder of Tyagis."

170. In ***Avinash Nagra (supra),*** the obligations of teachers to transform students into responsible citizens, and inculcate the value system of the Indian Constitution, was stated thus:

"...The State has taken care of service conditions of the teacher and he owed dual fundamental duties to himself and to the society. As a member of the noble teaching profession and a citizen of India he should always be willing, self-disciplined, dedicated with integrity to remain ever a learner of knowledge, intelligently to articulate and communicate and imbibe in his students, as social duty, to impart education, to bring them up with discipline, inculcate to abjure violence and to develop scientific temper with a spirit of enquiry and reform constantly to rise to higher levels in any walk of life nurturing Constitutional ideals enshrined inArticle 51Aso as to make the students responsible citizens of the country. Thus the teacher either individually or collectively as a community of teachers, should regenerate this dedication with a bent of spiritualism in broader perspective of the Constitutionalism with secular ideologies enshrined in the Constitution as an arm of the State to establish egalitarian social order under the rule of law. Therefore, when the society has given such a pedestal, the conduct, character, ability and disposition of a teacher should be to transform the student into a disciplined citizen, inquisitive to learn, intellectual to pursue in any walk of life with dedication, discipline and devotion with an inquiring mind but not with blind customary beliefs....."

171. The students entering universities embark on a new phase in their lives. Many are often removed from their comfort zone, and the secure environment of their homes, to face the challenges of independent life. At times these new challenges can be intimidating, and the uncertainties can create apprehensions, in the minds of the young adults.

172. Some students are unmoored in this trying phase of life and change of circumstances. Ragging of juniors in institutions of higher learning and other evils make the situations worse for freshers. Such students especially girls students in our country, need full institutional support to face these challenges.

173. It is the responsibility of the universities and the institutions of higher learning to create requisite environment of sensitizing the senior students and supporting the freshers in every possible manner.

174. A programme for self development implemented in a proactive manner shall foster constitutional values among students. Students need to realize the value of dissent in a democracy, but also have to understand the manner of dissent in a society ruled by law.

175. This process also requires initiation of engagement with the students and improving the quality of interface between the teachers and the taught. Educating the educators in this regard has

to be a part of any such programme. Workshops have to be held and other methods have to be explored, to cultivate constitutional values in students and achieve behavioral change.

176. These are the preventive measures to address the issues of indiscipline, deficit in values and deviant behaviour in all institutions of higher learning.

177. The preventive measures preclude the occurrence of deviant behaviour. The post facto rehabilitation measures prevent recurrence of deviant behaviour. Both have to be integrated into one conjoint system of value creation, in the universities and institutions of higher learning.

178. Structured reform/self development programmes run by universities, can be catalysts for inducing behavioral change, and inculcating a constitutional value system in students. A successful reform, self development and rehabilitation programme, can convert a possible danger into a real asset for the society.

(iv) Creation of reform, self development & rehabilitation programmes

179. Many branches of knowledge in modern times are devoted to the study of human psychology, social behaviour and behavioural change. Psychology, Psychiatry, Sociology, Anthropology and Behavioral Economics, are some fields dedicated to gaining insights into human behaviour and inducing behavioural change.

180. Works of the Nobel prize winning economist Richard Thaler deserve special mention. The methodology of "nudges", in creating behavioral change has been gaining acceptability. The organization "Nudge" in Lebanon, has done noteworthy work with refugee children, and on environmental protection.

181. The Behavioral Insights Teams sometimes called "Nudge Units", are also existing in many nations including Australia, Canada, Germany, Qatar, the United Arab Emirates, Japan, the United States, and the United Kingdom. The Economic Survey released by India's Finance Ministry in July, 2019 has concluded with the clear recommendations that "the proposal to set up a behavioral economics unit in the NITI Ayog must be immediately activated". The report further noticed that the unit should work with State Governments, helping them to make their programme more effective, and informing them of the potential value of Behavioural Insights.

182. Ancient branches of knowledge and wellness like yoga, meditation, vipassana and so on may prove to be rich resources to benefit from.

183. Many scientific researches have confirmed the efficacy of these ancient systems of human wellness. These branches of knowledge have to be approached with a scientific and an open academic mindset. Personal beliefs have to be respected at all times. There can be no imposition of any system, which is resisted on grounds of faith or beliefs; in which cases other options may be given.

184. Socially useful work like planting and taking care of trees, and flora may be a part of the programme. Sports and sporting activities also go a long way in creating integrating social values, and enhancing emotional intelligence.

Teaching needy children, serving the sick, and other forms of service to the society are options which may be explored. Counselling sessions with experts and psychologists could prove useful.

185. Therapeutic solutions to social problems, are being increasingly recognized by social scientists, medical experts, psychologists, and jurists alike.

186. Creation of course content of the reform or self development programme, and manner of its implementation has to be decided by the respondents. This requires wide consultations, deliberations and workshops with academia, varsities, institutions of research, student counsellors, psychologists, psychiatrists, students and other stakeholders.

187. The UGC is a statutory body, and cannot abdicate its responsibilities in this scenario. The functions of the UGC are enumerated in the University Grants Commission Act, 1956. The UGC will play an important role, in the creation and standardization of the course, for reformation and self development, and aid its implementation on an institutional basis.

188. The Government of India in particular, the Ministry of Human Resource Development, also has a contribution to make in the process. The Ministry of Human Resource Development, Government of India, New Delhi, has to provide the necessary support to the University as may be required under law to create and implement the reform, self development and rehabilitation programme. This support would include the creation of necessary infrastructure for implementing the programmes.

189. Both the University Grants Commission and the Ministry of Human Resource Development, Government of India, are required to support the universities in their endeavours to create and implement the programmes of reform, self development and rehabilitation.

190. Law enforcement agencies the world over are engaging with the youth, to draw them away from the appeal of extreme ideologies.

191. The prestige enjoyed by universities and the teachers in society, will make the programme credible to concerned individuals, and acceptable to the student community. The key to the efficacy of any structured reform programme, is empathetic engagement and a supportive environment.

192. An impersonal approach and institutional prejudice, can make the programme a non starter. Due sensitization of all stakeholders is required, before implementing the programme.

193. The founding purpose of universities to supply intellectual and moral leadership to the society, and to be at the vanguard of social transformation, will be eminently achieved by effective reformation/therapeutic/self development programmes.

(v) Concerns of universities regarding discipline & restraints during the reformation, self development & rehabilitation programme:

194. The Court is cognizant of concerns of the universities, that a reform programme should not derail university

administration, nor should it have a detrimental effect on discipline and good order in the campus. A reform and rehabilitation programme, is not intended to allow a wrongdoer to escape justice.

195. Apprehensions of the universities need to be addressed. The reform programme has to be created and structured and implemented in a manner that it does not adversely impact the good order and discipline in the university campus.

196. The start of reform programme does not inevitably mean a free access to, or unconditional reinstatement of a delinquent student into the university campus. In cases of indiscipline where presence of individuals poses a threat of breakdown of order in the university campus, a decision can be made only by the university. Even when such students undergo a reform programme, and the students are pursuing their academic studies, the university may impose restraints it deems fit.

197. To obviate possibilities of disruption in the academic atmosphere, various measures of graduated restrictions may be imposed on a case to case basis. These restraints may include minute monitoring of movements in campus, restricting movements and contact, an employee escort till the student is in the campus, alteration of class schedules and timings. Such lighter restrictions could continue, while undergoing reform programmes along with the academic course.

198. More stringent measures in aggravated cases, may include a campus ban, with on-line classes and home schooling. Transfer to constituent colleges or other universities from a pool of universities, or setting up separate premises are among the options. In these cases entry to the specific university campus may be barred, even as the reform programme is underway, and the student is prosecuting his academic course.

199. These are some illustrative instances, of restraints which may be imposed by the universities.

M. Proportionality & Punishment

200. The controversy has to be seen from another critical legal perspective. The doctrine of proportionality is an established ground of judicial review in the Indian Constitutional jurisprudence.

201. Aharon Barak, former President of Supreme Court of Israel in his book "Proportionality" thus defines the rules of the doctrine of proportionality, "According to the four components of proportionality a limitation of constitutional right will be permissible if, (1) It is designated for a proper purpose, (2) The measures undertaken to effectuate such a limitation are rationally connected to the fulfillment of that purpose, (3) The measures undertaken are necessary and in that there are alternative measures that may similarly achieve that same purpose with a lesser degree of limitation and finally; (4) Their needs to be a proper relation "proportionality strict senso and balance" between the importance of achieving the proper purpose and social importance of preventing the limitation on the constitutional right."

202. The concept of proportionality essentially visualizes, a graduated

response to the nature of the misconduct by a delinquent student. The purpose of the institution, its role in the society and its obligations to the nation, provide the setting for adjudication of the issue of proportionality.

203. Proportionality first came to be applied in the context of punishments imposed for misconduct in service jurisprudence. The necessity of proportional punishment, in cases of misconduct by students is more strongly needed. Hence action of the respondent-University, is liable to be tested on the anvil of disproportionality.

204. The "doctrine of proportionality" was introduced, and embedded in the administrative law of our country, by the Hon'ble Supreme Court in the case of ***Ranjit Thakur Versus Union of India,*** reported at ***(1987) 4 SCC 611.*** The Hon'ble Supreme Court in Ranjit Thakur held thus:

"Judicial review generally speaking, is not directed against a decision, but is directed against the "decision making process". The question of the choice and quantum of punishment is within the jurisdiction and discretion of the Court-Martial. But the sentence has to suit the offence and the offender. It should not be vindictive or unduly harsh. It should not be so disproportionate to the offence as to shock the conscience and amount in itself to conclusive evidence of bias. The doctrine of proportionality, as part of the concept of judicial review, would ensure that even on an aspect which is, otherwise, within the exclusive province of the Court-Martial, if the decision of the Court even as to sentence is an outrageous defiance of logic, then the sentence would not be immune from correction. Irrationality and perversity are recognised grounds of judicial review. "

205. The essence of proportionality is that, the competent authority while imposing a punishment upon a delinquent student, has to co-relate and balance the imperatives of institutional discipline with the demands of individual rights. Too light a punishment will not be conducive to institutional discipline. Too harsh a punishment will not be consistent with norms of justice.

206. The enquiry into the four components of proportionality, as elucidated by Justice Aharon Barak in his book "Proportionality" has been made in the preceding part of the judgment. The purpose and obligations of universities, have also received consideration, in the earlier part of the narrative.

207. The measures undertaken against the petitioner, are not rationally connected to the fulfillment of the purpose sought to be achieved. The proper and designated purpose of a punishment in a university, has to include reform of the student, not mere imposition of penalty. Clearly there are alternative reformative measures, that can achieve the same purpose, with a lesser degree of curtailment of the students rights.

208. The impugned action fails the test of proportionality. The action taken against the petitioner, does not achieve the purpose, and social importance of the reform and rehabilitation of the delinquent student. The impugned order is liable to be set aside on this ground as well.

N. Conclusions and Reliefs

209. The operative portion of the order dated 23.03.2019 passed by the Proctor, Aligarh Muslim, University, Aligarh, is extracted hereunder:

"In light of the directives of the Hon'ble Court the matter was placed before the Vice-Chancellor to re-consider the recommendation of the Discipline Committee. The Vice-Chancellor after re-considering all facts as well as the proceedings of Discipline Committee has ordered that the status quo of the earlier order passed vide Office Memo No. 2901/Proc. Dated 23.08.2016 based on the recommendation of Discipline Committee be maintained."

210. It is obvious that the respondent University has not applied its mind to the direction of the Court, to keep the prospects of reformation of a young adult in mind and also to consider giving a chance to the petitioner to redeem himself and efface the taint of the past by good conduct in future.

211. The order dated 23.03.2019 is arbitrary and illegal, and does not carry out the mandate of the orders passed by this Court. This has been passed on a mechanical manner without application of mind. The order is unsustainable in law and of no effect.

212. The petitioner has tendered a contrite apology, to the Court through his counsel, (this is without prejudice to the defence to the petitioner in criminal case), and seeks an opportunity to evolve into a law abiding and responsible citizen of the country.

213. The acts of violence if proved, may warrant disciplinary action to maintain discipline in the campus. But the facts of the case, also require reformative measures to protect the future of the petitioner.

214. In light of the above discussion, this Court feels that the petitioner has to be given an opportunity to make amends for his past conduct. He is also entitled to the benefit of a reform, self development and rehabilitation programme to be created by the University, in accordance with the directions given in the final part of the judgment. No orders are being passed to reinstate the petitioner and permit him to pursue further academic courses, forthwith. However, the aforesaid reinstatement/permission to continue his studies, shall be made as per the directions of this Court, in the last part of the judgement.

215. In the wake of the preceding discussion, this Court finds that the order dated 23.03.2019 passed by the Proctor, Aligarh Muslim University, is arbitrary and illegal and of no effect.

216. The order dated 23.03.2019 passed by the respondent no.4, Proctor, Aligarh Muslim University, Aligarh is quashed.

217. The case of the petitioner is liable to be revisited in view of the observations made in this judgment.

218. The matter is remitted to the respondents.

219. **A writ in the nature of mandamus is issued commanding the respective respondents to execute the following directions in the light of this judgment:**

I. The University shall pass a fresh reasoned order on the application of the petitioner for being reinstated as a

student in the University, in strict compliance of the directions of this Court in the judgment dated 15.02.2019, rendered in Writ C No. 5403 of 2019, Mohd. Ghayas Vs. Rajya Uttar Pradesh Dwara Pramukh Sachiv Shiksha and Others. While passing the order, the University shall also bear in mind the observations made in this judgment. This is without prejudice to the rights of the petitioner to be enrolled and benefit from the reform, self development and rehabilitation programme to be created in pursuance of this judgment;

II. The University shall create a reform, self development and rehabilitation programme, for students accused of misconduct and against whom disciplinary action or any action to deny facilities of the university is proposed or taken;

III. The reform, self development and rehabilitation programme should be created after wide consultations and workshops with institutions of higher learning and research, universities, experts, student counsellors/psychologists, psychiatrists, students and other stakeholders;

IV. University Grants Commission will aid the above process by providing the necessary support to the University to create, standardize and effectuate the reform, self development and rehabilitation programme in the university;

V. The Secretary, Ministry of Human Resource Development, Government of India, New Delhi (respondent no.5 herein), shall also provide the necessary support to create infrastructure in the University to effectuate the reform, self development and rehabilitation programme in the University, in light of this judgment and as per law;

VI. The reform, self development and rehabilitation programmes shall be processed as per law, and integrated into the existing legal/statutory framework, of the University dealing with deviant conduct and punishments;

VII. The petitioner shall be given the benefit of the reform, self development and rehabilitation programme. After the creation of the self development and rehabilitation programme, the petitioner shall be reinstated as a student, and permitted to continue his studies as per his eligibility, along with the said programme;

VIII. Attendance of the petitioner in the said programme shall be compulsory. An evaluation sheet of the petitioner's performance in the programme shall also be prepared;

IX. It shall be open to the AMU to impose necessary restraints, as it deems fit, upon the petitioner even as he pursues his academic course along with the reform, self development and rehabilitation programme. These restraints may include a campus entry ban upon the petitioner, if the university deems it necessary;

X. The exercise shall be completed, preferably, within six months, but not later than 12 months. At all times the respondents keeping in mind the best interests of the students and the society, shall make all efforts to expedite the compliance of the directions;

XI. It shall be open to the respondents to create a scheme for reform, self development and rehabilitation for convicts in criminal

cases who wish to pursue further higher studies in the respondent University;

XII. The counsels for the respondents shall provide certified copy of this judgment to the Vice Chancellor, Aligarh Muslim University, Aligarh (respondent no. 2 herein), the Secretary, Ministry of Human Resource Development, Union of India, New Delhi (respondent no.5 herein) and the Chairman, University Grants Commission, New Delhi (respondent no. 6 herein), for necessary compliances.

220. The writ petition is partly allowed to the extent and manner indicated above.

(2020)02ILR A1843

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 27.09.2019

BEFORE
THE HON'BLE PRADEEP KUMAR SINGH BAGHEL, J.
THE HON'BLE DR. YOGENDRA KUMAR SRIVASTAVA, J.

Writ C No. 30556 of 2019

M/s Baba Traders ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri B.K. Srivastava, Sri Dhiraj Srivastava

Counsel for the Respondents:
C.S.C., Sri K.R. Singh

Blacklisting-Petitioner-contractor- blacklisted from allotment of contract of work by the Gorakhpur Development Authority-with penalty and for indefinite period-without issuing show cause notice-illegal-**W.P. allowed**. (E-9)

CASES CITED-

1. M/s Erusian Equipment & Chemicals Ltd. Vs. State of West Bengal & Anr.,(1975) 1 SCC 70

2. Raghunath Thakur Vs. State of Bihar & Ors,(1989) 1 SCC 229

3. Mahabir Auto Stores & Ors. Vs. Indian Oil Corporation & Ors, (1990) 3 SCC 752

4. Gronsons Pharmaceuticals (P) Ltd. &Anr. Vs. State of Uttar Pradesh &Ors., AIR 2001 SC 3707

5. M/s Kulja Industries Limited Vs. Chief General Manager, W.T. Project, BSNL & Ors., (2014) 14 SCC 731

6. M/s Southern Painters Vs. Fertilizers & Chemicals Travancore Ltd. & Ans,1994 Supp (2) SCC 699

7. Patel Engineering Ltd. Vs. Union of India, (2012) 11 SCC 257

8. B.S.N. Joshi & Sons Ltd. Vs. Nair Coal Services Ltd. & Ors, (2006) 11 SCC 548

9. Joseph Vilangandan Vs. The Executive Engineer (PWD), Ernakulam & Ors, (1978) 3 SCC 36

10. Radha Krishna Agarwal & Ors. Vs. State of Bihar &Ors, (1977) 3 SCC 457

11. E.P. Royappa Vs. State of Tamil Nadu & Anr,(1974) 4 SCC 3

12. Maneka Gandhi Vs. Union ofIndia & Anr, (1978) 1 SCC 248

13. Ajay Hasia & Ors. Vs. Khalid Mujib Sehravardi & Ors, (1981) 1 SCC 722

14. Ramana Dayaram Shetty Vs. International Airport Authority of India & Ors, (1979) 3 SCC 489

15. Dwarkadas Marfatia and SonsVs. Board of Trustees of the Port of Bombay, (1989) 3 SCC 293

16. Gorkha Security Services Vs. Government (NCT of Delhi) & Ors, (2014) 9 SCC 105'

17. B.C. Biyani Projects Pvt. Ltd. Vs. State of M.P. & Ors, 2017 (3) AWC 2840 (SC)

18. Joint Anti -Fascist Refugee Com. Vs. McGrath, (1951) 341 US 123

19. V. Punnen Thomas Vs. State of Kerala, AIR 1969 Ker 81 (FB)

20. Joseph Vilangandan Vs. The Executive Engineer(PWD), Ernakulam & Ors.,(1978) 3 SCC 36

21. M/s Southern Painters Vs. Fertilizers and Travancore Ltd. & Anr, 1994 Supp (2) SCC 699

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

1. Heard Sri B.K. Srivastava, learned Senior Counsel assisted by Sri Dhiraj Srivastava, learned counsel for the petitioner and Sri K.R. Singh, learned counsel appearing for the second, third and the fourth respondents.

2. The present petition seeks to challenge the order dated 13.05.2019 passed by the third respondent/Vice Chairman, Gorakhpur Development Authority, Gorakhpur whereby the petitioner has been blacklisted for the purposes of allotment of contract of work by the Gorakhpur Development Authority and a penalty of Rs.20 lacs has been imposed. A further prayer is made for disposal of a representation made in this regard by the petitioner before the third respondent.

3. The facts of the case, as per the pleadings in the writ petition, in brief, are that the petitioner is a contractor registered with the Gorakhpur Development Authority engaged for the purposes of construction work for the past several years, and was directed by the respondent authorities to complete the work of construction of a culvert on a drain on urgent basis. It has been averred that after completion of the work some of the bricks used temporarily for supporting the concrete remained left over, and taking that to be the basis the impugned order dated 13.05.2019 has been passed by the third respondent blacklisting the petitioner permanently and imposing Rs.20 lacs as penalty for the alleged use of old bricks in the construction work.

4. With the consent of the parties the writ petition is taken up for disposal as per the Rules of the Court.

5. Contention of the learned Senior Counsel appearing for the petitioner is that the impugned order of blacklisting dated 13.05.2019 has been passed against the petitioner without giving any show cause notice and opportunity of hearing hence the same is in gross violation of principles of natural justice.

6. It has been pointed out that the order of blacklisting which has been passed is not for any specified period of time and any such order having a permanent effect is not sustainable. It is also submitted that the impugned order does not refer to any enquiry which could be said to form basis of the order of blacklisting and that the effect of the order is not only stigmatic but it also has adverse civil consequences and as such cannot be legally sustained.

7. Sri K.R. Singh, learned counsel appearing for the second, third and the fourth respondents has not been able to

point out from the order impugned that the same has been passed pursuant to any fact finding enquiry or that the petitioner was given any show cause notice or opportunity of hearing before passing of the order of blacklisting. There is no material on record to show that the principles of natural justice were complied with before passing of the order.

8. In order to appreciate the contentions of the parties we may advert to the meaning of "blacklist" and "blacklisting" and in this regard reference may be drawn to the enunciation of the aforementioned terms in the legal dictionaries.

9. The term **"blacklist"** has been defined in **Black's Law Dictionary1** in the following manner:-

"To put the name of (a person) on a list of those who are to be boycotted or punished."

10. **Wharton's Law Lexicon2** refers to the term **"blacklist"** as follows:-

"The term given to any list of persons with whom the person or body compiling the list advises no one should have dealings of the character indicated. Thus the list of defaulters on the Stock Exchange is so named, and various societies and individuals also publish lists with a similar purpose."

11. The terms **"blacklist"** and **"blacklisting"** have been described in **Advanced Law Lexicon by P. Ramanatha Aiyar3** in the following manner:-

"Black list is a list of persons or firms against whom its compiler would warn the public, or some section of the public; a list of persons unworthy of credit, or with whom it is not advisable to make contracts. Thus, the official list of defaulters on the Stock Exchange is a blacklist. To put a man's name on such a blacklist without lawful causes is actionable; and the further publication of such a list will be restrained by injunction. A list of persons, firms companiesbycotted or punished."

"Blacklisting is a part of the paraphernalia of strike. It may be said to represent the malignant hate and revenge of the parties resorting to it. In its purpose and effects it is closely allied to a boycott. A "blacklist" is defined to be a list of the persons marked out for special avoidance, antagonism, and enmity on the part of those who prepare the list or those among whom it is intended to circulate, as where a trade union blacklists workmen who refuse to conform to it rules; but it is most usually resorted to by combined employers, who exchange lists of their employees who go on strikes, with the agreement that none of them will employ the workmen whose names are on the lists, and comes within the meaning of what is termed a 'conspiracy'.

List of companies, products or people that are undesirable and to be avoided. In the USA the term means more specifically the denial of work to certain people on the grounds of their past beliefs or actions."

12. In the celebrated case of **Quinn Vs. Leathem4** which is a case on economic tort and relates to the tort of "conspiracy to injure", it was stated by **Lord Lindley**, as follows:-

"...Black lists are real instruments of coercion, as every man whose name is on one soon discovers to his cost,..."

13. The issue with regard to the entitlement to a notice to be heard before blacklisting came up in the case of **M/s Erusian Equipment & Chemicals Ltd. Vs. State of West Bengal & Anr.5** and referring to the powers of the State under Article 298 of the Constitution of India6 to carry on trade or business, it was held that the exercise of such powers and functions in trade by the State is subject to Part III of the Constitution and the State while having the right to trade has the duty to observe equality and cannot choose to exclude persons by discrimination. The relevant observations made in the judgment are as follows:-

"12. Under Article 298 of the Constitution the executive power of the Union and the State shall extend to the carrying on of any trade and to the acquisition, holding and disposal of property and the making of contracts for any purpose. The State can carry on executive function by making a law or without making a law. The exercise of such powers and functions in trade by the State is subject to Part III of the Constitution. Article 14 speaks of equality before the law and equal protection of the laws. Equality of opportunity should apply to matters of public contracts. The State has the right to trade. The State has there the duty to observe equality. An ordinary individual can choose not to deal with any person. The Government cannot choose to exclude persons by discrimination. The order of blacklisting has the effect of depriving a person of equality of opportunity in the matter of public contract. A person who is on the approved list is unable to enter into advantageous relations with the Government because of the order of blacklisting. A person who has been dealing with the Government in the matter of sale and purchase of materials has a legitimate interest or expectation. When the State acts to the prejudice of a person it has to be supported by legality.

13. But for the order of blacklisting, the petitioner would have been entitled to participate in the purchase of cinchona. Similarly the respondent in the appeal would also have been entitled but for the order of blacklisting to tender competitive rates.

14. The State can enter into contract with any person it chooses. No person has a fundamental right to insist that the Government must enter into a contract with him. A citizen has a right to earn livelihood and to pursue any trade. A citizen has a right to claim equal treatment to enter into a contract which may be proper, necessary and essential to his lawful calling.

15. The blacklisting order does not pertain to any particular contract. The blacklisting order involves civil consequences. It casts a slur. It creates a barrier between the persons blacklisted and the Government in the matter of transactions. The blacklists are "instruments of coercion".

16. In passing an order of blacklisting the Government department acts under what is described as a standardised code. This is a code for internal instruction. The Government departments make regular purchases. They maintain list of approved suppliers after taking into account the financial standard of the firm, their capacity and their past performance. The removal from the list is made for various reasons. The grounds on

which blacklisting may be ordered are if the proprietor of the firm is convicted by court of law or security considerations to warrant or if there is strong justification for believing that the proprietor or employee of the firm has been guilty of malpractices such as bribery, corruption, fraud, or if the firm continuously refuses to return Government dues or if the firm employs a Government servant, dismissed or removed on account of corruption in a position where he could corrupt Government servants. The petitioner was blacklisted on the ground of justification for believing that the firm has been guilty of malpractices such as bribery, corruption, fraud. The petitioners were blacklisted on the ground that there were proceedings pending against the petitioners for alleged violation of provisions under the Foreign Exchange Regulations Act.

17. The Government is a Government of laws and not of men. It is true that neither the petitioner nor the respondent has any right to enter into a contract but they are entitled to equal treatment with others who offer tender or quotations for the purchase of the goods. This privilege arises because it is the Government which is trading with the public and the democratic form of Government demands equality and absence of arbitrariness and discrimination in such transactions. Hohfeld treats privileges as a form of liberty as opposed to a duty. The activities of the Government have a public element and, therefore, there should be fairness and equality. The State need not enter into any contract with any one but if it does so, it must do so fairly without discrimination and without unfair procedure. Reputation is a part of a person's character and personality. Blacklisting tarnishes one's reputation.

18. Exclusion of a member of the public from dealing with a State in sales transactions has the effect of preventing him from purchasing and doing a lawful trade in the goods in discriminating against him in favour of other people. The State can impose reasonable conditions regarding rejection and acceptance of bids or qualifications of bidders. Just as exclusion of the lowest tender will be arbitrary, similarly exclusion of a person who offers the highest price from participating at a public auction would also have the same aspect of arbitrariness.

19. Where the State is dealing with individuals in transactions of sales and purchase of goods, the two important factors are that an individual is entitled to trade with the Government and an individual is entitled to a fair and equal treatment with others. A duty to act fairly can be interpreted as meaning a duty to observe certain aspects of rules of natural justice. A body may be under a duty to give fair consideration to the facts and to consider the representations but not to disclose to those persons details of information in its possession. Sometimes duty to act fairly can also be sustained without providing opportunity for an oral hearing. It will depend upon the nature of the interest to be affected, the circumstances in which a power is exercised and the nature of sanctions involved therein.

20. Blacklisting has the effect of preventing a person from the privilege and advantage of entering into lawful relationship with the Government for purposes of gains. The fact that a disability is created by the order of blacklisting indicates that the relevant authority is to have an objective satisfaction. Fundamentals of fair play require that the

person concerned should be given an opportunity to represent his case before he is put on the blacklist."

14. The aforementioned proposition that no order of blacklisting could be passed without affording opportunity of hearing to the affected party was reiterated in the case of **Raghunath Thakur Vs. State of Bihar & Ors.7** wherein it was stated as follows:-

"4. Indisputably, no notice had been given to the appellant of the proposal of blacklisting the appellant. It was contended on behalf of the State Government that there was no requirement in the rule of giving any prior notice before blacklisting any person. Insofar as the contention that there is no requirement specifically of giving any notice is concerned, the respondent is right. But it is an implied principle of the rule of law that any order having civil consequence should be passed only after following the principles of natural justice. It has to be realised that blacklisting any person in respect of business ventures has civil consequence for the future business of the person concerned in any event. Even if the rules do not express so, it is an elementary principle of natural justice that parties affected by any order should have right of being heard and making representations against the order..."

15. The exercise of the executive power of the State or its instrumentalities in entering into a contract with private parties flowing from Article 298 of the Constitution including the power to enter or not into a contract came up for consideration in the case of **Mahabir Auto Stores & Ors. Vs. Indian Oil Corporation & Ors.8** and it was held that the decision of the State or any of its instrumentalities to enter or not into a contract being an administrative action the same would be open to a challenge on the ground of violation of Article 14 of the Constitution and would also be subject to the power of judicial review. The observations made in the judgment are as follows:-

"12. It is well settled that every action of the State or an instrumentality of the State in exercise of its executive power, must be informed by reason. In appropriate cases, actions uninformed by reason may be questioned as arbitrary in proceedings under Article 226 or Article 32 of the Constitution. Reliance in this connection may be placed on the observations of this Court in Radha Krishna Agarwal v. State of Bihar (1977) 3 SCC 457. It appears to us, at the outset, that in the facts and circumstances of the case, the respondent company IOC is an organ of the State or an instrumentality of the State as contemplated under Article 12 of the Constitution. The State acts in its executive power under Article 298 of the Constitution in entering or not entering in contracts with individual parties. Article 14 of the Constitution would be applicable to those exercises of power. Therefore, the action of State organ under Article 14 can be checked. See Radha Krishna Agarwal v. State of Bihar at p. 462, but Article 14 of the Constitution cannot and has not been construed as a charter for judicial review of State action after the contract has been entered into, to call upon the State to account for its actions in its manifold activities by stating reasons for such actions. In a situation of this nature certain activities of the respondent company which constituted State under Article 12 of the Constitution may be in certain

circumstances subject to Article 14 of the Constitution in entering or not entering into contracts and must be reasonable and taken only upon lawful and relevant consideration; it depends upon facts and circumstances of a particular transaction whether hearing is necessary and reasons have to be stated. In case any right conferred on the citizens which is sought to be interfered, such action is subject to Article 14 of the Constitution, and must be reasonable and can be taken only upon lawful and relevant grounds of public interest. Where there is arbitrariness in State action of this type of entering or not entering into contracts, Article 14 springs up and judicial review strikes such an action down. Every action of the State executive authority must be subject to rule of law and must be informed by reason. So, whatever be the activity of the public authority, in such monopoly or semi-monopoly dealings, it should meet the test of Article 14 of the Constitution. If a governmental action even in the matters of entering or not entering into contracts, fails to satisfy the test of reasonableness, the same would be unreasonable. In this connection reference may be made to E.P. Royappa v. State of Tamil Nadu (1974) 4 SCC 3, Maneka Gandhi v. Union of India (1978) 1 SCC 248, Ajay Hasia v. Khalid Mujib Sehravardi (1981) 1 SCC 722, R.D. Shetty v. International Airport Authority of India (1979) 3 SCC 489 and also Dwarkadas Marfatia and Sons v. Board of Trustees of the Port of Bombay (1989) 3 SCC 293. It appears to us that rule of reason and rule against arbitrariness and discrimination, rules of fair play and natural justice are part of the rule of law applicable in situation or action by State instrumentality in dealing with citizens in a situation like the present one. Even though the rights of the citizens are in the nature of contractual rights, the manner, the method and motive of a decision of entering or not entering into a contract, are subject to judicial review on the touchstone of relevance and reasonableness, fair play, natural justice, equality and non-discrimination in the type of the transactions and nature of the dealing as in the present case.

x x x x x

18. ...we are of the opinion that decision of the State/public authority under Article 298 of the Constitution, is an administrative decision and can be impeached on the ground that the decision is arbitrary or violative of Article 14 of the Constitution of India on any of the grounds available in public law field. It appears to us that in respect of corporation like IOC when without informing the parties concerned, as in the case of the appellant-firm herein on alleged change of policy and on that basis action to seek to bring to an end to course of transaction over 18 years involving large amounts of money is not fair action, especially in view of the monopolistic nature of the power of the respondent in this field. Therefore, it is necessary to reiterate that even in the field of public law, the relevant persons concerned or to be affected, should be taken into confidence. Whether and in what circumstances that confidence should be taken into consideration cannot be laid down on any strait-jacket basis. It depends on the nature of the right involved and nature of the power sought to be exercised in a particular situation. It is true that there is discrimination between power and right but whether the State or the instrumentality of a State has the right to function in public field or private field is a matter which, in our opinion, depends upon the facts and circumstances of the situation, but such exercise of power

cannot be dealt with by the State or the instrumentality of the State without informing and taking into confidence, the party whose rights and powers are affected or sought to be affected, into confidence. In such situations most often people feel aggrieved by exclusion of knowledge if not taken into confidence."

16. The requirement of grant of opportunity to show cause before blacklisting was restated in the case of **Gronsons Pharmaceuticals (P) Ltd. & Anr. Vs. State of Uttar Pradesh & Ors.9** and it was held that since the order blacklisting of an approved contractor results in civil consequences, the principle of *audi alteram partem* is required to be observed.

17. The power to blacklist a contractor was held to be inherent in the party allotting the contract and the freedom to contract or not to contract was held to be unqualified in the case of private parties; however when the party is State, the decision to blacklist would be open judicial review on touchstone of proportionality and the principles of natural justice. The relevant observations made in this regard in the case of **M/s Kulja Industries Limited Vs. Chief General Manager, W.T. Project, BSNL & Ors.10** are as under:-

"17. That apart, the power to blacklist a contractor whether the contract be for supply of material or equipment or for the execution of any other work whatsoever is in our opinion inherent in the party allotting the contract. There is no need for any such power being specifically conferred by statute or reserved by contractor. That is because "blacklisting" simply signifies a business decision by which the party affected by the breach decides not to enter into any contractual relationship with the party committing the breach. Between two private parties the right to take any such decision is absolute and untrammelled by any constraints whatsoever. The freedom to contract or not to contract is unqualified in the case of private parties. But any such decision is subject to judicial review when the same is taken by the State or any of its instrumentalities. This implies that any such decision will be open to scrutiny not only on the touchstone of the principles of natural justice but also on the doctrine of proportionality. A fair hearing to the party being blacklisted thus becomes an essential precondition for a proper exercise of the power and a valid order of blacklisting made pursuant thereto. The order itself being reasonable, fair and proportionate to the gravity of the offence is similarly examinable by a writ court."

18. The aforementioned judgment has taken note of the fact that the principle of *audi alteram partem* has been held to be applicable to the process that may eventually culminate in the blacklisting of a contractor in the earlier judgments in **M/s Southern Painters Vs. Fertilizers & Chemicals Travancore Ltd. & Anr.11, Patel Engineering Ltd. Vs. Union of India12, B.S.N. Joshi & Sons Ltd. Vs. Nair Coal Services Ltd. & Ors.13, Joseph Vilangandan Vs. The Executive Engineer (PWD), Ernakulam & Ors.14.**

19. It was held that even though the right of the petitioner may be in the nature of a contractual right, the manner, the method and the motive behind the decision of the authority whether or not to enter into a contract is subject to the powers of judicial review on the touchstone of

fairness, relevance, natural justice, non-discrimination, equality and proportionality. In this regard reference was made to earlier decisions in **Radha Krishna Agarwal & Ors. Vs. State of Bihar & Ors.15, E.P. Royappa Vs. State of Tamil Nadu & Anr.16, Maneka Gandhi Vs. Union of India & Anr.17, Ajay Hasia & Ors. Vs. Khalid Mujib Sehravardi & Ors.18, Ramana Dayaram Shetty Vs. International Airport Authority of India & Ors.19 and Dwarkadas Marfatia and Sons Vs. Board of Trustees of the Port of Bombay20.**

20. The legal position governing blacklisting in USA and UK was also considered and it was noticed that in USA the term "debarring" is used by the statutes and the courts and comprehensive guidelines have been issued in this regard. It was also taken note of that though "debarment" is recognised as an effective tool for disciplining deviant contractors but the debarment is never permanent. The observations made in the judgment in this respect are as follows:-

"21. The legal position governing blacklisting of suppliers in USA and UK is no different. In USA instead of using the expression "blacklisting" the term "debarring" is used by the statutes and the courts. The Federal Government considers "suspension and debarment" as a powerful tool for protecting taxpayer resources and maintaining integrity of the processes for federal acquisitions. Comprehensive guidelines are, therefore, issued by the government for protecting public interest from those contractors and recipients who are non-responsible, lack business integrity or engage in dishonest or illegal conduct or are otherwise unable to perform satisfactorily. These guidelines prescribe the following among other grounds for debarment:

(a) Conviction of or civil judgment for.--

(1) Commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public or private agreement or transaction;

(2) Violation of Federal or State antitrust statutes, including those proscribing price fixing between competitors, allocation of customers between competitors, and bid rigging;

(3) Commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, tax evasion, receiving stolen property, making false claims, or obstruction of justice; or (4) Commission of any other offense indicating a lack of business integrity or business honesty that seriously and directly affects your present responsibility;

(b) Violation of the terms of a public agreement or transaction so serious as to affect the integrity of an agency program, such as.--

(1) A wilful failure to perform in accordance with the terms of one or more public agreements or transactions;

(2) A history of failure to perform or of unsatisfactory performance of one or more public agreements or transactions; or

(3) A wilful violation of a statutory or regulatory provision or requirement applicable to a public agreement or transaction;

(c) x x x x x

(d) Any other cause of so serious or compelling a nature that it affects your present responsibility.

22. The guidelines also stipulate the factors that may influence the debarring official's decision which include the following:

a) The actual or potential harm or impact that results or may result from the wrongdoing.

b) The frequency of incidents and/or duration of the wrongdoing.

c) Whether there is a pattern or prior history of wrongdoing.

d) Whether contractor has been excluded or disqualified by an agency of the Federal Government or have not been allowed to participate in State or local contracts or assistance agreements on a basis of conduct similar to one or more of the causes for debarment specified in this part.

(e) Whether and to what extent did the contractor plan, initiate or carry out the wrongdoing.

(f) Whether the contractor has accepted responsibility for the wrongdoing and recognized the seriousness of the misconduct.

(g) Whether the contractor has paid or agreed to pay all criminal, civil and administrative liabilities for the improper activity, including any investigative or administrative costs incurred by the government, and have made or agreed to make full restitution.

(h) Whether contractor has cooperated fully with the government agencies during the investigation and any court or administrative action.

(i) Whether the wrongdoing was pervasive within the contractor's organization.

(j) The kind of positions held by the individuals involved in the wrongdoing.

(k) Whether the contractor has taken appropriate corrective action or remedial measures, such as establishing ethics training and implementing programs to prevent recurrence.

(l) Whether the contractor fully investigated the circumstances surrounding the cause for debarment and, if so, made the result of the investigation available to the debarring official."

23. As regards the period for which the order of debarment will remain effective, the guidelines state that the same would depend upon the seriousness of the case leading to such debarment.

24. Similarly in England, Wales and Northern Ireland, there are statutory provisions that make operators ineligible on several grounds including fraud, fraudulent trading or conspiracy to defraud, bribery etc.

25. Suffice it to say that "debarment' is recognised and often used as an effective method for disciplining deviant suppliers/contractors who may have committed acts of omission and commission or frauds including misrepresentations, falsification of records and other breaches of the regulations under which such contracts were allotted. What is notable is that the "debarment' is never permanent and the period of debarment would invariably depend upon the nature of the offence committed by the erring contractor."

21. In **Patel Engineering Ltd. Vs. Union of India8,** referring to the authority of the State and its instrumentalities to enter into contracts in view of the power conferred under Article 298 of the Constitution it was taken note of that the right to make a contract includes the right to not to make a contract; however, such right including the right to blacklist which could be exercised by the State is subject to the constitutional obligation to obey the

command of Article 14. The observations made in the judgment in this regard are being extracted below:-

"13. The concept of "blacklisting" is explained by this Court in Erusian Equipment & Chemicals Limited v. State of W.B. (1975) 1 SCC 70, as under: (SCC p.75, para 20)

" 20. Blacklisting has the effect of preventing a person from the privilege and advantage of entering into lawful relationship with the Government for purposes of gains."

14. The nature of the authority of State to blacklist persons was considered by this Court in the abovementioned case and took note of the constitutional provision (Article 298), which authorises both the Union of India and the States to make contracts for any purpose and to carry on any trade or business. It also authorises the acquisition, holding and disposal of property. This Court also took note of the fact that the right to make a contract includes the right not to make a contract. By definition, the said right is inherent in every person capable of entering into a contract. However, such a right either to enter or not to enter into a contract with any person is subject to a constitutional obligation to obey the command of Article 14. Though nobody has any right to compel State to enter into a contract, everybody has a right to be treated equally when State seeks to establish contractual relationships. The effect of excluding a person from entering into a contractual relationship with State would be to deprive such person to be treated equally with those, who are also engaged in similar activity.

15. It follows from the judgment in Erusian Equipment case that the decision of State or its instrumentalities not to deal with certain persons or class of persons on account of the undesirability of entering into contractual relationship with such persons is called blacklisting. State can decline to enter into a contractual relationship with a person or a class of persons for a legitimate purpose. The authority of State to blacklist a person is a necessary concomitant to the executive power of the State to carry on the trade or the business and making of contracts for any purpose, etc. There need not be any statutory grant of such power. The only legal limitation upon the exercise of such an authority is that State is to act fairly and rationally without in any way being arbitrary--thereby such a decision can be taken for some legitimate purpose. What is the legitimate purpose that is sought to be achieved by the State in a given case can vary depending upon various factors."

22. The applicability of the principle of *audi alteram partem* and the necessity of issuance of a show cause notice before passing of an order of blacklisting and the prejudice caused for the reason of failure of giving notice was reiterated in **Gorkha Security Services Vs. Government (NCT of Delhi) & Ors.21,** and it was stated as follows:-

"16. It is a common case of the parties that the blacklisting has to be preceded by a show cause notice. Law in this regard is firmly grounded and does not even demand much amplification. The necessity of compliance with the principles of natural justice by giving the opportunity to the person against whom action of blacklisting is sought to be taken has a valid and solid rationale behind it. With blacklisting many civil and/or evil consequences follow. It is described as "civil death" of a person who is foisted

with the order of blacklisting. Such an order is stigmatic in nature and debars such a person from participating in government tenders which means precluding him from the award of government contracts.

17. Way back in the year 1975, this Court in Erusian Equipment & Chemicals Ltd. v. State of W.B. [(1975) 1 SCC 70], highlighted the necessity of giving an opportunity to such a person by serving a show cause notice thereby giving him opportunity to meet the allegations which were in the mind of the authority contemplating blacklisting of such a person...

x x x x x

20. ...there is no dispute about the requirement of serving show-cause notice. We may also hasten to add that once the show-cause notice is given and opportunity to reply to the show-cause notice is afforded, it is not even necessary to give an oral hearing. The High Court has rightly repudiated the appellant's attempt in finding foul with the impugned order on this ground. Such a contention was specifically repelled in Patel Engineering (supra).

Contents of show-sause notice

21. The central issue, however, pertains to the requirement of stating the action which is proposed to be taken. The fundamental purpose behind the serving of show-cause notice is to make the noticee understand the precise case set up against him which he has to meet. This would require the statement of imputations detailing out the alleged breaches and defaults he has committed, so that he gets an opportunity to rebut the same. Another requirement, according to us, is the nature of action which is proposed to be taken for such a breach. That should also be stated so that the noticee is able to point out that proposed action is not warranted in the given case, even if the defaults/breaches complained of are not satisfactorily explained. When it comes to black listing, this requirement becomes all the more imperative, having regard to the fact that it is harshest possible action.

22. The High Court has simply stated that the purpose of show cause notice is primarily to enable the noticee to meet the grounds on which the action is proposed against him. No doubt, the High Court is justified to this extent. However, it is equally important to mention as to what would be the consequence if the noticee does not satisfactorily meet the grounds on which an action is proposed. To put it otherwise, we are of the opinion that in order to fulfil the requirements of principles of natural justice, a show cause notice should meet the following two requirements viz:

(i) The material/grounds to be stated on which according to the Department necessitates an action;

(ii) Particular penalty/action which is proposed to be taken. It is this second requirement which the High Court has failed to omit.

we may hasten to add that even if it is not specifically mentioned in the show cause notice but it can be clearly and safely be discerned from the reading thereof, that would be sufficient to meet this requirement.

x x x x x

27. We are, therefore, of the opinion that it was incumbent on the part of the Department to state in the show cause notice that the competent authority intended to impose such a penalty of blacklisting, so as to provide adequate and meaningful opportunity to the appellant to show cause against the same. However, we may also add that even if it is not

mentioned specifically but from the reading of the show cause notice, it can be clearly inferred that such an action was proposed, that would fulfill this requirement...

x x x x x

29. No doubt, rules of natural justice are not embodied rules nor can they be lifted to the position of fundamental rights. However, their aim is to secure justice and to prevent miscarriage of justice. It is now well established proposition of law that unless a statutory provision either specifically or by necessary implication excludes the application of any rules of natural justice, in exercise of power prejudicially affecting another must be in conformity with the rules of natural justice.

30. We are conscious of the following words of wisdom expressed by this Court through the pen of Krishna Iyer, J. in Board of Mining Examination v. Ramjee (1977) 2 SCC 256 (pp. 258 & 262, paras 1, 13 & 14)

"1. If the jurisprudence of remedies were understood and applied from the perspective of social efficaciousness, the problem raised in this appeal would not have ended the erroneous way it did in the High Court. Judges must never forget that every law has a social purpose and engineering process without appreciating which justice to the law cannot be done. Here, the socio-legal situation we are faced with is a colliery, an explosive, an accident, luckily not lethal, caused by violation of a regulation and consequential cancellation of the certificate of the delinquent shot-firer, eventually quashed by the High Court, for processual solecisms, by a writ of certiorari.

x x x x x

13. Natural justice is no unruly horse, no lurking land mine, nor a judicial cure all. If fairness is shown by the decision-maker to the man proceeded against, the form, features and the fundamentals of such essential processual propriety being conditioned by the facts and circumstances of each situation, no breach of natural justice can be complained of. Unnatural expansion of natural justice, without reference to the administrative realities and other factors of a given case, can be exasperating. We can neither be finical nor fanatical but should be flexible yet firm in this jurisdiction. No man shall be hit below the belt - that is the conscience of the matter.

14. ...we cannot look at law in the abstract or natural justice as a mere artefact. Nor can we fit into a rigid mould the concept of reasonable opportunity."

31. When it comes to the action of blacklisting which is termed as "civil death" it would be difficult to accept the proposition that without even putting the noticee to such a contemplated action and giving him a chance to show cause as to why such an action be not taken, final order can be passed blacklisting such a person only on the premise that this is one of the actions so stated in the provisions of NIT.

The "prejudice" argument

32. It was sought to be argued by Mr. Maninder Singh, learned Additional Solicitor General appearing for the respondent, that even if it is accepted that show-cause notice should have contained the proposed action of blacklisting, no prejudice was caused to the appellant in as much as all necessary details mentioning defaults/prejudices committed by the appellant were given in the show-cause notice and the appellant had even given its reply thereto. According to him, even if the action of blacklisting was not proposed in the show-cause notice, reply of the appellant would have remained the same. On this premise, the learned Additional Solicitor General has argued that there is no prejudice caused to the appellant by non-mentioning of the proposed action of blacklisting. He argued that unless the

appellant was able to show that non-mentioning of blacklisting as the proposed penalty has caused prejudice and has resulted in miscarriage of justice, the impugned action cannot be nullified. For this proposition he referred to the judgment of this Court in Haryana Financial Corpn. v. Kailash Chandra Ahuja (2008) 9 SCC 31 (pp. 38, 40-41, & 44, paras 21, 31, 36 & 44)

"21. From the ratio laid down in ECIL v. B. Karunakar (1993) 4 SCC 727 it is explicitly clear that the doctrine of natural justice requires supply of a copy of the inquiry officer's report to the delinquent if such inquiry officer is other than the disciplinary authority. It is also clear that non-supply of report of the inquiry officer is in the breach of natural justice. But it is equally clear that failure to supply a report of the inquiry officer to the delinquent employee would not ipso facto result in the proceedings being declared null and void and the order of punishment non est and ineffective. It is for the delinquent employee to plead and prove that non-supply of such report had caused prejudice and resulted in miscarriage of justice. If he is unable to satisfy the court on that point, the order of punishment cannot automatically be set aside.

x x x x x

31. At the same time, however, effect of violation of the rule of audi alteram partem has to be considered. Even if hearing is not afforded to the person who is sought to be affected or penalised, can it not be argued that 'notice would have served no purpose' or 'hearing could not have made difference' or 'the person could not have offered any defence whatsoever'. In this connection, it is interesting to note that under the English law, it was held few years before that non-compliance with principles of natural justice would make the order null and void and no further inquiry was necessary.

x x x x x

36. The recent trend, however, is of 'prejudice'. Even in those cases where procedural requirements have not been complied with, the action has not been held ipso facto illegal, unlawful or void unless it is shown that non- observance had prejudicially affected the applicant.

x x x x x

44. From the aforesaid decisions, it is clear that though supply of report of the inquiry officer is part and parcel of natural justice and must be furnished to the delinquent employee, failure to do so would not automatically result in quashing or setting aside of the order or the order being declared null and void. For that, the delinquent employee has to show 'prejudice'. Unless he is able to show that non-supply of report of the inquiry officer has resulted in prejudice or miscarriage of justice, an order of punishment cannot be held to be vitiated. And whether prejudice had been caused to the delinquent employee depends upon the facts and circumstances of each case and no rule of universal application can be laid down."

33. When we apply the ratio of the aforesaid judgment to the facts of the present case, it becomes difficult to accept the argument of the learned Additional Solicitor General. In the first instance, we may point out that no such case was set up by the respondents that by omitting to state the proposed action of blacklisting, the appellant in the show-cause notice has not caused any prejudice to the appellant. Moreover, had the action of blacklisting being specifically proposed in the show-cause notice, the appellant could have mentioned as to why such extreme penalty is not justified. It could have come out

with extenuating circumstances defending such an action even if the defaults were there and the Department was not satisfied with the explanation qua the defaults. It could have even pleaded with the Department not to blacklist the appellant or do it for a lesser period in case the Department still wanted to black list the appellant. Therefore, it is not at all acceptable that non-mentioning of proposed blacklisting in the show-cause notice has not caused any prejudice to the appellant. This apart, the extreme nature of such a harsh penalty like blacklisting with severe consequences, would itself amount to causing prejudice to the appellant."

23. In **B.C. Biyani Projects Pvt. Ltd. Vs. State of M.P. & Ors.22** referring to the earlier judgment in the case of **M/s Kulja Industries Limited** it was held that an order of blacklisting for an indefinite period was not permissible in law. The observations made in the judgment in this regard are as follows:-

"7. In Kulja Industries Limited v. Chief General Manager, Western Telecom Project Bharat Sanchar Nigam Limited and others, (2014) 14 SCC 731, this Court held in paragraph 25 of the report that "debarment" cannot be permanent and the period of "debarment" would invariably depend upon the nature of the offence committed by the erring contractor. Paragraph 25 of the report reads as follows :

"25. Suffice it to say that "debarment" is recognised and often used as an effective method for disciplining deviant suppliers/contractors who may have committed acts of omission and commission or frauds including misrepresentations, falsification of records and other breaches of the regulations under which such contracts were allotted. What is notable is that the "debarment" is never permanent and the period of debarment would invariably depend upon the nature of the offence committed by the erring contractor."

8. As mentioned above, the order for blacklisting the appellant is a permanent one. This is impermissible in law."

24. It would be apposite to refer to a Full Bench judgment of the Kerala High Court in the case of **V. Punnen Thomas Vs. State of Kerala23** as an interesting stage in the course of development of law on the subject wherein it was held by a majority view that the Government can refuse to deal with any person without giving reason or for any reason it thinks fit and the principle of *audi alterm partem* would not be attracted.

25. Justice Mathew (as he then was) gave a dissenting view stating as follows:-

"14. Government has right like any private citizen to enter into contracts with any person it chooses and no person has a right fundamental or otherwise to insist that Government must enter into a contractual relation with him. See 1958 Ker LT 334=(AIR 1958 Ker 333). In AIR 1959 SC 490 the Supreme Court observed;

"There is no discrimination, because it is perfectly open to the Government, even as it is to a private party, to choose a person to their liking to fulfil contracts which they wish to be performed."

In that case, there was no question of the legality of putting a person's name in black-list. The only question was whether for breach of a contract by Government, the remedy of the

petitioner there, was to approach the Supreme Court under Article 32 of the Constitution. A citizen, I think, has the right "to earn his livelihood by any lawful calling; to pursue any livelihood or avocation; and for that purpose to enter into all contracts which may be proper, necessary, and essential to his carrying out to a successful conclusion the purposes above mentioned ..... In the privilege of pursuing an ordinary calling or trade, and of acquiring, holding and selling property, must be embraced the right to make all proper contracts in relation thereto". (See Allgeyar v. State of Louisiana. (1897) 165 US 578, 589, 591).

15. A contractual relationship presupposes a consensus of two minds. If Government is not willing to enter into contract with a person, I do not think that Government can be forced to do so. It is one thing to say that Government, like any other private citizen, can enter into contract with any person it pleases, but a totally different thing to say that government can unreasonably put a person's name in a black-list and debar him from entering into any contractual relationship with the government for years to come. In the former case, it might be said that Government is exercising its right like any other private citizen, 'but no, democratic government should with impunity pass a proceeding which will have civil consequences to a citizen without notice and an opportunity of being heard. The reason why the proceeding for blacklisting the petitioner and debarring him from taking government work for ten years was passed, is that he committed irregularities in connection with the tender of the contract work..."

26. An *ex parte* adverse adjudication without notice and opportunity of being heard and putting the petitioner on the blacklist and debarring him from work by way of punishment was held to be against all notions on fairness in a democratic country and in this regard the observations made by **Frankfurter, J. in Joint Anti Fascist Refugee Com. Vs. McGrath24** which were referred to are being extracted below:-

"That a conclusion satisfies one's private conscience does not attest its reliability. The validity and moral authority of a conclusion largely depend on the mode by which it was reached. Secrecy is not congenial to truth-seeking and self-righteousness gives too slender an assurance of lightness. No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss, notice of the case against him and opportunity to meet it. Nor has a better way been found for generating the feeling, so important to a popular Government, that justice has been done."

27. The minority judgment further referred to the article of **Kenneth Culp Davis** under the title **"The Requirement of a Trial-Type Hearing"25** to draw the inference that apart from the material damage involved in the loss of the prospect of entering into the advantageous relationship with Government, a verdict of being guilty of irregularities, coming from the Government has civil consequences as it touches the reputation and standing of the contractor in the business world. The passages of the article, which have been referred, are being extracted below:-

"The plain fact is that the Courts often give legal protection to what they persist in calling 'privileges'. In doing so they commonly rely upon one or more of

three ideas or on a fourth method which involves the lack of an idea. The three ideas are: (1) that constitutional principles of substantive and procedural fairness apply even when only a privilege is at stake and even when the privilege itself is not directly entitled to legal protection; (2) that privileges as well as rights are entitled to legal protection; and (3) that when a privilege is combined with another interest the combination may be a right and accordingly entitled to legal protection. The remaining method is (4) to cast logic to the winds in discussing right and privilege or to provide legal protection to a privilege without mentioning the problem of privilege.

(1) the essence of the first idea is that the government is still the government even when it is dispensing bounties, gratuities, or privileges, that we want the government to be fair no matter what its activities may be, and that often the best way to assure governmental fairness is by relying upon judicial enforcement of the usual concepts of fairness. Therefore, the basic constitutional Limitations having to do with fairness often apply even though the privileges as such are not entitled to legal protection.

But if a right is an interest which is legally protected, and if a Court gives legal protection to a privilege, does not the Court turn the privilege into a right? Even if the answer to this question is yes, the proposition still be perfectly sound that one who lacks a 'right' to a Government gratuity may nevertheless have a 'right' to fair treatment in the distribution of the gratuity. In tort law, the accident victim has no right to be helped by the passer-by who volunteers to help. Like the passer-by, the Government may refuse altogether to help applicants for gratuities, but it cannot provide the help improperly; it cannot grant or withhold on the basis of racial or religious discrimination. The federal Government could deny altogether the admission of Oklahoma to the union, but it could not admit Oklahoma improperly, that is with a condition that its capital must be at a particular place. A State can deny altogether a permit to a foreign corporation to do local business, but it cannot grant the privilege improperly, that is, on condition that suits against the corporation shall not be removed to a federal Court."

"Similarly, one who has no 'right' to sell liquor, in the sense that the State may prohibit the sale of liquor altogether, may nevertheless have a right to fair treatment when State officers grant, deny, suspend, or revoke liquor licences, The State need not grant any such licences, but if it does so, it must do so fairly -- without racial or religious discrimination, and without unfair procedure."

"The fundamental proposition, stated abstractly, is that some kinds of unfairness are deemed deserving of judicial relief even when they appear in a context of privileges or gratuities. This proposition appears frequently in judicial opinions."

"Even though one may have no right to a Government gratuity one may have a right to be free from damage to reputation or position that may result from withholding of a Government gratuity in some circumstances."

28. Viewing reputation both as an interest of personality and as an interest of substance i.e. as an asset, the following passage from **"Code of Actionable Defamation"26** was extracted in the judgment, and the same is being reproduced below:-

"It may be granted that reputation in many respects differs from other forms of property and connotes certain ideas involved in the notion of 'person' or 'personality', for ..... it is certainly a very special and strictly personal type of asset: it has some analogies, no doubt, to the right of the individual to his life, his limbs, or his liberty, which are all only 'property' in a somewhat metaphorical sense. ..... In so far, however, as individual honour, dignity, character, and reputation are recognised by the law as proper subjects of its protection and as being such that any injury thereto entitles the aggrieved party to the same forms of legal redresses as the invasion of property strictly so called, it is permissible to consider these rights as assets, though assets of a somewhat peculiar description."

29. Further, the extract from the article **"Interest of Personality"** by **Roscoe Pound27,** which was referred, is being reproduced below:-

"On the one hand there is the claim of the individual to be secured in his dignity and honour as part of his personality in a world in which one must live in society among his fellow men. On the other hand there is the claim to be secured in his reputation as a part of his substance, in that in a world in which credit plays so large a part the confidence and esteem of one's fellow-men may be a valuable asset."

30. With regard to the exercise of power of "debarment" having a serious effect and being attended with civil consequences, reference was drawn to **Australian Law Journal Volume 4928,** to state that the ultimate question was:-

"whether an exercise of the power would have a 'serious' effect on the applicant, and whether an exercise of the power was conditional on some factual determination or evaluation rather than being a completely open discretion based on policy".

31. The scope of exercise of powers by the Government in selecting the recipients for largess and the conferment of privileges was also considered and it was stated as follows:-

"The concept of privilege, gratuity, or grace is useful; we probably would invent it if our legal system were without it. Like an individual, the Government may make generous gifts, perform compassionate acts of grace, and legally recognise as privileges such interests as deserve to be something less than legal rights. A donee ought not to be allowed to compel the Government to make a gift. Nor should a supplicant for an act of grace be permitted to coerce officers to make a favourable determination in the exercise of discretionary power. Even so, the Government is not and should not be as free as an individual in selecting the recipients for largess. Whatever its activity the Government is still the Government and will be subject to restraints, inherent in its position in a democratic society. A democratic Government cannot lay down arbitrary and capricious standards for the choice of persons with whom alone it will deal."

32. In this regard reference was drawn to **"Summary of Colloquy on Administrative Law"** by **Walter Gellhorn29**, and the extract which was referred, is being reproduced below:-

"A 'privilege' is not something to be dealt with lightly. Much of modern life, it may be said, depends on the continued enjoyment of a 'privilege'."

33. Finally, Justice Mathew in his minority judgment drew the following conclusion:-

"As the memorandum in question casts a stigma on the reputation of the petitioner, which is both an interest of personality and an interest of substance, and as it is attended with civil consequences to the petitioner, and as it operates as a punishment for an alleged irregularity, I think, the memorandum should have been proceeded by notice and an opportunity of being heard. If anybody were to say that Ext. P-1 is an administrative proceeding and so no notice or opportunity of being heard was required and that no interference under Article 226 is possible, I would answer him in the high and powerful words of Mr. Belloc, "you have mistaken the hour of the night: it is already morning"..."

34. The question with regard to applicability of the principle of *audi alterem partem* in a matter of blacklisting of a contractor without notice by the government fell for consideration in **Joseph Vilangandan Vs. The Executive Engineer (PWD), Ernakulam & Ors.14** in a case where a petition challenging the order of blacklisting had been dismissed by a learned Single Judge of the High Court in the light of the majority decision by the Full Bench in the case of **V. Punnen Thomas** (supra), and the writ appeal filed there against had also been dismissed by the Division Bench *in limine.* The Supreme Court, hearing the appeal by special leave, upon considering the judgment in the case of **M/s Erusian Equipment & Chemicals Ltd.** (supra) held that the majority judgment in the case of **V. Punnen Thomas** must be deemed to be overruled by the decision in the case of **M/s Erusian Equipment & Chemicals Ltd.** The relevant observations made in the judgment are as follows:-

"17. The majority judgment of the Kerala High Court, inasmuch as it holds that a person is not entitled to a hearing, before he is blacklisted, must be deemed to have been overruled by the decision of this Court in Erusian Equipments (ibid) wherein it was held that (SCC p. 75, para 20) :

"Fundamentals of fair play require that the person concerned should be given an opportunity to represent his case before he is put on the blacklist."

35. A similar view was reiterated in **M/s Southern Painters Vs. Fertilizers and Travancore Ltd. & Anr.11,** and after referring to the minority view of Justice Mathew in the case of **V. Punnen Thomas** (supra), it was stated that the said minority view was now the law. The observations made in the judgment are as follows:-

8. The minority view of Justice Mathew is now the law. The majority view in V. Punnen Thomas case [V. Punnen Thomas Vs. State of Kerala, AIR 1969 Ker 81 : 1968 Ker LT 800 : 1968 Ker LJ 619] is not good law and must be considered to have been, impliedly, overruled by the Erusian case [Erusian Equipment & Chemicals Ltd. v. State of W.B, (1975) 1 SCC 70, 75]. Indeed, in Joseph Vilangandan v. Executive Engineer, Buildings & Roads (PWD) Division, Ernakulam [(1978) 3 SCC 36, 41 : (1978) 3 SCR 514, 518] it was held:

"The majority judgment of the Kerala High Court, inasmuch as it holds that a person is not entitled to a hearing, before he is blacklisted, must be deemed to have been overruled by the decision of this Court in Erusian Equipment & Chemicals Ltd. v. State of W.B, (1975) 1 SCC 70, 75] ...."

36. We may thus reiterate that the right to enter into a contractual relationship is inherent in every person capable of entering into a contract with a concomitant right also not to enter into a contract. The right to refuse to enter into a contract however does not vest with the State and its instrumentalities in the same manner as it vests with a private individual. The right to enter into a contract by the State flows from the power under Article 298 of the Constitution and together with it is the right not to enter into a contract and the choice to blacklist any particular person with whom the State does not wish to enter into a contract. This decision however in case it is taken by the State or any of its instrumentalities is to be made reasonably and in accord with the principles of natural justice.

37. An order of blacklisting has the effect of depriving a person of equality of opportunity in the manner of public contract and in a case where the State acts to the prejudice of a person it has to be supported by legality. The activities of the State having the public element quality must be imbued with fairness and equality.

38. The order of blacklisting involves civil consequences and has the effect of creating a disability by preventing a person from the privilege and advantage of entering into lawful relationship with the government therefore fundamentals of fair play would require that the concerned person should be given an opportunity to represent his case before he is put on the blacklist. A fair hearing to the party before being blacklisted thus becomes an essential pre-condition for a proper exercise of the power and a valid order of blacklisting made pursuant thereto. The applicability of the principle of *audi alteram partem* and the necessity of issuance of show cause notice also become imperative before passing of any such order of blacklisting.

39. In the instant case order of blacklisting having been passed without issuance of a show cause notice and opportunity of hearing and having been made for an indefinite period would be in clear violation of the principle of *audi alterm partem*, and would be legally unsustainable.

40. Accordingly, the order impugned dated 13.05.2019 passed by the third respondent/Vice Chairman, Gorakhpur Development Authority, Gorakhpur whereby the petitioner has been blacklisted, cannot be legally sustained and is therefore set aside.

41. The matter is remitted back to the third respondent leaving it open to pass a fresh reasoned order after giving due notice and opportunity to the petitioner in respect of the proposed action.

42. The writ petition is allowed to the extent indicated above.

(2020)02ILR A1863

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 14.01.2020

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.
THE HON'BLE RAJEEV MISRA, J.

Writ C No. 37453 of 2001

M/s Garg Oil Industries & Anr. **...Petitioners**

Versus

State of U.P. & Ors. **...Respondents**

Counsel for the Petitioners:
Sri Manoj Kumar Rajvanshi, Sri N.C. Rajvanshi, Sri Prakash Chandra Shukla

Counsel for the Respondents:
C.S.C., Sri A. Khan, Sri A. Khare, Sri Ateeq Ahmad Khan, Sri Dinesh Tewari, Sri V. Singh, Sri V.S. Singh

Petitioners applied for working capital Term Loan-loan sanctioned and disbursed-Petitioner applied for geting the unit declared as sick and-for rehabilitation-claim rejected—one time settlement sanctioned-not complied-enough opportunity given-but repeated default made in repayment-no fault if no time granted in last notice-W.P. dismissed.

Held, A person, who himself has committed repeated default and has not dealt with affairs in a bona fide and 10 honest manner, cannot seek indulgence on a technical plea when repeated notices, opportunities have been given and the same have all failed. **(para 16)** (E-9)

Cases Cited:

1. Mahesh Chandra vs. Regional Manager, U.P. Financial Corporation and others (1993) 2 SCC 279.

2. Maharashtra State Financial Corporation vs. M/s Suvarna Board Mills and another (1994) 5 SCC 566

3. M/s Kharavela Industries Pvt. Ltd. vs. Orissa State Financial Corporation and others, AIR 1985 Orissa 153

4. Haryana Financial Corporation and Another vs. Jagdamba Oil Mills and another (2002) 3 SCC 496 (**Differentiated)**

5. Mahesh Chandra vs. Regional Manager, U.P. Financial Corporation (supra)

6. U.P. Financial Corporation vs. Gem Cap (India) (P) Ltd. (1993) 2 SCC 299 **(Relied upon)**

7. U.P. Financial Corpn. vs. Naini Oxygen & Acetylene Gas Ltd. (1995) 2 SCC 754

8. Karnataka State Financial Corpn. vs. Micro Cast Rubber & Allied Products (P) Ltd. (1996) 5 SCC 65- (**Relied upon)**

9. Punjab Financial Corporation vs. Surya Auto Industries (2010) 1 SCC 297

10. Maharashtra State Financial Corporation and others vs. Sanjay ShankarsaMamarde (2010) 7 SCC 489

(Delivered by Hon'ble Sudhir Agarwal, J.)

1. Sri N.C.Rajvanshi, Senior Advocate, assisted by Sri Prakash Chandra Shukla, for petitioners and learned Standing Counsel for respondents 1, 2 and 5. None has appeared on behalf of respondent 3, U.P. Financial Corporation, and respondent 6-Taj Singh Tyagi, though this petition has been called in revise, hence we proceed to hear and decide the same after hearing

counsel for petitioners and learned Standing Counsel.

2. This writ petition under Article 226 of Constitution has been filed with a prayer for issue of writ of certiorari to quash sale deed dated 03.9.2001 and supplementary sale deed dated 26.9.2001 executed by U.P. Financial Corporation *(hereinafter referred to as "UPFC")* in favour of Tej Singh Tyagi respondent-6. Further a mandamus has been sought commanding respondents to hand over possession of land, building, plant and machinery etc. to petitioners and not to proceed with any recovery.

3. By way of amendment, two prayers have been inserted; one is to issue a writ of certiorari to quash notice dated 13.6.1997 and further a writ of mandamus not to charge interest over loan amount after 10.6.1997, when physical possession of Unit was taken over by UPFC.

4. Facts in brief, as stated in writ petition are that petitioner-1 M/s Garg Oil Industries, Village Ladu Khera, Agra *(hereinafter referred to as "M/s GOI")* is a Proprietorship Firm, engaged in the business of producing Oil and Oil Cakes. Petitioner 2, Vinod Kumar Garg is Sole Proprietor of M/s GOI. Industry was established in 1990 with financial assistance from UPFC, who sanctioned a term loan of Rs.1,69,600/- and Rs.1,81,000/-, for plant and machinery, with working capital, respectively. Production was started and instalments were also paid as and when the same fell due, as alleged in para 5 of writ petition.

5. In 1995, petitioners applied for Working Capital Term Loan of Rs.9 lakhs, which was also sanctioned and disbursed. In 1997, however, UPFC started proceedings under Section 29 of State Financial Corporation Act, 1951 *(hereinafter referred to as "Act, 1951")* and locked the Unit. Petitioners made various representations but same remained unheeded. There was a Government Order dated 13.11.1995 providing for rehabilitation of Sick Industrial Establishments, hence, petitioners made representation dated 04.03.2000 to General Manager, District Industries Centre, Agra *(hereinafter referred to as "GMDIC")* to declare petitioner's Unit sick and proceed for rehabilitation and revival of Unit by recomputation of financial liability of Financial Institutions. As nothing was done on the said representation, petitioners, M/s GOI came to this Court in Writ Petition No.39334 of 2000, which was disposed of vide judgment dated 05.9.2000, which reads as under :

"Heard learned counsel for petitioner and Sri H.N.Misra for U.P.Finance Corporation.

The petitioner claims that his unit has become sick and it has applied for rehabilitation vide Annexure-3 and 5 to the petition. This petition is disposed of with the direction to the authority concerned Corporation to decide petitioner's application for rehabilitation preferably within six weeks in accordance with law. If the petitioner files certified copy of this order before the said authority within two weeks from today the impugned recovery shall remain stayed, till disposal of the said application, unless the petitioner's application for rehabilitation has already been decided."

6. Pursuant thereto, Additional Director, Industry, vide letter dated 06.01.2001, communicated petitioners a decision of Divisional Level Committee

informing that petitioner's claim for rehabilitation was already rejected in April, 2000 but this fact was concealed in the above writ petition. Further, One Time Settlement was sanctioned by UPFC in 1998 but that was not adhered to and complied with by M/s GOI. Only Rs.96,000/- was deposited by M/s GOI in April, 1997. The Committee therefore, proposed that, if petitioners deposit Rs.1.40 lakhs, towards earnest money within three weeks with UPFC, it may be allowed an year's time to pay rest amount, which was total Rs.14 lakhs. Petitioners did not comply with the said demand claiming that it was arbitrary. Petitioners filed appeal before State Level Standing Committee vide memo of appeal dated 02.02.2001 which remanded the matter to Regional Level Committee but it reiterates earlier order vide decision dated 27.03.2001. Again an appeal was filed by petitioners on 24.4.2001 before State Level Standing Committee. When the same was pending, UPFC advertised, in daily newspaper Amar Ujala dated 10.05.2001, petitioner's Unit for sale with a reserve price of Rs.5 lakhs. Petitioners were also informed vide letter dated 28.6.2001 sent by Regional Manager, UPFC that pursuant to High Court's judgment dated 05.7.2001, his representation was rejected. Petitioners protested against said decision vide letter dated 12.7.2001 but UPFC reiterated the above decision vide letter dated 11.7.2001. Petitioners then filed an application before State Level Standing Committee on 05.9.2001 requesting for stay of sale of Unit by UPFC. The Committee, vide letter dated 13.9.2001, requested UPFC to defer sale of Unit till a decision is taken by State Level Standing Committee. Petitioners, vide letter dated 15.9.2001 made similar request to UPFC. UPFC sent a letter dated 4.10.2001 to petitioners stating that Unit has been sold for Rs.5 lakhs in the proceedings under Section 29 of Act, 1951 and after adjusting aforesaid amount of Rs.5 lakhs, the balance amount, if petitioners are ready, may be allowed to clear in instalments and if petitioners are ready for One Time Settlement, it may apply alongwith earnest money by 25.10.2001.

7. However, UPFC executed sale deed on 25.9.2001 (Annexure 14 to writ petition) and informed petitioners that rest amount shall be recovered by issuing a recovery certificate under U.P Public Moneys (Recovery of Dues) Act, 1972 *(hereinafter referred to as "Act, 1972")*. Hence present writ petition has been filed seeking relief, as described above.

8. Respondent 3 i.e. UPFC has filed a counter affidavit sworn by N.K.Dixit, Deputy Senior Manager (Law) sworn on 10.12.2001 stating that Term Loan of Rs.1.72 lakhs and Rs.1.80 lakhs were sanctioned to Mr. Vinod Kumar Garg in 1991 for setting up an Industrial Unit for manufacturing Mustard Oil at Village Ladu Khera Kheragarh, Agra. Subsequently, Working Capital Term Loan of Rs.9 lakhs was sanctioned and disbursed in September, 1995. Therefore, a total loan of Rs.12.52 lakhs was disbursed to petitioners by UPFC. Petitioners committed default in repayment of instalments of principal sum as well as interest. Despite repeated request and reminders, it did not clear its outstanding dues. Consequently, a notice under Section 29 of Act, 1951 was issued on 13.6.1997. Physical possession of Unit was also taken over by UPFC. Electric connection was already disconnected on 25.11.1995 due to default in payment of electricity dues to U.P. State Electricity

Board *(hereinafter referred to as "UPSEB")*. An undated proposal for rehabilitation submitted by petitioners were received in the office of UPFC on 07.3.2000 but it was not found viable hence rejected vide order dated 11.04.2000, which was communicated to petitioners. Then petitioners, vide letter dated 26.9.2000, informed about the steps taken before Regional Level Rehabilitation Committee. Additional Director (Industries) vide letter dated 6.1.2001 required petitioners to deposit Rs.1.40 lakhs within three weeks whereafter it would be given a year's time to make payment of balance One Time Settlement amount but even this direction was not complied with by petitioners. Consequently, UPFC proceeded for sale of Unit by publishing notice in daily newspaper 'Amar Ujala' on 10.5.2001, following guidelines laid down by Supreme Court in **Mahesh Chandra vs. Regional Manager, U.P. Financial Corporation and others (1993) 2 SCC 279.** Information was also given to petitioners vide letter dated 23.5.2001 sent by Regional Manager, UPFC. Here also petitioners did not respond. A registered letter was also sent to petitioners on 11.7.2001. Ultimately, auction was held and Unit of M/s GOI was sold by UPFC vide sale deed dated 03.09.2001 for a sum of Rs.5 lakhs. Thereafter, outstanding dues, after adjusting Rs.5 lakhs, were demanded from petitioners vide notice dated 04.10.2001. A similar notice was also given to Kailash Chandra Mittal, Guarantor to petitioner's loan.

9. To the amendment sought by petitioners, UPFC has also filed counter affidavit stating that initially notice under Section 29 of Act, 1951 was issued on 14.3.1995 and 06.5.1995 but the same remained unheeded. Thereafter, on the request of petitioners, for the interest of Unit and in the hope that it will function, Working Capital Term Loan of Rs.9 lakhs was sanctioned on 11.09.1995 and disbursed. Thereafter again petitioners committed default. He made part payments through various cheques, details whereof are given in para 4(d) of counter affidavit and all these cheques were dishonored. Details of said cheques, mentioned in para 4(d) of counter affidavit to the amendment application are as under :

Sl.	Cheque Date	Amount
1	17.01.1996	Rs.34,000/-
2	15.07.1996	Rs.56,000/-
3	23.10.1996	Rs.44,000/-
4	10.12.1996	Rs.44,000/-
5	30.09.1996	Rs.56,000/-
6	29.10.1996	Rs.12,000/-
7	10.12.1996	Rs.16,000/-
8	31.03.1997	Rs.79,000/-

10. On 15.5.1997 there were overdues of Rs.2 lakhs in Working Capital Term Loan Account and Rs.2,40,183.92 in the main loan account. When UPFC was contemplating to issue notice under Section 29 of Act, 1951, it came to knowledge, through its Recovery Officer on 12.9.1996, that petitioners had abandoned the Unit. Consequently, for the safety of assets of Unit, UPFC recommended for posting of its Guard. Thereafter notice under Section 29 of Act, 1951 was issued and actual physical possession of assets was taken over on 13.6.1997. Information to this effect was also given at Police Chauki Ladukhera, Agra. Thereafter, several letters were issued to petitioners but the same remained unheeded. On 13.6.1997, when UPFC Officers visited the Unit, they did not find either petitioners, his family members or

any other employees or representatives present at the Unit. This shows that information given by Recovery Officer that petitioners had abandoned the Unit was correct. Possession of Unit was taken almost after one and half years of disconnection of electric connection showing that Unit was not functional.

11. Respondent 6 has also filed counter affidavit, who is purchaser of Unit in question and he has taken a stand, similar to UPFC. Respondent 6 has also pleaded that he is a bona fide purchaser of Unit for valid consideration.

12. Learned Senior Counsel for petitioners has submitted written arguments and reiterated the contents of said arguments orally before this Court. However, he could not submit any reply to the contents of para 4(d) of counter affidavit, submitted to amended paragraph of writ petition, that several cheques submitted by petitioners towards payment of outstanding dues were dishonored. On this aspect nothing has been said either orally before us nor mentioned in the written arguments. However, relying on para 9 of writ petition, it is urged that there was no outstanding dues. This aspect stood contradicted by specific details of dishonored cheques given in para 4(d) of counter affidavit sworn on 27.6.2003 by R.K.Srivastava, Senior Manager (Law) in the office of Regional Manager, UPFC, Allahabad, hence cannot be accepted.

13. Learned Senior Counsel for petitioners however contended that notice under Section 29 of Act, 1951 was issued on 13.6.1997 (i.e. Annexure 4 to the counter affidavit) and on the same date physical possession was taken therefore no time was given to petitioners to clear the outstanding dues. Hence notice is in violation of principles of natural justice and reliance is placed on Supreme Court's Judgment in **Maharashtra Sate Financial Corporation vs. M/s Suvarna Board Mills and another (1994) 5 SCC 566** and a Division Bench judgment of Orissa High Court in **M/s Kharavela Industries Pvt. Ltd. vs. Orissa State Financial Corporation and others, AIR 1985 Orissa 153.** It is also contended that as per valuation chart, filed as Annexure 5 to supplementary affidavit, prepared by officials of UPFC on 25.7.2000, value of Unit was Rs.22.80 lakhs but it has been sold for a petty sum of Rs.5 lakhs, showing sale of Unit by UPFC on throw away prices and this is nothing but a malicious act on its part.

14. Counter affidavit of UPFC shows that first notice under Section 29 of Act, 1951 was issued on 14.3.1995 stating that a sum of Rs.61,662.72 was overdue till 20.12.1994, and petitioners were informed earlier vide letter dated 2.2.1995 but it remained unheeded. The entire outstanding dues including overdues of instalments of Principal and Interest, which came to Rs.3,34,262.72 as on 20.12.1994, was required to be paid within seven days. Further, a notice was sent by Assistant General Manager, UPFC on 6.5.1995 informing petitioners that upto 20.3.1995 principal amount of Rs.55,000/- and interest of Rs.27,796.54 was outstanding and the same must be cleared by 25.5.1995.

15. Thereafter, since Working Capital Term Loan of Rs.9 lakhs was sanctioned, it was disbursed to petitioners between 15.2.1996 to 15.11.1999 but petitioners' payment of instalment was not found regular. In view thereof, notice under Section 29 of Act, 1951 was again issued

on 13.6.1997 and on the same day actual physical possession was taken by UPFC. This was necessitated in view of the fact that Recovery Officer had informed UPFC that petitioners have abandoned the Unit. Actual possession memo (Annexure 5 to the counter affidavit) shows that petitioners or his family members were not present when physical possession was taken by UPFC. Therefore, contention of petitioners that no opportunity was given to clear dues is hyper technical objection considering facts, already discussed above, showing that repeated opportunity was given to petitioners to clear dues but it failed.

16. Annexure CA 9 to the counter affidavit sworn on 27.6.2003 filed by UPFC is a letter dated 17.12.1996 informing petitioners that cheque no.219562 drawn on Punjab National Bank, Belanganj, Agra on 30.11.1996 for Rs.60,000/- towards repayment of Term Loan was returned dishonored with the remark "insufficient funds' and petitioners were required to pay the said amount but nothing proceeded. Thereafter, a notice dated 10.02.1997 issued by Senior Manager (Technical) UPFC, (Annexure 10 to the writ petition), further shows demand of outstanding dues from petitioners as also inviting to submit proposal, if any, for repayment as Unit's physical possession would be taken on 25.02.1997 but nothing has been placed on record to show that in response thereof petitioners made payment of dues to UPFC. On the contrary, UPFC has filed petitioner-2's letter dated 15.6.1997 addressed to Senior Superintendent of Police, Agra, (Annexure CA-11 to counter affidavit) complaining that on 08.6.1997 petitioner-2 and his family members had gone out of station locking his House and Mill but when he returned, Mill was looted and possession was taken by third party who also threatened him. Another letter of petitioners dated 21.6.1997 is Annexure 12 to counter affidavit whereby petitioner-2 has informed Regional Manager that auction proposed on 26.6.1997 shows entire Unit but only 259.2 sq.m. is liable to be auctioned and rest area has no concerned with UPFC. Here also we do not find any objection raised by petitioner-2 for auction proposed by UPFC.

17. In the entirety of the facts and circumstances of this case we find that there was no honest and serious attempt on the part of petitioners to clear outstanding dues of loan amount as well as interest which admittedly was advanced to petitioners but default was committed in repayment thereof. The objections raised before this Court are hypertechnical, bereft of facts, which demonstrate that enough opportunity was given to petitioners to clear outstanding dues but failed. Principles of natural justice are not technically legal principle which can be attracted bereft of existence of good conscience, justice and equality. A person, who himself has committed repeated default and has not dealt with affairs in a bona fide and honest manner, cannot seek indulgence on a technical plea when repeated notices, opportunities have been given and the same have all failed. Application of natural justice is founded on the facts and where it is evident that enough opportunity has been given an ultimate action cannot said to be vitiated in law only on the ground that last notice has not given any further time though repeated time was already given.

18. Even authorities of Supreme Court are against petitioners. We may first refer to three Judges' decision of Supreme Court in **Haryana Financial Corporation and Another vs. Jagdamba Oil Mills and**

another (2002) 3 SCC 496. M/s Jagdamba Oil Mills *(hereinafter referred to as "JOM")* a Partnership Firm was sanctioned a Term Loan of Rs.7,48,000/- by Haryana Financial Corporation *(hereinafter referred to as "HFC")* vide letter dated 19.10.1992. The loan was to be repaid in 8 years, which was to commence from the date of execution of mortgage deed. Payment schedule comprised of 15 half-yearly instalments. The repayment was to be commenced within 13 months from the first disbursement of the loan. The first 13 instalments of payment were to be of Rs.50,000/- each and remaining two instalments of Rs.49,000/- each, towards principal sum. Interest fell due, was to be paid with respective instalments of principal amount. JOM mortgaged its land, building and machinery in favour of HFC. Loan instalments were to be on the basis of securities created by borrowers and as and when enough securities were created, loan amount was to be disbursed. The first instalment of loan was disbursed on 25.02.1993 and last on 26.02.1994. Total loan availed by JOM was Rs.7.45 lakhs. The first instalment payable was for Rs.1,29,551/- (including principal and interest) on 01.03.1994 but JOM failed to deposit. It requested HFC to reschedule repayment. Request was accepted and reshedulement was done. Then instalment fell due on 01.09.1994 of Rs.1,24,409/-. Again there was a default. JOM again requested for reshedulement. Again it was accepted. However, again default was committed when first instalment of Rs.1,31,046/- fell due on 01.03.1995. Since JOM proved to be a chronic defaulter in making payment of instalments, HFC initiated action under Section 29 of State Financial Corporations Act, 951 *(hereinafter referred to as "Act, 1951")* after recalling loan under Section 30 of the said Act. Possession of Unit was taken by HFC. JOM instituted Civil Suit No.86 of 1995 in the Court of Civil Judge (Senior Division), Ambala, seeking a decree for permanent injunction restraining HFC and its functionaries from auctioning the Unit, which was seized. Suit was decreed by Trial Court on the ground that HFC did not give breathing to JOM and possession was taken within one year from the date of last instalment hence such action cannot be sustained. Trial Court relied on Supreme Court judgment in **Mahesh Chandra vs. Regional Manager, U.P. Financial Corporation (supra)**. The First Appeal No.37 of 1998 filed by HFC was dismissed and it also failed before Punjab and Haryana High Court in Second Appeal hence matter came to Supreme Court.

19. Before Supreme Court, judgment in **Mahesh Chandra (supra)** was sought to be distinguished on the ground that facts of the case were different, inasmuch as JOM had already proved to be a chronic defaulter and in such as case no further opportunity was needed to the defaulting unit.

20. On behalf of HFC in fact argument was raised that decision in **Mahesh Chandra (supra)** required reconsideration in the light of later judgment of Supreme Court in **U.P. Financial Corporation vs. Gem Cap (India) (P) Ltd. (1993) 2 SCC 299.** Supreme Court considered the object of Act, 1951 and said that intention was that State Financial Corporations being instrumentality of the State deals with public money shall have approach of public-orientation. It can operate effectively if there is regular realization of the instalments. While Corporation is expected to act fairly in the matter of

disbursement of loans, corresponding duty is cast upon borrowers to repay instalments in time, unless prevented by insurmountable difficulties. Regular payment is the rule and non-payment due to extenuating circumstances is exception. If repayment is not received as per scheduled time-frame, equilibrium of financial arrangements of Corporation would get disturbed. Corporation do not have at their disposal unlimited funds. They have to cater to the needs of intended borrowers with available funds. Non-payment of instalment by defaulter may create obstruction in financial assistance to be extended to deserving borrower by Corporation. A Corporation is not supposed to give loan and right it off as a bad debt and ultimately to go out of business. Court approved observations made in **Gem Cap (India) (P) Ltd. (supra)** that promotion of industrialization does not serve public interest if it is at the cost of public funds. It may amount to transferring public money to private account.

21. Guidelines issued in **Mahesh Chandra (supra)** before exercising power under Section 29 were reiterated in para 7 of judgment but Court in **Haryana Financial Corporation Vs. Jagdamba Oil Mills (supra)** also said that these guidelines were stated to be necessary to ensure fair play. That decision **[Mahesh Chandra (supra)]**, was rendered in a case where borrower intended to repay the debt and was anxious to do so.

22. That was not the case either in **Haryana Financial Corporation Vs. Jagdamba Oil Mills (supra)** nor in the present case. Supreme Court in **Haryana Financial Corporation Vs. Jagdamba Oil Mills (supra)** further said that borrower cannot be insisted upon to honour commitments undertaken by him, Corporation alone cannot be shackled hand and foot in the name of fairness. One can**Mahesh Chandra (supra)Mahesh Chandra (supra)Mahesh Chandra (supra)Mahesh Chandra (supra)Mahesh Chandra (supra)Mahesh Chandra (supra)**not lose sight that fairness cannot be a one-way street. Corporations borrow money from Government or other Financial Corporations and are required to pay interest thereon. Where borrower had no genuine intention to repay and adopts pretexts and ploys to avoid payment, such borrower cannot make grievance that Corporation was not acting fairly, even if requisite procedures have been followed. Fairness required of Corporations cannot be carried to the extent of disabling them from recovering what is due to it. Supreme Court further said :

"The Corporation is an independent autonomous statutory body having its own constitution and rules to abide by, and functions and obligations to discharge. As such in the discharge of its functions, it is free to act according to its own light. The views it forms and decisions it takes are on the basis of the information in its possession and the advice it receives and according to its own perspective and calculations. Unless its action is mala fide, even a wrong decision by it is not open to challenge. It is not for the courts or a third party to substitute its decision, however, more prudent, commercial or businesslike it may be, for the decision of the Corporation.

23. Relying on earlier decision in **U.P. Financial Corpn. vs. Naini Oxygen & Acetylene Gas Ltd. (1995) 2 SCC 754** Court said that in commercial matters the courts should not risk their judgments for the judgments of bodies to whom that task

is assigned. It also relied on another judgment in **Karnataka State Financial Corpn. vs. Micro Cast Rubber & Allied Products (P) Ltd. (1996) 5 SCC 6**5 holding that for exercising power under Section 29, scope of judicial review is confined to two circumstances i.e. (a) where there is statutory violation on the part of State Financial Corporation, or (b) where State Financial Corporation acts unfairly i.e. unreasonably. Court very categorically said that High Court should not interfere with action under Section 29 of Act, 1951 unless aforesaid two situations exist.

24. Thereafter Court referred to guidelines referred in **Mahesh Chandra (supra)** and overruling the same, said in paras 17 and 18 as under :

"17. The aforesaid guidelines issued in Mahesh Chandra's case place unnecessary restrictions on the exercise of power by the Financial Corporation contained in Section 29 of the Act by requiring the defaulting unit holder to be associated or consulted at every stage in the sale of the property. A person who has defaulted is hardly ever likely to cooperate in the sale of his assets. The procedure indicated in Mahesh Chandra's case will only lead to further delay in realization of the dues by the Corporation by sale of assets. It is always expected that the Corporation will try and realize the maximum sale price by selling the assets by following a procedure which is transparent and acceptable, after due publicity, wherever possible.

*18. The subsequent decisions of this Court in Gem Cap's (supra), Naini Oxygen (supra) and Micro Cast Rubber (supra) run counter to the view expressed in Mahesh Chandra's case. In our opinion, the issuance of the said guidelines in Mahesh Chandra's case are contrary to the letter and the intent of Section 29. In our view, the said observations in Mahesh Chandra's case do n**Mahesh Chandra (supra)Mahesh Chandra (supra)Mahesh Chandra (supra)Mahesh Chandra (supra)Mahesh Chandra (supra)Mahesh Chandra (supra)**ot lay down the correct law and the said decision is overruled. "*

25. The aforesaid decision, in our view, fortifies our approach and justify no interference in the light of facts of present case.

26. Subsequently, similar issue has been considered in **Punjab Financial Corporation vs. Surya Auto Industries (2010) 1 SCC 297.** Therein also for setting up an Industrial Unit in Gurdaspur (Punjab), Punjab Financial Corporation *(hereinafter referred to as "PFC")* sanctioned a term loan of Rs.24.25 lakhs to M/s Surya Auto Industries *(hereinafter referred to as "SAI")*. Loan was to be repaid with interest on specified dates but SAI failed to adhere to repayment schedule and till 2002 could deposit only Rs.2.70 lakhs. PFC then issued notice under Section 29 and took possession of Unit. Thereafter notices dated 02.12.2002, 03.03.2003, 30.05.2003 and 29.08.2003 were issued by PFC but SAI failed to pay outstanding dues. It also failed to avail concession offered by PFC for reschedulement reducing rate of interest. Consequently, PFC also issued notice under Section 29 of Act, 1951 for taking over collateral security. Challenging the said notice on the ground of violation of principles of natural justice, SAI filed Writ Petition No.11932 of 2007 in Punjab & Haryana High Court, which upholding the contention held that possession of mortgage property could not

have been taken without giving reasonable time and opportunity for payment. Hence, writ petition was allowed and High Court set aside compounding of penal interest from 01.04.2003 i.e. after expirty of a period of six months from the date of taking over of SAI. Supreme Court in appeal preferred by PFC after noticing contradictory decisions in **Mahesh Chandra (supra)** and **U.P. Financial Corpn. vs. Gem Cap (India) (P) Ltd. (supra)** referred to Larger Bench judgment in **Haryana Financial Corporation Vs. Jagdamba Oil Mills (supra)** and following the same, in paras 21 and 22 of judgment in **Punjab Financial Corporation vs. Surya Auto Industries (supra)** said as under :

"21. The proposition of law which can be culled out from the decisions noted above is that even though the primary function of a corporation established under Section 3 of the Act is to promote small and medium industries in the State, but it is not obliged to revive and resurrect every sick industrial unit de hors the financial implications of such exercise The corporation is not supposed to give loans and refrain from taking action for recovery thereof. Being an instrumentality of the State, the corporation is expected to act fairly and reasonably qua its borrowers/ debtors, but it is not expected to flounder public money for promoting private interests.

22. The relationship between the corporation and borrower is that of creditor and debtor. The corporation is expected to recover the loans already given so that it can give fresh loans/financial assistance to Ors. The proceedings initiated by the corporation and action taken for recovery of the outstanding dues cannot be nullified by the Courts except when such action is found to be in violation of any statutory provision resulting in prejudice to the borrower or where such proceeding/ action is shown to be wholly arbitrary, unreasonable and unfair. The Court cannot sit as an appellate authority over the action of the corporation and substitute its decision for the one taken by the corporation. "

27. Having said so, Court held that PFC had acted in a most reasonable and fair manner and High Court was not justified in nullifying the second notice issued under Section 29 of Act, 1951 assuming that PFC had not taken effective steps for realization of dues in furtherance of first notice. Court said that High Court ignored conduct of borrower, who adopted a recalcitrant attitude in the matter of payment of outstanding dues, but also failed to avail concession offered by PFC by reducing rate of interest and reschedulement. It also held that High Court should not have reduced interest to simple interest, altering terms of loan agreement, which is not permissible.

28. Following decision in **Haryana Financial Corporation Vs. Jagdamba Oil Mills (supra)** Supreme Court in **Managing Director, Maharashtra State Financial Corporation and others vs. Sanjay Shankarsa Mamarde (2010) 7 SCC 489** held that where borrower had no genuine intention to repay and adopts pretexts and ploys to avoid payment, he cannot make grievance that Corporation was not acting fairly, even if requisite procedures have been followed.

29. In these facts and circumstances we do not find any illegality on the part of UPFC in proceeding to take possession of petitioner's Unit in exercise of power under

Section 29 of Act, 1951 and putting the Unit for auction.

30. Moreover, nothing has been placed by petitioners on record to show that there was any bona fide, willing buyer actually available to purchase Unit and its assets, for more than Rs.5 lakhs i.e. consideration whereupon it has been sold to respondent 6. In absence of any buyer offering higher price than that whereupon it has been sold to respondent 6, we find no reason to interfere with sale transaction of Unit in favour of respondent 6.

31. In the entirety of the facts and circumstances we find that petitioners have not approached this Court in a bona fide manner. It was financed by UPFC but committed repeated defaults in repayment. Despite demand and notices, petitioners made no attempt to clear outstanding dues. Several cheques issued by petitioners towards repayment of outstanding dues were dishonored. Even when One Time Settlement was accepted and Rehabilitation Committee of State Government made proposal to petitioners to deposit just 10 percent of the total outstanding dues, at that time i.e. Rs.1,40,000/-, vide letter dated 06.01.2001, still petitioners had no intention to pay the said amount and made no attempt to do so.

32. In these facts and circumstances, we do not find that petitioners are entitled to any relief and this is not a fit case justifying interference in extra ordinary equitable jurisdiction under Article 226 of Constitution. Writ petition lacks merit.

33. Dismissed.

34. Interim order, if any, stands vacated.

(2020)02ILR A1873

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.01.2020

BEFORE

THE HON'BLE PANKAJ BHATIA, J.

Writ C No. 57052 of 2010

Reena Gupta ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri S.V. Goswami, Sri Bharat Pratap Singh

Counsel for the Respondents:
C.S.C.

Sale deed executed in Petitioner's favour-for agricultural land-impugned order asseseed market value of the land on non agricultural basis-on ground that there exist a textile mill-and Petrol pump of Reliance-defficiency of stamp directed to be paid-impugned order quashed-as it is based upon view that land has potential to be used as commercial land-W.P. allowed.

HELD-

A perusal of the order dated 20th July, 2009 further reveals that on the property in question there is only one tree of Neem and there is no finding on record to suggest that the property in question was being used for non-agricultural purposes. The order impugned has been passed on the presumption that the land in question has the potential of being used for nonagricultural purposes. **(para 4)** (E-9)

Cases cited:

1. Sarvoday Babu Uddeshiya Vikas Samiti v. Commissioner, Kanpur Division and Others; [2014(1) ADJ 415]

2. M/s Prosperous Buildcon Pvt. Ltd. v. State of U.P. and others, judgment dated 20.9.2017 passed in Writ-C No. 53008 of 2012.

3. M/s Prosperous Buildcon Pvt. Ltd. v. State of U.P. and others,

(Delivered by Hon'ble Pankaj Bhatia, J.)

1. Heard Sri Bharat Pratap Singh, counsel for the petitioner and Standing Counsel for the State-respondents.

2. The submission of the counsel for the petitioner is that the sale deed in question was executed on 22.7.2008 for an agricultural land. A perusal of the order dated 20th July, 2009 shows that the market value of the land has been assessed on non-agricultural basis only on the ground that there exists a textile mill known as Chhadha Spin Mill and opposite to the land of the petitioner, a petrol pump of Reliance is in operation and, therefore, it appeared that the property in question had commercial value and on that basis, the deficiency of stamp duty was assessed as Rs. 1,52,000/- and equal amount of penalty as Rs. 1,52,000/- was imposed total Rs. 3,05,000/-, which was directed to be paid along with interest at the rate of 1.5% per month in terms of the statutory provisions.

3. The counsel for the petitioner Sri Bharat Pratap Singh submits that in terms of the U.P. Stamp (Valuation of Property) Rules, 1997, only two kinds of property are described in Rule 3, which includes agricultural land as well as commercial land, for which the manner of prescribing the stamp duty is prescribed. He further submits that in the impugned order, there is no finding to the effect that the land in question is not an agricultural land and is being used as a non-agricultural land.

4. A perusal of the order dated 20th July, 2009 further reveals that on the property in question there is only one tree of Neem and there is no finding on record to suggest that the property in question was being used for non-agricultural purposes. The order impugned has been passed on the presumption that the land in question has the potential of being used for non-agricultural purposes. Thus, the sole question to be considered is whether deficiency in stamp duty can be assessed under Section 47-A of the Indian Stamp Act only on the ground that the land in question has the potential of being used for non-agricultural purposes.

5. Sri Bharat Pratap Singh has relied upon judgments of this Court in the cases of ***Sarvoday Babu Uddeshiya Vikas Samiti v. Commissioner, Kanpur Division and Others; [2014(1) ADJ 415]*** and ***M/s Prosperous Buildcon Pvt. Ltd. v. State of U.P. and others,*** **judgment dated 20.9.2017 passed in Writ-C No. 53008 of 2012.** He further drawn my attention to the report dated 16.9.2008, in which the Joint Registrar has observed that on the land in question, the crop was still standing, although the land in question can be used for commercial purposes.

6. This Court while considering the similar question in the case of ***M/s Prosperous Buildcon Pvt. Ltd. v. State of U.P. and others,*** recorded as under:-

"A Division Bench of this Court in ***2015 (9) ADJ 503, Smt. Vijaya Jain vs. State of U.P. and Others*** *has held in*

paragraphs 20 and 23 which read as under:

"20. Having extracted the relevant statutory provisions above, the following principles emerge therefrom. Sub-section (1) (a) of Section 47-A of the Act empowers the registering officer to call upon the person who has presented an instrument for registration to pay deficit stamp duty. This power is exercisable by the registering officer immediately after presentation of an instrument and before accepting it for registration and taking any action under Section 52 of the Act. This power is liable to be exercised in a situation where the market value of the property as set forth in the instrument is less than even the minimum value fixed by the Collector in accordance with the rules made under the Act. In distinction to the above, the power under sub-section (3) of Section 47-A is exercised by the Collector either suo motu or on a reference from any Court or from the Commissioner of Stamps or an Additional Commissioner of Stamps, Deputy Commissioner of Stamps, an Assistant Commissioner of Stamps or any officer authorized in that behalf by the State Government. This power confers jurisdiction and authority on the Collector to call for and examine any instrument for the purpose of satisfying himself as to the correctness of the market value of the property which forms the subject matter of the instrument and if upon such examination, he has reason to believe that the market value of such property has not been truly set forth in such instrument, he may proceed to determine the market value of such property and the duty payable thereon. The first distinguishing feature of sub section (3) is that it is available to be exercised even after the instrument has been registered. Secondly the Collector proceeds under sub section (3) upon finding that the "market value" of the property has not been truly set forth in the instrument as distinct from the "minimum value fixed by the Collector in accordance with the rules made under the Act" which is the benchmark for initiation of action under sub section (1).

23. From the provisions extracted above, it is apparent that the Collector proceeds under sub section (3) of Section 47-A read with rule 7 when he has reason to believe that the market value of the property comprised in the instrument has not been truly set forth and that in the opinion of the Collector, circumstances exist warranting him to undertake the enquiry contemplated under rule 7. What we however find from the notice dated 09 September 2013 is that the Collector has proceeded to record, albeit prima facie, that the instrument in question has been insufficiently stamped to the extent of Rs.8,89,000/-. The notice apart from referring to a note dated 20 May 2013, received from the Assistant Inspector General of Registration neither carries nor discloses any basis upon which the Collector came to the prima facie conclusion that the appellant was liable to pay Rs. 8,89,000/ as deficit stamp duty. In our opinion a notice of this nature must necessarily disclose to the person concerned the basis and the reasons upon which the Collector has come to form an opinion that the market value of the property has not been truly set forth. In the absence of a disclosure of even rudimentary details on the basis of which the Collector came to form this opinion, the person concerned has no inkling of the case that he has to meet. A notice in order to be legally valid and be in compliance with the principles of natural justice must necessarily disclose, though not in great detail, the case and the basis on which

action is proposed to be taken against the person concerned. Not only this and as is evident from a bare reading of rule 7, at the stage of issuance of notice, the Collector has to proceed on the basis of material which may tend to indicate that the market value of the property has not been truly and faithfully disclosed in the instrument. The stage of computation of market value comes only after the provisions of sub rules (2) (3) and (4) of rule 7 come into play. At the stage of issuance of notices, the Collector calls upon the person concerned to show cause "as to why the market value of the property.... be not determined by him".

There is another aspect of the matter, which ought not to go un-mentioned, namely, the notice under Section 47-A (2) of the Act, 1899 refers to the potential value of the land as being more than the rates prescribed by the Collector for residential land. It is not denied by the authorities that the land in question was agricultural land but the authorities have proceeded for determining the stamp duty on a presumption that the said land has a potential of future user for residential purposes because the Village Shahpur Bamhaita, Pargana Dasna, District Ghaziabad has been declared as Hi-tech City and Integrated City. The Supreme Court and this Court have time and again held that the potential user of the property cannot be the determining factor for computing its market value or the consequent stamp duty payable thereon.

In ***(2012) 5 SCC 566, State of U.P. Vs. Ambrish Tandon and others,*** *the Supreme Court has held that merely because the property is being used for commercial purposes at the later point of time may not be a relevant criterian for assessing the value for the purpose of the nature of user is relatable to the date of purchase and it is relevant for the purpose of calculation of stamp duty.*

The judgment of the Supreme Court in the case of ***Ambrish Tandon (supra)*** *has been followed by the Full Bench of this Court reported in* ***2015 (3) ADJ 136 (Smt. Pushpa Sareen Vs. State of U.P.)*** *wherein the Full Bench has also held that the nature of the user is relatabe to the date of purchase which is relevant for the purposes of computing the stamp duty. Where however the potential of the land can be assessed on the date of execution of the instrument itself by referring to exemplar or comparable sale instances that is clearly a circumstances which is relevant and germane to determine the true market value. Paragraph 27 of the said judgement reads as under:*

"27.The fact that the land was put to a particular use, say for instance a commercial purpose at a later point in time, may not be a relevant criterion for deciding the value for the purpose of stamp duty, as held by the Supreme Court in State of U.P. and others vs. 23 Ambrish Tandon and another, 2012 (5) SCC 566. This is because the nature of the user is relatable to the date of purchase which is relevant for the purpose of computing the stamp duty. Where, however, the potential of the land can be assessed on the date of the execution of the instrument itself, that is clearly a circumstance which is relevant and germane to the determination of the true market value. At the same time, the exercise before the Collector has to be based on adequate material and cannot be a matter of hypothesis or surmise. The Collector must have material on the record to the effect that there has been a change of use or other contemporaneous sale deeds in respect of the adjacent areas that would have a bearing on the market value of the property which is under consideration. The

Collector, therefore, would be within jurisdiction in referring to exemplars or comparable sale instances which have a bearing on the true market value of the property which is required to be assessed. If the sale instances are comparable, they would also reflect the potentiality of the land which would be taken into consideration in a price agreed upon between a vendor and a purchaser."

A Division Bench of this Court in ***2016 (2) ADJ 533 (DB) Sumati Nath Jain Vs. State of U.P. and another*** *has held in paragraphs 18 and 19 as under:*

"18. We may note that on the date of execution of the instrument the land was admittedly recorded as agricultural. In fact the Khasra of the property remained unchanged throughout and continued to represent the land as recorded for agricultural purposes. The respondents were in our opinion wholly unjustified in initiating proceedings based on an unsubstantiated assumption that the property in future was likely to be put to non-agricultural use.

19. The perceived or presumed use to which a buyer may put the property in the future can never be the basis for adjudging its value or determining the stamp duty payable. The Act, we may note is a fiscal statute. The taxable event with which it concerns itself is the execution of an instrument which is chargeable to duty. The levy under the statute gets attracted the moment an instrument is executed. These propositions clearly flow from a plain reading of the definition of the words "chargeable", "executed" and "instrument" as carried in the Act. In the case of an instrument which creates rights in respect of property and upon which duty is payable on the market value of the property comprised therein, since the tax liability gets fastened immediately upon execution it must necessarily be quantified on the date of execution. The levy of tax or its quantum cannot be left to depend upon hypothetical or imponderable facets or factors. The value of the property comprised in an instrument has to be adjudged bearing in mind its character and potentiality as on the date of execution of the instrument. For all the aforesaid reasons we fail to find the existence of the essential jurisdictional facts which may have warranted the invocation of the powers conferred by section 47A (3). We are therefore of the firm opinion that the initiation of proceedings as well as the impugned order based upon a presumed future use of the property for residential purposes was wholly without jurisdiction and clearly unsustainable. Dealing with this aspect of the matter and after noticing the consistent line of precedent on the subject the Division Bench in Smt Vijaya Jain observed: -

"This Court on more than one occasion has held that the market value of the land is not liable to be determined with reference to the use to which a buyer intends to put it in future. The market value of the property is to be determined with reference to its character on the date of execution of the instrument and its potentiality as on that date.

xxx xxx xxx

The above principles of law enunciated in the aforementioned judgments have been consistently followed by this Court. We however find that the order of the Collector relies upon no evidence which would support imposition of residential rates on a property which was stated to be agricultural on the date of execution of the instrument."

7. Further there is no document in the form of comparable sale deed of any

property in the vicinity. It is well settled that the burden of proving that the market value of the property is more than that disclosed in the sale deed is to be discharged by the State, which the State has failed to discharge.

8. Considering and following the ratio of the judgments in the cases of Sarvoday Babu Uddeshiya Vikas Samiti (Supra) and M/s Prosperous Buildcon Pvt. Ltd. v. State of U.P. and others, I have no hesitation in holding that the order dated 20th July, 2009 deserves to be aside, as the same is based upon the view that the land in question has the potential to be used as a commercial land. Consequently, the appellate order dated 14.6.2010 also quashed. The amount deposited by the petitioner in terms of the order passed by this Court shall be refunded to the petitioner, along with interest at the rate of 8% per annum, within a period of four months from the date when an application is filed for refund of the same along with a certified copy of this order.

9. The writ petition is allowed in terms of the said order.

(2020)02ILR A1878

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.12.2019

BEFORE

THE HON'BLE ASHWANI KUMAR MISHRA, J.

Writ A No. 48219 of 2013

Anita Singh ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Ashok Khare, Sri Siddharth Khare, Sri Arun Kumar, Sri S.K. Dixit

Counsel for the Respondents:
C.S.C., Sri Amit Shukla, Sri Satyendra Chandra

A. Eligibility/qualification - a person possessing Bachelor's degree in physical education is not eligible to be a Principal of an Intermediate College

The training qualification possessed by respondent no. 5 is not even a bachelor qualification in physical education but she possess an inferior qualification of diploma in physical education. Therefore, in light of the Full Bench decision in the case of *Amal Kishore Singh Vs UOI* she has no right to continue as a principal. (para 8 & 11)

B. Doctrine of necessity - handing over the charge of office of Principal can only be justified only as long as a qualified and eligible teacher is not available to be appointed as officiating principal

On the date of accrual of vacancy i.e., 30.06.2009 the petitioner was not eligible to officiate on the post of principal. It was in that context that a decision had to be taken by the Managing Committee to hand over the charge to someone of the office of principal as the office could not have been left vacant. The appointment of respondent no. 5, therefore, may be justified on the touchstone of doctrine of necessity but such continuance can be justified only so long as an eligible person is not eligible to function as the principal. (para 10)

Writ Petition accepted/ disposed of (not stated) (E-10)

Lists of cases cited

1. Amal Kishore Singh Vs. State of U.P. and ors Special Appeal No. 1247 of 2013 *(followed)*

2. Smt. Hemlata Rajput Vs State of U.P. and ors 2019(9) ADJ 93 *(followed)*

(Delivered by Hon'ble Ashwani Kumar Mishra, J.)

1. Short question that arises for consideration in the facts of the present case is as to who would be eligible to officiate as Principal of the Institution concerned i.e. the petitioner or respondent No.5?

2. Jalaun Balika Inter college, Jalaun is a recognized institution under the provisions of U.P. Intermediate Education Act, 1921 and the provisions of Payment of Salaries Act, 1971 are also applicable upon the institution. The post of Principal fell vacant in the institution on 30.06.2009. An issue arose as to who would be entitled to officiate as principal and by the order impugned dated 16.05.2013, contained in Annexure No.9 to the writ petition, the District Inspector of Schools, Jalaun has accepted the candidature of respondent No.5 to officiate as principal, while denying petitioner's candidature primarily on the ground that on the date of accrual of vacancy, she was not eligible.

3. Qualification for appointment to the post of officiate principal is the same which is contemplated for a regular principal. Such qualification stands statutory prescribed in Appendix A to the Act of 1921 and is reproduced hereinafter:-

"APPENDIX- A

(In reference to Regulation 1 of Chapter II)

Minimum qualifications for Appointment of Head Master and Teachers in Private Recognised Higher Secondary Schools

1. Degree and diploma in the concerned subject of any University established or regulated by or under any Central Act, Provincial Act or State Act which is considered to be a University under Section 3 of the University Grants Commission Act, 1956, or of any such institution specially empowered by any Act of Parliament shall be recognised for the purpose of minimum qualifications prescribed under it.

2. Under it in reference to prescribed qualifications the word "trained" means post graduate training qualification such as L.T., B.T., B. Ed. S.C. or M. Ed. of any University or institution as specified in the earlier para or any equivalent (Degree or Diploma). It also includes departmental A.T.C. and C.T. with minimum teaching experience of 5 years'. J.T.C./B.T.C. Grade teacher shall also be considered to be. C.T. if he has worked in C.T. Grade at least for 5 years'.

Sl. No.	Name of the Post & Educational Training Experience	Age	Desirable qualifications
1	2	3	4
1.	Head of institution (1) trained M.A. or M.Sc. or M.Com or M.Sc. (Agri) or any equivalent Post-graduate or any other degree which is awarded by corporate body specified in above-mentioned para one and should have at least teaching experience of four years in classes 9-12 in any training institute or in any institution or university specified in above-mentioned para one or in any degree college	Minimum 30 years	

	affiliated to such University or institution, recognized by Board or any institution affiliated from Boards of other States or such other institutions whose examinations recognised by the Board, or should the condition is also that he/ she should not be below 30 years' of age. or (2) First or second class post-graduate degree along with teaching experience of ten years in Intermediate classes of any recognized institutions or third class post-graduate degree with teaching experience of fifteen years, or (3) Trained post-graduate diploma-holder in science. The condition is that he has passed this diploma course in first or second class and have efficiently worked for 15 or 20 years respectively after passing such diploma course.		

Notes: (1) Assistant teachers having at least second class postgraduate degree and specified teaching experience of ten years in Intermediate classes of a recognised institution may be exempted from training qualifications, (as per the provisions contained in the Act.)

(2) Teaching experience includes teaching prior to or after teaching or both.

(3) Higher classes means classes from 9 to 12 and experience of teaching these classes is admissible for the post of Head Master of Intermediate college."

4. The two contestants to the office are the petitioner and respondent No.5. Petitioner is a post graduate in Economics from the University of Allahabad. The post graduation has been completed by the petitioner on 30.05.2002. She has also acquired training qualification i.e. B.Ed. for which a certificate has been issued to her on 15.12.2010. It is not in issue that petitioner was appointed as lecturer in Economics in the institution concerned on 02.07.2003, after having being selected by the U.P. Secondary Education Service Selection Board. It is also not in dispute that she has been continuously working as a lecturer in the institution from 2003 on wards.

5. As against it, the 5th respondent is a post graduate in Sanskrit and has also obtained a certificate in Physical Education as also a Diploma in Physical Education. She appears to have been sanctioned lecturer's grade vide an order dated 23.06.2008, on the ground that she has completed 10 years teaching in Intermediate section. This benefit has been granted to her relying upon a Government Order dated 25.10.2000.

6. The District Inspector of Schools has examined the candidature of both the persons and has found that petitioner was not eligible to officiate as principal on the date of accrual of vacancy i.e. 30.06.2009. It has also been observed that respondent No.5 possess the requisite qualification for appointment to the post of principal, as she

was placed in lecturer's grade in the year 2008 itself.

7. Before adverting to the rival claim of the two teachers, it would be worth noticing that a Full Bench of this Court in Special Appeal No. 1247 of 2013 (Amal Kishore Singh Vs. State of U.P. and others) had an occasion to examine the question whether a persons possessing Bachelor degree in physical education is qualified to be appointed as Principal in an recognised intermediate school. The matter was referred to larger Bench in light of a conflict opinion in two previous judgments of this Court. The Full Bench examined the relevant provisions of U.P. Secondary Education Service Selection Board Act, 1982 as also the Statutory Regulations framed by the NCTE and the question was ultimately answered in following terms by the Full Bench in para 47 and 48, which are reproduced hereinafter:-

"47. We, thus, answer question (i) in affirmative and question (iii) by holding that Vindhyachal Yadav does not lay down the correct law. However, question (ii) has to be answered, subject to certain riders. A B.P.Ed. degree being a post graduate training qualification, would entitle a person to hold post of Headmaster of a recognised High School but not that of Principal of an Intermediate college. The reason is that under Regulations, 2001 as well as under Minimum Qualification Regulations, 2014 framed by NCTE, B.P.Ed. is recognised as eligibility qualification for teaching Classes IX - X (Secondary/ High School) but not for Classes XI - XII (Senior Secondary/Intermediate). For teaching Intermediate classes, the person should possess M.P.Ed. degree of at least two years duration from any National Council for Teacher Education recognised institution. These regulations do not prescribe any separate qualification for Head of institution and thus the qualification prescribed for a teacher of Intermediate classes (Senior-Secondary) would also apply to Head of such an institution. We have already held above that the qualifications prescribed by NCTE would be binding on the State, therefore, the qualifications prescribed by Minimum Qualification Regulations, 2014 have to be read alongwith Appendix-A and thus, a teacher possessing B.P.Ed. degree, would not be eligible to hold post of Principal of an Intermediate College.

48. We, thus, reply to question (ii) by holding that a teacher in physical education having B.P.Ed. degree is eligible to be appointed as Headmaster of a High School, but not as Principal of an Intermediate college."

8. B.P.Ed. qualification has, therefore, not been found to be a valid training qualification of appointment to the post of Principal in an intermediate institution. The training qualification possessed by respondent No.5 is not a bachelor qualification in physical education but she possess an inferior qualification of diploma in physical education. In view of the authoritative pronouncement of law by the Full Bench in Amal Kishore Singh (Supra) a person who possess diploma in physical education cannot be treated as a trained person for the purposes of appointment to the post of principal in a recognized intermediate institution.

9. It is also not in issue that petitioner did not posses requisite qualification for appointment to the post of principal on the date of accrual of vacancy i.e. 30.06.2009. The training qualification has been

obtained by the petitioner only later in December, 2010. She was otherwise having the qualification of 4 year teaching in classes 9 to 12 having been appointed a lecturer in Economics in 2003. After the training qualification has been obtained by the petitioner she, therefore, becomes eligible for officiating on the post of principal.

10. On the date of accrual of vacancy i.e. 30.06.2009 the petitioner was not eligible to officiate on the post of principal. It was in that context that a decision had to be taken by the Managing Committee to hand over charge to someone of the office of principal as the office could not have been left vacant. The appointment of respondent No.5, therefore, may be justified on the touchstone of doctrine of necessity but such continuance can be justified only so long as an eligible person is not available to function as the principal. This Court in Smt. Hemlata Rajput Vs. State of U.P. and others 2019 (9) ADJ 93; had an occasion to examine the issue in somewhat similar circumstances where none of the teacher was found eligible for appointment to the post of principal when such office fell vacant. The principal of doctrine of necessity in such an even has been pressed into service by this Court. It has, however, been observed that such necessity would continue only as long as a qualified and eligible teacher is not available to be appointed as officiating principal. Paragraph 18 to 21 of the judgment in Smt. Hemlata Rajput (supra) is extracted hereinafter:-

18. On the date of occurrence of vacancy on the post of Principal in the Institution concerned neither the petitioner nor the respondent possessed eligibility in terms of Appendix-A. In the absence of availability of eligible teacher who could be appointed as Principal in the Institution it would become inevitable for the Institution to appoint someone as the Officiating Principal even though such incumbent may not possess requisite eligibility. Doctrine of necessity would therefore be attracted to deal with such a scenario.

19. The doctrine of necessity has been examined by this Court in Committee of Management, S.G.M. Inter College, Khairgarh, District Firozabad (supra). Para 20 of the judgment examines the doctrine and is reproduced hereinafter:-

"20. Doctrine of necessity has been subject matter of consideration in the case of Election Commission of India and another Vs. Dr. Subramaniam Swamy and another (1996) 4 SCC 104 wherein view has been taken that law permits certain things to be done as a matter of necessity, if the choice is between allowing a biased person is applied to act or to stifle the action altogether the choice must fall in favour of the dormer as it is the only way to promote decision making. Apex Court in the case of State of U.P. Vs. S.S.L. Srivastava 2006 (3) SCC 276, has taken the view that where doctrine of necessity is applicable compliance with principle of natural justice would be excluded. Apex Court in the case of Lalit Kumar Modi Vs. BCCI 2011 (10) SCC 106, took the view that doctrine of necessity is common law doctrine and is applied to tide over the situation when there are difficulties as law does not contemplate a vacuum, and a solution has to be found out rather than allowing the problem to boil over. Said judgment have been given pressing the doctrine of necessity as an exception to the rule against the doctrine of bias. Said doctrine of necessity in Principle can also be pressed into service to tide over the

situation, where statutory provisions are being breached, i.e. where choice is to be made between an eligible and ineligible person, and a solution has to be found out rather than allowing the illegality to perpetuate."

20. Continuance of respondent as the Principal on officiating basis even without possessing essential eligibility would have to be endorsed by applying the doctrine of necessity. During first stage the petitioner had otherwise conveyed her reluctance to officiate as Principal of the Institution. The respondent in such circumstances if has worked as Officiating Principal then no exception can be taken to it and she would be entitled to payment of salary for the post of Principal in the first stage of controversy.

21. The doctrine of necessity, however, would no longer be available once an eligible teacher is available to officiate as the Principal in the Institution. Petitioner admittedly was appointed as Lecturer after she was selected by the Board on 4.7.2003. The qualification required for appointment to the post of Principal would include ten years teaching experience on the post of Lecturer. This experience of ten years is acquired by the petitioner on 4.7.2013. The records further reveal that the Committee of Management of the Institution concerned has also taken a decision on 24.8.2013 to appoint the petitioner as the Principal of the Institution. The doctrine of necessity, therefore, cannot extend beyond 24.8.2013, inasmuch as the competent authority i.e. the Committee of Management had acted in accordance with Section 18 of the Act of 1982 in appointing the senior most eligible teacher as Officiating Principal."

11. Applying the principle laid down in the case of Smt. Hemlata Rajput (supra), this court finds that the District Inspector of Schools, Jalaun was not justified in rejecting candidature of petitioner to officiate as principal of the institution concerned merely for the reason that on the date of accrual of vacancy the petitioner was not eligible to be appointed as principal. Respondent No.5 since has been to found not to be possessing requisite qualification to be appointed as officiating principal in light of the Full Bench Judgmet of this Court in the case of Amal Kishore Singh (supra), she has no right to continue as principal any further. The order impugned dated 16.05.2013, therefore, cannot be sustained and is set aside.

12. The District Inspector of Schools is directed to pass a fresh order in light of the observation made above, for the senior most eligible person to be allowed to officiate as principal of the institution so long as a regularly recruited Principal is not made available by the Commission. As the petitioner is not disputed to be the senior most lecturer in the institution, she would have the right to officiate as such. A seniority list has been annexed by the Committee of Management along with its counter affidavit in which the name of petitioner is not shown at Serial 1. It is, however, pointed out that all persons senior to her have already retired. The respondent No.5, who is shown to be senior to petitioner cannot be considered for appointment in view of the ratio laid down by Full Bench in the case of Amal Kishore Singh (supra). Although learned counsel for the Managing Committee states that work and conduct of the petitioner is not up to the mark but it is not disputed that no disciplinary action has ever been instituted or is pending against her.

13. It is further worth noticing that in respect of petitioner's working as lecturer for the last more than 15 years there has never been any disciplinary action and she is yet to officiate as principal. The opposition to petitioner's claim on account of none satisfactory work, therefore, cannot be accepted. In such circumstances petitioner's claim will not be overlooked merely for the reason that her work and performance is not satisfactory.

14. However, as law with regard to right of a teacher who possess training qualification in physical education was not clear and the issue has been resolved only in October, 2018 by the Larger Bench in Amal Kishore Singh (supra) and the 5th respondent has otherwise worked as officiating principal, the salary already paid to her for the post of officiating principal shall not be recovered from her. The petitioner would be entitled to salary for the post of officiating principal in accordance with the provisions of Section 18(2) of the U.P. Secondary Education Service Selection Board Act, 1982.

(2020)02ILR A1884

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 20.01.2020

BEFORE

THE HON'BLE SURYA PRAKASH KESARWANI, J.

Matters Under Article 227 No. 8078 of 2019 (CIVIL)

Nand Lal Keshari ...Petitioner
Versus
Shashi Bhushan Agarwal ...Respondent

Counsel for the Petitioner:
Sri Krishna Nand Rai, Sri Vijay Anand Rai

Counsel for the Respondent:
C.S.C., Smt. Rajni Ojha, Sri Ravindra Nath Chaubey

A. U.P. Act No. 13 of 1972 : Uttar Pradesh Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 - Section 20(2)(a) - rent deposited up to the month of March 2014 - SCC Suit -was instituted on 7.7.2014 - petitioner - tenant not in arrears of rent for four months or more as on the date of institution of the Suit – suit not maintainable - findings recorded by the Courts below - arrears of rent for more than four months as on the date of institution of SCC Suit - perverse and contrary to the documentary evidences on record - impugned judgments and decree in SCC Suit and SCC Revision - set aside.(Para 22,23)

The plaintiff - respondent is the owner and landlord of the disputed shop of which the defendant - petitioner is the tenant at a monthly rent of Rs. 200/- since 15.10.1982 - arrears of rent as demanded was not paid by the defendant – petitioner - plaintiff / landlord / respondent filed SCC Suit which has been decreed by the Court of Civil Judge (Senior Division) - Aggrieved defendant / tenant / petitioner filed SCC Revision which has been dismissed by the Court of District Judge.(Para 2,4)

Held:- A suit / case on the ground mentioned in Section 20(2)(a) of the U.P. Act No. 13 of 1972 for eviction of a tenant from a building after the determination of his tenancy may be instituted if the tenant is in arrears of rent for not less than four months, and has failed to pay the same to the landlord within one month from the date of service upon him of a notice of demand.(Para-22)

Matters Under Article 227 allowed. (E-7)

List of cases cited:-

1. Harcharan Singh Vs. Smt. Shivrani & others) , 1981 (2) SCC 535

2. Arun Kumar & others Vs. Thakur Ji Maharaj , 2001 (43) AllLR, 74

3. Mahmood Khan Vs. IIIrd Additional District Judge, Ballia & others , (1983) 2 ARC 198

4. Ram Singh Vs. Abdul Majeed , (2014) 1 ARC 368

5. Dr. Babu Ram Sharma Vs. IVth Additional District Judge, Saharanpur & others , (2006) 2 ARC 239

6. Noor Mohd. & another Vs. IVth Additional District Judge, Kanpur Nagar & others , (2006) 1 ARC 550

7. Vinay Kumar Agarwal Vs. 17th Additional District Judge, Allahabad , (2001) (43) AllLR 700

8. Arun Kumar & others Vs. Thakurji Maharaj , (2001) (43) AllLR 74,

9. Mohammad Azim & another Vs. Gopal Singh , (2013) (1) AWC 1023,

10. Ram Kumar Singh Vs. IIIrd Additional District Judge, Ghaziabad , (2003) 1 ARC 294,

11. Haider Abbas Vs. Additional District Judge & others , Writ Petition No. 43734 of 2001

12. Atma Ram Vs. Shakuntala Rani , (2005) 7 SCC 211

(Delivered by Hon'ble Surya Prakash Kesarwani, J.)

1. Heard Sri K.N. Rai, learned counsel for the defendant / tenant / petitioner and Smt. Rajni Ojha, learned counsel for the plaintiff / landlord / respondent.

2. **Necessary requirement to invoke Section 20(2)(a) of U.P. Act No. 13 of 1972 is the main question involved in the present petition.**

Facts

3. Undisputably, the plaintiff - respondent is the owner and landlord of the disputed shop of which the defendant - petitioner is the tenant at a monthly rent of Rs. 200/- since 15.10.1982. The plaintiff - respondent filed a P.A. Case No. 03 of 2001 (Sashi Bhushan Agarwal Vs. Nand Lal Keshari) under Section 21(1)(a) of U.P. Act No. 13 of 1972 which was dismissed by the Prescribed Authority / Civil Judge (Junior Division), East, Ballia on 28.2.2007 on the ground that the plaintiff - respondent failed to prove his bonafide need for the disputed shop. The said order of the Prescribed Authority has attained finality.

4. **Subsequently,** the plaintiff - respondent issued a notice dated 13.5.2014 by registered post to the defendant / tenant / petitioner for eviction of the disputed shop **on the ground of default in payment of rent since 1.7.2011.** This notice was served upon the defendant - petitioner by refusal on 16.5.2014. Since, the arrears of rent as demanded was not paid by the defendant - petitioner, therefore, the plaintiff / landlord / respondent filed **SCC Suit No. 03 of 2014 which has been decreed by the impugned judgment dated 5.2.2019** passed by the Court of Civil Judge (Senior Division), Ballia. Aggrieved with this judgment, the defendant / tenant / petitioner filed SCC Revision No. 01 of 2019 which has been dismissed by the impugned judgment dated 29.7.2019 passed by the Court of District Judge, Ballia. Aggrieved with these two judgments, the defendant / tenant / petitioner has filed the present petition under Article 227 of the Constitution of India.

Submissions

5. Learned counsel for the petitioner submits as under:-

(i) Since, the plaintiff - respondent refused to accept the rent from July 2011, therefore the defendant / tenant / petitioner started depositing it in Misc. Case No. 65 of 2011 under Section 30(1) of the U.P. Act No. 13 of 1972. He deposited the rent in that Misc. Case for the period till March, 2014.

(ii) Thus, as on the date of notice i.e. 13.5.2014, the rent for four months was not in arrears, inasmuch as the rent upto the period March, 2014 was deposited under Section 30(1) of the Act. Therefore, the notice determining the tenancy on account of default in payment of rent invoking the provisions of Section 20(2)(a) was itself bad. of law to hold that the defendant / tenant / petitioner defaulted in payment of rent and was liable to eviction on the ground mentioned in Section 20(2)(a) of the Act.

(iii) Under the facts and circumstances, both the Courts have committed a manifest error of law to hold that the defendant / tenant / petitioner defaulted in payment of rent and was liable to eviction on the ground mentioned in Section 20(2)(a) of the Act.

(iv) Apart from above, the defendant - tenant deposited the entire amount pursuant to the order of the Judge, Small Cause Court dated 4.4.2018 passed on application for deposit dated 25.2.2015. Therefore, the defendant / tenant / petitioner is entitled for the benefit of Section 20(4) of the U.P. Act No. 13 of 1972.

6. In support of his submission, learned counsel for the defendant - petitioner has relied upon a judgment of Hon'ble Supreme Court in ***Harcharan Singh Vs. Smt. Shivrani & others) 1981 (2) SCC 535*** (paragraphs 23 to 31) .

7. Learned counsel for the plaintiff - respondent submits as under:-

(i) The plaintiff - respondent supports the impugned judgments. The rent deposited by the defendant / tenant under Section 30(1) of the Act is not a valid deposit as both the Courts below have found that the plaintiff - respondent has not refused to accept the rent for the months of July and August, 2011.

(ii) The defendant / tenant / petitioner completely failed to establish refusal by the plaintiff - respondent to receive the rent. That a part, the aforesaid Misc. Case No. 65 of 2011 was dismissed for non prosecution on 1.2.2014. The restoration application being Misc. Case No. 17 of 2014 was also rejected on 17.2.2017 by the concerned Court. The notice for default in payment of rent was issued by the plaintiff - respondent on 13.5.2014 which was served on 16.5.2014 and the SCC Suit was filed on 7.7.2014. Thus, as on the date of notice, the defendant / tenant / petitioner was in arrears of rent since July, 2011.

8. In support of her submission, she relied upon a judgment of this Court in ***Arun Kumar & others Vs. Thakur Ji Maharaj 2001 (43) AllLR, 74*** (paragraph 6) and another judgment of this Court dated 30.8.2017 in Matters Under Article 227 Number 4290 of 2017 (Smt. Kalawati Vs. Deen Dayal Sharma Paragraphs 7 & 17).

Discussion and Findings

9. Section 20(2)(a) of the U.P. Act No. 13 of 1972 provides as under:-

"A suit for the eviction of a tenant from a building after the determination of his tenancy may be instituted on one or more of the following grounds, namely:

*(a) that the **tenant is in arrears of rent for not less than four months**, and has failed to pay the same to the landlord within one month from the date of service upon him of a notice of demand:*

Provided that in relation to a tenant who is a member of the armed forces of the Union and in whose favour the prescribed authority under the Indian Soldiers (Litigation) Act, 1925 (Act No. IV of 1925), has issued a certificate that he is serving under special conditions within the meaning of Section 3 of that Act or where he has died by enemy action while so serving, then in relation to his heirs, the words "four months" in this clause shall be deemed to have been substituted by the words "one year"."

10. Thus as per aforequoted provisions of Section 20(2)(a) of the U.P. Act No. 13 of 1972, a landlord acquires right to institute a suit for eviction of a tenant from a building after determination of his tenancy ***if the tenant is in arrears of rent for not less than four months,*** and has failed to pay the same to the landlord within one month from the date of service upon him of a notice of demand. Thus to institute a suit on the ground of eviction as provided in clause (a) of sub-section 2 of Section 20, there are two mandatory requirements which both have to be fulfilled: (i) the tenant is in arrears of rent for not less than four months (ii) the tenant has failed to pay the said arrears to the landlord within one month from the date of service upon him of a notice of demand.

11. Undisputably, the SCC Suit No. 03 of 2014 was filed by the plaintiff - respondent on 7.7.2014 for eviction of the petitioner - tenant on the ground under Section 20(2)(a) of the U.P. Act No. 13 of 1972. At internal pages 10 & 11 of the impugned judgment dated 29.7.2019 in SCC Revision No.01 of 2019 passed by the District Judge, Ballia, it has been mentioned that the petitioner - tenant filed receipts of rent deposit in Misc. Case No. 65 of 2011 for the period from July 2011 to March 2014. This, deposit of rent in Misc. Case No. 65 of 2011 for the period from July 2011 to March 2014 is undisputed.

12. The aforesaid Misc. Case No. 65 of 2011 was dismissed for non prosecution on 1.2.2014. A restoration application being Misc. Case No. 17 of 2014 was filed by the petitioner - tenant in which the plaintiff - respondent has filed an objection on 31.1.2015 mentioning the institution of SCC Suit No. 03 of 2014. Thus, the plaintiff - respondent was well aware of the fact that rent was being deposited by the petitioner - tenant in Misc. Case No. 65 of 2011 and rent for the period from July 2011 to March 2014 was deposited in the said Misc. Case.

13. According to the plaintiff - respondent, the notice for eviction was sent by him to the petitioner - tenant on 13.5.2014 which is said to have been served upon the petitioner - tenant by refusal. It is undisputed that in SCC Suit No. 03 of 2014, the petitioner - tenant, on the first date of hearing i.e. 25.2.2015, filed an application / representation 15-Ga2 under Order 15 Rule 5 CPC for depositing the entire amount of rent and the said application was allowed by the Civil Judge (Senior Division), Ballia by order dated 4.4.2018 and the entire amount of rent for the period from April 2014 to March 2018 was deposited by the petitioner - tenant with interest @ 9% within the time granted by the Court of Civil Judge (Senior Division), Ballia.

14. From the facts mentioned above, it was well proved by the petitioner - tenant that as on the date of institution of SCC Suit No. 03 of 2014 i.e. on 7.7.2014, the rent stood deposited upto the month of March 2014 in Misc. Case No. 65 of 2011. Thus, as on the date of institution of SCC Suit No. 03 of 2014 on the ground mentioned in clause (a) of sub-section 2 of Section 20 of the U.P. Act No. 13 of 1972, the petitioner - tenant was not in arrears of rent for a period of four months or more. Therefore, the suit itself was not maintainable. The findings recorded by both the Courts below on the point of default in payment of arrears of rent for more than four months as on the date of institution of the SCC Suit No. 03 of 2014, is perverse and contrary to evidences on record.

15. In ***Mahmood Khan Vs. IIIrd Additional District Judge, Ballia & others (1983) 2 ARC 198*** (paragraphs 3 & 4), a Bench of this Court held as under:-

"3. Having heard learned counsel for the parties, I am of the opinion that the impugned order is manifestly unsustainable in law. As mentioned above, the revisional court has found the petitioner to be in arrears only in respect of one month i.e. July, 1977. That being so it is obvious that the petitioner was not in arrears for more than four months when the notice of demand dated 10.1.1977 was served on him on 11.1.1977. Section 20(2)(a) was hence entirely inapplicable even on the facts found by the revisional court.

4.Coming to the submission made by the learned counsel for the landlord I find that there is a fallacy in this contention. ***The default contemplated under Section 20(2)(a) should be in regard to rent for a period of not less than four months. The provision does not say that even if the tenant is in arrears of rent for less than four months he would be liable to be evicted under it on the mere ground that default had continued for more than four months.*** *There is, therefore, no substance in this submission made by the learned counsel for the respondents." (emphasis supplied)*

16. In ***Ram Singh Vs. Abdul Majeed (2014) 1 ARC 368*** (paragraphs 3, 4 & 5), a Bench of this Court held as under:-

"3. he approach of Revisional Court is clearly erroneous. The issue was not with respect to benefit of Section 20 (4) of Act, 1972, but it was whether there was any default on the part of petitioner. ***When petitioner has validly deposited rent in the Court under Section 30 (1) of Act, 1972, the law presumes that such deposit amounts to payment of rent to landlord and that being so, there was no default on the part of petitioner. Hence, SCC Suit itself, for ejectment of petitioner, was not maintainable on the ground of default in payment of rent under Section 20 (2) (a) of Act, 1972. The question of benefit of Section 20 (4) of Act, 1972 does not arise.***

4. It is not in dispute that both the Courts below have concurrently held that the monthly rent of accommodation in question was Rs. 40/- and upto December, 1999 it was regularly deposited in the Court under Section 30 (1) of Act, 1972. In view thereof, the judgment of Revisional Court cannot sustain.

5. The writ petition is allowed. Impugned order of Revisional Court dated 18.11.2005 is hereby set aside and the Trial

Court's judgment dated 28.8.1998 is hereby restored and confirmed."

(emphasis supplied)

17. In ***Dr. Babu Ram Sharma Vs. IVth Additional District Judge, Saharanpur & others (2006) 2 ARC 239 and Noor Mohd. & another Vs. IVth Additional District Judge, Kanpur Nagar & others (2006) 1 ARC 550***, this Court again took the view that when the entire rent due till the date of notice had already been validly deposited under Section 30 of the Act, the notice of demand was bad in law, and therefore, since at the time of notice, tenants were not defaulter in payment of rent for four months or more, the Suit filed on the ground of default was liable to be dismissed. It was held that the Suit for eviction was not maintainable as at the time of notice, the tenant was not defaulter since he had already validly deposited the rent under Section 30 of the Act. It was further held that under the circumstances, the Suit was not maintainable under Section 20(2)(a) of the Act.

18. Learned counsel for the plaintiff - respondent has relied upon a judgment of this Court in ***Vinay Kumar Agarwal Vs. 17th Additional District Judge, Allahabad (2001) (43) AllLR 700.*** This judgment does not support the case of the plaintiff-respondent rather it supports the case of the petitioner - tenant. In paragraph 11 of the said judgment, in the case of Vinay Kumar Agarwal (supra), this Court held as under:-

*"11. **Section 20 (2) (a) of the Act** clearly provides that a suit for eviction of a tenant can be filed if the tenant is in arrears of rent for not less than four months and has failed to pay the same to the landlord within one month from the date of service upon him of a notice of demand. **Notice of demand will be invalid and could not be considered to be a notice of demand under the said provision if the tenant was not in arrears of rent for more than four months.** The tenant could not be held to be a defaulter in the eye of law if he was not in arrears of rent for more than four months on the date of the notice."*

(emphasis supplied)

19. The judgments of this Court in the case of ***Arun Kumar & others Vs. Thakurji Maharaj (2001) (43) AllLR 74, Mohammad Azim & another Vs. Gopal Singh (2013) (1) AWC 1023, Ram Kumar Singh Vs. IIIrd Additional District Judge, Ghaziabad (2003) 1 ARC 294, Haider Abbas Vs. Additional District Judge & others*** in Writ Petition No. 43734 of 2001 decided on 30.11.2005 and the judgment of Hon'ble Supreme Court in ***Atma Ram Vs. Shakuntala Rani (2005) 7 SCC 211*** relating to Delhi Rent Control Act are distinguishable on facts of the present case. The aforesaid judgments relied upon by the plaintiff - respondent are not on the point of necessary requirement of the ground of eviction under Section 20(2)(a) of the U.P. Act No. 13 of 1972. The relevant judgments as well as the provisions itself, have been well discussed by me in preceding paragraphs.

20. The default contemplated under Section 20(2)(a) should be in regard to rent for a period of not less than four months. The provision does not say that even if the tenant is in arrears of rent for less than four months he would be liable to be evicted under it on the mere ground that default had continued for more than four months. Even notice of demand will be invalid and could not be considered to be a notice of demand under the said provision if the

tenant was not in arrears of rent for more than four months.

21. When petitioner has validly deposited rent in the Court under Section 30 (1) of Act, 1972, the law presumes that such deposit amounts to payment of rent to landlord and that being so, there was no default on the part of petitioner. Hence, SCC Suit itself, for ejectment of petitioner, was not maintainable on the ground of default in payment of rent under Section 20 (2) (a) of Act, 1972.

22. For all the reasons aforestated, I hold that the findings recorded by the Courts below for arrears of rent for more than four months as on the date of institution of SCC Suit No. 03 of 2014, is perverse and contrary to the documentary evidences on record. A suit / case on the ground mentioned in Section 20(2)(a) of the U.P. Act No. 13 of 1972 for eviction of a tenant from a building after the determination of his tenancy may be instituted if the tenant is in arrears of rent for not less than four months, and has failed to pay the same to the landlord within one month from the date of service upon him of a notice of demand. Since, admittedly the rent was deposited upto the month of March 2014 and the SCC Suit No. 03 of 2014 was instituted on 7.7.2014, therefore, the petitioner - tenant was not in arrears of rent for four months or more as on the date of institution of the Suit. Therefore, the suit itself was not maintainable.

23. For all the reasons aforestated, the impugned judgments and decree dated 5.2.2019 in SCC Suit No. 03 of 2014 passed by the Court of Civil Judge (Senior Division), Ballia and the impugned judgment dated 29.7.2019 in SCC Revision No. 01 of 2019 passed by the Court of District Judge, Ballia are hereby set aside. The writ petition is allowed.

24. The SCC Suit No. 03 of 2014 is **dismissed.** No order as to costs.

(2020)02ILR A1890

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 04.02.2020

BEFORE

THE HON'BLE NEERAJ TIWARI, J.

Matters Under Article 227 No. 7635 of 2015
(Criminal)

Daya Shankar Upadhyay ...Petitioner
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Petitioner:
Sri Brajesh Kumar Chaturvedi

Counsel for the Respondents:
A.G.A., Pramod Kumar, Sri Manoj Kumar Dubey

(A) Code of criminal procedure, 1973 – Summon - under Section 195(1)(a)(i) - Prosecution for contempt of lawful authority of public servants, for offences against public justice and for offences relating to documents given in evidence - Indian Penal Code, 1860 - Section 177 IPC - Furnishing false information - complaint filed by a private person, under Section 195(1)(a)(i) of Cr.P.C. as well as Section 177 of IPC - bad in law – summoning order not sustainable - quashed . (Para-12)

A complaint has been filed by a private person, under Section 195(1)(a)(i) of Cr.P.C. for an offence under Section 177 of IPC - learned Chief Judicial Magistrate, has summoned the petitioner under Section 177 IPC. (Para-3,12)

Held:- Summoning order can be issued under Section 195 (1)(a) (i) Cr.P.C. for an offence under Section 177 IPC only in case complaint is filed by a public servant and not by private person.(Para-9)

Matters Under Article 227 allowed. (E-7)

List of cases cited:-

1. Kailash Mangal Vs. Ramesh Chand , 2015 LawSuit (SC) 251,

2. Prashant Chauhan S/O Ms Chauhan Vs. State of Madhya Pradesh , 2014 LawSuit (MP) 199

3. Smt. Minakshi Sonkar Shastri Vs. State of U.P. and another

(Delivered by Hon'ble Neeraj Tiwari, J.)

1. Heard Sri Brajesh Kumar Chaturvedi, learned counsel for the petitioner, learned AGA for the State-respondent and Sri Pramod Kumar, learned counsel for the respondent no.2.

2. Present petition has been filed for quashing the whole proceedings as well as the impugned summoning order dated 28.10.2015 passed by the learned Chief Judicial Magistrate, Court No.17, Deoria, in Case No. 492 of 2015 (Misc Case No.1471 of 2010) (Prem Shankar Vs. Shashikant), Police Station- Khukhundoo, District- Deoria.

3. Brief facts of the case are that after death of one Smt. Subhwanti wife of Late Hari Shankar Dubey, Smt. Sita Devi D/o Late Hari Shankar Dubey and respondent no.2 both submitted their separate applications before A.D.O. Panchayat, Deoria for recording their names as legal heir and representatives in the Kutumb Register. In pursuance of aforesaid applications, A.D.O. Panchayat had called a meeting of villagers on 27.09.2002 in which 32 villagers including petitioner and Gram Pradhan were given their statements that Smt. Sita is the daughter of Late Subhwanti and Late Hari Shankar Dubey and no one has given statement in favour of respondent no.2. On the basis of aforesaid statements, the A.D.O. Panchayat has passed an order dated 29.01.2003 in favour of Smt. Sita. An objection was filed by the respondent no.2 against the order dated 29.1.2003 passed by the A.D.O. Panchayat, which was set aside by the Superior Authority and litigation is pending between the parties. Thereafter, respondent no.2 has lodged an FIR dated 19.02.2005, which was registered as Case Crime No.10 of 2005, under Section 419, 420 & 471 IPC against the two persons, namely Shashi Kant Pandey (A.D.O. Panchayat) and Prem Chandra Srivastava (Gram Panchayat Adhikari). After investigation, Investigating Officer has submitted final report on 2.7.2006. Against the final report, respondent no. 2 has filed a protest petition on 4.7.2007 without mentioning the name of petitioner. The statement of respondent no.2 was recorded under section 200 Cr.P.C., in which for the first time he disclosed the name of petitioner. After perusing the documentary evidence, Court below rejected the complaint under Section 203 Cr.P.C. vide order dated 25.08.2008. Against the said order, respondent no.2 has filed a revision before the Revisional Court and Revisional Court has passed an order dated 13.8.2009 without giving opportunity of hearing to the petitioner and remanded the matter back to the trial Court. In pursuance of the order dated 13.8.2019 passed by Revisional Court, the trial Court without applying its mind summoned the petitioner alongwith other co-accused under Section 419, 420, 467, 468 and 471 IPC vide order dated 23.11.2010. Against

which, petitioner has approached this Court by filing Application U/S 482 No. 13098 of 2011 in which this Court has directed the petitioner to move discharge application under Section 245(2) Cr.P.C. before the Court below. In pursuance of the said order, petitioner has moved an application under Section 245(2) Cr.P.C. before the Court below, which was partly allowed by setting aside the order dated 23.11.2010 as well as bailable warrant order dated 15.03.2011, but learned Chief Judicial Magistrate, Court No.17 Deoria has summoned the petitioner under Section 177 IPC vide order dated 28.10.2015, which is under challenge in this petition.

4. Learned counsel for the petitioner submitted that summoning order under Section 177 IPC can only be issued in case of filing of written complaint by a public servant and if it has been filed by private person, cognizance is barred under Section 195(1)(a)(i) of Cr.P.C. He next submitted that undisputedly the respondent nos. 2 is a private person, therefore, on any complaint made by him, no summoning order can be issued for an offence under Section 177 IPC.

5. In support of his contention, he has placed reliance upon the judgment of Apex Court as well as this Court and Madhya Pradesh High Court in the cases of ***Kailash Mangal Vs. Ramesh Chand*** reported in ***2015 LawSuit (SC) 251, Prashant Chauhan S/O Ms Chauhan Vs. State of Madhya Pradesh*** reported in ***2014 LawSuit(MP) 199*** and ***Smt. Minakshi Sonkar Shastri Vs. State of U.P. and another*** decided on 10th November, 2014.

6. Sri Pramod Kumar, learned counsel for the respondent no.2 has fairly not disputed the factual and legal positions raised by the learned counsel for the petitioner.

7. I have considered the rival submissions made by the learned counsel for the parties, perused the summoning order dated 28.10.2015 as well as provisions of Section 177 of IPC & Section 195(1)(a)(i) of Cr.P.C and judgments relied upon.

8. Section 177 of IPC as well as Section 195(1)(a)(i) of Cr.P.C. is being quoted hereinbelow:-

Section 177 IPC

*"**Furnishing false information**.-- Whoever, being legally bound to furnish information on any subject to any public servant, as such, furnishes, as true, information on the subject which he knows or has reason to believe to be false, shall be punished with simple imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both; or, if the information which he is legally bound to give respects the commission of an offence, or is required for the purpose of preventing the commission of an offence, or in order to the apprehension of an offender, with imprisonment of either description for a term which may extend to two years, or with fine, or with both.*

Section 195 (1)(a)(i) Cr.P.C.

"Prosecution for contempt of lawful authority of public servants, for offences against public justice and for offences relating to documents given in evidence.- No Court shall take cognizance-

(a) (i) of any offence punishable under Section 172 to 188 (both inclusive) of the Indian Penal Code (45 of 1860) or..."

9. By perusal of provision of Section 177 IPC as well as Section 195(1)(a)(i) of Cr.P.C., it is very much clear that summoning order can be issued under Section 195(1)(a)(i) for an offence under Section 177 IPC only in case complaint is filed by a public servant and in the present case undisputedly the complaint has been filed by opposite party no.2, who is private person, therefore, summoning order is not sustainable. Further judgment of Apex Court in the case of ***Kailash Mangal (supra)*** has taken the same view. Relevant paragraph no.8 of judgment of ***Kailash Mangal (supra)*** is being quoted hereinbelow:-

"8. We may usefully refer to the judgment of this court reported in the case of C. Muniappan in which case the scope of Section 195(1)(a)(i) of the Code of Criminal Procedure was discussed at length. Relevant para Nos. 28 to 33 are extracted hereunder:

"28. Section 195(1)(a)(i) Cr.PC bars the court from taking cognizance of any offence punishable under Section 188 IPC or abetment or attempt to commit the same, unless, there is a written complaint by the public servant concerned for contempt of his lawful order. The object of this provision is to provide for a particular procedure in a case of contempt of the lawful authority of the public servant. The court lacks competence to take cognizance in certain types of offences enumerated therein. The legislative intent behind such a provision has been that an individual should not face criminal prosecution instituted upon insufficient grounds by persons actuated by malice, ill-will or frivolity of disposition and to save the time of the criminal courts being wasted by endless. This provision has been carved out as an exception to the general rule contained under Section 190 Cr.PC that any person can set the law in motion by making a complaint, as it prohibits the court from taking cognizance of certain offences until and unless a complaint has been made by some particular authority or person. Other provisions in the Cr.P.C. like sections 196 and 198 do not lay down any rule of procedure, rather, they only create a bar that unless some requirements are complied with, the court shall not take cognizance of an offence described in those Sections. (vide Govind Mehta v. The State of Bihar, 1971 3 SCC 329; Patel Laljibhai Somabhai v. The State of Gujarat, 1971 2 SCC 376; Surjit Singh & Ors. v. Balbir Singh, (1996) 3 SCC 533; State of Punjab v. Raj Singh & Anr., (1998) 2 SCC 391; 2 K Vengadachalam v. K.C. Palanisamy 7 Ors., (2005) 7 SCC 352; and Iqbal Singh Marwah & Anr. v. Meenakshi Marwah & Anr., AIR 2005 SC 370).

29. The test of whether there is evasion or non- compliance of Section 195 Cr.PC or not, is whether the facts disclose primarily and essentially an offence for which a complaint of the court or of a public servant is required. In Basir-ul-Haq & Ors. v. The State of West Bengal, AIR 1953 SC 293; and Durgacharan Naik & Ors. v. State of Orissa, AIR 1966 SC 1775, this Court held that the provisions of this Section cannot be evaded by describing the offence as one being punishable under some other sections of IPC, though in truth and substance, the offence falls in a category mentioned in Section 195 Cr.PC. Thus, cognizance of such an offence cannot be taken by mis-describing it or by putting a wrong label on it.

30. In M.S. Ahlawat v. State of Haryana & Anr., AIR 2000 SC 168, this

Court considered the matter at length and held as under :

"....Provisions of Section 195 CrPC are mandatory and no court has jurisdiction to take cognizance of any of the offences mentioned therein unless there is a complaint in writing as required under that section."

31. In Sachida Nand Singh & Anr. State of Bihar 7 Anr., (1998) 2 SCC 493, this Court while dealing with this issue observed as under :

"7..... Section 190 of the Code empowers "any magistrate of the first class" to take cognizance of "any offence" upon receiving a complaint, or police report or information or upon his own knowledge. Section 195 restricts such general powers of the magistrate, and the general right of a person to move the court with a complaint to that extent curtailed. It is a well-recognised canon of interpretation that provision curbing the general jurisdiction of the court must normally receive strict interpretation unless the statute or the context requires otherwise."

32. In Daulat Ram v. State of Punjab, AIR 1962 SC 1206, this Court considered the nature of the provisions of Section 195 Cr.PC. In the said case, cognizance had been taken on the police report by the Magistrate and the appellant therein had been tried and convicted, though the concerned public servant, the Tahsildar had not filed any complaint. This Court held as under :

"4....The cognizance of the case was therefore wrongly assumed by the court without the complaint in writing of the public servant, namely, the Tahsildar in this case. The trial was thus without jurisdiction ab initio and the conviction cannot be maintained.

5....The appeal is, therefore, allowed and the conviction of the appellant and the sentence passed on him are set aside."

33. Thus, in view of the above, the law can be summarized to the effect that there must be a complaint by the pubic servant whose lawful order has not been complied with. The complaint must be in writing. The provisions of Section 195 Cr.PC are mandatory. Non-compliance of it would vitiate the prosecution and all other consequential orders. The Court cannot assume the cognizance of the case without such complaint. In the absence of such a complaint, the trial and conviction will be void ab initio being without jurisdiction."

Applying the above decision, the conviction of the Appellant under Section 193 and 419 of the Indian Penal Code is not sustainable."

10. Again in the matter of ***Minakshi Sonkar Shastri (Supra),*** this Court reiterated the same ratio of law. Relevant paragraphs 5 to 7 of the said judgment are quoted hereinbelow:-

"5. Section 182 I.P.C. provides that whoever gives to any public servant any information which he knows or believes to be false, intending thereby to cause, or knowing it to be likely that he will thereby cause, such public servant - (a) to do or omit anything which such public servant ought not to do or omit if the true state of facts respecting which such information is given were known to him, or (b) to use the lawful power of such public servant to the injury or annoyance of any person, shall be punished.

6. Section 195 (1) (a) (i) Cr.P.C. provides that no Court shall take cognizance of any offence punishable under Section 172 to 188 (both inclusive) of the Indian Penal Code or abetment of or attempt to commit such offence or of any criminal conspiracy to commit such offence except on a complaint in writing by the public servant concerned or of some other public servant to whom he is administratively subordinate.

7. The cumulative reading of the aforesaid provisions is that a criminal complaint under Section 182 I.P.C. is maintainable only at the instance of a public servant and not a private person. Admittedly, opposite party no. 2 is a private person. If that be so, criminal complaint filed by him under Section 182 I.P.C. was completely barred and the Court was precluded from taking cognizance in view of the specific embargo under Section 195 (1) (a) (i) of the Code. Once a criminal complaint itself was not maintainable, this Court could not relegate the revisionist to claim a discharge."

11. Madhya Pradesh High Court has also taken the same view in the case of ***Prashant Chauhan (Supra)*** . Paragraphs 11 to 13 of the said judgment are quoted hereinbelow:-

"11. There is no dispute that petitioner has been subjected to prosecution for the alleged commission of offence punishable under Section 188 of IPC. It is also not in dispute that the allegation against the petitioner is that he has disobeyed the order/instructions issued by District Magistrate, Gwalior in relation to availability of books, uniform and stationaries at eight shops and providing the list of books as per syllabus and sellers to the Additional District Magistrate/District Education Officer prior to starting of academic session. Section 195 of the Code contains general provisions with regard to taking cognizance of offence by the Magistrate, however in respect of certain offences, special provisions have been made prescribing the manner in which, and the circumstances, in which, the cognizance could be taken by the Court. Section 195(1) provides that no Court shall take cognizance of certain offences enumerated in clauses (a) and (b), except in the manner provided therein. The provisions contained in subsection (1) are mandatory in nature and are not directory. The statutory mandate prohibits taking of cognizance except in the manner provided therein.

12. So far as commission of offence under Section 188 of IPC is concerned, the provisions contained in clause (a) are applicable which mandate that no Court shall take cognizance of the offence punishable under Section 188 of IPC, except on the complaint in writing of the public servant concerned or some other public servant to whom he is administratively subordinate. Thus, the Court is prohibited from taking cognizance of the offence punishable under Section 188 of IPC except when the complaint in writing is made by the concerned public servant. The statutory scheme with regard to cognizance of commission of offence under Section 188 of IPC is that complaint has to be filed before the Magistrate concerned having territorial jurisdiction either by the concerned public servant, whose order is alleged to have been disobeyed or by any other public servant to whom, the concerned public servant is administratively subordinate.

13. This being so, the aforesaid discussion makes it clear that for the offence under Section 188 of IPC without complaint filed directly to the Magistrate, Court cannot take cognizance, therefore, on

police report the trial Court was not obliged to take cognizance of the offence.

12. Therefore, under such facts and circumstances, once there is no dispute that complaint is filed by a private person, under Section 195(1)(a)(i) of Cr.P.C. as well as Section 177 of IPC and law laid down by the Apex Court as well as different High Courts, summoning order dated 28.10.2015 as well as entire proceedings so far as against the petitioner is concerned, is bad in law and hereby quashed.

13. Accordingly, the petition is **allowed**. No order as to costs.
